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You Can Only Race if You Can't Win? The Curious Cases of Oscar Pistorius & Caster Semenya

SHAWN M. CRINCOLI

This article discusses the curious case of Oscar Pistorius within the context of international sports law and compares it to the situation regarding Caster Semenya. Both athletes are controversial South African runners whose eligibility to compete in IAAF-sanctioned races was called into question, in one case due to the use of prosthetics and in one case due to alleged intersexuality. This article not only represents the first comprehensive look among legal scholars at the Court of Arbitration for Sport tribunal's decision in the Oscar Pistorius case, but it is almost certainly the first to discuss Caster Semenya's eligibility as well. These cases raise important issues of disability, sex, and societal treatment of difference.

The article argues that in balancing the rights of competing athletes, fair competition, and equal opportunity, the current lex sportiva *places too high a burden on individual athletes who are different. While it is important to balance the rights of competing athletes, a standard that forces atypical athletes to undertake lengthy and costly steps to gain eligibility on a case-by-case basis, rather than operating from a baseline assumption of presumptive eligibility, misallocates the risk that these athletes wield an unfair advantage over competitors. More significantly, a policy that sets the bar for eligibility precisely at the point where atypical athletes are virtually guaranteed to lose to the 'normal' athlete does not allow for meaningful participation in competition. Finally, the functional limitation on fair and equal participation in elite competition within the athlete's desired category calls into question that athlete's identity & humanity, which is contrary to both the stated purposes of the Olympic movement and broader conceptions of human rights.*

I. INTRODUCTION

A. HAVE YOU MET OSCAR?

Oscar Pistorius is an athlete, a world-class runner, a sprinting champion.[1] In a word, fast. The problem? Pistorius might be too fast. Despite the fact that he is not the fastest man on earth,[2] Pistorius may still be too fast for his own good. Whereas Pistorius considers

1. *Life Without Limitations: Oscar Pistorius Profile*, OSSUR, http://www.ossur.com/?PageID=13008 (last visited Apr. 28, 2011).

2. Jamaican sprinter Usain Bolt is currently the "fastest man on earth." *See Fastest Man on Earth Usain Bolt Wins Laureus Sportsman of the Year Award*, LAUREUS.COM (June 10, 2009), http://www.laureus.com/press_releases?article_id=1652 (describing Bolt's achievements for which he received the prestigious award). Bolt holds the world records in both the 100 and 200 meter races, with times of 9.58 and 19.19 respectively. *See World Records – Men*, TRACKANDFIELDNEWS.COM,

himself to be a regular athlete,[3] he is best known for the extraordinary fact that he happens to be a double-amputee who is fast enough to compete among able-bodied runners. A Paralympic world-record holder, Pistorius has set his sights on competing against the world's fastest runners on the largest track and field stage in sports: the Olympics.[4] As a result, "The Blade Runner," as Pistorius has been dubbed,[5] has spent a significant portion of the past few years battling for the right to race, contesting the decision of the International Association of Athletics Federations ("IAAF)" that his disability creates an advantage on the track, one that should render Pistorius ineligible to compete against able-bodied athletes.[6]

In May 2008, the Court of Arbitration for Sport ("CAS"), the supreme arbiter on questions of eligibility within federation sports,[7] ruled that Pistorius was eligible to compete. This ruling reversed the decision of the IAAF that the carbon-fiber prosthetic *Cheetah* flex-foot blades Pistorius uses to run constitute an impermissible "technical device" under IAAF Competition Rule 144.2(e).[8] The CAS discussed the massive procedural failures that led to the IAAF ineligibility ruling,[9] and, instead, relied upon a more extensive scientific evaluation of Pistorius and the *Cheetah* blades to determine that while the mechanics of running differ between Pistorius and able-bodied runners, he possesses no measurable advantage.[10] Having prevailed in the legal arena, Pistorius has focused his attention on qualifying for and competing in the 2012 Olympics in London.[11]

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http://www.trackandfieldnews.com/tfn/records/records.jsp?listId=1 (last visited Apr. 15, 2011). In comparison, Oscar Pistorius holds the world records among disabled athletes with times of 10.91 and 21.58. Note, though, that Pistorius's best event is actually the 400 meters, a race that does not come with the label of world's fastest man. Pistorius' best time in the 400 meters is 46.52 seconds, which trails Michael Johnson's record of 43.18 from 1999 by 3 seconds. *See Oscar Pistorius Profile: Oscar Pistorius' Website*, OSCARPISTORIUS.COM, http://www.oscarpistorius.com/index.php?option=com_content&view=article&id=1233:400-metres&catid=110:achievements&Itemid=269 (last visited Apr. 20, 2011). Meanwhile, Bolt, who uses the 400 meter races only as a training technique rather than as a competitive goal, has a personal best of 45.28 at that distance, just inside the current Olympic qualifying time of 45.55. *See Usain Bolt*, NYTIMES.COM (Aug. 21, 2009), http://topics.nytimes.com/topics/reference/timestopics/people/b/usain_bolt/index.htm (last updated Aug. 21, 2009).

3. Jere Longman, *An Amputee Sprinter: Is He Disabled or Too-Abled?*, N.Y. TIMES, May 15, 2007, at A1, *available at* http://www.nytimes.com/2007/05/15/sports/othersports/15runner.html?_r=1&oref=slogin (quoting Pistorius as saying "I don't see myself as disabled").

4. Prior to the 2008 Olympics, Pistorius admitted that he was unlikely to qualify for the games in Beijing. He remained hopeful as to the 2012 Olympics. *See Pistorius Admits Beijing Appearance Will be Difficult*, USA TODAY (May 19, 2008), http://www.usatoday.com/sports/olympics/2008-05-19-pistorius-beijing_N.htm (stating that "[d]ouble-amputee sprinter Oscar Pistorius thinks he might have a more realistic chance of qualifying for the 2012 London Olympics than this summer's Beijing Games."). Although he did not compete in the 2008 Olympics (he did compete in the Paralympics), Pistorius is now focusing on preparing for the 2012 Olympics. *See Oscar Pistorius Profile*, *supra* note 1 (noting "his ambition to compete in the 2012 Olympics in London").

5. Josh McHugh, *Blade Runner*, WIRED, Mar. 2007, *available at* http://www.wired.com/wired/archive/15.03/blade.html. Pistorius has titled his autobiography after this well-known nickname. *See* OSCAR PISTORIUS, BLADE RUNNER (2009).

6. The IAAF Council ruled that Pistorius was ineligible to compete in early 2008. *Pistorius is Eligible for IAAF Competition*, IAAF (May 16, 2008), http://www.iaaf.org/aboutiaaf/news/newsid=44917.html.

7. Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 78–91 (2008) (describing CAS jurisprudence).

8. Pistorius v. IAAF, Arbitration CAS 2008/A/1480 (May 2008) (Ct. of Arb. for Sports), *available at* http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1480.pdf. [hereinafter Pistorius Arbitration].

9. *Id.* at 6–9.

10. *Id.* at 10–14.

11. Pistorius was injured in a boating accident in 2009 but that event was not expected to detract significantly from his chances of competing at the 2012 Olympics. *See Double-Amputee Sprinter Oscar Pistorius Hurt in Boating Accident*, N.Y. TIMES, Feb. 22, 2009, at D4, *available at* http://www.nytimes.com/2009/02/23/sports/othersports/23pistorius.html.

Although the CAS found for Pistorius, its ruling was narrow in scope.[12] The Tribunal specifically announced that the decision would not apply to future cases regarding athletes who use prosthetics.[13] The CAS concluded that Pistorius would be permitted to run only so long as the evidence regarding the *Cheetah* blades, which were thoroughly vetted and examined, did not change.[14] Should Pistorius ever prove to be the fastest sprinter among all runners, it is likely that his eligibility would be revoked. Thus, his legal victory remains somewhat hollow; that is, Pistorius can only compete—for now—because it is clear that he cannot win. Notably, since the CAS decision, the scientists involved in the testing have published additional research regarding the debate over whether the *Cheetah* blades create an advantage and whether the CAS even explored the right scientific questions.[15]

While Pistorius is unique, his case raises significant issues in sports governance beyond his own eligibility. First, it forces the question of what constitutes an improper "technical device" for competition. This debate is far broader in the context of elite athletic competition than the specifics of Pistorius's disability. Given advances in technology, this discussion spans a wide range of issues facing the sporting world, from the clothing and shoes that athletes wear to specific surgeries they undergo, from pharmaceutical assistance, whether permitted or forbidden, to the largely unexplored sector of genetic modification.[16] The IAAF declared Pistorius ineligible based on perceived biomechanical advantages, whereas another athlete who may have had a steel rod placed inside his leg rather than beneath it,[17] or for whom a knee ligament has been reconstructed from other organic material,[18] would face no similar inquiry. Pistorius and his *Cheetah* blades are only one small piece in an overarching debate searching for a more unified theory of what it means to participate in unassisted, elite athletic competition and how society celebrates athletic achievement.

More globally, the Pistorius case reflects the challenges that sports governing bodies face when they seek to apply rules of competition to athletes who differ from the norm. To

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12. *See* discussion *infra* Section II.C.

13. Pistorius Arbitration, *supra* note 8, at 14, ¶ 56.

14. *Id.* at 14, ¶ 55.

15. For a discussion of the most recent scientific studies, *see infra* Section II.C. *See* Peter G. Weyand & Matthew W. Bundle, *Point: Artificial Limbs Do Make Artificially Fast Running Speeds Possible*, and Rodger Kram et al. *Counterpoint: Artificial Limbs Do Not Make Artificially Fast Running Speeds Possible*, J. APPL. PHYSIOLOGY (Nov. 5, 2009), *available at* http://jap.physiology.org/cgi/reprint/01238.2009v1?maxtoshow=&HITS=20&hits=20&RESULTFORMAT=&searchid=1&FIRSTINDEX=0&displaysectionid=POINT-COUNTERPOINT&resourcetype=HWCIT [hereinafter Point & Counterpoint]; Alena M. Grabowski et al., *Running-Specific Prostheses Limit Ground-Force During Sprinting*, BIOLOGY LETTERS (Nov. 4, 2009), *available at* http://rsbl.royalsocietypublishing.org/content/early/2009/11/02/rsbl.2009.0729.full.pdf+html?sid=8f99e0df-66cb-4902-8f76-5dc491e90bc3. For a lay look at the debate and a discussion of how the CAS may not have considered all relevant scientific testimony, *see* David Epstein, *New Study, For Better or Worse, Puts Pistorius' Trial in Limelight*, SPORTSILLUSTRATED.CNN.COM (Nov. 19, 2009), http://sportsillustrated.cnn.com/2009/writers/david_epstein/11/19/oscar.pistorius/index.html.

16. Blair H. Moses, *Eligibility of Athletes Receiving Necessary Gene Therapy: The Oscar Pistorius Case as Procedural Precedent*, 49 JURIMETRICS J. 343 (2009) (analogizing from the Pistorius case to provide guidance for treatment of athletes who undergo gene therapy for medical reasons); Shayna M. Sigman, *Are We All Dopes? A Behavioral Law & Economics Approach to Legal Regulation of Doping in Sports*, 19 MARQ. SPORTS L. REV. 125, 133 (2008).

17. *Athlete Trades Broken Bones for Broken Records*, THEBOSTONCHANNEL.COM (Nov. 12, 2008), http://www.thebostonchannel.com/news/17967174/detail.html (describing a college football player's recovery from a motorcycle accident).

18. *See, e.g.*, Dr. Jonathan Cluett, *What You Need to Know About ACL Tears*, ABOUT.COM (Apr. 8, 2011) http://orthopedics.about.com/od/aclinjury/tp/acl.htm.

what extent do the rules of fair competition permit accommodation? How does one balance the rights of Pistorius against those of competing sprinters? Can the law of sport maintain fidelity to domestic or international laws regarding equality of opportunity? Pistorius forces us to grapple with these questions through the lens of disability while questioning what disability even means.

B. HAVE YOU MET CASTER?

Caster Semenya is an athlete, a world-class runner, and a middle-distance champion.[19] Like Oscar Pistorius, Caster Semenya is South African. Like Oscar Pistorius, Caster Semenya participated in other sports prior to running; Oscar played rugby,[20] Caster played football.[21] Like Oscar, she is fast. Some would say she is too fast. In August 2009, the eighteen year old Semenya won gold at the World Championships in the 800 meter race, shattering her personal record and winning the championship.[22] The IAAF promptly investigated Semenya due to the significant improvements in her performance, seeking evidence of drug use and subjecting the athlete to sex testing.[23] It was later revealed that such sex testing had begun in Semenya's home country, even prior to the IAAF's investigation.[24]

Unlike Pistorius, Semenya's "disability" is not outwardly visible. In fact, Semenya was likely unaware of whether she was different from the other athletes she competed against until the IAAF forced her to undergo sex testing. This process required Semenya to meet with at least five medical experts, including a gynecologist, endocrinologist, internist, psychologist, and gender expert.[25] In July 2010, eleven months after the investigation began, the IAAF cleared Semenya to race, issuing no additional information regarding the

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19. Caster Semenya has competed in the 800m and 1500m races. *Semenya, Caster Biography*, IAAF, http://www.iaaf.org/athletes/biographies/letter=s/country=rsa/athcode=242560/index.html (last visited Apr. 20, 2011).

20. *See infra* notes 44–45.

21. Andrew Malone, Emily Miller & Stewart Maclean, *'She Wouldn't Wear Dresses and Sounds Like a Man on the Phone': Caster Semenya's Father on His Sex-Riddle Daughter*, DAILY MAIL (Aug. 22, 2009), http://www.dailymail.co.uk/news/worldnews/article-1208227/She-wouldnt-wear-dresses-sounds-like-man-phone-Caster-Semenyas-father-sex-riddle-daughter.html (describing how Semenya played football among other sports).

22. Christopher Clarey, *Gender Test After a Gold-Medal Finish*, N.Y. TIMES, Aug. 19, 2009, at B13, *available at* http://www.nytimes.com/2009/08/20/sports/20runner.html (noting the significant size of Semenya's victory margin).

23. David Smith, *Caster Semenya Row: 'Who are White People to Question the Makeup of an African Girl? It is Racism'*, THE OBSERVER (Aug. 23, 2009), http://www.guardian.co.uk/sport/2009/aug/23/caster-semenya-athletics-gender ("The IAAF says it was obliged to investigate after Semenya made improvements of 25 seconds at 1500m and eight seconds at 800m – the sort of dramatic breakthroughs that usually arouse suspicion of drug use."); *see also* Ryan Lucas, *SAfrican In Gender Flap Gets Gold For 800 Win*, NEWSVINE.COM (Aug. 22, 2009), http://www.newsvine.com/_news/2009/08/19/3168203-safrican-in-gender-flap-gets-gold-for-800-win (suggesting that even prior to the race, the South African federation was investigating Semenya).

24. *Government Wants Chuene Fired*, ESPN.COM (Sept. 20, 2009), http://sports.espn.go.com/oly/trackandfield/news/story?id=4489230 (discussing how the president of the South African federation for track and field lied about Semenya's case and that sex testing began on August 7th, 2009, in South Africa, even before Semenya's race performance at the World Championship).

25. *See* Smith, *supra* note 23.

athlete's medical condition.[26] Thus, any discussion of Semenya's difference remains speculative.

In September 2009, the IAAF medical examination allegedly discovered that Semenya had testes, male internal reproductive organs, instead of ovaries, female internal reproductive organs.[27] In other words, Semenya was reported to have an intersex condition.[28] While the IAAF has now ruled on Semenya's eligibility, there have been no official announcements revealing the results of testing. The report of intersexuality has been neither confirmed nor denied.[29] Since the type of intersexuality that Semenya was suspected of having would have likely caused her body to produce testosterone at far greater levels than the average woman,[30] the IAAF did consider stripping Semenya of her gold medal and requiring her to return the prize money that accompanied the medal.[31] For nearly a year, it was unclear if the IAAF would even allow the race results to stand, let alone continue to allow Semenya to compete against other women.[32] Meanwhile, Semenya grew weary of waiting, announcing her own intentions to return to racing and noting that she had not actually been banned or prevented from running.[33] She was merely trying to cooperate with the process, a process that she believed took far too long to reach resolution. Only after Semenya indicated her intention to return to racing did the IAAF follow up with its announcement that she would be eligible to compete.[34] And when Semenya returned to racing, she was faced with mocking and rejection by some of her competitors, who, today,

26. David Epstein, *Biggest Issue Surrounding Semenya Remains Unanswered*, SI VAULT (Nov. 19, 2009), http://sportsillustrated.cnn.com/vault/article/web/COM1163081/index.htm.

27. Mike Hurst, *Caster Semenya Has Male Sex Organs and No Wombs or Ovaries,* THETELEGRAPH.COM.AU (Sept. 11, 2009), http://www.dailytelegraph.com.au/sport/semenya-has-no-womb-or-ovaries/story-e6frexni-1225771672245. *See also* Epstein, *supra* note 26 (citing the Telegraph article as the source of the information regarding Semenya's medical condition and discussing the ramifications of that information); Ariel Levy, *Either/Or: Sports, Sex, and the Case of Caster Semenya*, THE NEW YORKER, Nov. 30, 2009, *available at* http://www.newyorker.com/reporting/2009/11/30/091130fa_fact_levy ("On September 11th, Australia's *Daily Telegraph*, a tabloid owned by Rupert Murdoch, reported that Semenya's test results had been leaked, and that they showed that Semenya, though she was brought up as a girl and had external female genitalia, did not have ovaries or a uterus. Semenya was born with undescended testes, the report said, which provided her with three times the amount of testosterone present in an average female—and so a potential advantage over competitors.").

28. For a definition of "hermaphrodite," *see* http://www.merriam-webster.com/dictionary/hermaphrodite.

29. The IAAF issued a statement in the middle of November 2009 expressly declining to comment on medical aspects of Semenya's case and noting that "the IAAF, the South African Ministry of Sport and Recreation and Caster Semenya's representatives are in discussions with a view to resolving the issues surrounding Caster Semenya's participation in Athletics." *Caster Semenya – Statement*, IAAF (Nov. 18, 2009), http://www.iaaf.org/aboutiaaf/news/newsid=54923.html.

30. *See* Epstein, *supra* note 26 (discussing whether three times the average testosterone level of women is within the permissible hormonal limits for international competition).

31. *Id.* ("An agreement between the IAAF, the governing body for track and field, South Africa's government, and Semenya's lawyers will allow Semenya to keep the gold medal and the prize money she won at the world championships in Berlin in August.").

32. Anna Kessel, *Gold Medal Athlete Caster Semenya Told to Prove She is a Woman*, GUARDIAN (London) (Aug. 19, 2009), http://www.guardian.co.uk/sport/2009/aug/19/caster-semenya-gender-verification-test.

33. *See* Owen Slot, *Caster Semenya Ready to Make Statement of Intent and Get Back on Track*, THE SUNDAY TIMES (June 10, 2010), http://www.timesonline.co.uk/tol/sport/more_sport/athletics/article7147133.ece (discussing Semenya's continued training despite her uncertain status).

34. *800m Champ Semenya Cleared to Race*, ESPN.COM (July 6, 2010), http://sports.espn.go.com/oly/trackandfield/news/story?id=5357298.

continue to believe that she is simply too different to race amongst the pool of female athletes.[35]

There is much that is not known regarding Caster Semenya's case. Respecting the privacy of the athlete means that the results of the testing will never become known. It is unclear if Semenya was asked to undergo treatment or surgery to change her natural organs and hormones or even what her baseline physiology is.[36] There is absolutely no evidence that Semenya has any male internal organs, and no basis for the original media reports that she does.

Just like in the case of Pistorius, the question seemed to be whether Semenya has an advantage.[37] If Semenya did have an advantage, then she would not have been allowed to race. One may conclude from the fact that Semenya has been cleared to run and the limited information provided about that decision that the IAAF has determined that she does not possess an advantage, even as some of her competitors remain suspicious. The shadows of this year-long investigatory process may loom large over the remainder of Semenya's athletic career.

Intersexual athletes, like Caster Semenya was suspected to be, and transgender athletes,[38] pose eligibility questions analogous to those raised in the case of Oscar Pistorius. Semenya is not the first athlete to force the IAAF or the International Olympic Committee ("IOC") to grapple with questions of sex and gender in competition, nor is there any official blueprint in the world of elite sports competition for handling intersexuality. The current "solutions" to dealing with atypical athletes, like Pistorius and Semenya, seem to permit them to compete only when they are disadvantaged. More bluntly, if these athletes win, then the victory is ascribed to an advantage arising from their unusual conditions. In turn, these athletes may only be permitted to race if they are not capable of winning at all. And it is the lack of assurance from the IAAF that Semenya has no advantage that seems to be unsettling competitors.[39]

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35. Christopher Clarey, *Semenya Returns and So Do Questions*, N.Y. TIMES, Aug. 22, 2010, at D1, *available at* http://www.nytimes.com/2010/08/23/sports/23iht-TRACK.html.

36. *SA Threatens 'War' over Semenya*, BBC MOBILE (Sept. 11, 2009), http://news.bbc.co.uk/sport2/hi/athletics/8249948.stm (reporting that Semenya would not likely have to relinquish her medal and discussing the potential that Semenya may be required to undergo treatment before being deemed eligible to compete).

37. *Id.* ("There are three possible outcomes from the expert's discussions: that the condition does not give her a competitive advantage; the condition gives her a competitive advantage, which cannot be treated; or most likely, the condition can be treated in some way if she consents to it, and in time she can return to competition.").

38. For a discussion of the transgender athlete, *see* Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholarstic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1 (2011); Shayna M. Sigman, *From Sex-Testing to the Stockholm Consensus: The Tenuous Lex Sportiva of the Transgender Athlete*, Symposium, *Transgender Law: Challenging the Boundaries of Law and Gender*, 4 J. RACE, GENDER & ETHNICITY 31, 31-38 (May 2009), *available at* http://www.tourolaw.edu/JournalRGE/uploads/Issues/Vol4Issue2/TransSymposiumTranscript.pdf (discussing the Stockholm Consensus and how treatment of transgender athletes in misguided); Jill Pilgrim, David Martin, & Will Binder, *Far From the Finish Line: Transsexualism and Athletic Competition*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 495 (2003) (providing a comprehensive overview of the treatment of transgender athletes across various sporting disciplines); Yael Lee Aura Shy, *"Like Any Other Girl": Male-to-Female Transsexuals and Professional Sports*, 14 SPORTS LAW. J. 95 (Spring 2007).

39. *See* Clarey, *supra* note 35.

C. OSCAR AND CASTER VS. THE FIELD

This article discusses the curious case of Oscar Pistorius within the context of international sports law and compares it to the situation regarding Caster Semenya. This article also compares the treatment of Caster Semenya to that of other athletes with sex or gender variations, including both intersexual and transgender athletes.

This article argues that, in balancing the rights of competing athletes, fair competition, and equal opportunity, the current *lex sportiva* places too high a burden on individual athletes who are different. While it is important to balance the rights of competing athletes, a standard that forces atypical athletes to undertake lengthy and costly steps to gain eligibility on a case-by-case basis, rather than operating from a baseline assumption of presumptive eligibility, is problematic. The fact that both Pistorius and Semenya are currently eligible to run does not negate the fact that each has lost significant training and racing time to the process of being declared eligible, and that very process has done little to demonstrate to competing athletes why they should embrace these – or any other - athletes who are different.[40]

This framework misallocates the risk that these athletes wield an unfair advantage over competitors, requiring the individual athletes to bear too high a burden in the name of protecting all other athletes and the purity of competition. Given the short window for elite achievement in many sporting fields, such a burden ensures that the question of eligibility may prevent an athlete from being able to compete among the best in the world.

This is particularly problematic at a time when sports governing officials and competitors are highly uneducated regarding the nuances of difference, whether related to issues of disability, sex, or gender. It is far too easy to begin the downward spiral to rumor-mongering and doubt, without proper respect for the privacy and dignity of the individual athlete. The current legal landscape—in terms of both the law of sport and international or domestic laws—provides insufficient protection of these basic human rights. This danger is exacerbated by the fact that many of the complaints against atypical athletes come from competitors, or "the field," who can hardly be considered unbiased. The IAAF, IOC, and other organizations governing sport need to be able to issue eligibility decisions and guidelines that genuinely protect all individuals. However, the predominant voices are often those of the "normal" majority, rather than the scant minority athletes that need protection.

Next, this article maintains that the current policies set the bar for eligibility precisely at the point where atypical athletes are virtually guaranteed to lose to the "normal" athlete. Given that victory and defeat are measured in fractions of a second, it is nearly impossible for any two athletes to be perfectly evenly matched. As a result, standards that find any advantage grounds for disqualification presume that eligibility stems from disadvantage. This is true both for Pistorius and Semenya, as well as a handful of other athletes. No amount of process can validate such a substantive rule in a system that clearly does not plan to allow these athletes an opportunity for meaningful participation in competition.

It is true that some amount of advantage may indeed nullify the sporting categories that seek to promote the fairness of the competition. After all, it is a fundamental aspect of athletic competition to allow athletes to compete against similarly situated athletes. Children compete in age brackets, as do masters or seniors. Many sports rely on weight-classes. Men

40. *See, e.g.*, Dave Middleton, *Jenny Meadows Happy to Race Against Caster Semenya*, GUARDIAN (London) (July 7, 2010), http://www.guardian.co.uk/sport/2010/jul/07/jenny-meadows-caster-semenya.

and women seldom compete against one another. Almost all elite athletes have genetic variances from the average population that allow them to succeed in the first place. Normally, these genetic differences, such as height or the distribution of various muscle-tissue types, are celebrated, rather than disqualified. Shaquille O'Neal, Yao Ming, or Michael Phelps can each be labeled a "freak of nature," but all are celebrated "freaks!"

This article asserts that the governing bodies of sports, including, but not limited to, the CAS and the IOC, have mistakenly drawn the line in the wrong place for treatment of certain kinds of physiological differences. Although there is no smoking gun evidence that this is due to intentional discrimination or bias, the implication of the current standards is that distinguishing these athletes is acceptable and desirable. Given the history of discrimination against the rights of the disabled, intersexual, or transgender, it is important to scrutinize distinctions that seem to place the greater burden for inclusion on the individual instead of the organization to be accommodating and understanding. In tough cases, where legitimate concerns may exist on both sides, the risk of a mistake with regard to inclusiveness ought to be borne by the sports organizations and the field (the pool of competing athletes), not by the individual.

Finally, this article addresses the implications of the treatment of athletes like Oscar Pistorius and Caster Semenya to the philosophy of sport. A functional limitation on equal participation in elite competition in the athlete's desired category calls into question that athlete's identity and humanity, which is contrary not only to basic notions of human rights, but also to the stated purposes of the Olympics.[41] To prohibit Pistorius from competing against other runners is to deny him a sense of his identity as a *normal* sprinter. To Pistorius, the *Cheetah* blades are how he runs; they are not a device. When attached to his body, they are an integral piece of his self and his identity as a runner. Similarly, to prohibit Semenya from competing against other female runners is to deny her identity as a woman and an athlete. Semenya is not a man pretending to be a woman. No magazine make-over ought to be necessary for her to prove her femininity,[42] and no complex medical and psychological testing can challenge her womanhood. A cryptic statement that a panel of experts has concluded that Semenya may compete, effective immediately, hardly undoes the damage of the questioning, the rumors, the media leaks, and the fact that other athletes running the 800 meter race view Semenya as someone to mock, scorn, or reject.

This article concludes that, although sport needs some objective standards to protect all athletes, it is a grave mistake when policy discussions and determinations alter issues of identity and the human condition. Rather than setting rules that presuppose would-be cheating or gamesmanship, the governing bodies of sport, accompanied by the authority and legitimacy of antidiscrimination and human rights laws, ought to focus on treating all athletes with the presumption of a good faith desire to participate. Then, *all* athletes would be able to play, maintain their privacy, *and* have a fair chance to win.

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41. *The Modern Olympic Games*, THE OLYMPIC MUSEUM, at 2, *available at* http://multimedia.olympic.org/pdf/en_report_668.pdf (stating the purpose of the Olympic Games).

42. Will McCahill, *Semenya's Makeover Downright Cynical: Too Bad South African Athlete Can't Just "Wear Pants If She Feels Like It"*, NEWSER (Sept. 8, 2009), http://www.newser.com/story/68907/semenyas-makeover-downright-cynical.html (quoting Jezebel blogger Anna N. critiquing the public relations choice of Semenya's makeover and asserting "the idea that she has to put on a dress and lipstick to prove her femaleness to people is pretty depressing").

II. THE CURIOUS CASE OF OSCAR PISTORIUS

A. SEE OSCAR RUN

Oscar Pistorius is a sprinting prodigy. Born without fibula bones in his legs, he is a double-amputee below the knee.[43] Pistorius grew up using prosthetics and competing in athletics, particularly rugby.[44] He began sprinting only in 2004, at the age of 17, while rehabilitating a knee injury sustained playing rugby.[45]

The Paralympics are the Olympic-equivalent for athletes with physical disabilities.[46] The rules for eligibility in the Paralympics are more complicated than those in the Olympics because they seek to pit similarly situated athletes against one another. Athletes are categorized based on their levels of disability to facilitate this goal.[47] They then compete against athletes of similar disability levels, ensuring a fair opportunity to compete and prevail.[48]

Within one year from when he began sprinting, Pistorius set the world record at the Athens Paralympics in the 200 meter sprint, while competing against single-amputees (T44 category).[49] He also medaled in the 100 meter race.[50] Pistorius is currently the record holder in the double-amputee (T43 category) for the 100, 200, and 400 meter, and these record performance times are all equal or better than the current T44 record.[51] Pistorius has also shown improvement since he began running, as he has broken his own world records dozens of times.[52]

Pistorius first competed against able-bodied runners in his native South Africa in 2005. He won an open competition in the 100 meter, and he finished sixth in the 400 meter at the South African Championship.[53] The International Association of Athletics Federation ("IAAF") invited him to compete in the 400 meter race at the Grand Prix, but Pistorius

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43. *See* Longman, *supra* note 3; McHugh, *supra* note 5.

44. *See* McHugh, *supra* note 5.

45. Gareth A. Davies, *My Sport: Oscar Pistorius*, TELEGRAPH.CO.UK (May 9, 2007), http://www.telegraph.co.uk/sport/mysport/2312850/My-Sport-Oscar-Pistorius.html (quoting an interview with Pistorius where he states, "I thought that I would be going back to the rugby season at school in April 2004, but started sprinting as part of my training after an injury, entered the South African disabled championships, and never looked back.").

46. *See Official Website of the Paralympic Movement*, INT'L PARALYMPIC COMM., http://paralympic.org/IPC (last visited Apr. 20, 2011) (describing the creation of the International Paralympic Committee (IPC), "the global governing body of the Paralympic Movement" that was created in 1989 and has managed the Paralympic Games since 1994).

47. *See Making Sense of the Categories: BBC Sport Online's Guide to the Different Disability Categories at The Paralympic*, BBC SPORT (Oct. 6, 2000), http://news.bbc.co.uk/sport2/hi/olympics2000/paralympics/959701.stm (explaining the six main categories of disability, of which amputee is one, and then how these other categories are broken down within each specific sport).

48. *Id.*

49. *See Oscar Pistorius Profile*, *supra* note 2.

50. *Id.*

51. *IPC Athletic Records*, INT'L PARALYMPIC COMM., http://ipc-athletics.paralympic.org/records/ (search for records under "Paralympic Records" and "Outdoor") (last visited Apr. 20, 2011) (listing Pistorius' Paralympic records of 11.16 in the 100 meters, 21.97 in the 200 meters, and 47.49 in the 400 meters).

52. *See Oscar Pistorius Profile*, *supra* note 2 ("Pistorius has now broken his own world records 27 times").

53. *Id.*

declined due to personal reasons related to his education and training.[54] He returned to elite competition against able-bodied runners in 2007, and in March of that year, he placed second in the South African Championship 400 meter.[55]

Later that month, the IAAF adopted Competition Rule 144.2(e) prohibiting the use of technical devices that would provide users with an advantage over other athletes.[56] The text of the Rule states, "[f]or the purpose of this Rule the following shall be considered assistance, and are therefore not allowed. . . use of any technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device."[57] During a press conference in June 2007, the IAAF President was asked about Pistorius' eligibility. He answered that absent scientific evidence demonstrating an advantage, Pistorius was free to compete. [58]

Pistorius was subsequently invited to run at the Golden Gala event in Rome in July of 2007. The IAAF specifically staged a "B" race which would be video-recorded using high definition cameras from different angles. Pistorius placed second in this race.[59] A cursory viewing of the video demonstrates that Pistorius is slower in his acceleration than other runners, and runs with a flatter stride (less bounce).[60] Most sprinters running a 400 meter race are fastest in the first and second 100 meters of the race.[61] Pistorius is notably different; he is fastest in the second and third 100 meters of the race.[62] There is no indication that Pistorius has a different stride length or that the amount of time his *Cheetah* blades are in contact with the ground differs from other athletes.[63]

Following the Rome event, Pistorius agreed to undergo more testing to determine whether his prostheses would fall under those devices rendered impermissible by Rule 144.2(e).[64] The IAAF charged Dr. Elio Locatelli with the task, and he in turn referred the matter to Professor Brüggemann at the Institute of Biomechanics and Orthopaedics at the German Sport University in Cologne.[65] On November 12 and 13, 2007, Pistorius went to

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54. Hannington Osodo & Alistair Thomson, *Fastest Man on No Legs,* THE TRIBUNE ONLINE EDITION (July 2, 2005), http://www.tribuneindia.com/2005/20050702/spr-trib.htm#2 (noting that school studies kept Pistorius from accepting the invitation); Matthew Pryor, *Pistorius Willing and Able to Compete with the Best,* TIMESONLINE (April 24, 2006), http://www.timesonline.co.uk/tol/sport/more_sport/athletics/article708725.ece?print=yes&randnum=1151003209000 ("The World Championships in Helsinki, which I was invited to go to, were a huge thing for me and I couldn't go. But I didn't want to waste 11 years of school.").

55. Pryor, *supra* note 54 (explaining that Pistorius had run the 400 meter race only five times when he finished in sixth place with a 47.34).

56. Pistorius Arbitration, *supra* note 8, at 3.

57. *Id.* (citing the rule in part and describing its enactment on March 26, 2007). *See also* INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS, COMPETITION RULES 2009, R. 144.2(f), *available at* http://www.iaaf.org/mm/Document/Competitions/TechnicalArea/04/95/59/20090303014358_httppostedfile_CompetitionRules2009_printed_8986.pdf (the current R. 144.2(f) is exactly the same as the former R. 144.2(e)).

58. Pistorius Arbitration, *supra* note 8 at 3.

59. *Id.*

60. PDoctor1980, *Oscar Pistorius – Golden Gala 2007 e risposta a una disabile*, YOUTUBE (May 16, 2008), http://www.youtube.com/watch?v=5P1AMi-0KOc.

61. Pistorius Arbitration, *supra* note 8, at 3.

62. *Id.*

63. *Id.*

64. *Id.* at 3–4.

65. *Id.*

Cologne where he raced against, and was tested with, five control athletes at the Institute's laboratory.[66]

Dr. Brüggemann issued the ensuing report, known as the Cologne Report, on December 15, 2007.[67] The Report found that Pistorius had "significant biomechanical advantages" due to his flatter stride and the decreased energy loss from his *Cheetah* blades, as opposed to if he had ankle joints.[68] Based on the Cologne Report, on January 14, 2008, the IAAF Council ruled that Pistorius was ineligible to compete in IAAF-sanctioned events against able-bodied athletes.[69] The IAAF decision determined that Pistorius' use of the *Cheetah* blades constituted a technical device that provided the runner with an advantage over other able-bodied athletes, thus violating IAAF Competition Rule 144.2(e).[70]

B. SEE OSCAR APPEAL

Oscar Pistorius appealed the IAAF's eligibility decision to the Court of Arbitration for Sport. The CAS has jurisdiction over the IAAF on matters of eligibility, and reviews all issues *de novo*, whether determinations of rules, laws, or facts.[71]

Pistorius raised several claims in his appeal. First, he challenged the process that led to the IAAF decision as "procedurally unsound."[72] Next, Pistorius argued that the IAAF decision was "unlawfully discriminatory."[73] Last, he claimed that the IAAF decision was "wrong in determining that Mr. Pistorius' use of the *Cheetah Flex-Foot* device contravenes Rule 144.2(e)."[74] The CAS treatment of each of these claims will be taken in turn.

1. FAILURES IN PROCESS

a. A PROBLEMATIC MOTIVE

Rule 144.2(e) was introduced in March of 2007, shortly after Pistorius began competing against able-bodied athletes.[75] Pistorius' appeal raised the claim that the manner in which this rule was enacted and then applied against him was procedurally defective.[76]

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66. *Id.* at 4.

67. *Id.*

68. *Id.* ("In total the double transtibial amputee received significant biomechanical advantages by the prosthesis in comparison to sprinting with natural human legs.").

69. *Id.* at 5.

70. *Id.*

71. *Id.* (citing IAAF Competition R. 60.11 placing jurisdiction of appeals in the hands of the CAS and describing the CAS standard of review). *See also* Mitten & Davis, *supra* note 7 (discussing the CAS more generally); TAS/CAS, *General Information/20 Questions About The CAS*, TAS/CAS, http://www.tas-cas.org/20question (last visited Apr. 20, 2011).

72. Pistorius Arbitration, *supra* note 8, at 6.

73. *Id.* at 9–10.

74. *Id.* at 10–14.

75. *Id.*

76. *Id.*

In considering this claim, the CAS first examined whether Rule 144.2(e) ("the Rule") was enacted specifically for the purpose of targeting Pistorius or whether there was an alternative explanation for it.[77] The IAAF offered testimony that "the introduction of this new Rule was aimed primarily at the use of spring technology in running shoes."[78] The CAS rejected this potential motivation for the Rule, since the issue of questionable running shoes predated the Rule's enactment and continued to be handled adequately, without any need for a new rule or policy.[79] In addition, the CAS noted that the IAAF had conceded during the hearing that another rule prohibits shoes that give athletes additional assistance constituting an unfair advantage, namely Rule 143.2.[80] As a result, the CAS found that it was "likely that the new Rule was introduced with Mr. Pistorius in mind."[81]

The CAS had no objection to the "B" race filming of Pistorius, nor with the effort to test whether Pistorius had an advantage over other athletes, particularly given that Pistorius consented to participate.[82] However, once the IAAF handed the testing over to the Cologne Institute, the CAS found that "the process began to go 'off the rails'."[83]

b. A PROBLEMATIC CHARGE

An initial misstep was made when the IAAF charged Professor Brüggemann with his task.[84] The IAAF asked Brüggemann to determine whether Pistorius had an advantage in specific aspects of his running.[85] For example, the IAAF instructed Professor Brüggemann to test Pistorius while running in a straight line, after the acceleration phase.[86] Yet, the CAS noted, after having observed the Rome videotape, the IAAF would have known that excluding the start and acceleration phases of the race would have excluded the portions in which Pistorius was disadvantaged, thereby distorting the analysis.[87]

In fact, at the CAS hearing, "Prof. Brüggemann made it clear that he did not believe that his mandate was to determine all of the advantages and disadvantages of running with the *Cheetah Flex-Foot* prosthesis."[88] Given that the entire point of the Cologne testing was to determine if Pistorius violated Rule 144.2(e), it would seem that examining all the advantages *and* disadvantages the runner encountered would have been precisely the correct mission for the IAAF to have given the professor.

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77. *Id.* at 7.

78. *Id.* at 6.

79. *Id.*

80. *Id.*

81. *Id.* at 7.

82. *Id.* (referring to the filming of the B race as "a *bona fide* exercise primarily designed to check whether Mr. Pistorius' stride-length was greater than that of other athletes who ran comparable times in competition.").

83. *Id.*

84. *See id.* (describing errors in the instructions to Prof. Brüggemann).

85. *Id.*

86. *Id.* ("The correspondence between the IAAF and Prof. Brüggemann shows that his instructions were to carry out the testing only when Mr. Pistorius was running in a straight line after the acceleration phase. By the time that the IAAF commissioned the Cologne tests it was known that this was the part of the race in which Mr. Pistorius usually ran at his fastest.").

87. *Id.*

88. *Id.*

c. A PROBLEMATIC REPORT

In what continued to be a litany of procedural errors, not only was the IAAF's charge troubling, but the IAAF also ensured that Dr. Robert Gailey, the scientist that Pistorius and Ossur, the manufacturer of the *Cheetah* blades, selected to join in the Cologne testing, "was essentially 'frozen out' to such an extent that he declined to attend the Cologne tests."[89] Dr. Gailey was offered the opportunity only to observe testing, not to have any input into protocol or data analysis.[90] Dr. Gailey sent an email to the IAAF's Dr. Locatelli, who had delegated the testing to Professor Brüggemann and the Institute. The email raised several questions and offered a few suggestions regarding testing protocol.[91] However, this communication was never sent to Brüggemann, who remained completely unaware of the potential for Dr. Gailey to participate in the testing or of Dr. Gailey's questions and recommendations.[92] Therefore, the conclusions Professor Brüggemann reached, issued in the Cologne Report, were tainted by the limitations of the IAAF charge as well as the exclusion of Pistorius' chosen scientist, Dr. Gailey, to have meaningful input in the process.

The problematic Cologne Report continued down a troubled path. Pistorius was given less than one month to respond to the complicated scientific document.[93] Meanwhile, the IAAF created its own summary of the report and provided it to its Council members.[94] Professor Brüggemann was never shown a copy of the summary prior to the CAS hearing on this case, nor did he approve of its contents.[95] Once given a chance to review the summary at the hearing, Brüggemann "acknowledged that the summary as presented to Council members was not wholly accurate."[96]

d. A PROBLEMATIC VOTE

This flawed eligibility process culminated with a vote of the IAAF Council members. On Friday, January 11, 2008, the IAAF's summary of the Cologne Report was distributed along with a call for a vote on eligibility.[97] Members were asked to return their votes by Monday morning, January 14.[98] The voting technique specified that abstentions would be counted as votes against eligibility for the athlete.[99] Only thirteen of twenty-seven Council members met the deadline, which was then extended.[100] Meanwhile, the CAS found that prior to the vote, Dr. Locatelli and several other IAAF officials had commented to the press that Pistorius would be deemed ineligible.[101]

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89. *Id.*
90. *Id.*
91. *Id.* at 8.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*

The CAS concluded that "at least some IAAF officials had determined that they did not want Mr. Pistorius to be acknowledged as eligible to compete in international IAAF-sanctioned events, regardless of the results that properly conducted scientific studies might demonstrate."[102] Additionally, the CAS concluded that the IAAF's handling of this case "fell short of the high standards that the international sporting community is entitled to expect from a federation such as the IAAF."[103] This phrasing is quite understated. Plain and simple, the IAAF railroaded Oscar Pistorius through its manipulation of his case, from the direction of testing through its final decision to ban the athlete.

2. WHAT CONSTITUTES UNLAWFUL DISCRIMINATION?

Since the CAS resolves all issues *de novo*, the procedural deficiencies merely set the tone for its decision regarding whether Oscar Pistorius may compete against other athletes. After describing the process, the CAS addressed Pistorius' next claim, that the decision to ban him was unlawfully discriminatory.[104] Pistorius asserted that the IAAF failed to search for "any alternative solution, modification or adjustment that might permit him to participate in such events on an equal basis with able-bodied athletes," denying "fundamental human rights, including equal access to Olympic principles and values."[105]

IAAF Rules have a choice of law provision. Issues of substantive law are governed in accordance with the laws of the Principality of Monaco.[106] There is no specific antidiscrimination or disability law in Monaco that would give rise to Pistorius' claim.[107] When Casey Martin sued the Professional Golfers Association[108] to allow him to use a golf cart while competing on the tour, he brought his claim under the Americans with Disabilities Act ("ADA"), which requires reasonable accommodations of disabilities in certain contexts.[109] Pistorius had no such analog to the ADA under which to bring his claim.

The UN Convention on the Rights of Persons with Disabilities ("The Convention") might protect some athletes with similar claims to Pistorius.[110] Article 30.5 requires a signatory "[w]ith a view to enabling persons with disabilities to participate on an equal basis with others . . . to encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels."[111] The Convention was adopted in December 2006, opened for signature in March of 2007, and came into force on May 3, 2008, when it obtained its twentieth ratification.[112] While signatories to the Convention may have created legally binding obligations upon themselves, even prior to the

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102. *Id.*

103. *Id.* at 9.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. PGA Tour, Inc. v. Martin, 532 U.S. 661, 661 (2001) (holding that under Title III of the ADA, Martin should be permitted the use of a golf cart on the PGA tour as a permissible 'modification' on account of his disability).

109. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2008).

110. Pistorius Arbitration, *supra* note 8, at 9.

111. Convention on the Rights of Persons With Disabilities and Optional Protocol, G.A. Res. 61/106, art. 30.5(a), Dec. 6, 2006, U.N. Doc. A/RES/61/106, *available at* http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf.

112. Pistorius Arbitration, *supra* note 8, at 9.

Convention taking full effect, which corresponds to the timeframe in which the Cologne Report and IAAF ban happened, the Principality of Monaco has neither signed nor ratified this Convention, nor has it adopted this Convention as its own law.[113]

As a result, the CAS did not need to consider how to apply Article 30.5 of the Convention to the case of Oscar Pistorius.[114] Furthermore, the CAS explained that, even if the Convention were valid law to be applied to Pistorius, all the Article would require is competition on the "same footing as others,"[115] which is precisely the issue presented in the case: does Pistorius compete on an equal basis with other athletes, as compared to having some advantage?[116]

3. WHAT CONSTITUTES AN ADVANTAGE?

After determining the procedural defects in the case and the limited reliability of the Cologne Report's conclusions, and noting that no specific antidiscrimination laws protect Pistorius, the CAS then moved on to the core issue of the case: did Pistorius' use of the *Cheetah* blades constitute an advantage under Rule 144.2(e)?

At the outset of this discussion, the CAS explored the ambiguities in the language of the Rule.[117] It questioned the phrase "technical device," though it assumed for purposes of this case that the prosthetic qualified as such a device.[118] The CAS also questioned the use of the phrasing "incorporates springs,"[119] suggesting that the human leg is naturally a spring, and speculating whether a difference exists between an actual spring and something that incorporates a spring.[120]

Moving beyond quibbling over technicalities in the term "spring," the CAS focused its attention on the language regarding advantages. It accepted that Rule 144.2(e) could indeed be viewed as a sensible rule that protects athletes against those who use "powered aids, such as motors, wheels, springs (as in 'pogo sticks,' for example), or other active propulsive devices."[121] Indeed, these are advantages, and the Rule prohibits devices that "provide the user with an advantage."[122]

The IAAF argued before the CAS that the term "advantage" was meant in an absolute sense, and that any device that provided an advantage, "however small, in any part of a competition . . . must render that athlete ineligible to compete regardless of any compensating disadvantages."[123]

The CAS rejected that argument, finding that such a definition of advantage "flies in the face of both legal principle and commonsense."[124] Instead, the CAS adopted an

113. *Id.*
114. *See id.* (describing the purpose of Art. 30.5).
115. *Id.*
116. *Id.* at 10.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*

interpretation that advantage meant "overall net advantage."[125] If the disadvantages from the device outweighed the advantages, then the athlete, who was at a competitive disadvantage, could not be thought to have been provided an advantage.[126] Accordingly, the inquiry needed to identify whether Pistorius had a net overall advantage from using the *Cheetah* blades, which is something Professor Brüggemann had never been asked to determine.[127] The burden of proof fell on the IAAF to show by a "balance of probability" that Pistorius had such an advantage.[128]

In February of 2008, Pistorius went back to the laboratory for more testing, this time under the protocol of his own experts, who delivered the Houston Report as evidence for this case.[129] The IAAF and Pistorius offered contesting arguments regarding whether the *Cheetah* blades delivered an overall net advantage, and the CAS weighed the scientific evidence before the panel.[130] There are essentially two potential areas for Pistorius to have an advantage. The first focuses on the differences in the biomechanics of his running, namely that his stride is flatter and less bouncy.[131] The question was whether this difference might constitute an advantage.[132] Second, due to a different energy transfer system, it is possible that Pistorius would have a metabolic advantage over other athletes.[133] In other words, perhaps Pistorius would not get fatigued as quickly as other athletes, either as a matter of his body tiring or lung capacity.

There were many areas where the experts on each side of the case agreed.[134] The scientific experts for the IAAF acknowledged the validity of the Houston tests and report.[135] That report demonstrated that Pistorius used the same amount of oxygen as other runners at sub-maximal speed, and that Pistorius fatigued normally.[136] While the Cologne Report did not engage in the same level of metabolic testing, the testing it did with regard to metabolic rates, including blood lactate amounts, produced inconclusive results.[137] The argument regarding energy loss or energy transference from the Cologne Report was also deemed inconclusive, as the experts all agreed that energy "loss" is often absorbed elsewhere.[138]

As for the biomechanics, the experts agreed that Pistorius does run "flatter" than other runners.[139] However, it could not be determined if a less bouncy running stride constituted an advantage or a disadvantage.[140] In fact, there was some evidence that some sprinters train themselves to "bounce more" to create more speed.[141] Running may be an easy sport to

125. *Id.*
126. *Id.* at 10–11.
127. *Id.* at 11.
128. *Id.* (describing the IAAF's burden of proof and the "balance of probability" standard as the appropriate choice for a non-disciplinary matter).
129. *Id.* at 12.
130. *Id.* (discussing the expert testimony and the panel's assessment of the evidence).
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 13.
139. *Id.*
140. *Id.*
141. *Id.*

begin, but its inherent simplicity belies the complexity of the mechanics involved.[142] New training techniques as well as strategies for improved biomechanics continue to bring about development and achievement.[143]

Most importantly, the experts agreed that "a mechanical advantage by a prosthetic leg would be expected to lead to a metabolic advantage for a runner."[144] Since neither the Cologne Report nor the Houston Report found a metabolic advantage, there was reason to believe that there was no mechanical advantage.[145]

As a result of this evidence, the CAS determined that the IAAF did not meet the burden of proof that Pistorius had an advantage.[146] The IAAF decision of January 14, 2008, declaring Pistorius ineligible, was revoked, and Pistorius was deemed eligible to compete in IAAF-sanctioned events.[147] In reaching this conclusion, the panel noted that, even though the *Cheetah* blades had existed for a decade, no runner other than Pistorius, whether a single or double amputee, had ever run fast enough to compete with able-bodied runners.[148] This reinforced the CAS decision; if the *Cheetah* blades were such an advantage, why had no other athlete until then been able to use them for that purpose?[149]

C. RUN OSCAR RUN?

The CAS decision finding for Oscar Pistorius was issued with three significant caveats. First, the CAS limited its ruling to the existing *Cheetah* blades, not any subsequent developments in prosthetics that may indeed be able to provide net overall advantages.[150] Next, the CAS declared that its decision does not rule out the possibility that with developments in scientific knowledge, a new testing protocol could someday discover that Pistorius does have an advantage with the *Cheetah* blades.[151] Therefore, the CAS decision has no *stare decisis* or precedential value to Pistorius if the opportunity arises for more testing. Finally, the CAS determination has no validity as applied to any other athlete, even if the athlete uses the same model as Pistorius does, the *Cheetah* "flex-foot" blades.[152] Future athletes "must collaborate with the IAAF to have his or her eligibility under Rule 144.2(e) . . . interpreted on an individual basis."[153]

The first limitation makes sense. After all, the CAS should only rule on issues before the panel, and it would be irresponsible to issue Pistorius or any other athlete a blanket license to compete, no matter what device Ossur or another manufacturer may develop in the future. Nonetheless, the limitation suggests that any new device would require Pistorius to undergo the entire testing process from the beginning, rather than being permitted to demonstrate how a new prosthetic is functionally equivalent to the *Cheetah* blades. If, for

142. *See id.* (noting conflicting hypotheses on whether more vertical force is an advantage or disadvantage).
143. *See id.* (discussing adaptations of running styles).
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 14.
151. *Id.*
152. *Id.*
153. *Id.*

whatever reason, he is no longer able to use that particular prosthetic, then he will be unfairly required to re-visit issues that have already taken significant time away from his life and training.

The second condition is more problematic. It stands to reason that if someone were to discover new scientific evidence demonstrating that Pistorius has a clear overall net advantage, the case ought to be re-opened. However, the CAS decision speaks of "a testing regime designed and carried out to the satisfaction of both Parties,"[154] a vague statement regarding the leverage that the IAAF would continue to hold over Pistorius to force him to agree to additional testing in the future. It is unclear that there is any initial gate-keeper (as opposed to after-the-fact CAS review) that would prevent the IAAF from abusing this process. Given the IAAF's gross mishandling of Pistorius' eligibility,[155] the lack of clarity combined with the implication that the IAAF is a neutral party capable of reinitiating testing is troubling.

The secondary and tertiary review by the IAAF would be aided by the continued attention that researchers have bestowed on Pistorius and the science of his running. In fact, the CAS process itself has been the source of additional scientific data that may lead to future controversy for Pistorius or similarly situated runners. Several studies have recently been published about Pistorius and the mechanics of the *Cheetah* blades, giving rise to a battle of the experts and further questioning of the CAS decision-making process.[156]

As described above, the CAS based its decision on some of the findings contained in the Houston Report. This report was generated by the Rice University Locomotion Laboratory, and it was the work of seven experts in biomechanics and physiology.[157] At the CAS hearing, two of the experts presented the team's findings: Hugh Herr and Rodger Kram.[158] Ultimately, two other experts of the team of seven, Peter Weyand and Matthew Bundle, would reach a different conclusion, namely that Pistorius has an advantage over able-bodied competitors.[159]

On November 5, 2009, the Journal of Applied Physiology published a debate on whether "artificial limbs make artificially fast running speeds possible."[160] This disagreement was between five of the Houston Report experts, two other colleagues, who found no advantage for Pistorius,[161] and Weyand and Bundle, who believed that Pistorius does have an advantage. The primary area of dispute relates to the speed with which Pistorius swings his blades in the air and repositions them under his body.[162]

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154. *Id.*

155. *See* discussion *infra* Part II.B.

156. Jessica Stark, *Study Conducted at Rice Revives Olympic Prospects for Amputee Sprinter: Experts Find No Scientific Basis for Olympic Ban*, RICE NEWS & MEDIA REL., May 16, 2008, *available at* http://www.media.rice.edu/media/NewsBot.asp?MODE=VIEW&ID=11016.

157. *See id.* (listing the seven experts: Peter Weyand, Hugh Herr, Rodger Kram, Matthew Bundle, Craig McGowan, Alena Grabowski, and Jean-Benoit Morin).

158. *Id.*

159. *Id.*

160. *See Point & Counterpoint*, *supra* note 15.

161. Six of the seven authors of the *Counterpoint*, which argued against any advantage for Pistorius, additionally published another article on the mechanics of "running-specific prostheses," finding the prosthetics more limiting on force-generation and achieving top speeds. *See* Grabowski, *supra* note 15.

162. *See Point & Counterpoint*, *supra* note 15.

More troubling was the fact that Weyand and Bundle claimed to have evidence of Pistorius' advantage prior to the CAS decision.[163] In a press release in May of 2008, Weyand was quoted as stating, "Based on the data collected at Rice, the blades do not confer an enhanced ability to hold speed over a 400 meter race . . . nor does our research support the IAAF's claims of how the blades provide some sort of mechanical advantage for sprinting."[164] The conclusion of the Houston experts, that "the scientific evidence put forth by the IAAF investigation to ban Pistorius was fundamentally flawed," was reported as unanimous.[165] Yet, Weyand subsequently stated that he never claimed that Pistorius had no advantage, and that due to the technicalities of publishing scientific research and the narrow question presented by the CAS (exploring the validity of the IAAF's report), neither the CAS nor the public had the full findings of the Houston Report experts in May of 2008.[166] Weyand further alleged that Hugh Herr, one of the two experts who presented the Houston findings to the CAS, and who is also a double-amputee, was never willing to consider that Pistorius might have an advantage.[167]

Weyand is not the only scientist who has questioned Pistorius. Ross Tucker, a South African exercise physiologist, alleged on his Science of Sport blog that he was approached when the Pistorius legal team shopped around for researchers who would prove that he had no advantage.[168] Since Tucker felt that Pistorius had an advantage, he declined to participate in the process.[169] However, unlike Tucker, who cannot substantiate his belief in Pistorius' advantage, Weyand has recognized and published data, albeit contradictory to the data of his opponents.

Any attorney who has witnessed a battle of the experts can hardly be surprised by the outgrowth of Pistorius' testing. The key, though, is that the matter is hardly settled. Perhaps the CAS was correct to leave open the case of Oscar Pistorius' eligibility, in the face of future contrary scientific evidence. However, to the extent the CAS failed to consider all data that was available at the time of the decision, due to narrow questions posed to the scientific experts, and to the extent that the politics and logistics of science publishing have created advocates and detractors with strong opinions on the correct analysis of the data, the burden ought not be on Pistorius to re-arbitrate the issue of his advantage or lack thereof, should the IAAF choose to side with Weyand and Bundle. In other words, the experts clearly feel strongly about their findings, Pistorius, and the CAS hearing and decision.[170] This suggests that a second review of the matter may be fraught with additional procedural or substantive flaws and defects, and the decision to reopen this case should not be considered lightly. While the CAS could not foresee the breakdown between the experts behind the Houston Report—indeed, one may wonder what the CAS would have decided if

163. David Epstein, *New Study, for Better or Worse, Puts Pistorius' Trial in Limelight,* SPORTS ILLUSTRATED (Nov. 19, 2009), http://sportsillustrated.cnn.com/2009/writers/david_epstein/11/19/oscar.pistorius.

164. Stark, *supra* note 156; Epstein, *supra* note 163.

165. Stark, *supra* note 156.

166. Epstein, *supra* note 163 (conceding that while the press release "does not contradict the newly released conclusions . . . it's certainly more than enough to confuse the lay sports fan . . . only with 20/20 hindsight is it now apparent that the scientists took the wording narrowly to mean only that the precise basis presented to the CAS for an Olympic ban was not sound").

167. *Id.*

168. Ross Tucker, *Oscar Pistorius Gets a 10 Second Advantage in a 400m Race*, THE SCIENCE OF SPORT BLOG (Nov. 18, 2009, 11:52 AM), http://www.sportsscientists.com/2009/11/oscar-pistorius-gets-10-second.html.

169. *Id.*

170. Epstein, *supra* note 163 (referring to the scientific disagreement as "a not-so-civil debate" and the way in which the published research "devolves into thinly veiled insults").

it did have all the published results—it could have realized that the inconclusive data combined with a highly suspect IAAF agenda or perhaps even just the complaints of other competitors might lead to premature requests for reconsideration of Pistorius' eligibility.

Last, the lack of applicability of this ruling to any other athlete also raises red flags. While arbitration tribunals do not operate with the same presumption of *stare decisis* that courts do, it is nonetheless unclear why the CAS decision should not have persuasive value for other disabled athletes seeking to compete on the general playing field. The CAS declared, "It follows that this Ruling has no application to the eligibility of any other amputee athletes, or to any other model of prosthetic limb; and it is the IAAF's responsibility to review the circumstances on a case-by-case basis, impartially, in the context of up-to-date scientific knowledge at the time of such review."[171] The case-by-case method merely introduces the opportunity for inconsistent treatment of athletes, placing this judgment in the hands of the IAAF, which has already proved incapable of living up to its own standards in this case.

Furthermore, the CAS's concern about the time and cost of future testing seems misplaced. The panel decision expresses "hopes that this will not impose a substantial burden on the IAAF, because of the unique nature of Mr. Pistorius' case. However, if it does create an additional burden, it must be viewed as just one of the challenges of 21st century life."[172] The panel issues no such consideration for the athlete who might be burdened, even though it is the athlete whose training is interrupted by this process and who would be required to jump through the testing hoops that the IAAF would set, even at his or her own cost.

The upshot of the CAS decision is that Oscar Pistorius is eligible to compete—for now. At an able-bodied IAAF sanctioned competition in July of 2008, Pistorius set a personal best time in the 400 meter.[173] Nonetheless, his time was just 0.7 seconds shy of the Olympic qualification cut-off.[174] When Pistorius failed to qualify for the 2008 Beijing Olympics, it was not at all surprising; he spent the bulk of his prior year battling for his eligibility.[175] One may wonder if Pistorius could have shaved off the additional 0.7 seconds from this new personal best had he not spent so much of his time and energy devoted to his eligibility case.

Pistorius' efforts to qualify were not without some controversy. The IAAF general secretary expressed concern about "safety" if the South African Olympic Committee were to select Pistorius for their 4 x 400 meter relay team.[176] The Pistorius legal camp threatened action if the IAAF attempted to influence the South African selection. The IAAF retreated, insisting that it would comply with the CAS decision regarding Pistorius' eligibility.[177] In

171. Pistorius Arbitration, *supra* note 8, at 14.

172. *Id.*

173. *Double-Amputee Pistorius Fails Again to Qualify for Olympics*, ESPN.COM (July 11, 2008), http://sports.espn.go.com/oly/trackandfield/news/story?id=3483741.

174. *Id.*

175. *Id.* (describing Pistorius' 46.62 time as 1.07 seconds shy of the 45.55 qualifying time and noting that "Pistorius has struggled to regain his form after spending most of 2008 away from training to concentrate on fighting the ban, which was lifted on May 16").

176. Joshua Robinson, *Pistorius is Down to His Last Hope*, N.Y. TIMES, July 17, 2008, at D5, *available at* http://www.nytimes.com/2008/07/17/sports/olympics/17rings.html.

177. *Id.*

the end, the South African Olympic Committee did not select Pistorius, as four other athletes had posted better times.[178]

Pistorius continued to be successful at the 2008 Paralympic Games.[179] After all, there is no rule that he cannot run against disabled athletes, even while he challenges himself among the general field of elite runners. Only twenty-four years old now, Pistorius has plenty of time to recover from the effects of fighting for his eligibility in 2008 and from an off-track boating accident that he suffered in 2009,[180] to train and set his sights for the 2012 London Games and beyond. So long as his eligibility is not revoked, there is plenty of time to prepare.

III. THE CURIOUS CASE OF CASTER SEMENYA

A. SEE CASTER RUN

If Oscar Pistorius' introduction to the international running community was fast, then Caster Semenya's can be viewed as meteoric.[181] While Semenya may have a fair number of characteristics in common with Oscar Pistorius besides speed —nationality, sport of choice, support at home, controversy surrounding eligibility, and representation by the same law firm[182]—there are significant differences between the two. Pistorius is a young, white man who grew up with financial security in Johannesburg.[183] Semenya is a young, black woman who grew up in an impoverished rural village in South Africa's Limpopo Province.[184]

Another notable difference between Pistorius and Semenya is that Pistorius originally detested running, whereas Semenya embraced it.[185] As described earlier, Pistorius began running to rehabilitate a rugby injury and his international success came quickly. As a youth, Semenya enjoyed various traditionally male sporting activities, like football

178. Joshua Robinson, *Amputee Sprinter's Beijing Quest is Over*, N.Y. TIMES, July 19, 2008, at D1, *available at* http://www.nytimes.com/2008/07/19/sports/olympics/19track.html.

179. Stephen Wade, *Pistorius Wins 3rdGold in Beijing Paralympics*, USA TODAY (Sept. 16, 2008), http://www.usatoday.com/sports/topstories/2008-09-16-4209797663_x.htm (reporting that Pistorius won the gold medal in the 2008 Paralympics in the 100, 200, and 400 meters races).

180. *See Double-Amputee Sprinter Oscar Pistorius Hurt in Boating Accident*, *supra* note 11.

181. Christopher Clarey, *Gender Test After a Gold-Medal Finish*, N.Y. TIMES, Aug. 19, 2009, at B13, *available at* http://www.nytimes.com/2009/08/20/sports/20runner.html?_r=1 (quoting IAAF general secretary Pierre Weiss as explaining that Semenya "was unknown three weeks ago . . . Nobody could anticipate this one. Sorry. We are fast, but we are not a lion.").

182. Jeremy Hodges, *Dewey Takes Up Semenya Case in IAAF Dispute*, LEGALWEEK.COM (Sept. 21, 2009), http://www.legalweek.com/legal-week/news/1534157/dewey-takes-semenya-iaaf-dispute (discussing that Dewey & LeBoeuf was recommended to Semenya by the South African minister of sports and recreation due to the firm representation of Oscar Pistorius, and that the firm has taken on the case on a pro bono basis).

183. *Oscar Pistorius' Autobiography Out This Week; He Says His Prosthetics Have Taken Him Everywhere He's Wanted to Go in Life*, MEDIA DIS&DAT (May 4, 2009, 6:53 PM), http://media-dis-n-dat.blogspot.com/2009/05/oscar-pistorius-autobiography-out-this.html (citing The Times' (South Africa) book review of Blade Runner, in which Pistorius notes that, until his parents divorced and the family scaled back, he was "spoilt rotten").

184. *See* Levy, *supra* note 27.

185. *Compare Oscar Pistorius' Autobiography*, *supra* note 183 (quoting Pistorius as saying he "loathed" athletics and thought "Geez, this is terrible"), *with* Chandre Prince, *Hero Caster's Road to Gold...*, TIMES LIVE (Aug. 30, 2009), http://www.timeslive.co.za/sundaytimes/article35010.ece (describing Caster as a child who "would run religiously every day" as an "obsession.").

(American soccer), wrestling, and karate.[186] Semenya was deemed too rough to compete in girl's football, but continued playing association football with boys.[187] As part of her training for football, Semenya took up running every day.[188] Though Semenya was a valuable member of her football club, it was on the track she shined.[189] Until leaving for university in Pretoria, Semenya ran with the local Moletjie Athletics Club.[190]

Semenya debuted in elite competition at the 2008 World Junior Championships in Poland at the age of seventeen,[191] and later that year she won gold in the 800 meter race at the Commonwealth Youth Games.[192] In the summer of 2009, Semenya won gold in both the 800 meter and 1500 meter races at the 2009 African Junior Championships.[193] Not only did Semenya's 800 meter time of 1:56.72 set a junior national record, a championship record, and a personal best; at the time, it was the best 800 meter time run during the entire 2009 competitive season.[194] The performance also qualified Semenya to compete in her first senior competition, the 2009 World Championships in Berlin.[195] Weeks later, Semenya improved upon that record time, registering a 1:55.45, which was good enough for gold at the World Championships.[196] Counting her performances in regional, national and international competition, Semenya won thirty-one medals and received numerous awards in her home country in 2008 and 2009.[197]

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186. Malone, Miller & Maclean, *supra* note 21.

187. *Id.* (quoting Semenya's father as describing her as "heartbroken" and stating, "[u]p until that point, Caster had lived for football and she was desperate to play the game. The coaches said she was a 'hard mama'—too tough and too big to play."); Patrick Sawer & Sebastian Berger, *Gender Row Over Caster Semenya Makes Athlete into a South African Cause Célèbre*, THE TELEGRAPH (Aug. 23, 2009), http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/6073980/Gender-row-over-Caster-Semenya-makes-athlete-into-a-South-African-cause-celebre.html (describing how Semenya was "disqualified from her school's girls' football team at the age of 14 for being too rough").

188. Donald McRae, *Caster Semenya: 'People Want to Stare at Me, to Touch Me. I Don't Think I Like Being Famous So Much'*, THE GUARDIAN, Nov. 13, 2009, at p1 Sports, *available at* http://www.guardian.co.uk/sport/2009/nov/14/caster-semenya-donald-mcrae-training-camp.

189. Levy, *supra* note 27.

190. *Id.*

191. Philip Hersh, *Others in 800 Meters Raise Questions About Surprise Winner Caster Semenya of South Africa; International Officials Start Inquiry*, L.A. TIMES, Aug. 20, 2009, at C1, *available at* http://articles.latimes.com/2009/aug/20/sports/sp-world-track20?pg=2 (noting Semenya's time in 800 meters race at the 2008 World Junior Championships as 2:11.98).

192. *Youth SA Team Strikes Gold*, IOL SPORT (Oct. 16, 2008), http://www.iol.co.za/index.php?set_id=6&click_id=4&art_id=nw20081016164120337C414633 (listing Semenya's gold-winning performance was 2:04.23, which was a new South African record).

193. Levy, *supra* note 27 (showing that Semenya's performance in the 800 meters was 1:56.72); *see also* AFRICAN ATHLETICS, http://www.africanathletics.org/?p=245 (listing results of 1500 meters; Semenya's time was 4:08:01).

194. Mark Ouma, *African Junior champs, Day 2*, IAAF (July 31, 2009), http://www.iaaf.org/news/kind=100/newsid=52412.html ("South African Caster Semenya clocked the fastest women's 800m time in the world this year at the Africa Junior Championships at the Germain Comaramond Stadium in Bambous, Mauritius on Friday . . . . ").

195. Levy, *supra* note 27.

196. Anna Kessel, *Gold Medal Athlete Caster Semenya Told to Prove She Is a Woman*, GUARDIAN (London) (Aug. 19, 2009), http://www.guardian.co.uk/sport/2009/aug/19/caster-semenya-gender-verification-test (noting Semenya's time of 1:55.45 as being 2.45 seconds faster than the performance of Janeth Jepkosgei, the defending champion).

197. Prince, *supra* note 185 (listing the awards as including "the Aganang Local Municipality Sportsperson of the Year 2008/09, South African cross-country championship in Mpumalanga 2008, Cossasa School Sport Athletics Gauteng 2009, Confederation of African Athletics 2008 and Limpopo provincial athletics championships 2008.").

The story of Semenya's global success is brief, at least for the moment. For now, the ending remains unclear. We have not heard the last of this twenty-year-old runner, an athlete described as both "a natural"[198] and "a young Usain Bolt."[199] In July 2010, Semenya returned to racing and many predict in due time, she will set the world record in the 800 meter race.

The remainder of the Semenya story continues off the track, where things went, figuratively, off track, for both the athlete and the IAAF. Within hours of her performance at the 2009 World Championships, the IAAF launched an investigation into the athlete.[200] The IAAF cited the drastic improvements in Semenya's racing times over the 2008 and 2009 competition seasons, finding the situation highly suspicious and suggestive of drug use.[201]

The IAAF also compelled Semenya to undergo what the media dubbed a "gender test," though the process is actually one of sex testing and consists of more than one test.[202] The difference between sex and gender will be explained in the next section. Though it remained hidden at the time, it appears as though South African officials, at the request of the IAAF, had already begun the process of conducting sex tests on Semenya as early as August 7th, weeks before the Berlin competition, though it is not clear that the athlete was made aware of this at that time.[203]

Once it was reported that the IAAF was investigating Semenya, a media frenzy ensued.[204] Semenya went from being a little known athlete, competing in a race widely ignored by the common sporting public, into the spotlight. Very few could say who held the women's record for the 800 meter race, yet Caster Semenya's name, face, and body became recognizable overnight. Much of the attention was unflattering or insensitive, questioning Semenya's "mannish" appearance and voice.[205] Despite the fact that Semenya was no stranger to questions about her gender,[206] she was so upset by the handling of her case that she threatened to boycott the medal ceremony and had to be convinced to attend.[207]

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198. Levy, *supra* note 27 (quoting Coach Phineas Sako of the Moletjie Athletics Club).

199. Malone, *supra* note 21 ("Caster looked like a young Usain Bolt").

200. Kessel, *supra* note 196.

201. Clarey, *supra* note 181 (quoting IAAF spokesman Nick Davies as saying, "We just acted in a way we thought was sensible . . . . If we would have sat back and done nothing, it would have been very strange of us as well.").

202. *Id.* ("Davies emphasized that the testing is extensive . . . . ").

203. Jere Longman, *South African Runner's Sex-Verification Result Won't Be Public*, N.Y. TIMES, Nov. 19, 2009, at B10, *available at* http://www.nytimes.com/2009/11/20/sports/20runner.html (describing how then-president of Athletics South Africa, Leonard Chuene, rejected the medical advice of a South African top sports medical official to have Semenya withdrawn from the Berlin race, "because the results of the tests were not yet known"); Rick Broadbent, *Caster Semenya to Keep Her Gold Medal*, TIMES (London) (Nov. 20, 2009), http://www.timesonline.co.uk/tol/sport/more_sport/athletics/article6922916.ece (stating that Semenya was "duped into believing they were drug tests.").

204. Tom Fordyce, *Semenya Left Stranded by Storm*, BBC SPORT (Aug. 19, 2009), http://www.bbc.co.uk/blogs/tomfordyce/2009/08/semenya_left_stranded_by_storm.html (referring to the "media siege" and "cloud of official suspicion" in Semenya's case as "callous" and "cruel").

205. Sawer & Berger, *supra* note 187.

206. *See, e.g.*, Malone, Miller & Maclean, *supra* note 21 (quoting school officials who explained that they kept a copy of Semenya's birth certificate with them, because of frequent questions regarding her sex and quoting Semenya as stating, "They are doubting me" as the reason she would be taken to "the toiler" for further checking).

207. Sawer & Berger, *supra* note 187 ("So hurt was the 18-year old Semenya that she had to be persuaded by the president of her country's athletics federation, Leonard Chuene, to step onto the podium to accept her gold medal"); Prince, *supra* note 185 (noting that "the allegations 'deeply hurt' her").

The IAAF alleged the fact that the federation required sex testing was only made public due to a leak, and that Semenya was never intended to be thrown to the media.[208] However, there are some allegations that the source of this leak was an erroneously sent fax from an IAAF official.[209]

Allegations were also raised regarding the role that race may have played in the handling of Semenya's case.[210] South African officials and others insisted that Semenya would not have been treated the same way, had she been white or male.[211] For about one month following the race and the leak of the IAAF sex testing, Semenya became a focal point regarding the treatment of gender and race in sport. Subsequently, the IAAF admitted that Semenya's case could have been handled better and with greater sensitivity.[212] At the same time, as the facts have unraveled, it has become clear that Athletics South Africa and South African officials may have forced the IAAF's hand in this instance, claiming racism and an invasion of privacy, when more could have been done internally to protect Semenya.[213] As other sports "scandals" came and went, Semenya's case faded from the public conscience, popping only from time to time with vague pronouncements that offered no new information until the ultimate IAAF announcement of Semenya's eligibility in July 2010.

Many expected the IAAF to rule at its November 2009 Council meeting on whether Semenya would be allowed to keep the medals and prize money she had won, and whether she would be allowed to compete against women in the future. On November 18, 2009, the IAAF issued a statement that Semenya was still undergoing medical testing, and that her eligibility was not yet determined.[214] As a result, Semenya's case would not be discussed at

208. Smith, *supra* note 23 ("The International Association of Athletics Federations (IAAF) is standing its ground, saying it only made the sex test public after it had already been reported in the media.").

209. Gordon Farquhar, *New Twist in Semenya Gender Saga*, BBC SPORT (Aug. 25, 2009), http://news.bbc.co.uk/sport2/hi/athletics/8219937.stm (referring to the source of the leak as a fax sent to the wrong person); Ross Tucker & Jonathan Dugas, *How Do You Know the Sex of a Chromosome? Pull Down Its Genes! If Only It Were That Easy . . .* , THE SCIENCE OF SPORT (Aug. 25, 2009, 9:08 PM), http://www.sportsscientists.com/2009/08/caster-semenya-debate-some-physiology.html ("And finally it's now emerged that the leak that saw this process made public came because a fax was sent to the wrong person. What a pity for such a sloppy mistake to have such repercussions, and the IAAF will hopefully take action there, because they've also got a great deal to answer for when it comes to the leak. Not for the process or their policy, mind you, but for this leak, which was a grave error.").

210. *See, e.g.*, Smith, *supra* note 23; Sawer & Berger, *supra* note 187 (quoting the youth wing of the South African Communist Party, which is an alliance with the ANC, as stating, "the accusations against Semenya pander to 'the commercial stereotypes of how a woman should look, their facial and physical appearance, as perpetuated by a backward Eurocentric definition of beauty'"); Levy, *supra* note 27.

211. Sawer & Berger, *supra* note 187 (quoting Butana Komphela, the chairman of the Parliament's Portfolio Committee on Sport and Recreation, as saying, "The humiliation of Semenya was a sign of sexist action by IAAF as it undermined the achievements of women. It is a very gross action that gives an impression that the IAAF only recognizes good things when they are done by men;" and quoting Gugu Ndima of the Youth Communist League as saying, "It represents a mentality of conforming feminine outlook within the white race, that as long as it does not fall within this race or starve and paint itself in order to look like the white race it therefore is not feminine.").

212. Michael Sohn, *Is a Female Track Star a Man? No Simple Answer*, TIME.COM (Aug. 25, 2009), http://www.time.com/time/health/article/0,8599,1918668,00.html ("IAAF president Lamine Diack admitted that the affair could have been treated with more sensitivity.").

213. *See generally SA Chief Issues Semenya Apology,* BBC SPORT (Sept. 19, 2009), http://news.bbc.co.uk/sport2/hi/athletics/8261566.stm.

214. *IAAF: Semenya Still Undergoing Gender Tests*, WORLD-TRACK.ORG (Nov. 18, 2009), http://world-track.org/2009/11/iaaf-semenya-still-undergoing-gender-tests.

the November Council Meeting, and "no further comment will be made on this subject until further notice."[215]

Within a day or two of the IAAF announcement, several news accounts reported that an agreement had been reached whereby the IAAF would allow Semenya to keep the medal and prize money from the race she won.[216] While medals, championship records and titles are important to athletes, so is the prize money that they win, especially for athletes who come from poor families. Elite athletics is not just about being the best or fastest; it is an important source of income. However, all of these reports about Semenya being able to keep her medal and money appeared to derive from information provided by South Africa's sports minister, and the IAAF failed to verify that such a determination regarding the race results had been made at that time.[217] Given the tremendous controversy surrounding the South African handling of Semenya's case, which included the resignation of an Athletic South Africa coach, the suspension of the South African president of Athletics by the South African Sports Confederation and Olympic Committee, and an official apology issued to Semenya, there was reason to doubt whether the IAAF and the South African sporting officials were on the same page in November of 2009.[218]

In March, the IAAF announced that no further progress had been made in Semenya's case.[219] Semenya responded in late March announcing her intention to resume racing,[220] and on April 6, 2010, she set her return date as June 24, where she would race in Spain.[221] More than six months after the process began, only the IAAF officials, and perhaps Semenya and her legal team, knew exactly where things stood in terms of what medical testing or treatment would still be necessary. In June 2010, Semenya reaffirmed her commitment and intention to race in the 2010 season, noting that she was not banned or declared ineligible, and that she had voluntarily chosen to cooperate with the IAAF process.[222] Perhaps in response to Semenya's announcement or perhaps in response to behind the scenes agreements or medical treatments, the IAAF announced in July 2010 that Semenya was clear to race, and the athlete resumed racing.[223]

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215. *Id.*

216. *See, e.g.*, *Gender-Test Runner Semenya to Keep Gold Medal, Says South Africa*, CNN.COM (Nov. 19, 2009), http://www.cnn.com/2009/SPORT/11/19/athletics.semenya.test.gold/index.html.

217. *Semenya Will Keep Gold Medal*, SI.COM (Nov. 19, 2009), http://sportsillustrated.cnn.com/2009/more/11/19/caster.semenya.ap/index.html (quoting the South African sports ministry that Semenya will be able to keep her medal and citing the IAAF refusal to confirm this fact).

218. *See, e.g.*, Broadbent, *supra* note 203 (illustrating time-line of Semenya's case); *Government Wants Chuene Fired*, ESPN.COM (Sept. 20, 2009), http://sports.espn.go.com/oly/trackandfield/news/story?id=4489230 ("We need to be upright in censuring the officials who handled the matter,' said secretary-general Gwede Mantashe, the South African Press Association reported. 'ASA didn't handle the matter with the utmost transparency and honesty.").

219. *No Progress in Semenya Case*, RTE SPORT (Mar. 11 2010), http://www.rte.ie/sport/athletics/2010/0311/semenyac.html.

220. Sophie Taylor, *Caster Semenya Comeback In Spite of IAAF*, THE FIRST POST (Mar. 31, 2010), http://www.thefirstpost.co.uk/61636,sport,other-sport,caster-semenya-announces-comeback-in-spite-of-iaaf-after-gender-tests-and-hermaphrodite-claim.

221. *Caster Semenya Returns to Racing June 24 in Spain*, ESPN.COM (Apr. 6, 2010), http://sports.espn.go.com/espn/wire?section=trackandfield&id=5059569.

222. Southern Times Writer, *Semenya Vows to Race Again This Season*, THE SOUTHERN TIMES (June 4, 2010), http://www.southerntimesafrica.com/article.php?title=Semenya_vows_to_race_again_this_season_&id=3934.

223. *Caster Semenya May Compete*, IAAF (July 6, 2010), http://www.iaaf.org/aboutiaaf/news/newsid=57301.html.

B. RUN CASTER RUN?

After embarking on testing to determine if Semenya has a "rare medical condition" that would provide her with an unfair competitive advantage, the IAAF finally issued a statement that, based on the recommendation of a panel of medical experts, Semenya was cleared to race.[224] The presumption from the IAAF ruling is that Semenya either has no competitive advantage or has one which can be mitigated via some form of treatment.

Semenya returned to racing in July 2010, winning her first race back in Finland.[225] In August 2010, she returned to Berlin, one year after her victory in the championship that led her down the path of IAAF investigation.[226] Her future in the sport remains to be seen.

While there was a brief statement issued, there was no official or public ruling on Semenya's eligibility, leaving any questions regarding whether the process was defective unanswered. Semenya remains eligible to race and one can only speculate what compromises may have been reached to achieve this result. In her return to racing, Semenya has already won and lost, and her times have been slower than one might have projected based on her performance last year.[227] It is unknown how much of this is attributable to the distraction the process of sex testing had on Semenya's training, though one can safely assume that there would be some effect of the months of eligibility limbo.[228]

To the credit of the IAAF, the federation recognized the need for confidentiality of the results of Semenya's sex test.[229] The current lack of information regarding the outcome of Semenya's case suggests that the IAAF was able to prevent additional leaks and increased its own attention to ensuring that Semenya's privacy rights were not further violated. Whether a result of enlightenment or the threat of lawsuit, this was a move in the right direction, though far too late to protect Semenya's privacy. The IAAF's lack of information after nearly a full year of behind the scenes testing has left some of Semenya's competitors feeling more justified in rejecting her right to race and skeptical as to the fairness of racing against her.[230]

While one cannot commend the handling of Semenya's eligibility by either Athletics South Africa or the IAAF, as a procedural or substantive matter, it appears as though the IAAF is taking steps to improve how it treats athletes with atypical sex or gender variations. During the course of the year's public silence regarding Semenya, the IOC recommended the establishment of official "gender testing" to assist federations, such as the IAAF, in evaluating atypical athletes, such as Semenya, in a more consistent and private manner.[231]

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224. *800m Champ Semenya Cleared to Race*, *supra* note 34.

225. *Caster Semenya Wins Comeback Race in Finland,* CBSNEWS (July 15, 2010), http://www.cbsnews.com/stories/2010/07/15/sportsline/main6681573.shtml.

226. *Semenya Returns to Berlin,* S. AFR. ATHLETE (Aug. 20, 2010), http://www.saathlete.com/latest/semenya-returns-to-berlin.

227. Andrew Dampf, *Caster Semenya Baffles Observers with 'Incomprehensible' Run*, THE HUFFINGTON POST (Sept. 10, 2010), http://www.huffingtonpost.com/2010/09/01/caster-semenya-baffles-ob_n_701845.html.

228. *See* Anna Kessel, Caster Semenya Speaks of Rough Ride Back from Suspension, THE GUARDIAN (June 7, 2011), http://www.guardian.co.uk/sport/2011/jun/07/caster-semenya-diamond-league.

229. *See, e.g.*, David Smith, *Caster Semenya Gender Test Results Delayed After IAAF Intervention*, THE GUARDIAN (June 10, 2010), http://www.guardian.co.uk/sport/2010/jun/10/caster-semenya-gender-test-iaaf.

230. Clarey, *supra* note 35.

231. *IOC Recommends Gender-Test Centers*, CBSNEWS (Jan. 20, 2010), http://www.cbsnews.com/stories/2010/01/20/sportsline/main6120277.shtml.

Nonetheless, there is some evidence that the IAAF is still struggling with how to regulate participation in women's sport based on conceptions of advantage. In April 2011, the IAAF introduced new rules for determining the eligibility of female athletes with "hyperandrogenism," in an effort to bar athletes thought to have too many male hormones to fairly compete with women. It is yet to be seen whether these new regulations will prevent other athletes from being mistreated like Semenya or, instead, form the basis for future mistreatment.[232]

C. SEX & GENDER IN SPORT

The history of sex testing in sports is muddled and often ugly. Sex testing was introduced to elite athletic competition in the late 1960s.[233] Regional competitions began using sex tests in 1966, and the Olympics officially conducted sex testing starting in 1968.[234] The original method for sex testing was a visual inspection, which not only degraded the athlete, but could also produce inconclusive and erroneous results.[235] Over time, most sporting officials, though not all, switched to a chromosomal analysis, whether based on a smear or swab, like the Barr body test, or a DNA-based test, like the PCR (polymerase chain reaction).[236] This chromosomal approach also has its flaws. In 1996, eight female athletes "failed" sex tests, only to be later classified as having permissible intersex conditions.[237]

Officially, the IAAF ceased sex testing in 1991 and the IOC followed suit in 2000.[238] However, the IOC, the Olympics, and the federations still maintain the authority and ability to subject individual athletes to sex tests and do so in specific cases of athletes who compete in Olympic sports.[239] In Beijing, a laboratory was set up for the purpose of sex testing[240] and early in 2010, the IOC indicated the need for more formal testing centers.[241]

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232. *See* Shawn M. Crincoli, *Eligibility: The IAAF Hyperandrogenism Regulations and Discrimination*, WORLD SPORTS L. J., June 2011.

233. *See* Pilgrim, Martin & Binder, *supra* note 38, at 509 (describing how initial sex tests in the late 1960s consisted of "nothing more than women traipsing nude in front of a panel of physicians who were monitoring for appropriately corresponding genitalia").

234. *Id.* at 509.

235. *See Olympics Sex Test*, PEAK PERFORMANCE, http://www.pponline.co.uk/encyc/olympics-sex-test-583 (last visited Mar. 4, 2011).

236. Pilgrim, Martin & Binder, *supra* note 38 at 510–12 (describing the split between the IAAF and the IOC between using the PCR test, once the Barr body test was abandoned).

237. Emine Saner, *The Gender Trap*, GUARDIAN (London) (July 30, 2008), http://www.guardian.co.uk/sport/2008/jul/30/olympicgames2008.gender.

238. Joe Leigh Simpson et al., *Gender Verification in the Olympics*, 284 JAMA 1568, 1568–69 (2000); Pilgrim, Martin & Binder, *supra* note 38, at 99, 101; David Epstein, *Well, Is She or Isn't She? Sex Testing an Athlete Isn't Nearly as Simple as It Sounds*, SI VAULT (Sept. 7, 2009), http://sportsillustrated.cnn.com/vault/article/magazine/MAG1159745/1/index.htm (noting that the IAAF convened a panel of experts in 1990 to make suggestions on how to verify sex and the experts recommended abolishing sex testing, due to the virtual impossibility of finding a clear cut answer).

239. Ian O'Reilly, *Gender Testing In Sport: A Case for Treatment?*, BBC NEWS (Feb. 15, 2010), http://news.bbc.co.uk/2/hi/8511176.stm.

240. Katie Thomas, *A Lab is Set to Test the Gender of Some Female Athletes*, N.Y. TIMES (July 30, 2008), http://www.nytimes.com/2008/07/30/sports/olympics/30gender.html (describing the creation of the lab and the controversy surrounding sex testing of athletes).

241. *See* CBSNews, *supra* note 225.

It is unclear how often these tests occur. An IAAF official has indicated that since 2005, eight athletes have been subjected to sex testing, four of whom were asked to cease competing.[242] Due to the athletes' privacy, officials attempt to conduct these investigations quietly and confidentially. As the Semenya case demonstrates, this does not always happen. Even when such testing does remain private, there exists the potential for individual athletes to be forced into quiet retirement, as recommended by the IAAF, rather than challenge eligibility, which would typically require publicizing the results of the testing at the expense of the athlete's privacy. When sex testing functions well – to the extent one agrees with sex testing to begin with – the public and media would not know what had occurred or any resolution had been reached. Indeed, it is unclear if Semenya has received any treatment based on the testing that occurred. Given her public reactions and insistence on returning to competition over the course of the testing process, one can speculate that no changes have occurred. But this is mere speculation; any effort to investigate the subject would be inappropriate and disrespectful of the athlete's privacy. To the extent Semenya does not regain the running form and performance she demonstrated prior to testing, there will be some speculation whether she has received medical treatment that would affect her performance and to what extent she has been harmed by the IAAF's protracted process of sex testing.

Sex testing has grown more elaborate, reflecting the complexities of sex and gender.[243] Semenya met with no fewer than five medical experts. Her sex testing has included a gynecologist, endocrinologist, internist, psychologist, and gender expert.[244] The days of the strict chromosomal approach are behind us, as the IAAF and the IOC have struggled to protect competition in sports that is based on binary categories of male or female at a time when there is increasing medical knowledge that people are not always so easily categorized.[245]

1. THE DIFFERENCE BETWEEN SEX AND GENDER

a. SEX AND THE INTERSEXUAL

Many people use the terms sex and gender interchangeably.[246] The IAAF attempted to determine the "true" sex of Caster Semenya, and other athletes like her. Sex is a biological or physiological manifestation, and it represents the sum of the body's sexual or reproductive system.[247] When a baby is born, or even *in utero,* expecting parents want to

242. Broadbent, *supra* note 203, at 1 (citing Pierre Weiss, IAAF general secretary as indicated that Semenya was the eighth athlete to undergo sex testing since 2005, and referring to a 2006 policy paper indicating that six intersex conditions are permissible for future competition).

243. For a representative perspective of how sex and gender testing have changed over time, *see* IAAF Policy on Gender Verification, IAAF, http://www.iaaf.org/mm/document/imported/36983.pdf (last visited Apr. 15, 2011); M.A. Ferguson-Smith & Elizabeth A. Ferris, *Gender Verification in Sport: The Need for Change?*, 25(1) BRIT. J. SPECIAL MED. 17 (1991).

244. *Champion Female Runner's Gender Tested*, CBSNEWS (Aug. 20, 2009), http://www.cbsnews.com/stories/2009/08/20/sportsline/main5254301.shtml.

245. *See, e.g.*, Julie Shapiro, *Check Only One: M/F/Other*, 11 CARDOZO WOMEN'S L. J. 587, 587 (2005).

246. Tarynn M. Witten, et al., *Transgender and Transsexuality,* 216-17, *in* ENCYCLOPEDIA OF SEX AND GENDER, 216, 216–17 (Carol R. Ember & Melvin Ember eds., 2003) (noting that "[o]ne of the most widely used word-processing programs identifies sex and gender as interchangeable" and that a study conducted in 2000 questioning if people knew what gender meant found that a "common response" was that gender is the same as sex).

247. Pilgrim, Martin & Binder, *supra* note 38, at 497–99.

know if the baby is a boy or a girl. Doctors examine the external genitalia to pronounce the baby's sex.[248] In many cases, this cursory evaluation is sufficient, because the entirety of the sexual system is in alignment.[249] That is to say, the outsides match the insides.

In rare cases, though, treating sex as a binary choice between male and female physiology is incorrect. Intersexuality is the medical term for individuals who are neither strictly biologically male or female.[250] Debates over how to properly define and classify intersexuality have produced varying estimates of its prevalence in the population, ranging anywhere from roughly 0.018 % to 1.7% of all live births.[251] Between 0.1 and 0.2 % of intersex cases produce ambiguities that lead to specialized medical intervention and quite often surgery.[252] Some of these conditions are linked to medical deficiencies and other risks.[253]

Though different conditions can produce intersexuality, one common criterion is that the person has a chromosomal make-up that differs from how he or she appears.[254] For example, individuals may have XY chromosomes, which typically would render them male; however, something prevents the body from undergoing the usual development of a male. People with Androgen Insensitivity Syndrome (AIS), one of the more common intersexual conditions, cannot properly metabolize androgens, and, thus, lack the ability to synthesize and develop from male hormones.[255] AIS can produce an array of different external appearances along the male to female spectrum, which means that some individuals appear outwardly female and grow up without any knowledge that they have this condition.[256]

b. GENDER AND THE TRANSGENDER

Whereas sex focuses on physiology, gender refers to identity. Gender is the sense of self that makes one "feel" that she is a girl or woman (or in the alternative, a boy or man).[257]

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248. *Id.* at 498 (referring to this as the 'natal sex').

249. *See id.*

250. Stephanie Busari, *Gender Row Athlete: What is Intersexuality?*, CNNHEALTH.COM (Aug. 20, 2009), http://www.cnn.com/2009/HEALTH/08/20/gender.athlete.intersex/index.html (defining intersexuality and acknowledging that "there are around 20 to 30 types of biological 'intersex' conditions, each of them affecting the body in different ways.").

251. *Compare How Common is Intersex?*, INTERSEX SOC'Y OF N. AM., http://www.isna.org/faq/frequency (providing statistics based on the research of Anne Fausto-Sterling) (last visited Apr. 28, 2011) *with* Leonard Sax, *How common is Intersex? A Response to Anne Fausto-Sterling*, 39 J. SEX RES. 174, 175 (2002) (critiquing Fausto-Sterling's inclusion of conditions that may not be identified clinically as intersex conditions to produce a higher rate of incidence). For a middle-ground figure, *see* Alice Domurat Dreger, *"Ambiguous Sex" – or Ambivalent Medicine? Ethical Problems in the Treatment of Intersexuality*, 28 THE HASTINGS CENTER REP. 24, 26 (1998) (estimating intersexuality at 1 in 1,500 live births, or in other words, 0.067%).

252. *Id.*

253. *Are there Medical Risks Associated With Intersex Conditions?*, INTERSEX SOC'Y OF N. AM., http://www.isna.org/faq/medical_risks (last visited Apr. 28, 2011).

254. *See Is Intersex the Same as "Ambiguous Genitalia"?*, INTERSEX SOC'Y OF N. AM., http://www.isna.org/faq/ambiguous (last visited Apr. 28, 2011).

255. *See What is Intersex?*, INTERSEX SOC'Y OF N. AM., http://www.isna.org/faq/what_is_intersex (last visited Apr. 28, 2011).

256. Busari, *supra* note 250 (discussing why Semenya likely does not have AIS, based on her physical appearance and the questions being asked about her condition).

257. *See* Christine A. Smith et al., *Words Matter: The Language of Gender*, *in* HANDBOOK OF GENDER RESEARCH IN PSYCHOLOGY 364 (2010).

In the vast majority of the population, gender corresponds with sex.[258] Someone who is biologically male will feel like a man. Someone who is biologically female will feel like a woman. For some, though, there is mismatch between their gender and sex. To be transsexual is to have a biological or physiological sex that is different from one's own gender.[259] The psychological term for the condition once used was Dissociative Identity Disorder, in recognition of the fact that the gender identity is disassociated from the body's manifestation.[260] This condition is now called Gender Identity Disorder.[261]

The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM,"), lists the main components of Gender Identity Disorder. This includes: (1) an insistence that one is of the opposite biological sex or a strong desire to be the opposite sex; (2) evidence of persistent discomfort with, and the perceived inappropriateness of the individual's biological sex; and (3) evidence of clinically significant distress or impairment in work or social life.[262]

As part of the diagnosis, the DSM clearly excludes intersexual individuals from the definition of Gender Identity Disorder.[263] It does, however, include the possibility that an intersexual may wish to change the sex he or she was assigned. For these people, the DSM offers the category of Gender Identity Disorder Not Otherwise Specified.[264] These DSM categories are not without controversy since they suggest that transgender or transsexual individuals have a psychological defect or disorder.[265] At the same time, living a life in the "wrong" body does produce harmful psychological effects, including depression and suicidal thoughts.[266] Psychological counseling is a mandatory step on the path to what is commonly, and somewhat misleadingly, called a "sex change," and the DSM categorization itself may allow some transgender individuals to obtain health care for treatments or otherwise assert their rights.[267] As a result, even proponents of transgender rights often do

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258. *See supra* notes 242-244 and accompanying text.

259. Pilgrim, Martin & Binder, *supra* note 38, at 500-03.

260. National Alliance on Mental Illness, *Dissociative Identity Disorder*, http://www.nami.org/Content/ContentGroups/Helpline1/Dissociative_Identity_Disorder_(formerly_Multiple_Personality_Disorder).htm (last visited Apr. 7, 2011).

261. *See DSM-IV-TR Diagnostic Criteria For Gender Identity Disorder*, PSYCHIATRIC NEWS, July 18, 2003, at 32, 32, *available at* http://pn.psychiatryonline.org/content/38/14/32.full (listing criteria for gender identity disorder); Ken Hausman, *Controversy Continues to Grow Over* DSM's *GID Diagnosis*, PSYCHIATRIC NEWS, July 18, 2003, at 25, *available at* http://pn.psychiatryonline.org/content/38/14/25.full (discussing controversy over GID's inclusion in DSM-IV-TR).

262. *See* American Psychiatric Association, *DSM-IV-TR Diagnostic Criteria For Gender Identity Disorder*, PSYCHIATRIC NEWS 32 (July 18, 2003).

263. Gender Identity Disorder Information, *What is GID?*, http://www.hemingways.org/GIDinfo/about.htm (last visited Apr. 7, 2011).

264. *Id.*

265. *See, e.g.*, Lois Wingerson, *Gender Identity Disorder: Has Accepted Practice Caused Harm?* PSYCHIATRIC TIMES, May 19, 2009, *available at* http://www.psychiatrictimes.com/display/article/10168/1415037 (describing the controversy surrounding labeling atypical gender identities as a "disorder").

266. *Id.*

267. *The World Professional Association for Transgender Health, Inc., WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.*, WPATH (June 17, 2008), http://www.wpath.org/documents/Med%20Nec%20on%202008%20Letterhead.pdf (urging "health insurance carriers and healthcare providers in the United States to eliminate transgender or trans-sex exclusions and to provide coverage for transgender patients and the medically prescribed sex reassignment services necessary for their treatment and well-being, and to ensure that their ongoing healthcare (both routine and specialized) is readily accessible.).

not agree on the subject of DSM inclusion.[268] A full discussion of this topic falls well outside the scope of this article.

2. THE *LEX SPORTIVA* OF INTERSEXUAL AND TRANSGENDER ATHLETES

a. THE RATIONALE FOR SEX TESTING

While Caster Semenya might be the most recent noteworthy athlete to garner attention with regard to her gender, there exists a long history of sex testing within elite athletic competition.[269] Questions regarding sex and gender identity have forced the IOC, the federations, and other athletic organizations to grapple with how to celebrate the achievements of female athletes without compromising the integrity of athletic records, fairness to all women in sports, and the identity or humanity of particular individual athletes.

The story of sex testing is linked to two significant narratives regarding women's participation in elite sports: discrimination and doping. It is also connected to a fear of gender-based impostors and cheats. This age-old subject has been explored in fiction, whether the purpose is to make an audience think, to make people laugh, or simply for shock value.[270] To establish the background against which Semenya is categorized and judged as a cultural matter, this subsection discusses each of these aspects in turn: first, discrimination, then, doping, and, finally, gender-bending.

i. DISCRIMINATION & CULTURAL NORMS

First, it is impossible to understand the role that sex testing has played in elite sports without acknowledging a long-standing history of discriminatory treatment of female athletes that has been accompanied with a systematic denial of athletic opportunities for women.

The original claim against women's inclusion in athletics was that women were too fragile to play sports and that doing so would damage a woman's health.[271] While such claims may seem ridiculous in 21st century Western societies, athletic competitions, particularly the modern Olympics, were especially slow to offer women a chance to compete.[272] Some sports were modified to "protect" women from misperceived dangers.[273]

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268. GENDER IDENTITY REFORM ADVOCATES, http://www.gidreform.org/index.html (last visited April 7, 2011).

269. *See supra* notes 233–237 and accompanying text.

270. Some famous fictitious accounts of gender-bending include: William Shakespeare's *Twelfth Night or What You Will* (play 1600-01); Virginia Woolf's *Orlando* (novel 1928); Bosom Buddies (television series 1980-82); Victor/Victoria (film 1982); Tootsie (film 1982); Yentl (film 1983); The Crying Game (film 1992); Mrs. Doubtfire (film 1993).

271. *See* Andy Milroy, *Equality for Women?*, ASSOCIATION OF ROAD RACING STATISTICIANS, http://www.arrs.net/article_equalityforwomen.php (last visited April 7, 2011) (describing the IAAF hostility to women athletics from the early 20th century through 1960); Larry Eder, *Evolution of Olympic Women's Athletics, Courtesy of IAAF (Mel Watman), Comments by Larry Eder*, RUNBLOGRUN (Aug. 6, 2008, 9:39 AM) http://www.runblogrun.com/2008/08/evolution-of-olympic-womens-athletics-courtesy-of-iaaf-mel-watman-comments-by-larry-eder.html (noting the "strong antipathy to women's athletics" in the 1920s).

272. *See* Eder, *supra* note 271.

273. *Id.*

In our post-Title IX world, it has become clear that women are capable athletes, and that athletic participation in many cases bolsters women's health, rather than undermining it.[274] If anything, the concern should be that elite female athletes are now subject to the same over-training, recurrent injuries, and commercial exploitation that successful male athletes endure.[275] The same classic *machismo* disregard for safety and injury has permeated women's sports, as women demonstrate that they are just as tough and capable as men.[276]

Embedded in this long-standing discrimination is a pervasive cultural determination that sports are part of the masculine domain and that athletic achievement is simply not feminine behavior.[277] It is still perceived as an insult if you tell someone that he runs or throws "like a girl," even as elite female runners outrun and elite softball pitchers outgun the vast majority of the male population.

Other scholars have explored the hyper-masculinization of sports culture in various contexts, including the extent to which female athletes are either hyper-sexualized or questioned regarding sex or sexual orientation.[278] This has resulted in the athletes themselves engaging in a range of displays to express their own femininity, including expressions through hair, make-up, nail polish, or simply by acting more provocatively and sexual.[279] Mixed in the balance are cultural standards of beauty or feminine appearances,

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274. *See, e.g., Women Involved in Sports May be Healthier*, UPI.COM (Dec. 21, 2009), http://www.upi.com/Health_News/2009/12/21/Women-involved-in-sports-may-be-healthier/UPI-82601261435502 (reporting on the findings of the Women's Sports Foundation recently published document, Ellen J. Staurowsky et al., *Her Life Depends On it II: Sport, Physical Activity, and the Health and Well-Being of American Girls and Women*, WOMEN'S SPORTS FOUND. (Dec. 2009), http://www.womenssportsfoundation.org/~/media/Files/Research%20Reports/Her%20Life%20Depends%20On%20It%20II%20%20Covers%20and%20Inside%20with%20December.pdf); Robert Kaestner & Xin Xu, *Effects of Title X and Sports Participation on Girls' Physical Activity and Weight*, Univ. of Ill. at Chi. (Feb. 2006), http://harrisschool.uchicago.edu/Programs/beyond/workshops/ppepapers/obesity-title-9-advances.pdf (demonstrating positive effect on the health of adolescent girls from increased athletic opportunities).

275. *Compare, e.g.*, Michael Sokolove, WARRIOR GIRLS: PROTECTING OUR DAUGHTERS AGAINST THE INJURY EPIDEMIC IN WOMEN'S SPORTS (2008) (describing the risks to young girls and women in elite soccer from a culture that values over-training and playing hurt), *with* Mark Hyman, UNTIL IT HURTS: AMERICA'S OBSESSION WITH YOUTH SPORTS AND HOW IT HARMS OUR KIDS (2009) (looking at the increase in over-use injuries in youth sports, particularly arm injuries in teenage pitchers).

276. This unfortunately has produced skewed problems for women in the areas in which they are *not* physiologically like men. Young women participating in sports appear to suffer severe knee injuries (e.g., ACL tears) and head trauma (e.g., concussions) at a much greater rate per exposure hour than young men do. *See, e.g.*, Katherine Hobson, *4 Injuries That Hurt Female Athletes: Concussions, Stress Fractures, "Runner's Knee," and ACL Damage are Big Problems for Women in Sports*, U.S. NEWS (Aug. 15, 2008), http://www.usnews.com/health/family-health/articles/2008/08/15/4-injuries-that-hurt-female-athletes.html (referring to studies showing that women experience concussions more frequently than men in sports like basketball and soccer, and at the same rates in ice hockey, despite the lack of body-checking in women's hockey).

277. *See* Eder, *supra* note 271.

278. *See, e.g.*, Jennifer L. Knight & Traci A. Giuliano, *Blood, Sweat and Jeers: The Impact of the Media's Heterosexist Portrayals on Perceptions of Male and Female Athletes*, 26 J. SPORTS BEHAV. 272 (2003) (discussing media coverage of gender stereotypes and sexual orientation regarding athletes).

279. *See, e.g.*, Ron Sirak, *Overexposed?*, GOLF DIGEST (Sept. 7, 2009), http://www.golfdigest.com/golfworld/columnists/2009/09/golf_espn_posing_semi_nude_sirak (discussing the controversy over three LPGA decision to pose in "ESPN the Magazine in tastefully covered states of undress"); Randy Kim, *Behind the Scenes at Danica Patrick's SI Swimsuit Shoot*, AOLNEWS.COM (Feb. 10, 2009), http://backporch.fanhouse.com/2009/02/10/behind-the-scenes-video-from-danica-patricks-si-swimsuit-shoot (including a behind the scenes video that discusses Patrick's 2008 and 2009 photo shoots for the Sports Illustrated Swimsuit Issue); Christie Succop, *Amazing Moments in Olympic History: Florence Griffith-Joyner*, TEAMUSA.ORG (Sept. 30, 2009), http://www.teamusa.org/news/article/16583 (referring to Griffith-Joyner's trademark long fingernails and willingness to race with her hair down and noting that "Griffith-Joyner set a

and these norms are fraught with racial as well as gender-based judgments. It is this cultural effect that was most recently seen when Caster Semenya engaged in a magazine makeover, looking very much the girl that she was accused of not being.[280]

To summarize this rationale, sex testing is a tool by which officials, competing athletes, the media, and the general public, can give legitimacy to questions regarding the femininity of any athlete who is thought to be too masculine. Sometimes the suspicion relates to performance, to appearance, And sometimes to attitude and personality. For Semenya, all three of these aspects have been called into question. Her running performance and improvements seem too good for her to be a girl. She does not look feminine enough (especially prior to the make-over). And she has been described as a tomboy, deemed too rough to play football with girls. Thus, the act of questioning Semenya's sex and gender falls into the category of widely accepted societal behavior,[281] even if this type of questioning is disrespectful to Semenya or anathema to her dignity.

ii. DOPING – TURNING WOMEN INTO MEN

It is also impossible to understand the role of sex testing in elite athletic competition without recognizing the extent to which it was co-opted as a tool in the battle against doping and performance enhancing drugs. Women who dope by taking steroids often develop masculinizing characteristics, such as a deeper voice, male-pattern hair growth, and increases in lean muscle mass inconsistent with female endocrinology.[282]

For one transgender athlete, doping magnified gender confusion. Heidi Krieger was a track and field athlete who competed in the shot put for East Germany. In 1979, she joined the Dynamo Sports Club, the state-machine run athletic school and training facility, which was storming international competition with drug-fueled success.[283] From the age of fourteen, when she joined, Krieger was given steroids and injections, while being told these were vitamins, glucose or birth control.[284] The hormones wreaked havoc on Krieger's body, leading to aggression, depression, mood swings, and anatomical changes consistent with the masculinizing effects of androgenic-anabolic steroids.[285]

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precedent for female athletes by demonstrating that they can be both feminine and athletic.").

280. *Makeover for SA Gender-Row Runner*, BBC MOBILE NEWS (Sept. 8, 2009), http://news.bbc.co.uk/2/hi/8243553.stm (reporting on Caster Semenya's makeover in South Africa's YOU magazine); *see also* Levy, *supra* note 184 (describing Semenya's makeover expression as "painfully uncomfortable" and "garish" and how the images were deeply disturbing to Funeka Soldaay's cousin, a South African young woman with an intersex condition).

281. Brittney Griner is a college basketball player who has also raised similar questions to Caster Semenya on these three parameters, despite no questions as to her sex. Guy Trebay, *Brittney Griner, Basketball Star, Helps Redefine Beauty*, N.Y. TIMES, April 8, 2010, at E8, *available at* http://www.nytimes.com/2010/04/08/fashion/08Brittney.html (noting that tolerance and even appreciation of the beauty of muscular, aggressive, androgynous-appearing female athlete has increased, though people still question the sex and sexuality of such athletes).

282. Sigman, *supra* note 16, at 149.

283. Jere Longman, *DRUG TESTING; East German Steroids' Toll: 'They Killed Heidi'*, N.Y. TIMES (Jan, 26, 2004), http://www.nytimes.com/2004/01/26/sports/drug-testing-east-german-steroids-toll-they-killed-heidi.html?src=pm.

284. *Id.*

285. Matthew Syed, *How Blue Pills Turned Heidi Krieger into a Man*, TIMES (London) (July 5, 2008), http://www.timesonline.co.uk/tol/sport/more_sport/article4273050.ece.

In 1986, Krieger won gold in the shot put at the European Championships,[286] but the victory was short-lived. Crippled with mood swings, depression, and chronic pain, Krieger retired from competition in 1990.[287] In 1997, Krieger underwent surgery for sex reassignment, and he now lives as a man, and goes by the name Andreas.[288] Doping did not cause Andreas Krieger's gender identity confusion; the confusion predated the introduction of performance enhancing drugs.[289] Doping did, however, exacerbate the situation, producing physical side effects that Krieger felt left him no choice but to abandon his former female body.[290] Already masculinized in irreversible ways, Krieger chose to transition.[291]

In 2000, Dr. Manfred Hoeppner, the East German medical director, and Manfred Ewald, the president of the East German Olympic Committee, the masterminds behind the East German doping program, were tried on charges of causing bodily harm to the athletes they treated.[292] Retired athletes suffered from cancer, liver damage, pregnancy difficulties, birth defects in offspring, and psychological harms.[293] The doctors were convicted and given suspended sentences and probation, respectively.[294]

Evidence from secret documents revealed that more than 10,000 athletes were given steroids over a twenty-year time period beginning in the late 1960s, with the greatest impact on the *female* athletes.[295] The East German team rose from obscurity to significant medaling and record-setting performances at the elite level due to this state-wide system of doping.[296] It is no wonder that many of the women competing for the country looked masculine. The amount of steroids given to Krieger (and others like him) exceeded, by more than fifty times, what a female naturally produces. This represented an amount far greater than the testosterone that Canadian sprinter Ben Johnson was taking when he was caught doping.[297] Some of the drugs were not even clinically tested before they were given to the athletes.[298]

For Andreas Krieger, the story has a happy ending of sorts. During the trial, he met another former athlete, Ute Krause, who was testifying.[299] Krause had been a swimmer in the East German system.[300] Krause's rapid weight gain from the steroids led her to become bulimic and she later quit sports after a suicide attempt.[301] The two fell in love and

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286. *Id.* (Krieger's winning distance at the Championships in Stuttgart was 21.10 meters).

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Apology Over East German Doping*, BBC NEWS (May 5, 2000), http://news.bbc.co.uk/2/hi/europe/738098.stm.

293. Longman, *supra* note 283.

294. For an excellent overview of the East German doping lawsuit, *see* Steven Ungerleider, FAUST'S GOLD: INSIDE THE EAST GERMAN DOPING MACHINE (2001). The former athletes have also brought a class action lawsuit against Jenapharm, the drug company responsible for providing many of steroids. Roger Boyes, *Sex-Change Athlete Sues Pharmaceutical Company*, TIMES (London) (June 11, 2005), http://www.timesonline.co.uk/tol/news/world/article532095.ece.

295. *See* Syed, *supra* note 285.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

married.[302] A "Heidi Krieger Medal" is awarded each year to Germans who combat doping, and part of the award is taken from Krieger's tainted gold medal.[303] The happy ending, however, is marred by the fact that Krieger still suffers severe physical effects related to the doping.[304] And the irony is not lost on Krieger that, while he was previously tricked into taking steroids, he now voluntarily has his wife inject him with testosterone, as is typical for female-to-male transsexuals.[305]

Sex testing was introduced at the Olympic level precisely when officials started to realize how commonplace performance enhancing drugs had become at the elite level.[306] There was no suitable testing for doping,[307] yet the performances and appearances of the women competing suggested that *something* was making the women perform more like men. The expectation was that sex testing could capture some of these steroid-fueled athletes.[308]

The IOC officially dropped sex testing in 2000, though it continues, as noted above. This timeframe corresponds to the introduction of better doping detection methods. It also matches an era in which sex and gender are better understood, to the point where a mere chromosomal test is recognized to be insufficient to determine an athlete's sex.[309]

iii. GENDER-BENDING AS A TROPE

Last of the rationales is a deep-rooted concern that, without some controls, there is a risk for gender-bending cheating.[310] The unique category of women's sports is perceived to be threatened from the risk of men pretending to be women in order to win. This concern persists despite the fact that there is no evidence of a male athlete having ever won an Olympic medal while pretending to be a woman. In fact, there is only one reported case of someone who even tried.

"Dora" Ratjen competed for Germany in the 1936 Berlin Games in the high jump, where she placed fourth.[311] Later, she won gold at the European Championship in Vienna in 1938.[312] Beyond that, Ratjen did not compete.[313] However, Ratjen was noteworthy for what

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302. *Id.*

303. Longman, *supra* note 283.

304. Syed, *supra* note 285.

305. *Id.*

306. Saner, *supra* note 237.

307. *Id.*

308. *Id.*

309. *Id.*

310. *See* Steven Lynch, *Where Men Were Men . . . and So Were the Women,* GUARDIAN (London) (Aug. 7, 2004), http://www.guardian.co.uk/sport/2004/aug/07/athensolympics2004.olympicgames31 (describing the history of cheating in the Olympics).

311. Aaron Kuriloff, *25 Great Hoaxes, Cheats and Frauds in Sport*, ESPN.COM (Apr. 17, 2005), http://sports.espn.go.com/oly/columns/story?id=2039471 (ranking Ratjen as #18 on the list of all-time cheats in sports).

312. *Id.*; Stewart Maclean, *Is She Really a HE? Women's 800m Runner Shrugs Off Gender Storm to Take Gold*, DAILY MAIL (Aug. 19, 2009), http://www.dailymail.co.uk/news/worldnews/article-1207653/Womens-800m-gold-medal-favourite-Caster-Semenya-takes-gender-test-hours-World-Championship-race.html.

313. Stefan Berg, *How Dora the Man Competed in the Woman's High Jump*, SPIEGEL ONLINE (Sept. 15, 2009), http://www.spiegel.de/international/germany/0,1518,649104,00.html.

she wasn't—female.[314] Ratjen raised some suspicion due to his deep voice and unwillingness to shower with women, although he was accepted by his fellow German teammates, including Gretel Bergmann, who had been dropped from the team due to alleged underperformance (i.e., being Jewish).[315]

The truth about Ratjen's sex was later discovered by police at a train station, responding to a concern about a man dressed as a woman.[316] Ratjen later allegedly commented that living as a girl for three years was "most dull."[317] There is some suggestion that Ratjen had atypical genitalia, and it is unclear to what extent this was known to Nazi officials, who compelled him to compete as a woman.[318] Nonetheless, there was no question that Ratjen was male, in both sex and gender. After the fact, Ratjen returned the gold medal he had won, and his world record from Vienna was erased from the books.[319]

To date, Heinrich "Dora" Ratjen is the only male athlete who has pulled the wool over the eyes of officials in order to compete as a woman. Nonetheless, while Ratjen can be swept aside as atypical, he represents a significant fear in the minds of IOC officials and female competitors. Even though Ratjen is an exception that proves a rule, it is a popular movie or television trope that a man could dominate athletic competition by pretending to be a woman, just as another demonstrates that a woman pretending to be a man can achieve some of the successes expected of men.[320] Even the regimes that demonstrated systematic cheating, such as the East German steroid machine, have attempted to gain advantages to make their women bigger, faster, and stronger, rather than trying to pass men off as women. To date, this impostor concern has proven unsubstantiated. It reflects a societal unease about what it is to be male or female, rather than any genuine threat to sport.

b. CASES OF INTERSEXUAL ATHLETES

The first significant Twentieth Century case of an intersexual athlete had the twists and turns of a mystery novel. Stanislawa Walasiewicz, better known as Stella Walsh, was a Polish-American track and field athlete.[321] Though Walsh emigrated to the United States as an infant, the sixteen-year-old was disqualified from her place on the U.S. Olympic team in

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314. There are some discrepancies in reports of Ratjen's true first name. *Compare* Kuriloff, *supra* note 311 and Maclean, *supra* note 312 (both referring to Ratjen as Hermann), *with* Samuel Goldsmith, *Margaret Bergmann Lambert, 95, Gets Olympic Record Back After '36 Nazi Team Replaced Her With Man*, N.Y. DAILY NEWS (Nov. 24, 2009), http://www.nydailynews.com/sports/more_sports/2009/11/24/2009-11-24_qns_woman_95_gets_olympic_record_back_after_36_nazi_team_replaced_her_with_man_h.html (referring to Ratjen as Horst), and Berg, *supra* note 313 (referring to Ratjen as Heinrich). It appears that the naming confusion may exist because Ratjen really was originally named Dora, due to confusion regarding her sex, and only later in life did he take on a male name.

315. *See* Berg, *supra* note 313.

316. *Id.*

317. *Id.* (disputing this story and quote as coming from a 1966 *Time* magazine article that had several factual errors concerning Ratjen).

318. *Id.* (noting that for many years, Bergmann had maintained that the whole incident was a Nazi plan).

319. *Id. See also* Goldsmith, *supra* note 314.

320. Movies in which a boy or man pretends to be a woman or girl for sports team purposes include LADYBUGS (Paramount Pictures 1992) and JUWANNA MANN (Morgan Creek Productions 2002). Movies in which a girl or woman pretends to be a boy or man for sports team purposes include SHE'S THE MAN (DreamWorks SKG 2006).

321. Mike Rizzuto, *The Confusing Case of Stella Walsh . . .* , JEFFDAVISTODAY.COM (July 13, 2009), http://www.lakearthurtoday.com/content/confusing-case-stella-walsh.

1927 because she was not a citizen, nor would she be eligible to become a citizen until she turned twenty-one.[322] Instead, Walsh joined the Polish national team, and ran for Poland in the 1932 and 1936 Olympics, winning nine medals in total: five gold, three silver, and one bronze.[323] At the 1936 Olympics, Walsh was defeated in the 100 meter by an 18-year-old American athlete, Helen Stephens.[324] This victory was deemed suspicious and questioned by the Polish media considering Walsh's talent and dominance as an athlete.[325] As a result, accusations were leveled that Stephens was really a man.[326] Stephens was forced to undergo a genital inspection, which confirmed that, indeed, she was a woman.[327]

Meanwhile, after 1936, Walsh limited her participation to amateur events.[328] She became a U.S. citizen, involved herself in working in sports with children, and was ultimately inducted into the US Track and Field Hall of Fame in 1975.[329] In a cruel twist of fate, Stella Walsh was shot during a robbery at a department store in 1981.[330] The autopsy revealed that Walsh had an intersexual condition. She had both male and female chromosomes and ambiguous genitals, relating to a genetic condition known as mosaicism, a mutation that causes some cells to be XY and others to be XX.[331] The US Olympic Committee determined that there would be no effort to retract or disqualify Walsh's medals posthumously, despite the fact that she was intersexual.[332]

Though there have been athletes identified through sex tests to be intersexual, it has not been a common occurrence. One would hope that the infrequency of reported sex tests discovering intersexual athletes is a consequence of both their rare numbers and a respect for the privacy of athletes discovered to have some form of sexual ambiguity. There is no formal IOC rule regarding treatment of intersexual athletes, though anecdotal evidence suggests that intersexual athletes must conform to the typical presentation of the female sex through hormonal and/or surgical treatment before they would be eligible to compete against women.

While the stories of Dora Ratjen and Stella Walsh are commonly cited in the annals of athletes who may have been men competing among women, far fewer accounts mention Ewa Klobukowska or Erik Schinegger, two of the first intersexual athletes to be identified by sex testing in the late 1960s. In 1967, Klobukowska, a Polish runner, became the first athlete to flunk a chromosomal-based sex test; she was forced to return the two Olympic medals she had won in 1964 and refrain from competition.[333] Klobukowska was reported to have "one chromosome too many," suggesting that she was mosaic, and possessed some

322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*; *See also Report Says Stella Walsh; Had Male Sex Organs*, N.Y. TIMES (Jan. 23, 1981), http://www.nytimes.com/1981/01/23/sports/report-says-stella-walsh-had-male-sex-organs.html (describing the autopsy report).
332. Bob Proske, *Gender Questions Began in Cleveland with Olympian Stella Walsh Decades Ago*, CLEVELAND.COM (Aug. 21, 2009), http://www.cleveland.com/livingston/index.ssf/2009/08/gender_questions_began_in_clev.html (noting "that there was speculation that Walsh would be stripped of her Olympic medals, but nothing came of it").
333. Maclean, *supra* note 312.

XYY cells.[334] Interestingly, it was reported that Klobukowska later became pregnant and bore a son.[335]

While Klobukowska was the first atypical athlete discovered by chromosomal testing, Schinegger was the athlete who prompted the universal adoption of such testing.[336] Born as Erika Schinegger, the Austrian became a World Cup skiing champion.[337] Her 1968 Olympic dreams were interrupted when sex testing revealed Schinegger's intersex condition, and she was barred from competing.[338] Schinegger chose to transition to become Erik and is noteworthy for having competed on ski tours as a woman and, later, as a man.[339] Schinegger later married and became a father.[340]

Also lost in the discussion of the development of sex testing is the story of two sisters: Tamara and Irina Press. The Press sisters were Ukrainian Jews who dominated track and field events for the Soviet Union in the 1960s, during the height of the Cold War.[341] The sisters were suspected of not being "real women" due to their appearances and achievements, which included setting twenty-three world records.[342] It was unclear if the Presses were doping, men, or both. Their existence has been deemed partially responsible for pressure from Western countries to take sex testing seriously. The Presses's subsequent disappearance from elite athletic competition once sex testing began suggested to the testers that they must be doing something right.[343] The Press sisters quietly retired in 1966, allegedly to care for an ailing mother, and seemingly disappeared into obscurity, except for their achievements that are still noted in the record books.[344]

Though athletes and others critiqued sex testing from the time it was introduced, the first case that forced the IAAF to reconsider its stance on the matter did not come until the mid-80s. Maria Martinez Patino was a Spanish hurdler who failed a chromosomal-based sex test in 1985.[345] Like the other athletes before her, she was surprised to learn the results of the test. Unlike Klobukowska or Schinegger, Patino refused to withdraw from competition, despite requests from Spanish officials that she fake an injury.[346] Instead, she competed in the 60 meter hurdles, winning gold at the World Championships.[347] Patino was stripped of

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334. *Genetics: Mosaic in X & Y*, TIME (Sept. 29, 1967), http://www.time.com/time/magazine/article/0,9171,899860,00.html.

335. David Smith, *Caster Semenya Sex Row: 'She's My Little Girl,' Says Father*, GUARDIAN (London) (Aug. 21, 2009), http://www.guardian.co.uk/sport/2009/aug/20/caster-semenya-sex-row-athletics.

336. *Encyclopedia: Erika Schinegger*, NATIONMASTER.COM, http://www.statemaster.com/encyclopedia/Erika-Schinegger (last visited Apr. 8, 2011).

337. *Id.*

338. *Id.*

339. *Id.* Schinegger's 1988 autobiography is titled MEIN SIEG UBER MICH. DER MANN, DER WELTMEISTERIN WURDE, which means: "My victory over myself: the man who became a female world champion." In 2005, Kurt Mayer created a documentary film about Schinegger called ERIK(A) (Kurt Mayer Film 2005).

340. *Id.*

341. *Maria's Story*, ANDROGEN INSENSITIVITY SYNDROME SUPPORT GROUP, http://www.aissg.org/articles/MARIA.HTM (last visited Apr. 13, 2011).

342. *Id.*

343. *Id.*

344. *Id.*

345. Chris Alonzo, *Meet Maria Patino, The Latino Woman/"Man" Athlete Who Already Went Through This Gender Nonsense Decades Ago*, GUANABEE (Aug. 21, 2009, 3:11 PM), http://anyguey.guanabee.com/2009/08/maria-patino-transgender-athlete.

346. *Id.*

347. *Id.*

her medals and kicked off the Spanish National team.[348] She fought to be reinstated, ultimately being allowed to compete again, once she demonstrated that she has AIS, an intersexual condition that produces no competitive advantage.[349]

For Patino, the reinstatement came slightly too late. When she was allowed to compete again, she was past her prime; she missed qualifying for the 1992 Olympics in her home country by hundredths of a second.[350] Maria Patino's case demonstrated the danger in the lengthy process that required an athlete to fight for eligibility; namely, that the window for elite competition is often extremely short. An athlete "temporarily" banished from the track may never return, despite having done nothing wrong and possessing no advantage. Patino's treatment prompted the IAAF to revisit the question of sex testing, leading the federation to drop formal chromosomal testing.[351]

Though it may be slow, the IOC also would learn to differentiate among intersexual athletes. Edinanci Silva is a judoka (competitor in judo) from Brazil who was born with both male and female sex organs.[352] During the 1990s, she underwent surgery to reflect her decision to live and compete as a woman, consistent with her gender identity.[353] Silva has represented Brazil in three Olympic Games and has medaled at the World Championships and Pan American Games.[354] One athlete whom Silva defeated in the 2000 Sydney Games, Natalie Jenkins, repeatedly referred to Silva as a "he" at a press conference, even though the IOC has accepted Silva's eligibility to compete as a woman.[355]

This represents a common theme throughout the cases of atypical athletes: some of their competitors refuse to accept the athlete as he or she is and will complain or worry about any advantages the atypical athlete may possess. While one should not trivialize the concern that some athletes may have a genuine advantage, given Silva's physiology and surgery, there was no suggestion that she had any advantage over competitors. Jenkins exhibited poor sportsmanship and disrespect for an athlete who bested her.

For Santhi Soundarajan, the consequences of her intersexual condition were far more dire than mere rudeness from an uneducated competitor. Soundarajan is an Indian runner who was forced to undergo a sex test after she medaled in the 800 meter race at the Asian games in 2006.[356] Like Caster Semenya, Soundarajan was examined by a gynecologist, an endocrinologist, a psychologist, and a genetic expert.[357] She was deemed to have "failed" the sex test, and she was informed that she was insufficiently female to be competing among women.[358] Reports suggest that Soundarajan has AIS, though the details of her condition or results of her test were never confirmed.[359] Soundarajan was disqualified from

348. *Id.*

349. *Id.*

350. *Id.*

351. Myron Genel, *Gender Verification No More?*, MEDSCAPE (May 26, 2000), http://www.medscape.com/viewarticle/408918.

352. Smith, *supra* note 340.

353. *See id.*

354. *Brazil Announce Star-Studded GB World Cup Team*, BRITISH JUDO, http://www.britishjudo.org.uk/home/BrazilTeam.php (last visited Apr. 8, 2010).

355. Saner, *supra* note 237.

356. *Id.*

357. *Id.*

358. *See id.*

359. *Id.*

the race and stripped of her medal.[360] The runner, who had no prior inkling of her condition, was humiliated by the process and the public nature of what happened to her.[361] Adding to the sensitivity was her cultural heritage. Not all countries or cultures are accepting or tolerant of female athletes in the first place. Even among those that are, most still fail in acceptance and tolerance of those deemed "different." The families of questioned athletes may not always be supportive. Caster Semenya is fortunate that her entire family stood by her side through the course of her case.[362]

After the discovery of her intersexuality and the treatment from her community that she received, Santhi Soundarajan attempted suicide.[363] Fortunately, that attempt was unsuccessful. Nonetheless, it is no hyperbole to recognize that sex testing and the failure to keep the results private not only was devastating to this young woman's athletic career, but also destroyed her life.[364] Soundarajan now coaches athletes at a small academy that she started in an effort to reclaim her life, and she told reporters that if her reward money was restored, she would spend it on her students.[365]

c. TREATMENT OF TRANSGENDER ATHLETES

There are a handful of transgender athletes who have competed at an elite level. When sex reassignment surgery first came into existence in the 1930s, there were several accounts of European athletes who transitioned, including Czech runner Zdenka Koubkova.[366] Since there is no indication that any of these athletes competed after their transitions, this section will not feature their exploits. Instead, this section introduces some of the transgender athletes who have competed after transitioning, and it describes how their eligibilities have been treated among various sport's governing bodies.

There are currently several known transsexual athletes who are openly competing in their respective sports. Other transgender athletes may choose to remain closeted, simply competing in their transitioned state, so this section is not exhaustive. Renee Richards is a famous transsexual tennis player who competed in the late 1970s and early 1980s.[367] Mianne Bagger is a golfer who was born in Denmark and lives in Australia.[368] Canadian

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360. *Id.*

361. *Id.* (noting that Kristen Worley, a transgender cyclist, has advocated for Soundarajan to have her medal restored); *The Sad Story of Santhi Soundarajan*, THE TIMES OF INDIA (Jan. 10, 2007), *http://www.dailytimes.com.pk/default.asp?page=2007\01\10\story_10-1-2007_pg2_17* (explaining that while the IOC stopped sex testing, the Olympic Council of Asia required it); Harmeet Shah Singh, *India Athlete Makes Plea for Semenya*, CNN.COM/ASIA (Sept. 14, 2009), http://www.cnn.com/2009/WORLD/asiapcf/09/14/Semenya.India.Athlete (quoting Soundarajan as saying, "I still feel sad. And that's why I want Semenya should be treated with honor. She's a good athlete...Don't reject (withdraw) her medal. She should be allowed to run (as a woman).").

362. Smith, *supra* note 335.

363. Singh, *supra* note 361.

364. *Id.* (adding that Soundarajan was ostracized and "still feels haunted by her past").

365. *Id.*

366. *Medicine: Change of Sex*, TIME (Aug. 24, 1936), http://www.time.com/time/magazine/article/0,9171,756527-1,00.html (describing the treatment of Koubkova, and Mark Weston, who competed for England, both athletes who transitioned from female to male).

367. *Richards, Renee*, GLBTQ, http://www.glbtq.com/arts/richards_r.html (last visited Apr. 13, 2011).

368. *Player Profile: Mianne Bagger*, LADIES EUROPEAN TOUR, http://www.ladieseuropeantour.info/profiles/120149.htm (last visited Apr. 16, 2011).

Kristen Worley competes in cycling,[369] whereas her compatriot Michelle Dumaresq competes in mountain biking.[370] Each of these athletes falls under the ambit of a different sports organization and, as a result, their treatment has been inconsistent. A complete discussion of the circumstances for transgender athletes falls outside the scope of this article, though it is notable that each of these four athletes is male-to-female (MTF) transsexual. Most of the concern about the advantages that transgender athletes possess in competition stem from the worry that MTF transsexuals are advantaged as compared with typical female athletes.[371] For female-to-male (FTM) transsexuals, the concern would be what form of medical waiver, and what testosterone levels, should be given for the "doping" that is necessary as part of the hormone replacement therapy to masculinize the athlete's body.[372]

There is no single organization controlling all sports. There also is no one set of laws that applies to each sport's governing body. Each organization system must follow the laws of its home jurisdiction, which may include international laws or treaties, as well as domestic laws. As a result, the rules for these athletes vary greatly.

The International Olympic Committee (IOC) is a large umbrella organization that governs elite sports competition by both country and sport.[373] Participating countries maintain National Olympic Committees (NOC) to administer sports within their borders and among their athletes.[374] The United States Olympic Committee (USOC) was created by Congress for this purpose.[375] The USOC is an agency with delegated authority, though it is not viewed as a state actor for legal purposes.[376]

The sports themselves are governed by the federation system. Each sport has its own federation. The International Association of Athletics Federations (IAAF) is the governing body for track and field.[377] In addition, each country participating has a national governing body (NGB) for the sport. For example, in the United States, track and field is governed by USA Track & Field (USATF); in South Africa, the NGB is Athletics South Africa (ASA).[378] In many sports, the NGB oversees athletes and competitions at the youth levels as well.[379]

The cases of Oscar Pistorius and Caster Semenya are both eligibility cases within the IOC system, falling in the jurisdictions of the IOC, the South African Olympic Committee,

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369. Elizabeth Chuck, *Hidden Past, Hopeful Future for Trans Athletes*, NBC SPORTS (Feb. 26, 2006), http://nbcsports.msnbc.com/id/10809648.

370. Michelle Dumaresq, *Michelle's Adventures* (Jan. 10, 2003), http://ai.eecs.umich.edu/people/conway/TSsuccesses/MichelleDumaresq.html.

371. Heather Sykes, *Transexual and Transgender Policies in Sport*, 15 WOMEN SPORT & PHYSICAL ACTIVITY J. 3 (2006), *available at* http://www.transgenderlaw.org/resources/Sykes.pdf.

372. *Id. See* Buzuvis, *supra* note 38, at 17.

373. *See generally* Int'l Olympic Comm., *The Organisation*, OLYMPIC.ORG, http://www.olympic.org/about-ioc-institution (last visited Apr. 7, 2011).

374. Int'l Olympic Comm., *National Olympic Committees*, OLYMPIC.ORG, http://www.olympic.org/ioc-governance-national-olympic-committees (last visited Apr. 7, 2011).

375. *See* Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501-03 (2010).

376. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 543 (1987) (holding that the USOC is not a state actor, since there is no government control).

377. *The International Athletic Foundation at Glance*, IAAF, http://www.iaaf.org/aboutiaaf/foundation/index.html (last visited Apr. 8, 2011).

378. *See* USA TRACK & FIELD, http://www.usatf.org; ATHLETICS SOUTH AFRICA, http://www.athletics.org.za.

379. Mitten & Davis, *supra* note 7, at 75.

IAAF, and the ASA. Not all sports fall within the governance structure of the IOC and federation system. This is particularly true of professional sports in the United States, which are typically governed in independent league or association systems.[380] This ranges from the "big leagues," such as Major League Baseball (MLB) or the National Football League (NFL) to somewhat smaller associations, such as the Association of Volleyball Professionals (AVP) or the Professional Bowlers Association (PBA). These non-IOC sports systems are free to make their own rules, though they still must follow domestic law.[381]

Professional sports leagues are welcome to participate within the federation system, and this is the norm outside the United States. In Europe, for example, this is far more common, as there is far greater transnational competition and movement of athletes.[382] The premier European football leagues all belong to FIFA, the Federation Internationale de Football Association. FIFA's rules govern all competition.[383] Using an organization like FIFA enables professional leagues to coordinate their scheduling and player movement, and also to accommodate important international tournaments, such as the World Cup and the Union of European Football Associations (UEFA) Cup.[384]

Due to the variations in sports governance, athletes may face different rules and hurdles in gaining eligibility. Oscar Pistorius obtained the right to run in IAAF-sanctioned races. This eligibility would be useless to him if he were to attempt to play in the National Football League (NFL) or become a mixed martial artist.[385] Casey Martin obtained the legal right to use a golf cart on the PGA tour. This ruling is limited to that organization and any other bodies obligated to follow the holding of that Supreme Court decision.[386] Similarly, transgender athletes face an array of legal and sports ruling regimes determining their eligibility. This section discusses how different systems have produced different results for these athletes in terms of eligibility.

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380. *See id.* at 100.

381. *See id.* at 100–02.

382. *Commission White Paper on Sport*, at 14, COM (2007) 391 final (Jan. 9, 2009), *available at* http://ec.europa.eu/sport/white-paper/whitepaper8_en.htm#4_2.

383. *Laws of the Game 2010/2011*, FIFA, http://www.fifa.com/mm/document/affederation/generic/81/42/36/lawsofthegame_2010_11_e.pdf (last visited Apr. 28, 2011).

384. Thomas M. Schiera, *Balancing Act: Will the European Commission Allow European Football To Reestablish the Competitive Balance That It Helped Destroy*, 32 BROOK. J. INT'L L. 709, 712–13 (2007).

385. Steve Cantwell is an amputee aiming to compete in mixed martial arts. *See* Sergio Non, *No Elbows, No Knees, No Problem: Amputee Set for MMA*, USA TODAY (April 22, 2009), http://content.usatoday.com/communities/mma/post/2009/04/65879517/1 (describing that, when Cantwell was denied a license to fight in Georgia, he moved to Alabama, which does not regulate MMA).

386. Indeed, Paralympians who have challenged the USOC under the ADA for failing to provide equal benefits to disabled athletes have lost and courts have rejected the analogy to Casey Martin, since the Paralympics are not open to the public. *See, e.g.*, Shepherd v. U.S. Olympic Comm., 464 F. Supp. 2d 1072 (D. Colo. 2006) (lawsuit by former wheelchair basketball player); Hollonbeck v. U.S. Olympic Comm., 513 F.3d 1191 (10th Cir. 2008) (lawsuit by three wheelchair racers). For a discussion of these cases, *see* Joshua L. Friedman & Gary C. Norman, *The Paralympics: Yet Another Missed Opportunity for Social Integration*, 27 B.U. INT'L L.J. 345 (2009) (arguing against the separation of the Olympics and Paralympics under the USOC).

i. RENEE RICHARDS – ON THE TENNIS COURT, IN THE NEW YORK COURTHOUSE

Renee Richards was the first transgender athlete to pursue a legal right to compete. Born as a male named Richard Raskind, he competed in men's tennis in high school and college.[387] Though he served in the Navy and became a doctor, Raskind still played competitive tennis, reaching the final of the 35-and-over championship in 1972.[388] A male-to-female (MTF) transsexual, in 1975 Raskind transitioned, and she became known as Renee Richards.[389]

Richards competed in women's tennis from 1977 to 1981, but this did not come without a legal battle. In 1976, the United States Tennis Association (USTA) denied Richards' entry to the U.S. Open, on the grounds that she had not been born a woman.[390] Richards challenged this ruling, and a New York state court agreed with her.[391] In 1977, in a landmark decision, the court declared that denying entry to the U.S. Open violated the athlete's rights.[392] Since Richards had no competitive advantage, the court said that she must be allowed to participate.[393]

The USTA is an NGB that falls under the federation system, but the decision was based solely in domestic law. Even though the federation system did not deem Richards eligible, as it had no specific policy for transgender athletes in 1976, the NGB had no choice but to follow the law of its own country.[394] At the same time, the New York court's authority only reached tennis events held in New York public parks.[395] Had Richards wished to play in other locations, she may not have been permitted to do so.

After the ruling, Richards had some success competing in doubles and singles in the 35-and-over category.[396] She remained connected to tennis through coaching for some time after her retirement from competitive playing. Since the end of her playing days, Richards has been a somewhat controversial figure within the transgender community. Richards has commented that she now believes that MTF transsexual athletes do have an advantage over other women, and that they should not be eligible to compete.[397] When asked to comment on Caster Semenya's case, Richards indicated that while it would be sad if Semenya has more male characteristics than female ones, Semenya still should not be allowed to compete against women.[398] Richards has also made similar comments regarding other transsexual

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387. *Transcript: 'The Second Half of My Life'*, NPR (Feb. 8, 2007), http://www.npr.org/templates/story/story.php?storyId=7277665.

388. John Ireland, *He Shoots, She Scores*, IN THESE TIMES (June 27, 2007), http://www.inthesetimes.com/article/3232/he_shoots_she_scores.

389. *See* Renee Richards, SECOND SERVE (1983).

390. Richards v. U.S. Tennis Ass'n, 400 N.Y.S.2d 267, 267 (N.Y. Sup. Ct., 1977).

391. *Id.* at 272.

392. *Id.* at 273.

393. *Id.* at 272.

394. *Id.* at 268.

395. *Id.* at 268.

396. *Id.*

397. Joyce Wadler, *The Lady Regrets: At Home with Renee Richards*, N.Y. TIMES, Feb. 1, 2007, at F1, *available at* http://www.nytimes.com/2007/02/01/garden/01renee.html?pagewanted=1&_r=1 (Richards referred to the IOC decision to permit transgender athletes to compete as "a particularly stupid decision).

398. Gregg Doyel, *Renee Richards Breaks Down X's and Y's of Semenya Situation*, CBSSPORTS.COM (Aug. 25, 2009), http://www.cbssports.com/columns/story/12111173 (noting the hypocrisy in Richards's opinion and quoting Richards as differentiating herself because of her age at the time she was competing).

athletes, such as Mianne Bagger, who is discussed below. As a commentator, one may agree or disagree with Richards. On the merits of her own landmark case, though, Richards is a true pioneer.

ii. THE STOCKHOLM CONSENSUS – THE CURRENT IOC REGIME

In 2003, the IOC Medical Commission, which deals with issues of medical health and ethics, created an ad hoc committee to grapple with the treatment of transgender athletes.[399] The resulting document, known as the Stockholm Consensus, has allowed transgender athletes to compete in IOC sanctioned events in their transitioned sex category since 2004, provided that they meet a set of guidelines.[400] Athletes who transition prior to puberty—a virtual impossibility for most, given legal and medical hurdles—need not follow the guidelines and may compete immediately.[401]

The Stockholm Consensus provides that eligibility will be determined on a case-by-case basis.[402] The three main requirements of the Consensus are that an athlete can become eligible to compete once: (1) the athlete has completed surgical changes to the transitioned sex, including surgery on the external genitalia and a gonadectomy; (2) the athlete has obtained legal recognition by "appropriate official authorities;" and (3) the athlete has undergone hormone therapy for a sufficient length of time to minimize advantages. The Consensus recommended a two-year minimum waiting period after surgery.[403]

Some may find it difficult to critique the Stockholm Consensus guidelines because they are a set of standards and not rules. Each athlete will be dealt with on a case-by-case basis, so it is not clear the extent to which there is room for discretion in application of, or variation from, the guidelines. Furthermore, the Stockholm Consensus represents, at the minimum, a fair effort by the IOC to allow for the eligibility of transgender athletes.

That said, the Stockholm Consensus presents several challenges. The biggest problem with the guidelines is that they set complicated—and sometimes impossible—barriers to entry for athletes that have no connection to athletic performance. Many countries do not allow for legal recognition of transsexual people in their transitioned sex. Surgery is costly and may not be desired for privacy or personal reasons. The amount of time it takes to undergo surgery and legal recognition, even if possible, is often far greater than the amount of time it takes to lose any athletic advantage via hormone treatment.[404]

Beyond that, there is no clear evidence that transitioned athletes have an advantage that requires waiting so long after beginning hormone treatment. In fact, there is some indication that athletes may actually have a hormonal disadvantage after transitioning.[405] Elite competition requires an athlete to be at the top of his or her sport, which allows for a

399. *IOC Approves Consensus with Regard to Athletes Who Have Changed Sex*, OLYMPIC.ORG (May 17, 2004), http://www.olympic.org/medical-commission?articlenewsgroup=-1&currentarticlespageipp=50&articleid=56230.

400. *Id.*

401. *See id.*

402. *Id.*

403. *Id.*

404. Sykes, *supra* note 371 at 8.

405. *Id.*

very short window of time, based on the sport. The transgender athletes who have come forward all happen to compete in sports with longer windows of competition. This is surely no coincidence.

iii. PROFILES OF MTF TRANSSEXUAL ATHLETES

This section briefly discusses three MTF transgender athletes, and how the Stockholm Consensus has, or has not, affected their participation in sports. The athletes are golfer Mianne Bagger, cyclist Kristen Worley, and mountain biker Michelle Dumaresq. Each of these athletes has criticized or lobbied the IOC, IAAF or other international sports organizations for better treatment of atypical athletes, particularly as relates to the dignity and privacy to which each individual is entitled, regarding sex and gender.

Mianne Bagger underwent surgery in 1995 and in 1998, she began competing as an amateur woman in Australia.[406] Bagger won the South-Australian championship in 1999, 2001, and 2002.[407] In 2004, Bagger made the move to golfing professionally, playing in the Australian Women's Open.[408] Though Bagger attempted to join Australian Ladies Professional Golf (ALPG), she was turned down at the time due to a rule that required members to have been female at birth.[409]

Bagger did not have to wait very long for that rule to change. Once the IOC issued the Stockholm Consensus in 2004, both the ALPG and the Ladies European Tour amended their membership criteria, allowing transgender golfers to compete.[410] In 2005, Mianne Bagger competed in the Women's British Open, subsequent to a rule change by the Ladies Golf Union, which oversees that tournament.[411] The United States Golf Association also adopted a new policy to allow transgender athletes to compete, opening up USGA golf championships, including the U.S. Women's Open, to golfers like Bagger.[412]

Most of the golfing world opened its doors to welcome Mianne Bagger and any other transgender golfers. There remained, however, one significant holdout. The Ladies Professional Golf Association (LPGA), which is responsible for American professional golf tournaments and is the largest and best-known women's professional golf association, refused to change its "female at birth" membership entry policy.[413] Since the LPGA is not governed by the USGA or the federation system, and since there were no domestic or

406. John Esterbrook, *Transsexual Tees Off at Pro Event*, CBSNEWS (Mar. 4, 2004), http://www.cbsnews.com/stories/2004/03/04/world/main603942.shtml.

407. *Player Profile: Mianne Bagger Amateur Highlights*, AUSTL LADIES PROF'L GOLF, http://www.alpg.com.au/index.php?page_id=player&id=1299# (last visited Mar. 30, 2011).

408. *See Bagger Cleared for British Open*, BBC SPORT (Feb. 9, 2005), http://news.bbc.co.uk/sport2/hi/golf/4249647.stm.

409. *See* Peter Stone, *Bagger Triggers Sex Rule Change and Heads for Europe*, SYDNEY MORNING HERALD, Sept. 2, 2004, at 38, *available at* http://www.smh.com.au/articles/2004/09/01/1093938997899.html?from=storyrhs.

410. *ALPG Gives Mianne Bagger the Green Light*, ISEEKGOLF.COM (Nov. 29, 2004) http://www.iseekgolf.com/news/3129-alpg-gives-mianne-bagger-the-green-light.

411. *Transsexual to Play British Open*, DAILY MAIL (Feb. 9, 2005), http://www.dailymail.co.uk/sport/othersports/article-337216/Transsexual-play-British-Open.html.

412. Cyd Zeigler, Jr., *USGA Welcomes Trans Golfers*, OUTSPORTS.COM, http://www.outsports.com/moresports/050325transgolf.htm (last visited Apr. 17, 2011).

413. *Fore! Transgender Golfers Get into Catfight Over 'Female at Birth' Rules*, DAILY MAIL (Feb. 8, 2011), http://www.dailymail.co.uk/news/article-1354617/Transsexual-golfer-Mianne-Bagger-blasts-Lana-Lawless-female-birth-rules.html.

international laws binding on the LPGA demanding recognition for or accommodation of Bagger, there was little she could do to compete in this prestigious golf circuit. The best legal case for Bagger would have been if the LPGA held an event at a public location in a jurisdiction that provided for gender identity protection in its anti-discrimination laws. Such a situation would parallel the Richards case, allowing Bagger entry to the clubhouse. Mianne Bagger did not pursue this route, preferring to educate and lobby the LPGA behind the scenes.[414]

However, in October 2010, another transgender golfer, Lana Lawless, did just that. Lawless, a retired police officer who transitioned in 2005, is a professional golfer who won the women's world championship in long drive in 2008. The Long Drivers of America, which oversees the competition, changed its rules to match the LPGA's "female at birth" eligibility rule. After Lawless was denied permission to apply to qualify at LPGA tournaments, she filed suit against both the Long Drivers of America and the LPGA in California, based on that state's civil rights laws.

In December 2010, the LPGA members voted to change the female at birth policy, to allow transsexual women to compete.[415]

There are some things that Kristen Worley and Michelle Dumaresq have in common. They are both Canadian. They are both athletes. They both ride bicycles at an elite level, which is governed by the Union Cycliste Internationale (UCI), the cycling federation. They are both MTF transsexual. And they have both been activists for the transgender community since coming out, and they have both criticized the Stockholm Consensus.

Kristen Worley, who is both a cyclist and world-class water skier, came out as transsexual and emerged on the competitive scene only after the IOC adopted the Stockholm Consensus.[416] Dumaresq began competing as a mountain biker in 2001, prior to the Consensus.[417] In addition, since Dumaresq's sport is not an Olympic one, there are more significant racing opportunities for her outside the IOC-sanctioned system.

Michelle Dumaresq first began entering races in May of 2001, after a lifetime of free-riding in the Vancouver area. Dumaresq won the first two races she entered, and her time as a novice category rider in the first race was faster than the time of the winner in the professional category.[418] Other bikers began to complain, and Cycling BC, the regional arm of the Canadian Cycling Association (the NGB for cycling), suspended her racing license.[419] The Canadian Cycling Association and Cycling BC consulted with both the UCI and local organizers, ultimately declaring Dumaresq eligible to race as a woman in April 2002, because her B.C. birth certificate declares her to be a female.[420]

Dumaresq's racing license was re-issued after the temporary suspension, and she continued her meteoric rise to the upper echelon of Canadian mountain bike racing. After

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414. *Id.*

415. Press Release, The Dolan Law Firm, LGPA Changes Female at Birth Policy Following Transgender Woman's Discrimination Suit (Dec. 1, 2010), http://www.prweb.com/releases/LPGA-Changes-Policy/12-2010/prweb4853364.htm.

416. *See* Jacob Anderson-Minshall, *Kristen Worley: Reaching for the Olympics—And More*, WINDY CITY MEDIA GROUP (Nov. 14, 2007), http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=16630.

417. *Michelle's Adventures*, *supra* note 370.

418. Chris A. Cavacuiti, *Transgender Athletes*, 2 (2006), http://www.cpath.ca/wp-content/uploads/2010/06/Transgender-Athletes.pdf.

419. *Id.*

420. *Id.* at 3.

placing third in her first race as a professional, Dumaresq easily won her next race.[421] It was at this point that many racers protested Dumaresq's eligibility. They signed a petition and tried to get her disqualified from racing.[422] But Dumaresq had been issued a racing license and she was permitted to ride, so the results would stand. Dumaresq went on to win the Canada Cup Mountain Bike Series in 2002 and the Canadian National Championships in 2003 and 2004.[423]

Dumaresq proved particularly controversial, despite the fact that she met every standard of what would soon become the Stockholm Consensus. Other athletes, women whom she once thought were her friends, had no problems with her competing—so long as she was not winning. Once Dumaresq was winning, all of a sudden they did not think she should be permitted to race. Though Dumaresq initially had trouble winning at the international level, her teammates and competitors made it clear that she was not welcome if she were to win.[424]

In 2006, long after the Stockholm Consensus standards made it clear that an athlete like Michelle Dumaresq was eligible to compete and deemed to have no advantage, the second-place finisher in the Canadian National Championships, Danika Schroeter, put on a shirt stating "100% Pure Woman Champ." The Canadian Cycling Association suspended Schroeter for the poor sportsmanship move, which was clearly aimed to take away from Dumaresq's victory and achievement.[425]

While Dumaresq gained her eligibility prior to the Consensus, Kristen Worley did not emerge on the international scene until 2006.[426] Unlike Dumaresq, who was open with fellow bikers about her transgender history from when she started to compete, Worley stayed under the radar until 2006, despite her athletic talents in both water skiing and cycling. Worley began hormone treatment in 1996 and underwent surgery in 2001.[427]

Worley applied for eligibility as a woman and has since railed against the process. To become eligible to compete in both water skiing and in cycling, Worley had to submit "medical records and blood work to four separate panels: the two organizations that oversee cycling and water skiing in Canada and the two that govern international competitions in both sports."[428] Worley also endured questioning from an all-male panel, and "she describes a conference call she had with officials of Water Ski and Wakeboard Canada as 'gross.'"[429]

While both Mianne Bagger and Michelle Dumaresq have spoken or written about intersexual or transsexual athletes, Kristen Worley has become an advocate for the rights of atypical athletes.[430] She has since taken up the cause of intersexual athlete Santhi

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421. *Id.*

422. *Id.*

423. *Canada Cup Series Champions Crowned*, PINKBIKE.COM (Aug. 6, 2002), http://www.pinkbike.com/news/article869.html.

424. *See* Cavacuiti, *supra* note 418, at 4.

425. *Id.*

426. Chuck, *supra* note 369.

427. Anne McIlroy, *'I'm A Woman On The Move'*, GLOBE & MAIL (Canada) (Sept. 7, 2007), http://www.theglobeandmail.com/sports/article779766.ece.

428. *Id.*

429. *Id.*

430. *See* Randy Starkman, *Complaints Against Caster Semenya 'Total Sour Grapes'*, THE STAR (Aug. 23, 2010), http://www.thestar.com/sports/olympics/article/851583--complaints-against-caster-semenya-total-sour-grapes; Nandita Sengupta, *Hope to Return Santhi Her Dignity: Worley*, TIMES OF INDIA (Aug. 1, 2010),

Soundarajan and is petitioning to have Soundarajan's medal returned.[431] Worley also adopted Semenya's cause, and she has alleged that Semenya has congenital adrenal hyperplasia (CAH), a "natural" intersexual condition among women that causes Semenya to produce extra testosterone. Worley points out that CAH can be revealed through simple blood tests, and that the excess production of testosterone can easily be counteracted by an androgen suppressant.[432]

More significant than her advocacy on behalf of Semenya or Soundarajan alone, Worley has called attention to the fact that the IOC has known about intersexual athletes for over fifty years, and that its continued failure to create a coherent policy that respects these individuals is particularly troublesome.[433] Indeed, Worley has offered her own suggestion for how the IOC should deal with athletes of atypical sex or gender via blood tests that can work in conjunction with World Anti-Doping Agency (WADA) testing that is already occurring for elite athletes.[434] It seems that IOC may agree with Worley to some degree. In January 2010, the IOC held a conference devoted to dealing with the questions of sex and gender variance in athletes, and it determined that official testing sites should be established which would have the expertise to handle the medical evaluation and treatment, in conjunction with existing doping regulations.[435]

IV. ELIGIBILITY CONSIDERATIONS FOR ATYPICAL ATHLETES

A. THE SIGNIFICANCE OF SPORT

The stories of Oscar Pistorius and Caster Semenya are compelling. Pistorius has been lauded for his willingness to fight, despite adversity. In 2007, Pistorius was awarded the BBC Sports Personality of the Year Helen Rollason Award, which is given "for outstanding achievement in the face of adversity."[436] Pistorius has steadfastly pursued his Olympic dream and has been recognized as a source of inspiration by many. Semenya, due to her youth and the recent emergence of her controversy, has not received the same acclaim as Pistorius. Nonetheless, she has also been celebrated as a "heroine" in her native South Africa.[437]

The beauty of athletic competition stems from its ability to demonstrate the universality of the human condition. The sporting venue is one in which athletes, without regard to race, class, nationality or religion, have been able to achieve in ways that once seemed impossible. And to the extent athletes have been barred from competition due to prejudice, it is a black mark on the record of sporting history. Elite athletic competition

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http://timesofindia.indiatimes.com/sports/more-sports/interviews/Hope-to-return-Santhi-her-dignity-Worley/articleshow/6242555.cms.

431. Sengupta, *supra* note 430.

432. *Id.*

433. Kristen Worley, *Sport Leaders Request That Random Gender Verification Testing of Female Athletes at the 2010 Winter Olympic Games in Vancouver Be Prohibited,* COAL. OF ATHLETES FOR INCLUSION IN SPORT (Jan. 25, 2010), http://kristenworley.ca/wp-content/uploads/2010/01/CoalitionPR25thcp.pdf.

434. Kristen Worley, *An Alternative to the IOC's Gender Testing Policy*, WORLD SPORTS L. REP., Feb. 2010, at 02, 02–03, *available at* http://kristenworley.ca/wp-content/uploads/2010/02/WSLRfeb10worley.pdf.

435. CBSNews, *supra* note 231.

436. *'Blade Runner' Handed Olympic Ban*, BBC SPORT (Jan. 14, 2008), http://news.bbc.co.uk/sport2/hi/olympics/athletics/7141302.stm.

437. *SA Threatens 'War' over Semenya, supra* note 36 (quoting South Africa's sports minister as stating, "Caster is a woman, she remains our heroine.").

allows us to celebrate the performances of men and women who push the boundaries in physical accomplishment. At the epicenter of athletics lies running. Running, perhaps the oldest and purest of all sport, presents an opportunity to measure victory and defeat in quantifiable seconds and meters.

Along came Oscar Pistorius and Caster Semenya, two runners who demonstrate that the running track is fraught with questions related to disability, gender and equality. What makes their eligibility cases interesting, as a matter of rules of competition, and so difficult to determine, is that they both fall in the middle of the cultural uncertainty we share when it comes to science, technology and difference. What excellence do we celebrate with their accomplishments? Is it the success of the runner or the success of the prosthetic manufacturer? Is it the success of the runner or the success of a natural hormonal quirk akin to doping? What adherence to fairness can we guarantee their competitors?

B. MAN VERSUS MACHINE

Oscar Pistorius was born without legs and by all traditional measures is considered disabled. To Oscar, he no more relies on prosthetics to walk and *Cheetah* blades to run as a myopic individual wears glasses or contact lenses (or perhaps gets laser corrective surgery) to see better. He is not meaningfully *different*, and as such, there is no reason to prohibit his participation in races with the legged competition field. Tension exists between viewing Pistorius as inspirational and viewing him as not meaningfully different. If he is not genuinely different, then what is so special about him? Acknowledging his perseverance is a form of recognizing his difference and celebrating his triumph. Perhaps it may be viewed as hair-splitting, but it seems that Pistorius is *different* from some athletes, on account of the adversity he has faced, while he is no different from other athletes, when it comes to conditions regarding levels of advantage or disadvantage.

As compelling as this may sound, one could say the same of wheelchair athletes. Athletes who rely on wheelchairs for locomotion routinely compete in races and team sports, such as basketball and rugby. Are these athletes different from Pistorius and the field simply because they are not ambulatory? They too face adversity. They too can overcome this with technical assistance. The slippery slope argument forces us to question what makes Pistorius the same as legged sprinters and what makes athletes in wheelchairs different. If the issue is wheels versus legs or leg-like devices, then what of pogo sticks compared to the *Cheetah* blades? How can one even speak of artificial springs, when the entire human leg is, itself, a spring? The process of enactment of Rule 144.2 regarding technical devices might have been flawed, but the rule itself holds a kernel of truth and logic. At some point, a runner relies on a device—a *thing*—rather than *himself* to achieve, and at that point, the competition is compromised. It no longer represents the triumph of human effort and spirit; it demonstrates the superiority of human invention.

There is a deep-rooted fear that science and technology can ultimately threaten what makes us human. The two primary themes relate first to man's ability to create a new type of machine or artificial existence, and secondly to that creation having sentience to fight and/or overcome humanity. The 19th century saw Mary Shelley's *Frankenstein;* the early Cold War era, Isaac Asimov's *I, Robot*; by the end of the 20th century, the endemic battle of man versus machine would be represented in The Terminator and The Matrix movies.

The man versus machine trope creates a tension within our understanding of sports. If athletic competition measures the extreme abilities in body, heart and mind of athletes,

artificial creations threaten to undermine what it means for humanity to achieve. This debate lies at the core of technological development in sport, whether it be in the discussion of the proper treatment of performance-enhancing drugs, genetic modification, or high-tech swimsuits, running shoes or tennis rackets.

There is a recurrent purist approach to athletics that aims to keep out new technologies. The differences are most apparent in how events are officiated or refereed. Running times, for example, are calculated by computers; they have been for years now, and there is absolutely no one advocating a return to the imperfection of human timing. On the other hand, a sport like baseball has only recently introduced any form of instant replay, and only in very limited circumstances, despite the fact that technology could provide machines far more accurate for aspects of umpiring, such as calling balls and strikes.[438] Meanwhile, in 2009, FINA, the international swimming federation, issued a ban on high-tech swimsuits that would be effective starting in 2010, recognizing that nearly all elite swimming records had been shattered after the introduction of these technological devices.[439]

Currently, Oscar Pistorius has various types of prosthetic legs. They are external. They are visible. What if Oscar Pistorius had cybernetic legs that fused both organic and inorganic material to create a new form of prosthesis instead of needing to use one type of prosthesis for walking and his current *Cheetah* blades for running? He might look like every other runner on the outside, yet on the inside, he would possess some "less than" (or perhaps "more than") human characteristics propelling his locomotion.

What if Oscar Pistorius had an artificial heart? What if Pistorius had artificial lungs? What if these artificial lungs were capable of a higher VO2 max than any other athlete could naturally have? In the face of so many "what ifs," one might be tempted to point out that if Pistorius had wheels, he could also be a truck. The point of such hypothetical questions is that they are not that remote. Artificial organs and prosthetic limbs may not yet be equal to "natural" ones, but they are getting closer and closer, and there is no reason to think that at some point, they will not surpass the abilities of the organs and limbs they replace.

The tension arises from accepting that Oscar Pistorius is 100% fully man, not machine.[440] People may be born without certain limbs or organs, or people may lose limbs or organs due to disease, war, or accident. Science and technology allow us ways to replace organs and limbs that are missing or broken beyond repair. In general, this melding of human-created machinery to assist man is celebrated. The Western world has created a golden age for those living with disabilities, at least compared to prior generations. However, once the machine aspect is strong enough to overtake the natural creation, positive feelings give way to deep-rooted fears. Will this be the breakthrough that compromises humanity?

The question remains: by what standard should eligibility in sports be determined? Oscar Pistorius was deemed eligible because he has no advantage. Does the argument that

438. *No Extended Replay for 2010 Postseason*, ESPN.COM (Sept. 20, 2010), http://sports.espn.go.com/mlb/news/story?id=5598222.

439. Karen Crouse, *Swimming Bans High-Tech Suits, Ending an Era*, N.Y. TIMES, July 25, 2009, at D1, *available at* http://www.nytimes.com/2009/07/25/sports/25swim.html.

440. Isabel Karpin & Roxanne Mykitiuk, *Going Out On A Limb: Prosthetics, Normalcy and Disputing The Therapy/Enhancement Distinction*, 16 MED. L. REV. 413, 427 (2008) (claiming that Pistorius should be allowed to race and that in his situation, "we see the concept of enhancement failing to adequately manage the complex relation between the contemporary highly technologised and always already modified but so-called 'natural' body and the enhanced/modified so-called disabled body.").

denying his eligibility denies his humanity necessarily mean that he must be allowed to compete, whether he has an advantage or not?

The fundamental principles of the Olympic Movement include the "practice of sport" as a "human right," "without any discrimination of any kind;" yet they also require "mutual understanding with a spirit of . . . fair play."[441] They ask: at what point do all athletes have an equal chance of winning? That is where we draw the line. The problem, of course, is that there is never pure, exact equality. That is why in a race someone always wins and others lose. No one can pinpoint exactly when Pistorius has an equal chance of winning. At most, we can observe if he has a heightened chance or a very limited one. In fact, Pistorius himself has stated that if he had a demonstrable advantage, he would stop competing among able-bodied athletes, because he only wishes to win a "fair" race.[442]

By this standard, Pistorius' case seems simple.[443] Let him run until he has a real advantage on a track. Allow him to win races. Only when it is clear that Pistorius is faster than everyone, then conduct the testing to see if it is because of his *Cheetah* blades. After all, Oscar Pistorius is faster than other Paralympians, and they also run with prosthetics. Clearly, his advantage in that context is not a product of manufacturing, so some accord must be given for his natural abilities. At some point, though, the technology may be such that it is clear: Oscar Pistorius has an advantage. Then it would be time for him to stop competing against a disadvantaged able-bodied field. However, the unequivocal presumption ought to be in favor of Pistorius in the absence of evidence that he is meaningfully different when it comes to sprinting. To place the burden of proof on Pistorius or any athlete like him creates two problems: it leads to a false sense of security that the results at athletic competitions are pure, and causes harm by denying the atypical individual or minority's humanity, integrity, and right to fair participation.

C. MAN VERSUS WOMAN

The case for intersexual athletes is even more challenging than the case for Oscar Pistorius. It is also far more challenging than the case for changing the Stockholm Consensus guidelines for transsexual athletes. In the case of transsexual athletes, the Stockholm Consensus relies on factors that are not related to questions of fairness or advantage. Even in the criteria where the Consensus does consider actual advantages, particularly with regard to hormone levels, the Stockholm Consensus errs on the side of extending the waiting period for eligibility to two years, despite the dearth of evidence demonstrating any advantage that far removed from treatment.[444]

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441. INT'L OLYMPIC COM., OLYMPIC CHARTER 10 (2007), http://multimedia.olympic.org/pdf/en_report_122.pdf.

442. Tom Knight, *Pistorius Is No Novelty Sprinter*, TELEGRAPH (London) (July 11, 2001), http://www.telegraph.co.uk/sport/othersports/athletics/2316794/Pistorius-is-no-novelty-sprinter.html.

443. *See generally* Peter Charlish & Dr. Stephen Riley, *Should Oscar Run?*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 929 (2008) (arguing in favor of Pistorius' eligibility and critiquing the current standards for disabled athletes); Alexis Chappell, Recent Development, *Running Down a Dream: Oscar Pistorius Prosthetic Devices, and the Unknown Future of Athletes with Disabilities in the Olympic Games*, 10 N.C. J. L. & TECH. ONLINE 16 (2008), *available at* http://cite.ncjolt.org/10NCJOLTOnlineEd16 (describing the CAS decision and agreeing with the decision).

444. OLYMPIC.ORG, *supra* note 399.

If the allegations considering Semenya's intersexual condition were true, then she very well may have a decisive advantage over other women. The question becomes whether the sporting world can accept the level of difference and advantage that she would have, without it devastating the meaning of elite competition among women. So far, there is no evidence suggesting that Semenya is anything but female, both in sex and gender. However, it does seem possible that she has a distinct hormonal advantage over "typical" women. Should she or any other athlete who has such a condition be required to undergo hormonal treatment to minimize this advantage? Has the IAAF imposed this criteria on Semenya in the shadow of secrecy surrounding her case? And even if Semenya has been cleared to compete without the need for "treatment," what connection can one draw from the way the IAAF handled her case to the recent promulgation of rules regarding "hyperandrogenism" in female athletes?

Setting Semenya aside, to deny the eligibility of an intersexual athlete is to deny her gender identity as a woman, on account of her biological sexual ambiguity or hormonal differences. It is to say that she is not sufficiently female to compete with other women. Yet if the purpose of the sex categories of sport is to allow women to compete against others similarly situated, then allowing intersexual athletes to compete is to deny the opportunity of other women for an equal chance at winning.

Women are not biologically the same as men. Forced to compete against men, they would struggle in many athletic areas. The male gender identity is not the problem; rather, the problem is the physiology of the ratio of lean muscle mass, pound for pound. How is inclusion of an intersexual athlete with a natural hormonal advantage who has not received treatment any different than permitting a transsexual athlete who has not yet undergone any treatment to compete? Each may be of the female gender, yet each may still possess some of the advantages of male biology. On the other hand, how is the potential hormonal advantage of an intersexual athlete different from the hormonal advantage that some women naturally have over other women?

Again, a line drawing problem emerges. There are women who are biologically female, who possess more lean muscle mass than others and produce more testosterone. They are allowed to participate. Indeed, they are the overwhelming majority in athletics. There is no existing category for the intersexual, nor are there enough athletes with similar conditions to justify creating a new category of competition. An intersexual athlete may be neither biologically male nor female as traditionally understood, or she may be clearly female with hyper production of testosterone. Either situation would mean that the athlete would likely be disadvantaged competing with men, while she would be advantaged competing with women.

If the only choice is one of disadvantage or advantage, which one is correct? One could argue that gender identity should govern exclusively. If an athlete has been raised as a female and she feels that she is a girl, then that alone ought to be her eligibility ticket to compete. Under such a system, Caster Semenya would have been free to compete without any need for investigating her sex at all. Yet a rule of sports governance that relies solely on gender identity seemingly requires the inclusion of transsexual athletes, even prior to any medical treatment. It seems problematic to allow transsexual athletes who clearly possess significant biological advantages before undergoing hormone therapy to compete. On the other hand, by what rationale can the intersexual athlete and transgender athlete be differentiated from one another?

Perhaps, here, the answer lies in the imperfect Stockholm Consensus. The Stockholm Consensus separates athletes who have transitioned prior to puberty from those who have

not.[445] On its face, this designation seems bizarre. It would be highly extraordinary to discover a transsexual athlete who transitioned before the onset of puberty, despite the fact that gender identity disorder exists in childhood and many transgender individuals were aware of their gender confusion or unhappiness long before puberty.[446]

Nonetheless, many of the difficulties surrounding intersexual athletes, like Semenya, are that they were raised as girls and never believed themselves to be any different from any other woman. The gender identity of their youth, before puberty, is female. Erik Schinegger is a rare instance of an intersexual athlete who embraced the opportunity to transition and live as a man. To the extent that the IOC seeks to prevent another Dora Ratjen or the suspicious Soviet Press sisters, there needs to be some rule in place regarding the potential for an adult athlete who wants to "fake" or "cheat" as transgender.

While many may argue that this risk is overblown and ought to be shelved, this concern simply does not exist at all for the athlete discovered to be intersexual. No one knew when Caster Semenya or Santhi Soundarajan were born that they *were not* necessarily female as commonly understood or that they may have possessed atypical hormone profiles; and no one could have predicted that they would have become elite runners. Under this perspective, the athletes ought to be allowed to compete, despite any advantages, because it came about naturally without any effort to cheat or distort the competitive process. In fact, failure to permit these athletes to compete would be a denial of their womanhood and identity. It would be akin to suggesting that a female athlete who is naturally 6 foot 6 can take advantage of her physiology on the basketball or volleyball court, whereas a female athlete given an internal endocrine-based advantage must suppress this; no one suggests that tall women should medically stunt their growth to compete with women whose height falls closer to that of the average female.

An alternative viewpoint, which might be more acceptable to those who worry more about the disadvantaged competitors, would be to rule for eligibility based on hormones alone. The IOC and federations have previously determined the acceptable bounds of testosterone for women to still be eligible to compete.[447] This was done in the name of doping and drug testing. The upper boundaries were set quite high, in recognition of the variance within the female population.[448]

While methods for drug testing have become more sophisticated, it would seem that there is no reason the IOC or IAAF could not judge athletes solely by a hormonal profile. Using the WADA or moving to a biological passport profiling system would allow for greater ease in monitoring an athlete's hormone levels. Under such a system, Semenya's eligibility would have depended solely on her endocrinology, rather than a more complicated assessment of her physiology. Any decision by the IAAF to move toward a hormonal cut-off based on a biological passport would create a better template for how to deal with athletes of atypical sex or gender in the future. Indeed, this is the proposal that transsexual athlete Kristen Worley has suggested: requiring athletes with naturally

445. *Id.*

446. *See e.g.*, Syed, *supra* note 285.

447. *Disorders of Sexual Differentiation (DSD): A Consensus Statement*, WOMEN SPORT INT'L (2010), *available at* http://www.sportsbiz.bz/womensportinternational/conferences/documents/2010_June_Baltimore_DSD.pdf.

448. *See generally* Gina Kolata, *Some Researchers Question the Tests for Testosterone*, N.Y. TIMES, July 28, 2006, at D1 (explaining natural variations in testosterone levels).

occurring over-production of testosterone to take an androgen suppressant to bring hormone levels into an acceptable range if they want to be included in women's competition.[449]

This would protect the competing field at the expense of the individual, by setting an acceptable range for hormone profiles. But it also provides the individual with an option of compromising and seeking hormonal treatment that would ensure that she is not meaningfully different from the other athletes in the field. At a minimum, this would be a step in the right direction to avoid dragging another athlete through the same ordeal that Semenya has suffered. Mandatory and confidential biological passport profiling of all athletes prior to competition would remove the media circus that occurred in this and prior instances. And, last, keeping quality records of athlete's biological profiles and hormone ranges could provide useful information that could assist endocrinologists and other medical professionals treating transgender or intersexual individuals in the population more generally. Unfortunately, the federation system still lacks the ability to implement the biological passport system in a comprehensive way.

As discussed earlier, it appears that the IOC recognizes the need for this type of solution, in principle. At a conference in January 2010, the IOC declared the need for gender test medical centers, which could help the various federations deal with "disorders of sex development."[450] And this is the direction the IAAF has moved toward, with its recently adopted hyperandrogenism regulations. Any execution of such a functioning system is in its infancy though, and by leaving determinations of eligibility and the investigation process to the federations themselves, it's not clear that this amounts to a step forward. Due to the decentralized nature of sports governance, both within and outside of the IOC, it is unclear how appropriate dignity, privacy and eligibility protections can be afforded to all elite athletes, particularly when they have been grossly violated in the past. Given the history of sex testing and continued problems in process, relying on either the future prospect of a biological passport system or a more generalized hormone-based cut-off for eligibility remain imperfect methods for dealing with the questions of advantage and disadvantage in sport.

D. CONCLUSION – ELIGIBILITY AS A FOOTNOTE TO EDUCATION

We are at the cusp of a revolution in sport. Science and technology have outpaced our rule-makers, the officials who govern sport. A man born with no legs can now use prosthetics and run at world class speeds. A teenager understood to be born a woman can be physiologically profiled to break down her composition, as a chromosomal matter, as a matter of reproductive organs both inside and out, and as a matter of gender identity. An athlete born biologically male can seek treatment that would allow her to live a full and complete life as a woman, and her right to continue in sport will not be infringed. The medical developments have been remarkable and it is impossible to predict the next frontier in sporting eligibility, whether it relates to gene therapy, artificial organs, or some other unknown.

At the same time that experts know and can do so much, the public still understands atypical athletes so little. Falling back on a hard-wired reaction to *difference*, the public instinct is to question, stare, and, often, mock that which is less understood. The officials

449. Worley, *supra* note 434.

450. *IOC Recommends Gender-Test Centers*, *supra* note 231.

and ministers of sport have failed to protect athletes, such as Oscar Pistorius and Caster Semenya, from turning into objects and spectacles; instead, they too have been caught up in the insensitivities surrounding atypical athletes.

This article focuses on rules of eligibility; however, that is merely a result of the reactive nature of federation sports. The true role that sport ought to play is an educational one. Sport, as a historical and cultural matter, can cut through societal barriers, uniting people with a common goal and demonstrating through its performance-centric focus that categories such as nationality, race, religion, gender, and class are all subsumed within the larger human condition.

Cases like those of Oscar Pistorius and Caster Semenya afford the IOC and the IAAF the opportunity to be leaders in the world, ushering in an era of global acceptance and understanding of difference, whether it be in the realm of sex, gender or disability. Rather than judiciously guarding the record books from would-be cheaters who have never materialized and protecting those competitors who are more likely to perceive anyone else who prevails as unfairly advantaged, these organizations and officials ought to be at the forefront of research, development and education. This would include supporting further research into physiology and human movement, as well as endocrinology and the intersexual or transgender. Only then will the elite athletic world be better able to understand the science and technological developments that will be exhibited by the next Oscar Pistorius or Caster Semenya. What happened to Oscar was a travesty. What happened to Caster was a tragedy. Despite the fact that both Pistorius and Semenya emerged eligible and triumphant, the athletes were not unscathed. There should be no opportunity or excuse for handling the next athlete to demonstrate difference in the same way.

The Problem With Salary Caps Under European Union Law: The Case Against Financial Fair Play

JOHAN LINDHOLM

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I. INTRODUCING SALARY CAPS TO EUROPE

Several North American professional sport leagues have adopted salary caps, which are measures that limit how much money teams may spend on player salaries.[1] Thus far, salary caps and similar devices have been uncommon in European sports. One credible explanation for the lack of such measures in Europe is the difference in how sport is organized. A club engaged in a sport organized around promotion and relegation between leagues on different levels, and with partially overlapping competitions on a national and European level, is more likely to resist a central authority controlling talent distribution.[2]

However, the situation in European sports is changing. For instance, some European rugby leagues have implemented salary caps. Following the example of many non-European rugby leagues, salary caps were introduced in U.K. professional rugby, first by the Rugby Football League (RFL) in 1997,[3] and two years later by the Rugby Football Union (RFU).[4] Finally, the French rugby league, Ligue Nationale de Rugby (LNR), has recently adopted a salary cap that enters into effect in the 2010-11 season.[5] The implementation of salary caps in rugby has attracted some attention from scholars and policy makers.[6]

The introduction of salary caps in European football (sometimes called "soccer") will likely have a greater impact on European sports and be subject to legal challenge due to the massive amount of money involved.[7] When UEFA's Financial Fair Play rules become

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1. This is the definition used by the Commission of the European Communities. *Commission White Paper on Sport*, at note 210, COM (2007) 391 final (July 11, 2007). Economic scholars doing research in the field also use this definition, *see, e.g.*, Helmut Dietl et al., *The Effect of Salary Caps in Professional Team Sports on Social Welfare*, 9 B.E. J. ECON. ANALYSIS & POL. 1, 1 (2009); Paul D. Staudohar, *Salary Caps in Professional Team Sports*, *in* COMPETITION POLICY IN PROFESSIONAL SPORTS: EUROPE AFTER THE BOSMAN CASE 71, 71 (Stefan Késenne & Claude Jeanrenaud eds., 1999). Three of America's four largest leagues have hard team salary caps: the National Basketball Association (NBA) has had a salary cap in place since 1984, the National Football League (NFL) followed in 1994, and the National Hockey League (NHL) implemented one in 2005. Additionally, NBA and Major League Baseball (MLB) have a luxury tax. On the distinction between different types of salary caps, *see infra* Part II B.

2. Helmut Deitl et al., *Overinvestment in Team Sports Leagues: A Contest Theory Model*, 55 SCOTTISH J. POL. ECON. 353, 355 (2008).

3. Andrew Howarth, *The Impact of the Salary Cap in the European Rugby Super League*, 3 INT'L J. BUS. & MGMT. 3, 4 (2008). The Super League, RFL's top league, currently has a hard team salary cap of $2.5m (£1.6m) for the twenty-five highest paid players on a team. *Id.*

4. The Rugby Premiership, RFU's top league, currently has a hard team salary cap of £4 million. Paul Rees, *Leicster Call for Change in Guinness Premiership Salary Cap Review*, GUARDIAN (London), May 3, 2010, http://www.guardian.co.uk/sport/2010/may/03/guinness-premiership-salary-cap-leicester.

5. LIGUE NATIONALE DE RUGBY, *Règlement du Plafonnement de la Masse Salariale Joueurs, Saison Sportive 2010/2011*, *available at* http://www.lnr.fr/IMG/pdf/Reglement_plafonnement_masses_salariales.pdf. For the first season, this cap has been set at €8.1 million.

6. *See, e.g.*, *Commission*, *supra* note 1, at note 210; Howarth, *supra* note 3; Leanne O'Leary, *Price-Fixing Between Horizontal Competitors in the English Super League*, 2008/3-4 INT'L SPORTS L.J. 77 (2008).

7. European top division football clubs earned €11.5 billion in 2008. UEFA, THE EUROPEAN FOOTBALLING LANDSCAPE – CLUB LICENSING BENCHMARKING REPORT FINANCIAL YEAR 2008 12, *available at* http://www.uefa.com/MultimediaFiles/Download/Publications/uefaorg/Publications/01/45/30/45/1453045_DOWNLOAD.pdf (2008) [hereinafter BENCHMARKING REPORT]. The combined revenue of Europe's top twenty earning clubs for the 2008-09 season was €3.9 billion. DELOITTE, FOOTBALL MONEY LEAGUE 2010 2, *available at* http://www.deloitte.com/view/en_GB/uk/industries/sportsbusinessgroup/6a5fb29b3f907210VgnVCM100000ba42f00aRCRD.htm (2010). By comparison, the combined yearly league-wide revenue of MLB, NFL, NBA, and NHL is approximately $20.8 billion. Ben Klayman, *Average U.S. Baseball Team Worth More, but 9 Lost Value*, REUTERS, Apr. 7, 2010, *available at* http://www.reuters.com/article/2010/04/08/us-baseball-forbes-idUSTRE6365V620100408 (MLB league-wide revenues for 2009 was $6.7 billion); Kurt Badenhausen, Michael

applicable in 2012, salary caps will become an important feature of European football as clubs will need to learn cap management.[8] The content and purpose of the rules are described in greater detail in Part II, but its core is the "break-even requirement," according to which professional football clubs will be denied a UEFA competition license if their expenses exceed their incomes.[9]

At first sight, the Financial Fair Play rules may appear distinct from salary caps in use currently. They are different in that, unlike traditional team salary caps, the Financial Fair Play rules do not stipulate a fixed maximum amount that clubs may spend on salaries and that is the same for all clubs. The rules do, however, have the same effect and purpose as salary caps in other leagues: to limit how much money clubs can spend on player salaries.[10]

This article examines whether UEFA's Financial Fair Play rules are compatible with European Union (E.U.) law. It should be noted that Europe is not the same as the E.U. and that European football extends beyond the borders of the Member States. In fact, only twenty-seven of the fifty nations organized under UEFA are E.U. Member States. The top premier football clubs of Europe (and the world) do however operate inside the E.U. and are subject to E.U. law. It is thus impossible in practice for UEFA to uphold regulations that contravene E.U. law.[11]

The Financial Fair Play rules raise antitrust issues. Numerous American scholars have pointed out that salary caps in professional sports are, by their nature, anticompetitive and may thus violate U.S. law.[12] Much like U.S. law, E.U. competition law seeks to abolish anticompetitive agreements and abuse of dominant positions.[13] Part III of this article examines whether the Financial Fair Play rules qualify under either or both categories.

K. Ozanian & Christina Settimi, *The Most Valuable NFL Teams*, FORBES, (Aug. 25, 2010), http://www.forbes.com/2010/08/25/most-valuable-nfl-teams-business-sports-football-valuations-10-intro.html (NFL league-wide revenues for the 2009-10 season was $8 billion); *NBA's Revenue Exceeds Expectations*, STREET & SMITH'S SPORT BUS. J., Apr. 19, 2010, *available at* http://www.sportsbusinessdaily.com/Journal/Issues/2010/04/20100419/This-Weeks-News/Nbas-Revenue-Exceeds-Expectations.aspx (estimates NBA league-wide revenues for the 2008-09 season was $2.6 billion).

8. *Cf.* Ari Nissim, *The Trading Game: NFL Free Agency, the Salary Cap, and a Proposal for Greater Trading Flexibility*, 11 SPORTS LAW. J. 257, 257 (2004) (claiming that American professional teams employ personnel whose only task is cap management).

9. UEFA, CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS (2010) arts. 58–63, *available at* http://www1.uefa.com/MultimediaFiles/Download/uefaorg/Clublicensing/01/50/09/12/1500912_DOWNLOAD.pdf.

10. In 2009, the Commission compared "introducing through licensing systems some sort of cost control mechanisms" (presumably referring to the then not yet adopted Financial Fair Play rules) to similar mechanisms already implemented in "major US leagues." *Commission*, *supra* note 1, at 5. *See also infra* Part III.B.

11. This became obvious after the European Court of Justice's seminal judgment in Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921.

12. *See, e.g.*, Mélanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap System*, 190 SPORTS LAW. J. 189 (2003); D. Albert Daspin, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 IND. L.J. 96 (1986); Scott J. Foraker, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157 (1985).

13. Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market." Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Sep. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. Article 102 TFEU provides that "[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States. *Id.* art. 102.

A more uniquely European basis for challenging the Financial Fair Play rules is that they limit free movement of workers. A measure that collectively regulates employment in professional sports violates E.U. law if it hinders or deters individuals from seeking or taking up employment in another Member State, irrespective of whether it applies without regard to the athlete's nationality.[14] Part D examines whether the Financial Fair Play rules hinder player movement and thereby violate athletes' fundamental right to free movement of workers.

This article concludes that the Financial Fair Play rules likely restrict both competition and free movement of workers. Under such circumstances, the compatibility of the rules with E.U. law depends on whether such rules can be justified. This issue, which is explored in Part IV, turns on whether the rules are proper and necessary to achieve an aim that is legitimate under E.U. law. While the aim underlying the Financial Fair Play rules is most likely legitimate, this article concludes that it is highly questionable whether the rules are necessary and suitable for achieving that aim. Consequently, the conclusion of this article is that the Financial Fair Play rules are most likely incompatible with E.U. law.

II. THE FINANCIAL FAIR PLAY RULES

A. FORM AND SCOPE

The Financial Fair Play rules are an extension of UEFA's Club Licensing Regulations and can only be properly understood in that context. In order to participate in club competitions a club must comply with all requirements imposed by the entity organizing the competition. Since 2004, only those European football clubs that have been awarded licenses by UEFA have been allowed to participate in competitions organized by UEFA, such as the prestigious and lucrative UEFA Champions League.[15] In order to qualify for a UEFA license, clubs must comply with the minimum financial, legal, and management standards established by UEFA.[16] The Financial Fair Play rules strengthen the financial requirements of the licensing system. The rules are also enforced through the licensing system as clubs that fail to meet UEFA's Financial Fair Play requirements will not be awarded a UEFA club license.[17]

In accordance with the aforementioned principle that teams must be licensed by the entity organizing the competition, UEFA's Financial Fair Play rules only directly apply to UEFA club competitions. Three factors, however, strongly suggest that the rules will have far-reaching impact for European football as a whole. First, UEFA currently organizes four club competitions: UEFA Champions League, UEFA Europa League, UEFA Super Cup, and UEFA Women's Champions League.[18] These competitions attract Europe's richest and most competitive football clubs. Second, in addition to clubs actually participating in UEFA

14. Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921, ¶ 96; Case C-325/08, Olympique Lyonnaise v. Bernard & Newcastle Utd., judgment of 16 March 2010, not yet reported, ¶ 34.

15. *See further infra* Part IV.E.1 (Club licenses are not to be confused with player licenses, the possession of which is a requirement for a player to be allowed to play for a club in competition. UEFA's scrutiny of the applicants is quite strict as one in six applicants are refused a license, most commonly for failure to comply with the financial requirements); BENCHMARKING REPORT, *supra* note 7, at 19–20.

16. BENCHMARKING REPORT, *supra* note 7, at 19–20.

17. UEFA, CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS art. 57(1)..

18. *See* UEFA, http://www.uefa.com/uefa/index.html (last visited Feb. 16, 2011) (click "All Competition" tab).

club competitions, any team aspiring to participate will seek to comply with the Financial Fair Play rules. Third, although under no obligation to do so, national federations have previously modeled their club license requirements after UEFA's, and it is therefore a distinct possibility that the Financial Fair Play rules will trickle down the sporting pyramid and apply to clubs participating in national club competitions.[19]

The form of the Financial Fair Play rules also carries legal significance. In the United States, salary caps are normally part of a collective bargaining agreement (CBA).[20] As part of a CBA, salary caps can utilize the so-called "labor exemption" to antitrust law. According to the principles expressed in *Mackey*, an antitrust claim cannot be made against a CBA if the agreement "primarily affects only the parties," "concerns a mandatory subject of collective bargaining," and "is the product of bona fide arm's-length bargaining."[21] For example, the Second Circuit Court of Appeals applied this test in *Wood* and ruled that the NBA salary cap qualified under the labor exemption.[22]

The form of the salary cap also carries legal significance under E.U. law. As will be discussed further below, there are primarily three provisions in the Treaty of the Functioning of the European Union (TFEU) that can be used to challenge salary caps. One of these is Article 101 TFEU, which prohibits agreements that distort competition.[23] There is, however, an exception to this rule similar to the U.S. "labor exemption." The European Court of Justice ruled in *Albany* that even "though certain restrictions of competition are inherent" to CBAs, they cannot, "by virtue of their nature and purpose," be challenged as anticompetitive agreements.[24] Thus, it might be possible to shield the Financial Fair Play rules from challenge on the basis of Article 101 TFEU by including the rules in a CBA.[25] This is largely irrelevant for the purpose of this article because it is not currently the case, it would be difficult to achieve support for such action,[26] and finally, in any case, it would not prevent the rules from being challenged as a restriction of the free movement of workers under Article 45 TFEU.[27]

B. REQUIREMENTS

Salary caps can be designed in a number of different ways. Measures currently in use include "team salary caps" that regulate the total payroll of a team, "player salary caps" that

19. UEFA, HERE TO STAY CLUB LICENSING 12-15 (2004), http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/618655_DOWNLOAD.pdf (last visited Oct. 15, 2010) [hereinafter HERE TO STAY].

20. *See, e.g.*, NFL, NFL Collective Bargaining Agreement 2006-2012, art. XXIV (2006), *available at* http://static.nfl.com/static/content/public/image/cba/nfl-cba-2006-2012.pdf; NBA, 2005 Collective Bargaining Agreement, art. VII (2005), *available at* http://www.nbpa.org/cba/2005; NHL, Collective Bargaining Agreement 2005, art. 50 (2005), *available at* http://www.nhlfa.com/CBA/2005-CBA.pdf.

21. Mackey v. NFL, 543 F.2d 606, 614–15 (8th Cir. 1976) (concerning the so-called Rozelle Rule, a provision in the constitution of the NFL requiring that teams compensate a player's previous team when signing him as a free agent); *see* Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (upholding the *Mackey* test).

22. Wood v. NBA, 809 F.2d 954, 956 (2nd Cir. 1987).

23. TFEU art. 101.

24. Case C-67/96, Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie, 1999 E.C.R. I-5751, ¶¶ 59–60.

25. It should however be noted that it would not prevent challenges that the rules hinder free movement of workers.

26. Stefan Szymanski, *The Economic Design of Sporting Contests*, 16 J. ECON. LIT. 1137, 1172–73 (2003).

27. *See further infra* Part III.D.

provide a maximum salary for an individual player, and combinations of the two.[28] Another distinction can be made between "hard caps" that teams can never exceed and "soft caps" that teams may exceed under certain conditions, e.g., to keep a player that has been with the team for a long time. Salary caps are frequently distinguished from "luxury taxes," or surcharges on sport teams' aggregate pay roll in excess of a predetermined limit.[29] However, both seek to curb excessive spending since the imposition of a luxury tax creates an incentive for teams to keep salaries below the defined level. Finally, in U.S. sports, salary caps are sometimes combined with a "salary floor," i.e., rules forcing teams to spend a minimum amount of money on salaries.[30]

Despite the many variants of salary caps, the Financial Fair Play rules are distinguishable from most salary caps currently in use. The core of the Financial Fair Play rules is the break-even requirement that a club will fail if, during a three-year period, its relevant expenses[31] exceed its relevant incomes[32] by more than $7 million (€5 million) after taking into consideration any surplus generated in the preceding two years.[33]

The break-even requirement is a salary cap constructed like a measure previously attempted in European football. In 2003, the so-called G-14 group, an organization formed by fourteen of Europe's most successful professional football clubs, entered into an agreement according to which the teams undertook to limit their salary expenditures to 70% of their turnover starting in the 2005-06 season.[34] The clubs failed to comply with the cap, probably due to the fact that it had no enforcement mechanisms in place.[35] Like the G-14 cap, the break-even requirement is a "relative salary cap," meaning that the capped amount

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28. For example, the NHL has a $59.4 million team salary cap and a $11.88 million player salary cap. Squeet, *Salary/Payroll Cap the Most Complicated Thing in the NHL*, LEAFSPACE (Aug. 2010), http://media.fans.mapleleafs.nhl.com/_8-SalaryPayroll-Cap-the-most-Complicated-thing-in-the-nhl/blog/2519175/122856.html.

29. Helmut Dietl et al., *The Effect of Luxury Taxes on Competitive Balance, Club Profits, and Social Welfare in Sports Leagues*, 2 (Inst. for Strategy and Bus. Econ., U. of Zurich, Working Paper No. 91, 2009).

30. *See, e.g.*, NFL, NFL Collective Bargaining Agreement 2006-2012, art. XXIV (2006); NBA, 2005 Collective Bargaining Agreement, art. VII (2005); NHL, Collective Bargaining Agreement 2005, art. 50 (2005).

31. UEFA, CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS app. X. "Relevant expenses" consists of cost of sales, monetary and non-monetary employee benefits, other operating expenses such as match expenses, rent, administration and overhead, losses from trades, finance costs and dividends except certain defined expenditures such as youth and community development and non-football related expenses. *Id.*

32. *Id.* "Relevant incomes" consists of incomes from gate receipts, sponsorship, advertisement, broadcasting rights, merchandising and other types of sales, profits from trades, and financial incomes except certain defined incomes such as non-football related incomes. *Id.*

33. *Id.* art. 63(2)(b)–(3). Determining compliance with the break-even requirement also involves taking three other factors into consideration: the auditor of the financial statement must not conclude that the club is in threat of being liquidated, the club's net liabilities position must not have deteriorated since the preceding reporting period, and the club cannot have overdue payables as of 30 June. *Id.* arts. 62(3), 63(1). The club is however in compliance with the break-even requirement even if it fails one of these "indicators" but meets the requirement described in the main text which is thus the only relevant requirement in most situations. *Id.*

34. Helmut Dietl et al., *Welfare Effects of Salary Caps in Sports Leagues with Win-Maximizing Clubs*, 3, 5–6 (Inst. for Strategy and Bus. Econ., U. of Zurich, Working Paper No. 86, 2009). The authors refer to this as a "percentage-of-revenue cap," a term that is slightly confusing considering that most North American salary caps are calculated as a percentage of league revenue. *See* Thomas C. Picher, *Baseball's Antitrust Exemption Repealed: An Analysis of the Effect on Salary Cap and Salary Taxation Provisions*, 7 SETON HALL J. SPORT L. 5, 37–38 (1997)

35. Dietl et al. claim that this agreement was never put in place due to the dissolution of G14 in 2008. Dietl et al., *supra* note 29, at 5–6. This is however unpersuasive since the G14 was disbanded two full seasons after the agreement entered into force. *Id.*

is different for each club. This distinguishes it from the more common "absolute salary cap" under which all clubs are subject to the same capped amount.[36]

In addition to the break-even requirement, the Financial Fair Play rules require that clubs provide annual and projected financial information and that they have no overdue payables to other clubs, employees, and authorities.[37]

C. PURPOSE

Salary caps are frequently motivated by the goal of achieving "competitive balance."[38] Those who support such measures subscribe to the theory that financial differences between teams translate into competitive differences, and that rules must be enacted to ensure that small and large market teams have equal chances to compete.[39] Regardless of whether it was ever their purpose,[40] the Financial Fair Play rules now in force do not seek to improve competitive balance. According to UEFA, neither the licensing system in general nor the Financial Fair Play rules in particular seek to achieve greater competitive balance.[41] On the contrary, UEFA has emphasized that the licensing system does not seek to establish "a level playing field," only a certain minimum level.[42]

This position appears sensible. While an absolute salary cap may improve competitive balance by allowing teams to compete on more equal terms,[43] a relative salary cap like the Financial Fair Play rules will not make it easier for small/poor clubs to compete with large/rich clubs. On the contrary, if one accepts that there is a correlation between a team's financial resources and its success in sporting competitions,[44] the Financial Fair Play rules will make it more difficult for less successful clubs to compete with traditionally strong teams. These, in general, have less revenue and are therefore more dependent on overinvesting to improve. This is supported by Kesenne who, in studying a salary cap similar to the Financial Fair Play rules,[45] concluded that such measures will worsen competitive balance regardless of whether clubs are profit-maximizers or win-maximizers.[46]

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36. *Cf.* Dietl et al., *supra* note 29, at 5.

37. UEFA, CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS arts. 47, 64–68.

38. *See, e.g.*, RFL Operational Rules § E1.9.3.4; Daspin, *supra* note 12, at 107 (discussing the purpose of the NBA salary cap).

39. Christopher D. Cameron & J. Michael Echevarría, *The Ploys of Summer: Antitrust, Industrial Distrust, and the Case against a Salary Cap for Major League Baseball*, 22 FLA. ST. U. L. REV. 827, 852–853 (1994) (criticizing the competitive balance theory); Richard A. Kaplan, *The NBA Luxury Tax Model: A Misguided Regulatory Regime*, 104 COL. L. REV. 1615, 1615 (2004); Stefan Késenne, *The Impact of Salary Caps in Professional Team Sports*, 47 SCOTTISH J. POL. ECON. 422 (2003).

40. *See* JOSÉ LUIS ARNAUT, INDEPENDENT EUROPEAN SPORT REVIEW 52 (2006), *available at* http://www.independentfootballreview.com/doc/A3619.pdf. "An agreed policy on cost control is, first and foremost, a mechanism designed to promote competitive balance between teams." *Id.*

41. HERE TO STAY, *supra* note 19, at 5; UEFA CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS art. 2. *See also* E.U. Conference on Licensing Systems for Club Competitions, Sep. 17–18, 2009, *Report* 2, *available at* http://ec.europa.eu/sport/library/doc/c7/licensing_conf_final_report.pdf.

42. HERE TO STAY, *supra* note 19, at 13, 57.

43. While this appears true in theory it has proven difficult in practice to construct an effective absolute salary cap or a luxury tax with similar effect. Szymanski, *supra* note 26, at 1171–72. *But cf.* Howarth, *supra* note 3 (concluding that the introduction of the salary cap improved competitive balance in the Super League).

44. BENCHMARKING REPORT, *supra* note 7, at 48–49.

45. Stefan Kesenne, *The Salary Cap Proposal of the G-14 in European Football*, 3 Eur. Sport Manag. Q. 120 (2003). *But see* Dietl et al., *supra* note 1 (concluding that salary caps increase competitive balance in a league

For example, in achieving on-field success, the Premier League's five best clubs for the 2009-10 season[47] accumulated substantial debt, on average $581 million per team (£365 million), which equals three times their annual turnover.[48] The five worst clubs in the league[49] had considerably less debt in both absolute and relative numbers, an average of $86 million (£54 million) per team, which equals 114% of their yearly turnover.[50]

If the break-even requirement is effective, it will nevertheless affect the bad clubs more severely than the good clubs. During the 2009-10 season, the Premier League's five best teams had an average wages-to-turnover ratio of 61% compared to 94% for the five worst clubs. Requiring all clubs to break even will thus affect bad teams more. The break-even requirement will not change the fact that the best clubs' turnover is four times greater than that of the worst clubs—$318 million (£200 million) compared to $78 million (£49 million)—and that they will thus presumably be able to field a significantly better team.[51]

UEFA argues instead that the rules ensure continued competition. UEFA has argued that the club licensing system is necessary to ensure the "integrity of competitions" and, specifically, to "safeguard [] the continuity of international competitions for one season."[52] The core of the argument is that the orderly completion of competition will be distorted if clubs fail to complete the season due to insolvency.[53] The Commission has recently explained why this is so important.

> One needs only to consider the consequences of the collapse of one or more clubs during the competition season to *understand* the seriousness of the risk: the calendar of fixtures may be thrown into chaos, difficult economic questions arise for the remaining clubs, and a legal minefield is opened in respect of broadcasting and other revenues.[54]

This argument has not been mentioned explicitly with regard to the Financial Fair Play rules, but presumably applies equally because it is linked to the licensing system. When UEFA's Executive Committee approved the Financial Fair Play concept in September 2009, it claimed instead that the principal objectives behind the rules are:

> [T]o introduce more discipline and rationality in club football finances; to decrease pressure on salaries and transfer fees and limit inflationary effect; to encourage clubs to compete with(in) their revenues; to encourage long-term investments in the youth sector and infrastructure; to protect the long-term viability of European club football; to ensure clubs settle their liabilities on a timely basis.[55]

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consisting of both small- and large-market clubs).

46. *Id.*

47. Chelsea, Manchester United, Arsenal, Tottenham, and Manchester City. 2009/2010 League Table, BARCLAY'S PREMIER LEAGUE, http://www.premierleague.com/page/LeagueTables/0,,12306~20100512,00.html (last updated May 9, 2010).

48. David Conn, *The Latest Accounts of the Premier League's Clubs*, GUARDIAN (London), May 19, 2010, http://www.guardian.co.uk/football/2010/may/19/premier-league-finances.

49. Wigan Athletic, West Ham United, Burnley, Hull City, and Portsmouth. 2009/2010 League Table, BARCLAY'S PREMIER LEAGUE, http://www.premierleague.com/page/LeagueTables/0,,12306~20100512,00.html (last updated May 9, 2010).

50. Conn, *supra* note 48.

51. *Id.*

52. HERE TO STAY, *supra* note 19, at 5.

53. *Id.*

54. E.U. Conference on Licensing Systems for Club Competitions, Sep. 2009, *Background Paper* 2, http://dms.msport.gov.pl/app/document/file/1050/Conf__Lice__Materialy_Pomocnicze.pdf?field=file1.

55. *Financial Fair Play*, UEFA (Jan. 4, 2010),

These objectives are closely related to each other and can be summarized as one main objective: the Financial Fair Play rules seek to achieve long-term financial soundness and thereby ensure the long-term viability of European football.

III. A RESTRICTION OF COMPETITION AND MOVEMENT

A. APPLYING E.U. LAW TO SPORT

It was not until December 2009 that the E.U. acquired direct and independent competence in the field of sport.[56] This power is, however, quite limited and the E.U. has yet to rely upon it to take any measures. However, since the European Court of Justice's 1974 judgment in *Walrave* it has been clear that E.U. law can be used to challenge rules and decisions in sport.[57] The Treaty of the Functioning of the European Union (TFEU) contains a number of substantive rights and obligations that apply to all sectors, including areas in which the E.U. lacks competence to introduce legislation.

The only requirement is that the activity in question is "economical" in nature.[58] The European Court of Justice has consistently held in a long line of cases that professional and semi-professional sports, and football in particular, constitute "an economic activity" to which the Treaties apply.[59] It is clear that the Financial Fair Play rules regulate economic activity and consequently fall within the scope of E.U. law as they specifically target professional and semi-professional football.[60]

The Financial Fair Play rules can primarily be challenged on two grounds under the Treaty. First, it can be argued that the Financial Fair Play rules distort or restrict competition. Numerous commentators have examined the anticompetitive effects of salary caps in North American sports, and many of the arguments expressed apply equally to the Financial Fair Play rules.[61] Much like the U.S. Sherman Act,[62] E.U. competition law consists of two central provisions: Article 101 TFEU, which prohibits anticompetitive agreements or decision, and Article 102 TFEU, which prohibits abuse of a dominant position. Whether the actor engaging in the activity is acting alone or together with others is determinative of whether a situation falls under one or the other. In addition, Article 45 TFEU prohibits

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http://www.uefa.com/uefa/footballfirst/protectingthegame/financialfairplay/news/newsid=1445028.html#financial+fair+play.

56. *See* TFEU art. 165.

57. Case 36/74, Walrave v. Union Cycliste Internationale, 1974 E.C.R. 1405.

58. *Id.* ¶ 4.

59. Case 36/74, Walrave v. Union Cycliste Internationale, 1974 E.C.R. 1405, ¶ 4; Case 13/76, Donà v. Mantero, 1976 E.C.R. 1333, ¶ 12; Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921, ¶ 73; Cases C-51/96 & C-191/97, Deliége v. Ligue Francophone de Judo et Disciplines Associées ASBL, 2000 E.C.R. I-2549, ¶ 41; Case C-176/96, Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball ASBL, 2000 E.C.R. I-2681, ¶ 32; Case C-519/04P, Meca-Medina & Majcen v. Comm'n of the European Communities, 2006 E.C.R. I-6991, ¶ 22; Case C-325/08, Olympique Lyonnaise v. Bernard & Newcastle Utd., judgment of 16 March 2010, not yet reported, ¶ 27.

60. As the Financial Fair Play rules intend to reduce the salaries clubs pay players, they will only affect professional and semi-professional football.

61. *See, e.g.*, Daspin, *supra* note 12; Foraker, *supra* note 12; Jeffrey E. Levine, *The Legality and Efficacy of the National Basketball Association Salary Cap*, 11 CARDOZO ARTS & ENT. L.J. 71 (1992); Dan Messeloff, *The NBA's Deal with the Devil: The Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 521 (2000).

62. Sherman Act, 15 U.S.C. §§ 1–2 (1998).

measures restricting workers from moving between Member States.[63] We shall now consider in turn whether the Financial Fair Play rules violate these Treaty provisions.

B. FINANCIAL FAIR PLAY AS AN ANTICOMPETITIVE DECISION

Article 101 TFEU prohibits agreements and decisions between market operators that restrict or seek to restrict competition and declares any such agreement or decision void.[64] It follows from the European Court of Justice's judgment in *Meca-Medina* that this prohibition applies to agreements and decisions in sport.[65] The analysis of whether the Financial Fair Play rules violate Article 101 can be divided into four steps.

First, the prohibition in Article 101 only applies to agreements between undertakings, decisions by associations of undertakings, and concerted practice among undertakings.[66] The term "undertaking" has been interpreted broadly by the ECJ to include "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed . . . ."[67] Considering the Court has held that professional and semi-professional football constitutes an "economic activity",[68] it is clear that professional and semi-professional football clubs constitute "undertakings" for the purpose of applying Article 101.[69]

A more complex issue is how to categorize UEFA. The European Court of Justice has classified sporting federations differently depending on the context. For example, in the *Italia* case, the Commission considered FIFA an "undertaking" for the purpose of Article 101 when it enters into contracts relating to television broadcasting rights.[70] By comparison, in the decision examined in *Meca-Medina*, the Commission concluded that within the Olympic Movement the International Olympic Committee constitutes an association of undertakings.[71]

While UEFA can be viewed as an "undertaking" in certain situations and an "association of undertakings" in others, the General Court's judgment in *Piau* strongly suggests that UEFA should be categorized as the latter with regard to the Financial Fair Play rules. *Piau* concerned a person living in France that challenged FIFA regulations of players' agents on the basis of Article 101 TFEU.[72] The court concluded that FIFA in this context was an "association of undertakings" since it is composed of national federations that, in turn, are composed of clubs, i.e., undertakings.[73] Since UEFA is also made up of national

63. This is relevant under U.S. law as well. *See infra* note 92 and accompanying text, but constitutes a separate legal basis under E.U. law. *See further infra* Part III. D.

64. TFEU art. 101.

65. Case C-519/04 P, Meca-Medina & Majcen v. Comm'n of the European Communities, 2006 E.C.R. I-6991, ¶¶ 30–33, 40–42.

66. Case C-41/90, Höfner & Elser v. Macroton GmbH, 1991 E.C.R. 1-1979, ¶ 21.

67. *Id.*

68. *See supra* Part III.A.

69. *See also* Case C-519/04 P, Meca-Medina & Majcen v. Comm'n of the European Communities, 2006 E.C.R. I-6991, ¶¶ 37–38.

70. 92/521/EEC, Distribution of Package Tours During the 1990 World Cup, L 326, 12/11/1992, ¶¶ 47–49.

71. Case C-519/04 P, Meca-Medina & Majcen v. Comm'n of the European Communities, 2006 E.C.R. I-6991, ¶ 38.

72. Case T-193/02, Piau v. Comm'n of the European Communities, 2005 E.C.R. II-209, ¶¶ 71-72.

73. *Id.*

federations, it too should be considered an "association of undertakings."[74] This interpretation is consistent with the reason why decisions by associations of undertakings are included in Article 101: to prevent undertakings from circumventing the ban on anticompetitive agreements by creating an association to formalize their cooperation.[75]

Inspired by the U.S. Supreme Court's decision in *American Needle*,[76] some may argue that UEFA and its members constitute a "single economic entity" and therefore agreements between these are not captured by Article 101. This argument is supported by the case law of the European Court of Justice but the Court has construed the concept of "single economic entity" narrowly to cover only wholly owned subsidiaries that carry out the instructions of their parent companies and have no real freedom to decide how to act in the market.[77] In light of this narrow interpretation, UEFA and its members should not be considered a "single economic entity."

Second, it follows from Article 101 that in order to be prohibited, the decision must affect trade between Member States. This requirement is easy to meet in practice. It follows from the Court's judgment in *Société Technique Minière* that this requirement has been met if it is "possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States."[78] As discussed further below, it is likely that the Financial Fair Play rules will affect trade actually and directly and, at the very least, potentially influence it indirectly.[79] It may appear from the word "trade" that Article 101 only applies to measures that affect sales of goods, but the Court's case law clearly shows that the provision can be used to challenge sporting rules such as the Financial Fair Play rules.[80]

Third, closely related to this requirement is the *de minimis* doctrine, which is not expressed in Article 101 but has been established by the European Court of Justice. According to the Court's case law, a decision or agreement will not be caught by the prohibition in Article 101 unless its effect on competition or inter-state trade is "appreciable."[81] In other words, anticompetitive agreements and decisions of "minor importance" are not prohibited. The "importance" of an agreement or a decision in this regard is determined by the market share and turnover of the parties involved.[82] According to the Commission's guidelines, a decision is not considered *de minimis* if the parties involved collectively have 10% or more of the relevant market.[83] Since UEFA is the sole organizer of professional football in Europe, the *de minimis* exception does not apply to the Financial Fair Play rules.

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74. As of 2007-08 UEFA is made up of 53 national member associations. HERE TO STAY, *supra* note 19, at 12.

75. Advocate General Léger's opinion in Case C-309/99, Wouters v. Algemene Raad van de Nederlandse Order van Advocaten, 2002 E.C.R. I-577, ¶ 62.

76. Am. Needle, Inc. v. NFL, 130 S.Ct. 2201, 2205 (2010).

77. Case 22/71, Béguilin Import v. Gl Import-Export, 1971 E.C.R. 949; Case 15/74, Centrafarm BV v. Sterling Drug, Inc., 1974 E.C.R. 1183; Case C-73/95 P, Viho Europe BV v. Comm'n, 1996 E.C.R. I-5457.

78. Case 56/65, Société Technique Minière v. Maschinenbau Ulm GmbH, 1966 E.C.R. 235, 249.

79. *See infra* Part III.D.

80. *See, e.g.*, Case T-193/02, Piau v. Comm'n of the European Communities, 2005 E.C.R. II-209; Case C-519/04 P, Meca-Medina & Majcen v. Comm'n of the European Communities, 2006 E.C.R. I-6991.

81. Case 5/69, Völk v. Vervaecke, 1969 E.C.R. 295.

82. Commission Notice 2001/C 368/07, 2001 O.J. C 368/13.

83. *Id.*

Fourth, and finally, the decision must have as its object or effect the prevention, restriction, or distortion of competition.[84] Numerous scholars have concluded that when sport leagues adopt salary caps they act as monopsonizers[85] that artificially reduce the costs of a product through coordinated action.[86] In this regard the Financial Fair Play rules function like other salary caps. Professional football clubs compete in selling their product—football matches—and therefore also compete when it comes to buying the raw material—players.[87] The Financial Fair Play rules have as their main and explicit aim reducing the amount of money clubs spend on wages.[88] In this regard, the rules function like price fixing agreements among competing buyers in other sectors.

While not as egregious as price fixing agreements among sellers,[89] such agreements are clearly contrary to Article 101 TFEU.[90] Although it is sufficient to show that the decision has an anticompetitive objective, economic research suggests that measures such as the Financial Fair Play rules will actually be successful in reducing the overall salary cost and will, therefore, also have an anticompetitive effect.[91]

In conclusion, the Financial Fair Play rules meet all the requirements of an anticompetitive decision by an association of undertaking under Article 101 TFEU. As such, the rules are prohibited and void unless they can be justified, an issue examined further below.[92]

C. FINANCIAL FAIR PLAY AS ABUSE OF A DOMINANT POSITION

In some circumstances it is possible to challenge a single action as both an anticompetitive decision under Article 101 and an abuse of a dominant position under Article 102.[93] The pyramidal organization of sport in Europe exposes the rules and decisions of sporting organizations like UEFA to challenge on the grounds that they constitute abuse of a dominant position.[94] As the sole organizer of professional football in Europe, UEFA

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84. TFEU art. 101(1).

85. A market situation in which there exists a single buyer.

86. *See, e.g.*, Alan M. Levine, *Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports Leagues*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 243, 282 (1995); Foraker, *supra* note 12 at 171; O'Leary, *supra* note 6, at 79.

87. PAUL D. STAUDOHAR, THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING 89 (1986); Levine, *supra* note 61, at 73. As competitors in the market of professional football, clubs compete to attract and maintain the best players, primarily in the interest of winning games but also for financial reasons since the financial success of a professional football club is closely connected to its sporting success.

88. *Financial Fair Play*, *supra* note 55 ("it's principle objectives being: . . . to decrease pressure on salaries and transfer fees and limit inflationary effect").

89. *See* ALISON JONES & BRENDA SUFRIN, EC COMPETITION LAW 882 (3rd ed., Oxford University Press, Oxford 2008).

90. *See, e.g.*, Commission decision, COMP/C.38/281/B.2, OJ L 353/45, 13.12.2006 (horizontal agreement among tobacco processors aimed at setting common purchase price paid to tobacco producers was found to violate Article 101 TFEU), *upheld* Case T-29/05, Deltafina SpA v. Commission, 2010, not yet reported, ¶¶ 103–35.

91. *See generally* Dietl et al., *supra* note 34.

92. *See infra* Part IV.

93. Case 66/86, Ahmed Saeed Flugreisen & Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V., 1989 E.C.R. 803, ¶ 37.

94. *See* Case T-193/02, Piau v. Comm'n of the European Communities, 2005 E.C.R. II-209, ¶¶ 107–16 (stating that a dominant position is characterized by the market provision for players' agents' service and the rules to which they adhere). *See also* Case C-519/04 P, Meca-Medina & Majcen v. Comm'n of the European

can act without regard for competition and therefore possesses a dominant position in the professional football market.[95]

It does not appear, however, as if UEFA abused that position when enacting the Financial Fair Play rules. The Treaty does not contain a definition of what constitutes abuse, but it is normal to distinguish between three different types of abusive behavior: exploitive abuse that prejudices consumers, exclusionary abuse that injures competitors, and reprisal abuse that punishes another undertaking for its actions.[96] The Financial Fair Play rules do not fall under either category, nor do they fit any of the examples of abuse listed in the Treaty.[97] Like rules requiring clubs to compensate old clubs' training costs upon hiring free agents, salary caps only injure players, not competitors or consumers, and they do not belong to the class of persons protected by Article 102 TFEU.[98]

D. FINANCIAL FAIR PLAY AS OBSTACLE TO FREE MOVEMENT

By their very nature salary caps make it more difficult for players to move from one team to another because salary caps add the existence of cap space as a condition for employment.[99] A team will be unable to employ a player that is a free agent or whose club is willing to trade him or her if that team has too little cap space.[100] Salary caps complicate player movement, because this requirement did not previously exist.

For example, assume that Team A agrees to trade Player C to Team B. However, due to the imposition of a salary cap, the trade is not possible unless Team B can create sufficient cap space. The primary means for Team B to create additional cap space is to transfer players currently under contract along with their salaries. Player C taking up employment with Team B thus becomes contingent upon the cap space of Team A and other teams, the interest of such teams to trade and take on players, and, in some circumstances, the willingness of those players to be traded.

That salary caps hinder player movement is natural considering that many sports adopted salary caps to counteract wage inflation that was seen as attributable to greater player movement, e.g. through the introduction of free agency.[101] The NBA provides an illustrative example of how a salary cap may significantly hinder player movement. The availability and possibility of creating cap space has become a decisive factor for where players play.[102] This controls teams' actions in many different situations and several planned trades have been prevented since the introduction of the salary cap because the team that

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Communities, 2006 E.C.R. I-6991 (discussing the incompatibility of IOC rules with the Community rules on competition and freedom to provide services).

95. Case 85/76, Hoffmann-La Roche & Co. AG v. Commission, 1979 E.C.R. 461, ¶¶ 38–39.

96. PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS, 1019–36 (4th ed., Oxford University Press, Oxford 2008); JONES & SUFFRIN, *supra* note 89, at 316–38.

97. TFEU art. 102.

98. Advocate General Lenz' opinion in Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921, ¶ 286.

99. The difference between a team's actual payroll and the amount set by the salary cap.

100. Foraker, *supra* note 12, at 172.

101. *See* Foraker, *supra* note 12, at 158, and the discussion *infra* Part IV.C.

102. NBA Trade Machine, ESPN (Mar. 10, 2011), http://espn.go.com/nba/tradeMachine (website application allows users to make hypothetical trades of NBA players and see if they work under the NBA's trade rules).

was supposed to acquire the player had insufficient cap space.[103] Finally, experiences in the NFL show that players with high salaries are more affected by salary caps.[104]

That a salary cap hinders player movement is relevant in U.S. law as part of antitrust analysis.[105] However, under E.U. law the hindering of free movement constitutes an independent legal basis for challenging the validity of salary caps as Article 45 TFEU guarantees the fundamental right of free movement of workers.[106] The European Court of Justice has interpreted "worker" broadly to include anyone who "for a certain period of time . . . performs services for and under the direction of another person in return for which he receives remuneration."[107] According to well-established case law, professional and semi-professional athletes, including football players, belong to the class of persons to whom Article 45 applies.[108] The Court has also established that Article 45 applies not only to actions of public authorities, but also to actions by and between organizations and other private entities if they govern "gainful employment in a collective manner."[109] This includes regulations introduced by sporting organizations.[110]

Thus, it is clear that Article 45 is applicable to the Financial Fair Play rules and the relevant legal question becomes whether the rules violate the freedom of movement for workers.[111] The rules do not directly or indirectly discriminate on the basis of nationality,[112] but that does not mean that they are acceptable. According to the European Court of Justice, "[p]rovisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement . . . constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned."[113] Applying this test in *Bosman* and in *Bernard*, the Court found that sporting rules making employment of football players conditional upon the payment of "training fees" constituted such an obstacle.[114] Also, in *Lehtonen*, the Court concluded that regulations limiting when basketball players could switch teams hindered the free movement of workers.[115] In light of this case law, the Financial Fair Play rules "preclude or deter" player movement to such an extent that it constitutes an unlawful obstacle to the freedom of movement of workers.

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103. Daspin, *supra* note 12, at 104–05; Levine, *supra* note 61, at 91–92.

104. Nissim, *supra* note 8, at 267.

105. Mackey v. NFL, 543 F.2d 620 (8th Cir. Minn. 1976).

106. TFEU art. 45.

107. Case 66/85, Lawrie-Blum v. Land Baden-Württemberg, 1986 E.C.R. 2121, ¶ 17.

108. Case 36/74, Walrave v. Union Cycliste Internationale, 1974 E.C.R. 1405; Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921; Case C-176/96, Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball ASBL, 2000 E.C.R. I-2681. Employment in "public service" is exempted from Article 45 TFEU. TFEU art. 45(4). This has however been interpreted narrowly by the European Court of Justice. *See* CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE E.U. 500–504 (3d ed. 2010).

109. Case 36/74, Walrave v. Union Cycliste Internationale, 1974 E.C.R. 1405, ¶¶ 17–19; Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921, ¶¶ 82–84 (¶ 82 quoted); Case C-176/96, Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball ASBL, 2000 E.C.R. I-2681, ¶ 35.

110. *Id.*

111. Since the rules explicitly seek to reduce salaries it only applies to professional and semi-professional football.

112. TFEU art. 45(2).

113. Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921, ¶ 96.

114. Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921, ¶¶ 99–100; Case C-325/08, Olympique Lyonnaise v. Bernard & Newcastle Utd., judgment of 16 March 2010, not yet reported, ¶¶ 33–37.

115. Case C-176/96, Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball ASBL, 2000 E.C.R. I-2681, ¶ 49.

Article 45 does not apply to "internal situations," meaning that restrictions of workers' movement within a Member State do not fall within the provision's scope.[116] However, that the Financial Fair Play rules apply equally to transfers of players between clubs within the same Member State is irrelevant. While a challenge of the rules must be based on their effect on player movement between clubs in different Member States, the rules are constructed in such a manner that their effects on movement cannot be isolated to "internal situations."[117] A successful challenge of the rules will thus bring them down in their entirety.

IV. IS FAIR PLAY JUSTIFIED?

A. JUSTIFIABLE RESTRICTIONS UNDER E.U. LAW

According to Article 45 TFEU, a restriction of the free movement of workers can be justified to ensure public policy, public security, and public health.[118] These exceptions are quite narrow and none are applicable to the Financial Fair Play rules. However, according to the European Court of Justice's judgment in *Gebhard,* a non-discriminatory obstacle to the free movement of workers can also be sustained if the measure is "justified by imperative requirements in the general interest," is suitable, and does not go beyond what is necessary to attain that objective.[119] This exception applies equally to sport as to other sectors.[120]

Thus, in order to justify the Financial Fair Play rules it must be demonstrated, first, that the rules pursue a "legitimate aim," and second, that they comply with the so-called principle or test of proportionality.[121] The test of proportionality contains three requirements that must be fulfilled in order for the restriction to be justified.[122] First, the measure must be an effective way of achieving the stated aim (test of suitability).[123] Second, the measure must be necessary for achieving the aim, including that no alternative and less restrictive measure is capable of achieving the aim (test of necessity).[124] Finally, the restriction imposed cannot be greater than necessary to achieve the aim (test of proportionality *stricto sensu*).[125]

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116. Case 175/78, La Reine v. Saunders, 1979 E.C.R. 1129.

117. *Id.*

118. TFEU art. 45(2).

119. Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, ¶ 37. *See generally*, BARNARD, *supra* note 108, at 252–73; CRAIG & DE BÚRCA, *supra* note 96, at 544–51.

120. *See, e.g.*, Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921, ¶ 104 (*citing inter alia* Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, ¶ 37); Case C-176/96, Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball ASBL, 2000 E.C.R. I-2681, ¶¶ 51–56 (*citing* Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921, ¶ 104); Case C-325/08, Olympique Lyonnaise v. Bernard & Newcastle Utd., judgment of 16 March 2010, not yet reported, ¶ 38 (*citing inter alia* Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921, ¶ 104).

121. BARNARD, *supra* note 108, at 171–72; CRAIG & DE BÚRCA, *supra* note 96, at 544–45, 549–51; TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW 139–41 (2nd ed. 2006).

122. *Id.*

123. *Id.*

124. *See, e.g.*, Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649, ¶¶ 12–13; Case C-170/04, Rosengren et al. v. Riksåklagaren, 2007 E.C.R. I-4071, ¶¶ 50–55.

125. CRAIG & DE BÚRCA, *supra* note 96, at 545; TRIDIMAS, *supra* note 121, at 139. It should be noted that there is some scholarly disagreement as to whether proportionality *stricto sensu* is a separate test or included in the other two. *Id.*

The exception formulated in *Gebhard* applies only to restrictions of free movement of workers.[126] The European Court of Justice has, however, established a very similar exception for anticompetitive agreements and decisions. According to *Wouters*, an anticompetitive agreement or decision does not fall within the prohibition in Article 101 TFEU if it is justified by a legitimate objective and its restrictive effects on competition are inherent in the pursuit of that objective.[127] The Court applied this test to the area of sport in *Meca-Medina* holding that an anticompetitive agreement or decision in sports can be justified if it seeks to achieve a legitimate objective, the anti-competitive effects are inherent in the pursuit of the objective, and the restriction does not go beyond what is necessary to achieve the objective.[128]

Thus, there is considerable convergence in the Court's approach in cases concerning free movement of workers and antitrust matters.[129] The *Wouters* justification test under Article 101 is functionally identical to the *Gebhard* justification test under Article 45, at least as it applies to sports.[130] Compliance with the two main components of these tests—the legitimacy of the aim and the proportionality of the restriction—is therefore examined here below side-by-side. Finally, we shall briefly consider the applicability of the particular grounds for justification found in Article 101 (3) TFEU.

B. EXISTENCE OF A LEGITIMATE AIM

E.U. law recognizes that sport is unique in that the financial success of the competitors is dependent on there being uncertainty regarding the result of the sporting competition and that measures to achieve competitive balance may therefore be supported by a legitimate aim.[131] In *Bosman*, the Court explicitly recognized maintaining financial and competitive balance between clubs as a legitimate aim.[132] If the Financial Fair Play rules intended to improve financial and competitive balance, it would consequently pursue an aim that is legitimate under E.U. law.[133] However, the Financial Fair Play rules do not improve competitive balance, nor is that their purpose. The central issue to be examined here is whether the Court will accept the actual aim of the rules–to achieve and maintain long-term financial viability and continued competition–as legitimate.[134]

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126 Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, ¶ 20.

127. Case C-309/99, Wouters v. Algemene Raad van de Nederlandse Order van Advocaten, 2002 E.C.R. I-577, ¶ 97 (concerned a rule established by Netherlands' Bar according to which Bar members were prohibited from entering into partnership with accountants).

128. Case C-519/04 P, Meca-Medina & Majcen v. Comm'n of the European Communities, 2006 E.C.R. I-6991, ¶¶ 41–47.

129. *See, e.g.*, Kamiel Mortelmans, *Towards Convergence in the Application of the Rules on Free Movement and on Competition?*, 38 COMMON MKT. L. REV. 613 (2001); Rosemary O'Loughlin, *EC Competition Rules and Free Movement Rules: An Examination of the Parallels and Their Furtherance by the ECJ Wouters Decision*, 2003 EUR. COMPETITION L. REV. 62.

130. Stephen Weatherill, *Anti-doping Revisited – The Demise of the Rule of "Purely Sporting Interest,"* 2006 EUR. COMPETITION L. REV. 645, 653.

131. *Commission*, *supra* note 1, at 35–40.

132. Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921, ¶¶ 105–06. *See also Commission White Paper on Sport*, at 68, COM (2001) 391 final (Feb. 11, 2007) (describing legitimate objectives of sporting rules).

133. *But see* Szymanski, *supra* note 26, at 1158–59 (concluding that there is no proven relationship between improved player mobility through free agency and decline in competitive balance).

134. *See supra* Part II.C.

In doing so, it is important to recognize that the sporting market in certain regards differs from other markets. In most sectors, the financial failure of an actor is positive both for the remaining competitors and to society at large because the actor is viewed as a victim of its own inefficiency. In sport, by comparison, the success of one team is dependent on the survival of other teams with which it can compete.[135] The Commission has accepted this reasoning, concluding that "sport teams, clubs and athletes have a direct interest not only in there being other teams, clubs and athletes, but also in their economic viability as competitors."[136] It appears that the Commission considers the aim of the Financial Fair Play rules to be legitimate.

It would be surprising if the Court did not follow the Commission's position on this topic considering its position in *Bosman*[137] and that it has recently reaffirmed its recognition, and willingness to protect, the socio-cultural value of sport.[138] Thus, the European Court of Justice will likely find that the claimed objective of the Financial Fair Play rules constitutes a legitimate aim.

C. EMPIRICAL SUPPORT FOR THE OVERINVESTMENT THEORY

It is beyond dispute that many European football clubs suffer from high levels of losses and debt,[139] and it was concluded above that rectifying this problem is a legitimate aim under E.U. law. A legitimate aim is necessary, but not sufficient, to justify the Financial Fair Play rules. The analysis of the legitimacy of a measure's aim is separate from that of its proportionality.[140] It is not sufficient to show that European football is suffering from financial difficulties and that the Financial Fair Play rules intend to solve this problem. In order to justify the rules, UEFA must also show that they are necessary and suitable for the purpose of achieving the aim without being excessively restrictive.[141] UEFA must also show that no alternative, less restrictive measure is capable of achieving the objective.[142] As the analysis below will demonstrate, this may prove difficult.

The Financial Fair Play rules are based on the theory that clubs are overspending on player salaries, that this will ultimately drive them into bankruptcy, and that external intervention is necessary to prevent the clubs from overspending.[143] Herein, this is referred to as the "overinvestment theory." Arnaut expresses the underlying narrative succinctly:

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135. Levine, *supra* note 61, at 79–80.

136. *Commission*, *supra* note 1, at 35–40.

137. Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921, ¶¶ 105–06.

138. Case C-325/08, Olympique Lyonnaise v. Bernard & Newcastle Utd., judgment of 16 March 2010, not yet reported, ¶¶ 39-40.

139. *See, e.g.*, BENCHMARKING REPORT, *supra* note 7; Conn, *supra* note 48; DELOITTE SPORTS BUSINESS GROUP, ANNUAL REVIEW OF FOOTBALL FINANCE 2010: HIGHLIGHTS, http://www.deloitte.com/assets/Dcom-UnitedKingdom/Local%20Assets/Documents/Industries/Sports%20Business%20Group/UK_SBG_ARFF2010_Highlights.pdf.

140. *See, e.g.*, Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921, ¶¶ 105–09; Case C-325/08, Olympique Lyonnaise v. Bernard & Newcastle Utd., judgment of 16 March 2010, not yet reported, ¶¶ 38–49 (establishing that competitive balance and recruitment and training of young players constitute a legitimate aim but concluding that the measures taken to achieve these aims violated the principle of proportionality).

141. *See supra* Part IV.A.

142. *Id.*

143. Mark Chaplin, *Financial Fair Play Protects Football's Stability*, UEFA (May 27, 2010), http://www.uefa.com/uefa/aboutuefa/organisation/executivecommittee/news/newsid=1493180.html.

> There is no doubt that football in Europe has faced a form of financial crisis for many years now. This crisis is directly related to the massive wage inflation the sport has seen in recent years (particularly following the *Bosman* ruling) fuelled by the ever higher financial demands made by players at the encouragement of their ubiquitous agents. In the face of these trends, many clubs have been unable to control their spending.[144]

At least some football clubs share this view. In 2003, the so-called G-14 group – an organization formed by fourteen of Europe's most successful professional clubs – entered into an agreement under which the teams undertook to limit their salary expenditures to 70% of their turnover starting in the 2005-06 season.[145] The clubs failed to live up to this agreement,[146] but the European Club Association (ECA) that replaced the now dissolved G14[147] has maintained its support for rules that limit how much their members can spend on salaries.[148]

The argument expressed by Arnaut is not unique to European football; North American professional sports have had similar experiences. When the NBA implemented a salary cap in 1984, it was the first professional North American league to do so, and it aimed to protect franchises that were under severe financial pressure and improve the competitive balance.[149] It was argued that the introduction of free agency threatened the viability of the league because franchises were paying increasingly higher salaries to players that teams could not afford.[150] Similarly, the introduction of free agency in the NFL brought drastic increases in player salaries.[151]

However, empirical data is not entirely conclusive. For example, salaries increased greatly when the reserve clause was abolished in MLB and teams began to bid for players.[152] This has however not been detrimental to individual franchises or to major league baseball as a collective. While there are differences in teams' payrolls, it is difficult to prove that this has affected the competitive balance.[153] In any case, participation continues to be profitable for both rich and poor teams.[154]

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144. ARNAUT, *supra* note 41, at 71.

145. Glenn Moore, *Europe's Top Clubs Agree to Salary Cap*, THE INDEPENDENT, Nov. 6, 2002, http://www.independent.co.uk/sport/football/news-and-comment/europes-top-clubs-agree-to-salary-cap-603409.html.

146. Dietl claims that this agreement was never put in place due to the dissolving of G14 in 2008. Dietl, *supra* note 29, at 5–6. However, this is unpersuasive since the G14 was disbanded two full seasons after the agreement was to be put in place. A more plausible explanation is that the agreement was not enforceable.

147. The replacing of G14 with the European Club Association (ECA) in January 2008 formed part of an agreement between the clubs, UEFA and FIFA that also lead to the case of *Oulmers* being removed from the ECJ. *See* Case C-243/06, SA Sporting du Pays de Charleroi & G-14 Group v. FIFA (removed from register) OJ C 69, 3/21/2009, 30.

148. *Financial Fair Play Regulations are Approved*, UEFA (May 27, 2010), http://www.uefa.com/uefa/aboutuefa/organisation/executivecommittee/news/newsid=1493078.html; *EPFL Welcomes Financial Fair Play*, UEFA (Mar. 12, 2010), http://www.uefa.com/uefa/stakeholders/leagues/news/newsid=1462150.html.

149. Staudohar, *supra* note 1, at 3.

150. Aubut, *supra* note 12, at 218; Daspin, *supra* note 12, at 106–07; Foraker, *supra* note 12, at 157; Levine, *supra* note 61, at 71–74; John Vrooman, *A General Theory of Professional Sports Leagues*, 61 S. ECON. J. 971, 971–72 (1995).

151. Staudohar, *supra* note 1, at 78–79.

152. Aubut, *supra* note 12, at 198–99, 226–27.

153. *See* Cameron & Echevarría, *supra* note 39, at 852–53 (describing the "competitive balance" theory justifying the salary cap); Rodney Fort & James Quirk, *Cross-Subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*, 33 J. ECON. LIT. 1265, 1275–76 (providing a statistical analysis of the impact

The overinvestment theory is also inconsistent with experience in European football as salary overspending is not a problem for the average European football club. In Europe, clubs spend on average 61% of their revenues on employee costs.[155] This does not appear unsustainably high considering that this includes all types of payments and all types of employees. By comparison, the NFL has set its cap for player salaries in the range of 57%-60%.[156]

The overinvestment problem is thus limited to a minority of the clubs: one in three clubs spend more than 70% of its revenues on wages and one in ten clubs spend more than 100%.[157] The size of this minority indicates that European football clearly suffers from a significant and systematic problem. That the overinvestment problem is limited to a minority of teams does however raise questions about its validity and, by extension the necessity of the Financial Fair Play rules.

Hence, the empirical evidence is inconclusive and cannot support the claim that clubs are incapable of refraining from overspending without the Financial Fair Play rules.

D. THEORETICAL SUPPORT FOR THE OVERINVESTMENT THEORY

European football clearly suffers from a financial problem, but it is difficult to understand why the Financial Fair Play rules are necessary and suitable for solving this problem. In order to show that the rules are proportional UEFA must explain why one in three football clubs are compelled to pay salaries they cannot afford when the remaining two-thirds of the clubs, as well as most actors in other, fiercely competitive, employee talent based sectors, are able to restrain themselves.

Whitney was among the first to try and explain the overinvestment problem. Whitney examined leagues organized according to the North American model and argued that clubs overinvesting can be explained if fan support and the financial success to which it is tied depends on the team's chance to win a championship.[158] If that is the case, teams will more fiercely recruit top players that improve their chances to win a championship, leading to overspending.[159]

Deitl and others have built upon Whitney's research and examined overinvestment from a more European perspective. In so doing, they have concluded that the overinvestment problem will increase if the following are present: if there is a close relationship between player investment and sporting success; if there is a close relationship between a team's revenues and its team sporting success, which is aggravated if clubs play

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of free agency).

154. Leaked financial documents show that some of MLB's least competitive franchises operate at significant profits. *See* Tommy Craggs, *MLB Confidential: The Financial Documents Baseball Doesn't Want You To See, Part 1*, DEADSPIN.COM (Aug. 23, 2010, 10:00 AM), http://deadspin.com/#!5615096/mlb-confidential-the-financial-documents-baseball-doesnt-want-you-to-see-part-1.

155. BENCHMARKING REPORT, *supra* note 7, at 52.

156. Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association, *NFL Collective Bargaining Agreement 2006-2012*, art. XXIV (2006).

157. BENCHMARKING REPORT, *supra* note 7, at 53.

158. James D. Whitney, *Bidding till Bankrupt: Destructive Competition in Professional Team Sports*, 31 ECON. INQUIRY, 100 (1993).

159. *Id.*; Dietl et al., *Are Voluntary Salary Cap Agreements Self-Enforcing?*, 6 EUR. SPORT MGMT. Q. 23, 24 (2006); Fort & Quirk, *supra* note 153, at 1267.

in an open league that uses the model of promotion and relegation; and if revenue is unevenly spread among the teams.[160]

However, these findings do not prove that the Financial Fair Play rules are necessary. It is not clear that fan interest depends on the team's championship potential. On the contrary, most salary caps are based on the theory that fan interest depends on how uncertain the outcome of matches and championships are, which is why they seek to achieve competitive balance.[161] There are conflicting theories as to what drives fan interest. Several studies have tried to show what drives fan interest but the results are inconclusive.[162] Because it is uncertain what drives fan interest it is also uncertain what actions are warranted and what effects different actions will produce.[163]

This creates doubt regarding the proportionality of the Financial Fair Play rules. The uncertainty regarding fan interest and, by extension, clubs' financial incentives, makes it difficult to prove that the Financial Fair Play rules are necessary. Moreover, the uncertainty regarding the underlying factors creates uncertainty regarding the effects of the rules. Dietl et al. has concluded that the effects of a relative salary cap, such as the Financial Fair Play rules, depend on whether fans value competitive balance or player talent.[164]

Existing research points out factors that cause teams to engage in destructive behavior. However, research does not prove that regulatory intervention, such as the Financial Fair Play rules, is necessary to correct it.

E. BEYOND FINANCIAL FAIR PLAY

Knowledge of what causes overinvestment can be used to formulate alternative strategies for its reduction. Although it is difficult to affect the connection between player investment and sporting success, it is more realistic to take measures to adjust the financial aspects of football that drive over investment. As previously discussed, considering such alternatives is one element of the test of proportionality.[165] Four such alternative solutions are considered below.

The aim of this section is not to provide a definitive answer on how to best solve European football's financial problems. However, it will illustrate that there are other measures than the Financial Fair Play rules that could be used to resolve the underlying problem. This is legally significant because the principle of proportionality requires the adoption of the least restrictive measure capable of achieving the stated aim.[166] UEFA must be able to explain why other alternative solutions, such as those discussed below, are not capable of ensuring the long-term financial viability of European football.

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160. Dietl et al., *supra* note 2.

161. *See generally supra* notes 39–40.

162. Szymanski, *supra* note 26, at 1153–56.

163. *See, e.g.*, Dietl et al., *supra* note 2 (concluding that an absolute salary cap will increase social welfare if fans value aggregate talent but decrease social welfare if they value competitive balance).

164. Dietl et al., *supra* note 34 (referring to this type of salary cap as a "percentage-of-revenue cap").

165. *See generally supra* notes 121–25.

166. *See supra* Part IV.A.

1. REDUCING CLUB COMPENSATION

One likely explanation as to why certain clubs engage in overinvesting is the strong connection in European football between sporting success and financial success. Although a certain connection is inherent in professional sports, European football is organized in a way that creates a threshold effect that induces teams to engage in overinvestment. Advancement to a superior national league, advancement to European club competitions, and achieving a national championship are often connected with significantly larger revenues. This creates financial incentives for a club to "gamble" on player recruitment. A club may be prepared to offer a player a salary it cannot afford if it believes that it thereby improves its chances of crossing such a "threshold."[167]

The open league model is a central aspect of European football that many seek to protect, and it is unlikely to change in the near future. Measures should instead focus on lowering the threshold effects. One way of doing this is to decrease the compensation to clubs for participating in competitions. In the 2009-10 season, UEFA distributed over $1 billion to the thirty-two clubs participating in the UEFA Champions League (on average $32 million per club),[168] whereas clubs participating in the less prestigious Europa League received, on average, 'only' $3.9 million.[169] Even though UEFA "encourages all clubs to adopt a prudent approach in budgeting anticipated income,"[170] these payouts provide a strong incentive for clubs to (over)invest in player talent in order to qualify for European club competition. Consequently, decreasing such payout will reduce the incentives for overinvestment.

2. REVENUE SHARING

Another factor that contributes to overinvestment in European football is the large financial disparity: the ten highest spending clubs spend twice as much as the next ten on wages and transfers.[171] Accordingly, revenue sharing is an alternative measure worth considering. The term "revenue sharing" refers to measures that reallocate funds from high revenues clubs to low revenue clubs.[172]

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167. *Cf.* Dietl et al., *supra* note 2, at 360–65. *See also* Shant H. Chalian, *Fourth and Goal: Player Restraints in Professional Sports, a Look Back and a Look Ahead*, 67 ST. JOHN'S L. REV. 593, 627–28 (1993) (noting that owners of teams may be willing to accept a short-term financial loss due to signing a player because on-field success can lead to long-term financial gain).

168. UEFA CHAMPIONS LEAGUE 2009/10: DISTRIBUTION, UEFA, http://www.uefa.com/MultimediaFiles/Download/competitions/General/01/51/72/68/1517268_DOWNLOAD.pdf (last visited Oct. 12, 2010) (of the total €746 million distributed, participating clubs received between €5.3 million (Maccabi Haifa FC) and €48.7 million (FC Internazionale Milano)).

169. *Europa League Revenue Put Back into Clubs*, UEFA (Aug. 24, 2010), http://www.uefa.com/uefa/management/finance/news/newsid=1517280.html (€135m distributed among forty-eight teams).

170. *Champions League Revenue Distribution*, UEFA (Dec. 14, 2009), http://www.uefa.com/uefa/management/finance/news/newsid=935017.html.

171. BENCHMARKING REPORT, *supra* note 7, at 12.

172. *See, e.g.*, Vittorio Vella, *Swing and a Foul Tip: What Major League Baseball Needs to Do to Keep Its Small Market Franchises Alive at the Arbitration Plate*, 16 SETON HALL J. SPORTS & ENT. L. 317, 330–31 (2006).

While it is uncertain whether revenue sharing leads to increased competitive balance,[173] the findings of Deitl et al. suggest that more equal distribution of revenue should reduce the problem of overinvestment.[174] This is intuitive since revenue sharing would mean that poor teams would not need to enter into debt to be able to compete with richer teams. In addition, revenue sharing would mean that rich teams would have less incentive to invest in players which would lead to less money being spent on salaries and greater profits for the clubs.[175] Revenue sharing may be in the long-term interest of European football, but it may be difficult to convince clubs to support revenue sharing as the interest to participate in such a scheme is smaller in an open league than in a closed league.[176]

Revenue sharing has the additional advantage that similar measures for the redistribution of funds already exist in European football in accordance with the principle of financial solidarity. For example, some of the incomes from UEFA Champions League and the European Championship funds youth development and is transferred to clubs outside of the top divisions.[177]

3. BAN ON CASH TRADES

Much of the discussion has come to center on the rise of player salaries and how this threatens the long-term viability of European football. However, a significant amount of club debt is attributable to player trades. For example, English and Spanish clubs lost a total of $536 million (€385 million) due to transfers in 2008. Thus, banning clubs from trading footballers for cash would reasonably reduce club debt and promote the aims of the Financial Fair Play rules without restricting competition or free movement of workers.[178] A ban on players being traded for cash would not be unprecedented. North American leagues have a tradition of restricting teams from trading players for cash.[179]

4. ABSOLUTE SALARY CAP OR LUXURY TAX

Finally, it is worth considering whether a traditional, absolute team salary cap would actually be better than the Financial Fair Play rules. Whereas the Financial Fair Play rules treat the symptoms, an absolute salary cap would both solve the root cause of inequitable resources and promote competitive balance. Dietl argues that an absolute team salary cap would be positive in several regards for European football as it would increase competitive balance, club profits, and social welfare.[180] Similarly, Fort and Quirk conclude that an enforceable salary cap is the only measure currently used in North American sports that is

173. *Id.* at 331; Vrooman, *supra* note 150.

174. *See* Dietl et al., *supra* note 2.

175. Szymanski, *supra* note 26, at 1166.

176. *Id.* at 1175. It is reasonably easier to convince clubs to support a salary cap because such measures primarily affect players in a negative way. *Id.* at 1173.

177. ARNAUT, *supra* note 40, at 66–68, 155–65.

178. That a worker may not change employer while under contract does not constitute an unlawful restriction of the right to free movement.

179. Fort & Quirk, *supra* note 153, at 1282; Stephen P. Ross, *Player Restraints and Competition Law Throughout the World*, 15 MARQ. SPORTS L. REV. 49, 50 (2004)

180. Dietl et al., *supra* note 1.

capable of both maintaining the financial viability of small market teams and achieving competitive balance.[181]

It has been argued that the financial disparity between different European football leagues is too large to support an absolute salary cap and that the cost of administration would be "prohibitive."[182] One should be skeptical of such arguments considering that UEFA has been able to overcome national differences in economy when regulating other aspects of European football.[183] The strongest argument against an absolute salary cap is that it restricts competition and player movement much like the Financial Fair Play rules. It is nevertheless preferable because its positive effects would be greater.

The creation of a luxury tax is, according to some, an option worthy of further consideration.[184] As previously discussed, a luxury tax functions much in the same way as an absolute salary cap,[185] and will consequently have the same restrictive effects on competition and on player movement. The only advantage of a luxury tax from a European law standpoint is that its effect is more relaxed. However, this is reasonably offset by a decreased ability to achieve the underlying aims. Moreover, experience suggests that it is difficult to frame an effective luxury tax. For example, Kaplan has found that the luxury tax used in the NBA has serious adverse effects and even works contrary to its stated goals.[186]

F. JUSTIFICATION UNDER ARTICLE 101(3) TFEU

It should finally be noted that besides the test established by the Court of Justice in *Wouters*, an anticompetitive decision can be justified on the certain specific grounds laid out in Article 101(3) TFEU.[187] However, this cannot be used to justify the Financial Fair Play rules because the exception only applies to decisions "improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit."[188] It is difficult to see how these rules which, unlike an absolute salary cap, do not enhance competitive balance comply with this requirement.[189] In addition, Article 101(3) requires that the decision be "indispensable to the attainment of these objectives."[190] As discussed at length above, it is difficult to show that the Financial Fair Play rules are necessary.[191] In any case, even if the Financial Fair Play rules would qualify under the exception in Article 101(3), this would not prevent them from being challenged as an unacceptable restriction of the free movement of workers and the end result would remain the same.

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181. Fort & Quirk, *supra* note 153, at 1266.

182. Dietl et al., *supra* note 1, at 5.

183. For example, under FIFA's current training compensation regulation, the amount that a professional team pays to teams responsible for a young player's training varies depending on what national league he or she has received the training in. FIFA, REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS, art. 20, annexe 4.

184. ARNAUT, *supra* note 40, at 84.

185. *See supra* Part II.B.

186. Kaplan, *supra* note 39, at 1615.

187. TFEU art. 101(3).

188. *Id.*

189 *See* Thomas M. Schiera, *Balancing Act: Will the European Commission Allow European Football to Reestablish the Competitive Balance That It Helped Destroy?*, 32 BROOK. J. INT'L L. 709, 737–39 (2007) (arguing that a hard cap or a luxury tax in European football would qualify under Article 101(3) TFEU).

190. *Id.*

191. *See generally* Part III.

V. SUMMARY AND CONCLUSION

U.S. courts and scholars have concluded that absolute team salary caps used in some sport leagues constitute anticompetitive agreements contrary to antitrust law.[192] This article reaches the same conclusion with regard to the Financial Fair Play rules and their compatibility with E.U. law. That the salary cap imposed by these rules is relative rather than absolute does not affect this conclusion. Moreover, the fact that the Financial Fair Play rules, like other salary caps, hinder player movement constitutes an independent ground for challenge under E.U. law. Whether the Financial Fair Play rules are incompatible with Union law therefore turns on whether the restriction imposed by the rules on competition and free movement can be justified.

Having concluded that salary caps can increase social welfare, Deitl et al. questioned in 2009 why European football had not then implemented salary caps. They noted that it was unclear whether salary caps are compatible with E.U. law.[193] It is the conclusion of this article that salary caps generally tend to conflict with E.U. law and that the Financial Fair Play rules are incompatible with E.U. law.

The objective of the rules is to achieve long-term financial soundness and thereby ensure the long-term viability of European football. Financial Fair Play is an unusual salary cap in that it does not seek to increase competitive balance. On the contrary, the rules will likely decrease the competitive balance in European football. This is strange considering that UEFA has previously opposed "a structure or a system where smaller clubs, smaller nations and all their supporters never have the chance to follow their dream."[194]

While this article concludes that the aim of long-term financial viability is likely legitimate from an E.U. law perspective, it finds that the rules do not comply with the principle of proportionality. The existence of financial problems is not sufficient in order to show that the Financial Fair Play rules are necessary and suitable for the purpose of protecting the long-term viability of European football. There is insufficient empirical and theoretical evidence to support such a claim. Even if we assume that the rules will resolve or at least alleviate the financial problems, there are other measures reasonably capable of doing the same and which have certain advantages.

It is also worth questioning whether it really is worse if football clubs go bankrupt than if other businesses do so. In supporting the licensing system, UEFA has pointed to how problematic it would be if clubs became insolvent during a season.[195] It seems to me that this argument carries more weight with regard to American-style closed professional leagues than in European football. The organization of football competitions requires that the competing clubs agree on issues such as the rules by which the game will be played and certain organizational aspects. However, the financial survival of a team is not directly linked to the continued existence of its current competitors. That some competitors disappear and others appear is an integral part of the system of promotion and relegation between levels of competition that in most cases guarantees that there will be clubs willing

192. *See* Joel Maxcy, *Judge Sotomayor and the NFL Draft-Eligibility Rule*, SPORTS LABOR RELATIONS (June 4, 2009, 4:33pm), http://sportslaborrelations.blogspot.com/2009/06/judge-sotomayer-and-nfl-draft_04.html.

193. Deitl et al., *supra* note 1, at 15–16.

194. *See* Plácido Rodríguez et al., *Sports Economics After Fifty Years: Essays in Honour of Simon Rottenberg*, 9 J. SPORTS ECON. 211, 222 (2006).

195. *See Commission*, *supra* note 1.

and, for the most part, able, to assume the vacated spot.[196] The replacement club would initially be less competitive than the team that it replaces (otherwise it would presumably already play in that division), but the effects of such a scenario do not appear so detrimental that avoiding it constitutes an "overriding reason in the public interest."

Of course, all of this matters little if no one is able or willing to challenge the Financial Fair Play rules. The Commission, which is the E.U. institution entrusted with ensuring compliance with competition law, is unlikely to intervene if it, as UEFA claims, supports the Financial Fair Play rules.[197] Those who primarily suffer due to the Financial Fair Play rules are the footballers whose salaries the rules aim to decrease; therefore obvious challengers would be the players or FIFPro, the organization representing professional football players.

When salary caps were created in North American sports, players accepted it because they were ensured a certain percentage of team revenues through the creation of a salary floor or some other measure.[198] One would reasonably expect European professional football players to object to the rules unless they include similar mechanisms. While such a measure would have no effect in certain clubs, others could afford to pay more in salaries.[199] However, according to UEFA, all stakeholders in European football support the Financial Fair Play rules[200] and FIFPro has representatives in the Professional Football Strategy Council (PFSC) that unanimously recommended UEFA to adopt the Financial Fair Play rules.[201] Thus, much like in the United States,[202] the legal validity of the Financial Fair Play rules would come under review primarily through individual players bringing legal claims.

196. For example, at the end of the 2009-10 season, my local professional hockey club went into bankruptcy and was promptly replaced by the best team in the division beneath for the 2010-11 season, seemingly without disruption. A club becoming insolvent during the course of a season may however disturb competition and affect its competitors. *See further supra* Part II.C.

197. *See Financial Fair Play Explained*, UEFA (June 2, 2010), http://www.uefa.com/uefa/footballfirst/protectingthegame/financialfairplay/news/newsid=1494481.html.

198. *See* Levine, *supra* note 61, at 98.

199. *See* Conn, *supra* note 48.

200. *See UEFA Statement on Financial Fair Play*, UEFA (Feb. 1, 2011), http://www.uefa.com/uefa/footballfirst/protectingthegame/financialfairplay/news/newsid=1590370.html. The Commission has expressed a cautious support for the Financial Fair Play rules. Commission of the European Communities. *Communication, Developing the European Dimension in Sport*, at p. 12, COM (2011) 12 final (Jan. 18, 2011). "In team sports, club licensing systems offer a valuable tool to ensure the integrity of competitions. They are also an effective way of promoting good governance and financial stability. The Commission welcomes the adoption of measures aimed at enhancing financial fair play in European football while recalling that such measures have to respect Internal Market and competition rules." *Id.*

201. *See Green Light for Financial Fair Play*, UEFA (Sept. 5, 2009), http://www.uefa.com/uefa/stakeholders/professionalfootballstrategycouncil/news/newsid=879610.html.

202. *See, e.g.*, Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976); Brown v. Pro Football, Inc., 518 U.S. 231 (1996); Wood v. NBA, 809 F.2d 954 (2d Cir. 1987).

The Law Firm and the League: The Legal and Electronic Connections Between Morgan, Lewis & Bockius LLP and Major League Baseball

ROSS E. DAVIES*

Last year marked the 10th anniversary of the transfer of a unique and valuable baseball property. On September 6, 2000, Major League Baseball and Morgan, Lewis & Bockius LLP (a prominent international law firm)[1] issued a joint press release announcing "that the law firm has transferred its domain name—**mlb.com**—to Major League Baseball."[2]

From today's perspective, looking back at a time when the ascendancy of the internet was not at all clear, it seems like a bizarrely fortuitous set of coincidences:

- The initials of big-time baseball (Major League Baseball) and the initials of one of big-time baseball's longtime, big-time outside law firms (Morgan, Lewis & Bockius) were MLB.
- In 1994, the law firm had the foresight—or luck—to move relatively early to register the mlb.com internet domain name.
- Several years later, in 2000, when Major League Baseball started to aggressively market itself on the internet, Morgan Lewis & Bockius was, for a variety of reasons described below, willing to part with mlb.com for a song.

At the time of its consummation, the mlb.com transaction received a lot of attention in the news media.[3] By 2000, it was obvious that the internet was big business, and transactions in internet domain names were sufficiently common and significant to inspire government regulation of the market.[4]

But even in the new, booming, volatile domain-name market, the mlb.com deal qualified as unusual in at least two respects, and illustrated the difficulty of placing a value on a favor, at least between lawyer and client, in the context of the business of baseball.

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* Ross E. Davies is editor-in-chief of the *Green Bag, An Entertaining Journal of Law*, and a professor at George Mason University. He thanks Paul Hass.

1. *See Inside Morgan Lewis*, MORGAN, LEWIS & BOCKIUS, http://www.morganlewis.com/index.cfm/fuseaction/content.page/nodeID/22984d05-bf9a-47ec-9070-57db566e3974/ (last visited Mar. 9, 2011).

2. Press Release, Bonnie P. Ciaramella, Morgan, Lewis & Bockius LLP, & Richard Levin, Major League Baseball, Morgan Lewis Pitches Web Address to Major League Baseball (Sept. 6, 2000), *available at* http://www.morganlewis.com/pubs/A78B64B1-9A01-4FB2-B4F5CE4D7A7132B1_Publication.pdf..

3. *See, e.g.*, Alan Schwarz, *Big Leagues' Net Bet*, NEWSWEEK, Oct. 2, 2000, at 74C; Neal Travis, *Homepage Derby*, N. Y. POST, Apr. 28, 2000, at 11.

4. *See, e.g.*, Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) (1999).

THE PRICE

First, the price. Morgan, Lewis & Bockius ("Morgan Lewis") reportedly gave, not sold, mlb.com to Major League Baseball ("MLB"). According to *The American Lawyer*, "After the league announced that it wanted to make a brand out of its initials, a la the National Basketball Association, Morgan, Lewis turned over its registered domain name, MLB.com, to the league — free of charge, of course."[5]

Though it is a leading magazine in the legal profession, it is possible, but unlikely, that *The American Lawyer* got the story wrong. The magazine did not cite a source for its report, and the exact terms of the deal were part of a "confidential transfer agreement."[6] As the *Philadelphia Inquirer* explained at the time, "While domain transfers typically are cash transactions, the parties in this case would not reveal terms — or even give a ballpark figure, if cash was involved."[7] Nevertheless, few media outlets (none of which cited a source or gave a dollar figure) did report that Morgan Lewis was asked by MLB to "sell" mlb.com,[8] and even fewer commentators were willing to assert in print (again without a source or dollar figure) that Morgan Lewis did in fact extract compensation from MLB.[9] Most news stories, however, implied it was a gift, or at least not a sale. They reported—without mentioning a sale or a price—that Morgan Lewis "surrendered,"[10] "would transfer,"[11] or had "relinquished" the domain[12] or that MLB "secured" the domain name courtesy of Morgan Lewis, or something similar.[13]

In any event, based on the available news stories, MLB seems to have gotten something quite valuable for nothing. How valuable? By the late 1990s, a short and commercially identifiable internet domain name could be worth a small fortune, or a large one.[14] Indeed, in a domain name lawsuit involving the National Football League and a couple of its teams, the presiding federal judge described the situation as follows:

> [I]t cannot seriously be disputed that domain names have become a valuable commodity in today's economy. In the battle to obtain as many website 'hits' as

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5. Ashby Jones, *Stuck in the Bullpen*, AM. LAW., Jan. 2002, at 18.

6. Jeff Blumenthal, *Morgan Lewis Decides to Play Ball with Client*, RECORDER (San Francisco), Sept. 12, 2000, at 3.

7. Michael Klein, *Major League Baseball Gains Right to 'MLB' Internet Address*, PHILA. INQUIRER, Sept. 9, 2000, at C1.

8. *See, e.g.*, Matt Fleischer, Karen Donovan, & Victoria Slind-Flor, *The Talk of the Profession*, NAT'L L. J., May 1, 2000, at A8; Greg Auman, *Online Reports Not Necessarily On Line*, ST. PETERSBURG TIMES, Aug. 11, 2000, at 2C.

9. *See, e.g.*, Clinton Wilder, *A New Game Plan*, INFO. WEEK, Apr. 9, 2001, http://www.informationweek.com/832/rbbaseball.htm;jsessionid=2ODMZY2XGBJY1QE1GHPSKH4ATMY32JVN; Mark Conrad, *MLB Gets Web Rights in MLB.com*, MARK'S SPORTSLAW NEWS, http://www.sportslawnews.com/archive/Articles%202000/mlbwebsite.htm (Sept. 5, 2000).

10. Henry Gottlieb, Charles Toutant, Sandy Lovell, & Tim O'Brien, *Who's On First?*, 161 N.J. L. J. 1279 (2000).

11. Blumenthal, *supra* note 6.

12. Schwarz, *supra* note 3.

13. *See, e.g.*, *On MLB's Hit List: Web Plays, All-Star Ambushers*, BRANDWEEK, July 17, 2000, at 18; Tom Hoffarth, *It's No Iceberg, It's P'burgh*, DAILY NEWS (L.A.), July 31, 2000; Tommy Cummings, *Underachievers Already Voted Off Packer Island*, S. F. CHRON., Aug. 23, 2000, at E8.

14. *See, e.g.*, Winn L. Rosch, *Domains: Today's Name Game*, PLAIN DEALER, July 20, 2000, at 2C ("The value of easy-to-remember and -recognize names comes as no surprise. The big hits this year: Business.com sold for $7.5 million, loans.com for $3 million and autos.com for $2.2 million.").

> possible, companies have paid hundreds of thousands, and sometimes millions, of dollars for domain names that consumers will remember and use when browsing the internet.[15]

Law firms, including Morgan Lewis, are for-profit enterprises. Why might such an enterprise give away such a valuable asset?

THE CONNECTIONS

The answer springs from the second unusual feature of the mlb.com-to-MLB deal: the fortuitous connections between the original owner of the valuable domain name (Morgan Lewis) and the entity seeking to acquire that name (MLB). Those connections—a long and fruitful, if sometimes rocky, relationship—probably made the sweetheart deal possible. In other words, giving up mlb.com might have been a small price for Morgan Lewis to pay to preserve and perpetuate the valuable relationship between the firm and MLB.

But the story of the connections leads to one last question: in September 2000, was the history between MLB and Morgan Lewis, and the prospect of future collaboration enough to justify Morgan Lewis's decision to turn over mlb.com to MLB?

CONNECTIONS 1978-1994

In September 2000, when the mlb.com deal was consummated, Morgan Lewis could boast connections to baseball dating back at least to 1978, when Michael Fremuth, a young lawyer working at the firm, moonlighted as a pitcher for the Alexandria Dukes of the Carolina League.[16] The firm's legal work involving baseball began in 1981, when it was defense counsel in *Dudley Sports Co. v. Berry*, a case in Florida state court in which a boy and his parents sued the manufacturer and distributor of a pitching machine after the boy was injured in an accident involving the machine.[17]

By the mid-1980s, Morgan Lewis's baseball involvement went directly and deeply to MLB itself. The firm, which then, as now, had a reputation as one of the strongest management-side law firms specializing in labor-management relations, was receiving publicity for its work representing teams at salary arbitration hearings.[18] But it was in October 1987 that the first of the two most important moments in the firm's relationship with MLB occurred. Murray Chass wrote in the *New York Times*:

> In what could be a significant change on the labor front, baseball management has made a change in its legal lineup.

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15. Weber v. National Football League, 112 F.Supp.2d 667, 672 (N.D. Ohio 2000).

16. *A Winner*, LEGAL TIMES, Sept. 11, 1978, at 3; Michael Fremuth, *Minor League Statistics & History*, http://www.baseball-reference.com/minors/player.cgi?id=fremut001mic.

17. Dudley Sports Co. v. Berry, 407 So.2d 335 (Fla. Dist. Ct. App. 1981); *see also* United States v. Athlone Industries, Inc., 746 F.2d 977 (3d Cir. 1984).

18. *See, e.g.*, Phil Hersh & Fred Mitchell, *Durham Is No Poor Loser: Cubs Win Arbitration, 'Bull' Gets $800,000*, CHI. TRIB., Feb. 21, 1985, at 1; *see also, e.g.*, Christine Brandt, Karen Dillon, Robert Safian, & Sara Seigle, *Major League Baseball Arbitration*, AM. LAW., Nov. 1987, at 30.

> For more years than Tommy John has pitched in the major leagues, Willkie Farr and Gallagher [a prominent New York-based law firm][19] has been the law firm that handled the owners' labor matters, sometimes to the detriment of the owners. The most noted legal-labor blunder occurred in 1975 when the owners were advised not to negotiate a settlement of the Messersmith-McNally grievance, but to let the arbitrator rule and then have his decision overthrown in court if the ruling went against them. However, the decision of Peter Seitz was upheld in court, and the free agency that followed became far more costly to the owners than it might have been.
>
> Willkie Farr does not specialize in labor law, and some owners think that has hurt them in their dealings with the union. Now, after many years, the Player Relations Committee, of which Rona is executive director, has hired a Washington firm, Morgan, Lewis and Bockius, which represents management in labor relations.
>
> "There are a number of labor lawyers there with great labor law expertise," [MLB spokesman Barry] Rona said. "Willkie Farr will continue to operate in corporate and general law and tax areas, where their strength and expertise lie."[20]

For most of the next decade, Morgan Lewis lawyers were important figures in a range of matters involving labor-management relations in the Major Leagues,[21] including the negotiation of collective bargaining agreements with the players' union (the Major League Baseball Players Association, or "MLBPA" for short) during the early and mid-1990s.[22]

MLB.COM 1994

In 1994, in a surprising exercise of techno-marketing savvy[23] Morgan Lewis registered the domain name "mlb.com." This display of web-based foresight happened a decade after the firm had begun working closely with MLB, and seven years after it had been hired as essentially MLB's chief outside labor relations counsel. Clearly, MLB did not hire Morgan Lewis solely in order to acquire mlb.com from the firm. A conventional client-lawyer relationship long predated the internet connection.

Moreover, neither side seemed to have a strong desire to move mlb.com from the law firm to its client at the time. Indeed, in an interview in 2000, an MLB spokesman recalled that, "I think we knew they had [the domain name] early on, but we didn't think much about it because the Internet was not a big thing back then."[24] Conversely, a Morgan Lewis official recalled that, "[f]rom the beginning, Major League Baseball had an interest in using the

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19. *See generally* http://www.willkie.com (discussing firm history and notable achievements).

20. Murray Chass, *Free Agency Still Key to Future Peace*, N.Y. TIMES, Oct. 15, 1987, at B17.

21. *See, e.g.*, Robert Safian, *Tom Roberts Breaks Into the Majors*, AM. LAW., May 1988, at 121; *Owners Gird for Costly Collusion Settlement*, CHI. TRIB., Jan. 18, 1990, at 3; Cusack v. Detroit Tigers Baseball Club, Inc., 956 F.2d 27 (2d Cir. 1992).

22. *See, e.g.*, Ross Newhan, *A New Man on the Point for Owners: Charles O'Connor Took Over at the Last Minute as Lead Negotiator for Baseball Management. Will His Outlook Affect the Outcome of the Talks?*, L.A. TIMES, Dec. 9, 1989, at 1; Margaret Cronin Fisk, *Names Behind the News: Batter Up: Lawyers Score in Baseball Talks*, NAT'L L. J., Apr. 2, 1990, at 10; Ronald Blum, *Finally, There's a Little Light at the End of the Tunnel*, AKRON BEACON J., Dec. 21, 1994, at C6.

23. See Gottlieb et al., *supra* note 10.

24. Blumenthal, *supra* note 6 (quoting MLB spokesperson Richard Levin and Morgan Lewis chairman Fran Milone).

mlb.com name . . . . And in the early years we weren't interested in considering that because we had just started the Web site."[25]

CONNECTIONS 1994-2000

In baseball, 1994 was something of a high water mark for Morgan Lewis. Firm partner Charles O'Connor, who had represented MLB during the 1990 spring training lockout, was again serving as counsel to MLB's labor relations arm (the MLB Player Relations Committee) as it negotiated with the MLBPA for a new collective bargaining agreement to replace the one that had expired at the end of 1993.[26] Those negotiations eventually triggered the 1994-1995 baseball strike. O'Connor and several of his colleagues at the firm played prominent roles not only in the contract negotiations but also in the related litigation in 1995, including the famous *Silverman v. Major League Baseball Player Relations Committee* case before then-Judge Sonia Sotomayor.[27]

Silverman was the second (and far less beneficial) of the two most important moments in the firm's relationship with MLB. Unfortunately for O'Connor and Morgan Lewis, management lost in *Silverman*.[28] The firm was portrayed in the media as one of the goats — or perhaps scapegoats (along with MLB labor relations executive Richard Ravitch) — of the debacle.[29] The reportage in the *Philadelphia Inquirer* was impressively thorough and well-written, but its take on the role of MLB's lawyers was not atypical of newspaper coverage at the time:

> Bill Buckner let a ground ball roll between his legs.
>
> Jim Fregosi let Mitch Williams pitch to Joe Carter.
>
> Oh, those agonizing, enduring errors of baseball lore.
>
> And now another has been added. Only this time, the guys in pinstripes who blundered were not ballplayers but lawyers — the ones representing the owners in their dealings with the union.
>
> Faulty strategy is what the judges in the Second U.S. Circuit Court of Appeals called it. The lawyer at last week's hearing in New York, Frank Casey [of Morgan Lewis], got the umpire treatment from the judges, who interrupted his presentation

25. *Id.*

26. Julie Stoiber, *Lawyer Goes to Bat for Owners: He Represents the Major-League Clubs; As a Baseball Fan, He's Eager to See the Strike Settled*, PHILA. INQUIRER, Jan. 16, 1995, at C1.

27. *See* Silverman v. Major League Baseball Player Relations Committee, 880 F.Supp. 246 (S.D.N.Y. 1995); *Baseball Talks May Resume*, N.Y. TIMES, July 9, 1995, at 7.

28. *See* Silverman v. Major League Baseball Player Relations Committee, 67 F.3d 1054 (2d Cir. 1995); *see also New Lawyer for Owners in Appeal of Injunction*, PHILA. INQUIRER, Apr. 26, 1995, at D4; ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 173-200 (1998) (reviewing the *Silverman* litigation and the entire course and consequences of the negotiations and related disputes from 1993 to 1996).

29. *See, e.g.*, *Baseball Owners to Replace Labor Lawyer*, PHILA. INQUIRER, Apr. 16, 1995, at C10; *Rangers, Tettleton Agree on 1-Year Deal*, HOUS. CHRON., Apr. 13, 1995, at 6; *see also, e.g.*, Jacques Steinberg, *Ravitch, Mayor's Choice to Run Schools, Has Extensive Public Record*, N.Y. TIMES, Sept. 17, 1995 ("While the [MLBPA] union blames Mr. Ravitch, in part, for bringing on the strike in summer 1994, David W. Sussman, the executive vice president and general counsel of the Yankees, believes he was cast unfairly as a scapegoat. Nevertheless, soon after the strike began, the owners eased Mr. Ravitch out of his lead role at the bargaining table.").

> with sarcastic retorts and accused him of 'going around in circles' and trying to confuse the court with double-talk.[30]

In the aftermath of *Silverman*, it probably was no surprise when MLB hired a new lawyer — Randy Levine, who had been serving as Commissioner of Labor Relations for New York City — to take the lead when negotiations with the MLBPA resumed in earnest in late 1995 and early 1996.[31] (Levine is now President of the New York Yankees.[32]) In another unsurprising move a few years later, both the American League and the National League retained Levine's former employer, Proskauer Rose Goetz & Mendelsohn (another prominent New York-based law firm).[33] Proskauer Rose partner Howard Ganz[34] served as lead outside counsel in labor disputes which by 1999 were beginning to boil over between the leagues and the umpires' union.[35]

These actions might have suggested that MLB's confidence in Morgan Lewis had been shaken,[36] but other actions indicated that faith in the firm had not been utterly destroyed. For the balance of the 1990s, Morgan Lewis continued to do labor-law work for the big leagues,[37] including work on the post-*Silverman* 1995-1996 collective bargaining with the MLBPA.[38] In addition, in 1998 MLB Commissioner Bud Selig hired two Morgan Lewis partners — Frank Coonelly and Robert Manfred — to serve as in-house labor relations counsel at MLB,[39] creating a long-term connection between the firm and the big leagues that remains in place today.[40]

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30. Julie Stoiber, *Philadelphia Law Firm May Have Dropped the Ball for the Owners: Judges Blasted the Strategy of the Baseball Owners' Lawyers; Will the Firm Be Benched?*, PHILA. INQUIRER, Apr. 9, 1995, at C1.

31. *See* David Firestone, *Labor Chief for Giuliani to Leave for Baseball Job*, N.Y. TIMES, Sept. 19, 1995.

32. *Yankees Front Office*, http://mlb.mlb.com/team/front_office.jsp?c_id=nyy (last visited Oct. 16, 2010). Levine is also of counsel at Akin, Gump, Strauss, Hauer & Feld LLP, yet another very big and very prominent international law firm. *See* http://www.akingump.com/rlevine/ (last visited Oct. 16, 2010).

33. *See* http://www.proskauer.com (last visited Oct. 16, 2010).

34. *See* http://www.proskauer.com/professionals/howard-ganz/ (last visited Oct. 16, 2010).

35. *See, e.g.*, Susan Hansen, *Proskauer on Deck for Baseball Owners?*, AM. LAW., Nov. 1995, at 17; Jones, *supra* note 5, at 18.

36. *See, e.g.*, *Season Opens with Replacement Umps*, ROCKY MTN. NEWS, April 26, 1995, at 8B ("The decision to replace Casey, made by the ruling executive council, signals what probably will be the phase-out of Morgan, Lewis. Several owners were angered over losing at the injunction hearing, and some want to drop Morgan, Lewis. Oral arguments on the appeal are scheduled for May 11.").

37. *See, e.g.*, Hansen, *supra* note 34; Bowen v. Workers' Compensation Appeals Board, 86 Cal. Rptr. 2d 95 (Cal. Ct. App. 1999).

38. *See, e.g.*, *Smiley an All-Star as a Replacement*, MIAMI HERALD, July 9, 1995, at 7D.

39. *See* Appellants' Brief and Appendix, Phillips v. Selig, 2007 WL 5289093 (Pa. Super. Ct. 2007).

40. *See* MLB Official Info: MLB Executives, http://mlb.mlb.com/mlb/official_info/about_mlb/executives.jsp?bio=manfred_rob (last visited Sept. 7, 2010) (identifying Robert D. Manfred, Jr. as "Executive Vice President, Labor Relations & Human Resources," and as a former "partner in the Labor and Employment Law Section of Morgan, Lewis & Bockius, LLP"); Coonelly left his position under Selig in 2007 to become President of the Pittsburgh Pirates. *See* Rob Biertempfel, *Bucs Hire Coonelly, President With a Plan*, PITTSBURGH TRIB. REV., Sept. 14, 2007; *Front Office Biographies, Frank Coonelly, President*, http://pittsburgh.pirates.mlb.com/pit/team/exec_bios/coonelly_frank.jsp (last visited Oct. 16, 2010) ("Frank Coonelly was named President of the Pittsburgh Pirates on September 13, 2007 . . . . Prior to joining the Pirates, Frank served as Senior Vice President and General Counsel of Labor in the Office of the Commissioner of Baseball . . . . Coonelly practiced labor and employment law as a Partner in the Washington, D.C. office of Morgan, Lewis & Bockius before joining the Commissioner's Office. A large part of Frank's practice consisted of the representation of Major League Baseball as outside labor counsel. In that role, Frank assisted the Commissioner of Baseball in collective bargaining and litigation matters. He also represented several individual Clubs.").

MLB.COM 2000

By 2000, MLB and Morgan Lewis had been through the trenches together. MLB had been a steady and valuable Morgan Lewis client for more than a decade, and continued to send business to Morgan Lewis even after the uncomfortable period in 1994 and 1995 when the firm spectacularly failed to carry the day for the team owners at the bargaining table and in court. Similarly, Morgan Lewis lawyers had represented them in court, the media spotlight, and taken the heat for the team owners' commitment to an unpopular and unsuccessful bargaining position in the 1994-1995 contract negotiations with the MLBPA.[41] The firm had also performed satisfactorily in other capacities as labor counsel to MLB both before and since that difficult time.

Against this background of deep disappointment and continuing collaboration, MLB began pressing Morgan Lewis to relinquish the mlb.com domain name. In the past, Morgan Lewis's control of mlb.com had not been an issue. As recently as early 1999, an official at MLB "indicated that the organization was satisfied with the current arrangement" under which Morgan Lewis used mlb.com and included on the firm's website a link to MLB's website at www.majorleaguebaseball.com.[42] By December 1999, however, MLB wanted to control mlb.com, and had begun negotiating with Morgan Lewis for a transfer.

What was Morgan Lewis to do? Ironically, this was the very firm whose experience in negotiations with organized labor,[43] had made it such a good choice for MLB back in 1987.[44] It could have damaged the relationship to negotiate with its client in 2000 over the transfer of mlb.com as it had negotiated with the MLBPA on behalf of that client

Holding out for a good price from MLB might have alienated the client. And it was a client that was building a substantial in-house legal operation (including two former Morgan Lewis lawyers) and showing a willingness, perhaps even a preference, for high-powered outside counsel from a competing firm (Proskauer Rose and its star sports labor law partner, Howard Ganz). In other words, MLB might have been willing to pay Morgan Lewis well for mlb.com if pressed to do so. But if the firm actually did demand payment, MLB could have easily walked away from its long relationship with the firm.

Of course, if MLB was already well on its way to leaving Morgan Lewis and likely to continue on its way, what else did Morgan Lewis have to lose? First, the firm would almost certainly lose any chance of holding on to MLB work, let alone winning back what it had lost to other firms or the in-house operation. Second, trying to extract top dollar from a client for an asset that had been acquired by the firm for little money but was of great value to that client was unlikely to inspire confidence toward Morgan Lewis among its other clients and prospective clients.

Finally, as the abbreviations used in this article for "Major League Baseball" (MLB) and "Morgan, Lewis & Bockius LLP" (Morgan Lewis) suggest, the transfer of mlb.com to MLB and the switch to using "morganlewis.com" by Morgan Lewis fit well with the brand-

41. *See* LEONARD KOPPETT, KOPPETT'S CONCISE HISTORY OF MAJOR LEAGUE BASEBALL 456-470 (Carroll & Graf Publishers 2004).

42. Ruth Singleton, *Morgan to Lewis to Bockius: Firm's Web Site Plays Major League Ball*, NAT'L L. J., Apr. 19, 1999, at A23.

43. *See* Jennifer Fried, *Walking the Line: Morgan, Lewis Knows How to Bargain at the Table and Battle in the Courthouse*, AM. LAW., Jan. 2004, at 99.

44. Murray Chass, *Free Agency Still Key to Future Peace*, N.Y. TIMES, Oct. 15, 1987, at B17.

marketing strategies of both organizations.[45] Thus, because Morgan Lewis would not use mlb.com itself, the firm had little or nothing to gain from the domain name other than whatever money it could extract from MLB.

In the end, as *The American Lawyer* put it, "Morgan, Lewis & Bockius made the best of a tricky situation with one of its sexiest clients, Major League Baseball."[46] The deal was consummated on September 6, 2000.

CONNECTIONS SINCE 2000

Without knowing what price MLB would have paid for mlb.com, and without access to the confidential MLB-Morgan Lewis agreement, it is impossible to ascertain whether Morgan Lewis did the right thing by (apparently) giving away a valuable domain name. A look at the MLB-Morgan Lewis relationship since then (or at least at the parts in the public record) might provide some basis for speculation about the value Morgan Lewis ended up getting for mlb.com.

To Morgan Lewis, the mlb.com deal must have initially seemed to be an excellent investment, then perhaps a fruitless one, and finally, for now, a pretty good one.

Morgan Lewis's baseball practice thrived following the September 2000 transfer of mlb.com. The firm began to play a prominent role on behalf of MLB in the important and well-publicized labor relations conflicts between the big leagues and the umpires.[47] Other work followed,[48] including an amicus brief for the Office of the Commissioner of Baseball

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45. Jim Oliphant, *Morgan, Lewis Takes On for the Team*, N.Y. L. J., Oct. 10, 2000, at 6.

46. Jones, *supra* note 5 ("The deal . . . was complicated by the fact that the two sides had long been business partners and enjoyed attorney-client privilege: Morgan Lewis has handled much of Major League Baseball's labor-negotiations work for a decade."); Monica Bay, *Yankee Stadium, Ringstrasse, Disney World, Dallas*, L. TECH. NEWS, Nov. 2000, at 16.

47. *See, e.g.*, Bonin v. World Umpires Association, 204 F.R.D. 67 (E.D. Pa. 2001); Defendant Office of the Commissioner of Major League Baseball's Memorandum of Law in Support of its Motion to Dismiss, Bonin v. World Umpires Association, 2001 WL 34898519 (E.D. Pa. 2001); Gregg v. National League of Professional Baseball Clubs, 57 Fed.Appx. 123 (3d Cir. 2003); Brief of Defendants/Appellees National League of Professional Baseball Clubs, Gregg v. National League of Professional Baseball Clubs, 57 Fed. Appx. 123 (3d Cir. 2002) (2002 WL 32818411); Major League Umpires Association v. American League of Professional Baseball Clubs, 2001 WL 34894718 (E.D. Pa. 2001); Major League Umpires Association v. American League of Professional Baseball Clubs, 357 F.3d 272 (3d Cir. 2004); Reply Brief of Appellees/Cross-Appellants, Major League Umpires Association v. American League of Professional Baseball Clubs, 357 F.3d 272 (3d Cir. 2002) (2002 WL 32819168); Memorandum of Law in Support of Motion of Defendants to Dismiss the Complaint, Major League Umpires Association v. American League of Professional Baseball Clubs, 2003 WL 23906078 (E.D. Pa. 2003); Memorandum of Law in Opposition to the Major League Umpires Association's Motion for Contempt of Court, Major League Umpires Association v. American League of Professional Baseball Clubs, 2005 WL 3724109 (E.D. Pa. 2005); Phillips v. Selig, 157 F.Supp.2d 419 (E.D. Pa. 2001); Brief & Appendix for Appellees, Phillips v. Selig, 959 A.2d 420 (Super. Ct. Pa. 2008) (2008 WL 2623632); Memorandum of Law in Support of the Motion of Defendants to Disqualify Patrick Campbell, Esquire and Phillips & Campbell, P.C., Major League Umpires Association v. American League of Professional Baseball Clubs, 2003 WL 23906093 (E.D. Pa. 2003); Memorandum of Law in Support of Motion for Summary Judgment of Defendants, Phillips v. Selig, 2006 WL 6048310 (Pa. Com. Pl. 2006); Complaint, Office of the Commissioner of Baseball v. Major League Umpires Association, 2002 WL 34447591 (E.D. Pa. 2002); *see also* Shannon P. Duffy, *Arbitrator's Call on Most Umpires Stands: Three See Their Cases Returned for Reassessment*, LEGAL INTELLIGENCER, Dec. 14, 2001, at 1.

48. Jones, *supra* note 5 ("For the time being, the firm is handling the league's garden-variety ERISA and employment work. 'We're just happy that Rob and Frank are keeping us busy with other matters,' says Steven Wall, the deputy manager of the firm's labor and employment practice group.").

filed in the Supreme Court of the United States in the case of *Major League Baseball Players Association v. Garvey*.[49]

In 2002, however, when the time came for MLB and the MLBPA to negotiate a collective bargaining agreement to succeed the one that ended the 1994-1995 strike, Morgan Lewis was not invited. Instead, Howard Ganz of Proskauer Rose was.[50] *The American Lawyer* interpreted this as an indication of how much value the mlb.com deal had for Morgan Lewis:

> The gift [of mlb.com] won Morgan, Lewis some goodwill. But it didn't permanently win over Major League Baseball (or, should we say, MLB). That became clear recently, when the commissioner's office bypassed Morgan, Lewis and tapped New York's Proskauer Rose to handle the most important piece of work to come along in a half-decade, this winter's labor negotiations with the Major League Baseball Players Association. The stakes are big. A failure to hammer out a new collective bargaining agreement could lead to a strike or lockout at the beginning of the 2002 season.[51]

While the loss of its prestigious seat at the MLB-MLBPA bargaining table must have been hard to take, it did not herald the end of Morgan Lewis's work for MLB. In the past decade, the firm has represented MLB in litigation relating to its conflicts with the umpires.[52] In recent years, MLB has also enlisted Morgan Lewis to lobby the administration of President George H. W. Bush to permit Cuba to participate in the World Baseball Classic,[53] and to represent the Major League Baseball Players Benefit Plan in federal court in Ohio.[54] Given the confidential nature of most legal work, there is no telling (from the outside) what other work Morgan Lewis may have done or might be doing for MLB.[55]

In the 15-plus years since Morgan Lewis originally registered the mlb.com internet domain name (and since the 1994-1995 MLB-MLBPA meltdown that cost baseball and its fans one World Series and parts of two seasons), the law firm and its big-league client have continued to work together. For the last decade, MLB has had (1) the probably-free benefit of Morgan Lewis's mlb.com as well as (2) the certainly-not-free benefit of the good work of the firm's labor lawyers. In return, Morgan Lewis has enjoyed the income and prestige of having MLB as a client. Would this particular lawyer-client relationship have persisted for so long, and in the face of such volatile and competitive pressures, if MLB had not received both kinds of benefits? You make the call.

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49. Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the Office of the Commissioner of Baseball in Support of the Petition, Major League Baseball Players Association v. Garvey, 532 U.S. 504 (2001) (Harry A. Rissetto, Counsel of Record, Morgan, Lewis & Bockius LLP).

50. Liane Jackson, *Play Ball: MLB Lawyers Strike a Deal*, CORP. LEGAL TIMES, Nov. 1, 2002, at 70.

51. Jones, *supra* note 5.

52. *See supra* note 47.

53. *See Looper Back with Cards for $13.5 Million, 3 Years*, CHI. TRIB., Dec. 16, 2005, at 6.

54. *See* Answer, United States v. Rogers, 558 F.Supp.2d 774 (N.D. Ohio 2008) (2004 WL 3124417); *see also* United States v. Rogers, 558 F.Supp.2d 774 (N.D. Ohio 2008).

55. *Cf., e.g., Rebecca A. Falk Attorney Biography*, MORGAN LEWIS, http://www.morganlewis.com/index.cfm/personID/52A82B22-9695-4E10-8E43-AF9969EC6A72/fuseaction/people.viewBio (last visited Oct. 17, 2010) ("Recent matters include . . . . Represented individuals employed by a Major League Baseball franchise in connection with the San Francisco U.S. Attorney's Office's investigation into steroid use and the related internal investigation conducted by the Commissioner of Baseball.").

A POSTSCRIPT IN DEFENSE OF MLB

Many news reports and editorials about MLB's acquisition of mlb.com leave the reader with the impression that if a journalist or editorialist had been in charge of the big leagues in the early 1990s, mlb.com would have been registered by MLB long before Morgan Lewis got to it. Perhaps MLB's failure to register its natural domain name early did have something to do with its "comparatively late [entry] in the game," or the "minor-league . . . quality" of its "tradition"-bound approach to the web.[56] But if so, it had some diverse and high profile company, including such marketing/self-promotion slugs as Nissan Motor Co.,[57] Planned Parenthood,[58] Madonna (the celebrity),[59] and the White House (meaning both the government operation and the National Fruit Product Company, makers of White House Apple Sauce and other delectable foods),[60] to name just a few of the more famous internet latecomers.

According to *Sports Illustrated*, when MLB and Morgan Lewis closed the mlb.com deal in September 2000, many other pillars of the sports world were still locked out of their natural homes on the internet. The list at the time included the International Olympic Committee, the NHL's Colorado Avalanche, and the Bears, Bills, Cowboys, and Saints of the National Football League, as well as the Arizona Diamondbacks and Montreal Expos.[61]

As always, wisdom after the event is easy to come by.

56. Klein, *supra* note 7; Wilder, *supra* note 9.

57. *See* Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002, 1006 (9th Cir. 2004) ("This appeal raises a number of trademark issues arising out of the use by Uzi Nissan of his last name for several business enterprises since 1980, his use beginning in 1991 of 'Nissan' as part of the name of a North Carolina computer store he owned—Nissan Computer Corp.—and his registration in 1994 of 'nissan.com' as a domain name . . ").

58. *See* Planned Parenthood Federation of America, Inc. v. Bucci, 42 U.S.P.Q.2d 1430, 1997 WL 133313 (S.D.N.Y. 1997) ("On August 28, 1996, Bucci registered the domain name 'plannedparenthood.com.'").

59. *See* Madonna Ciccone v. Dan Parisi, WIPO Case No. D2000-0847, http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0847.html (Oct. 12, 2000) (last visited Oct. 17, 2010) ("On or about May 29, 1998, Respondent . . . purchased the registration for the disputed domain name.").

60. *See* Letter from Charles F.C. Ruff, Counsel to President Clinton, to Dan Parisi, President, Infolook, Inc., http://news.com.com/2009-1023-207800.html?legacy=cnet (Dec. 8, 1997) (last visited Oct. 17, 2010) ("It will come as no surprise to you that the White House Counsel's Office is aware of your Internet Web site, 'www.whitehouse.com,' and that we object to your use of the names and images of the White House, the President, and the First Lady on that Web site to sell memberships in an adult video club."), *discussed in* Chad D. Emerson, *Wasting Time in Cyberspace*, 34 U. BALT. L. REV. 161, 186-87 & n.223 (2004).

61. *See Misdirection Plays*, SPORTS ILLUSTRATED, Sept. 18, 2000.

An Indecent Proposal? What Clamping Down on Fleeting Expletives on the Airwaves Means for the TV Industry

SHELLY ROSENFELD*

I. INTRODUCTION

"Why do they even call it 'The Simple Life?' Have you ever tried to get cow s*** out of a Prada purse? It's not so f***ing simple."[1]

—Nicole Richie, 2003 Billboard Music Awards, referencing the title of the Fox Television reality show in which she starred, "The Simple Life."

"I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** 'em."[2]

—Cher, singer, 2002 Billboard Music Awards, speaking about her career.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

—United States Constitution, First Amendment

While the Constitution's First Amendment protects freedom of speech, not all speech is exempt from regulation. Nicole Richie and Cher's brief remarks, comprising merely seconds of airtime on two live television broadcasts on Fox and its affiliates, spawned years of litigation reaching the nation's highest court. The FCC sought to punish networks for airing "fleeting expletives."[3] In April 2009, the Supreme Court ruled in favor of the FCC, in *FCC v. Fox Television Stations, Inc.*[4] In July 2010, the United States Court of Appeals for

* Shelly Rosenfeld is a licensed attorney and worked as a television anchor and reporter. She earned her LL.M. at UCLA Law School, J.D. at University of California, Hastings College of the Law, Masters of Science in Journalism at Northwestern University, and Bachelor of Arts, Political Science, Mass Communications at University of California, Berkeley. Shelly would like to thank Professor John Diamond for his guidance and feedback on this note and John Maatta for his wisdom, insightful advice, and continuous support at the CW Television Network.

1. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1808 (2009).
2. *Id.*
3. *Id.* at 1809.
4. *Id.* at 1800.

the Second Circuit ruled in favor of Fox in *Fox Television Stations, Inc. v. FCC*.[5] However, the FCC soon appealed the decision.[6] Since experts predict that the case will be finally resolved by the Supreme Court, the Supreme Court's previous ruling may be especially instructive in understanding the outcome of this issue.[7] This article will explore the Supreme Court's ruling, its analytical underpinnings, and evaluate the history of the FCC's regulation. Furthermore, the article will examine the relevant case law, including *FCC v. Pacifica Foundation*,[8] *Miller v. California*,[9] *CBS Corp. v. FCC*,[10] *United States v. Playboy Entertainment Group*,[11] and *Cohen v. California*[12] to show how the Court has balanced policing the airwaves to protect vulnerable viewers and preserving the First Amendment right of free speech.

In *Fox*, the Court ruled that federal regulators have the authority to punish broadcast networks that air isolated cases of profanity, known as fleeting expletives.[13] Fleeting expletives most often occur during a live broadcast on either radio or television. *Fox* marked a dramatic shift from the previous thirty years of broadcast indecency regulation. Before the Court's decision in *Fox*, the Federal Communications Commission ("FCC") only levied sanctions for an expletive when used repeatedly.[14] Now, the FCC can punish isolated outbursts of the "f-word" and "s-word" on broadcast TV and radio.[15]

The "fleeting expletive" rule raises important questions. First, considering the Supreme Court's decision to allow the FCC to penalize the broadcasting of "fleeting expletives," how far could this policy be taken and still remain constitutional? Given that the Supreme Court permitted the FCC to take a more activist role in the name of protection, the FCC may use this license to more actively regulate speech, thus holding the TV networks to an unreasonable standard. *Fox* could become a dangerous precedent, allowing the FCC to potentially expand the list of words considered profane. Could the expanded list include other words because they are controversial, or because they allude to a controversial topic the FCC terms "indecent?" This ruling has important implications. The Supreme Court decision has a broad reach, and thus numerous television networks filed amicus curiae briefs supporting Fox. Although the majority opinion differed, the ruling is a content based restriction on free speech.

Second, should networks be held accountable for the one-time, spontaneous utterance of a profanity during a live broadcast? In this paper, I will argue that a network should not be held responsible for an unscripted statement because it is one the network could neither anticipate nor control.. Moreover, the cost of hearing a rare expletive on television is not so dangerous that it outweighs the benefit of having a press free from such a stringent restriction. If the exclamation were unplanned, what would punishing the network prevent?

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5. Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010).

6. Joe Flint, *FCC Appeals Court Ruling on Indecency Rules*, L.A. TIMES, August 27, 2010, http://articles.latimes.com/print/2010/aug/27/business/la-fi-ct-fcc-appeal-20100827.

7. Paul Bond, *FCC Appeals TV Indecency Ruling*, HOLLYWOOD REPORTER, August 26, 2010, http://www.adweek.com/aw/content_display/news/media/e3i53445ccba5e5906e4252ae60b6a659b3.

8. FCC v. Pacifica Found., 438 U.S. 726 (1978).

9. Miller v. California, 413 U.S. 15 (1973).

10. CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008).

11. United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000).

12. Cohen v. California, 403 U.S. 15 (1971).

13. FCC v. Fox Television Stations, Inc., 129 S.Ct. 1800, 1809 (2009).

14. James Vicini, *Supreme Court Upholds TV Profanity Crackdown*, REUTERS, Apr. 28, 2009, http://www.reuters.com/article/2009/04/28/us-usa-television-indecency-idUSTRE53R41K20090428.

15. *Id.*

In order to avoid these difficult questions, the Court in *Fox* addressed a rather narrow issue: how adequate was the FCC's explanation of the decision to forbid broadcasting an expletive, even when uttered only once? The FCC claimed that its change in policy was reasonable to protect children from what the commissioners considered "'the most objectionable, most offensive language.'"[16] The rationale was that "'[p]rogramming replete with one-word indecent expletives will tend to produce children" who use them,"[17] because, the Court argued, kids copy "behavior they observe."[18] This ideal is not something the FCC has the right to promote via regulation, since there is no compelling public interest to reduce the amount of profanities expressed on television when they are isolated and fleeting.

The FCC also argued that the rule punishing fleeting expletives was predicated on the fact that bleeping technology was less expensive, so there was a lighter burden for networks to make sure no one heard a fleeting expletive. Finally, the FCC argued that the networks were on notice of this change based on Janet Jackson's wardrobe malfunction. The Court decided that the FCC's decision was not "arbitrary and capricious," [19] and its explanation of the policy was adequate. Thus, in approving the way the FCC reached its new guidelines, the Court allowed the Commission's new rule to survive.

Before further analysis, it is important to define the issue's scope: the FCC's policy only regulates the content of broadcast television—it does not apply to what is broadcast over cable (such as HBO), satellite channels, or the Internet.[20] A further limitation on the FCC's fleeting expletives rule is that broadcasters are only sanctioned for expletives between 6 a.m. and 10 p.m.[21] This is a compromise based on the Supreme Court's previous finding that adults have a First Amendment right to indecent materials,[22] balanced with the concern that children are most likely to watch television between the hours of 6 a.m. and 10 p.m.

II. INDECENCY ON BROADCAST AIRWAVES

The Communications Act of 1934[23] governs the system of broadcast licenses. The Act gives the FCC power to enforce its regulations, and thereby regulate broadcasts. Under the Act, in order to obtain and maintain a broadcast license, a broadcast licensee must operate in the "public interest, convenience and necessity."[24] Exactly what is in the public interest is open to interpretation. One of the requirements for getting a "free and exclusive use of a limited and valuable part of the public domain" is to abide by an indecency ban.[25] The consequences of violating the ban may include fines, license revocation, or prevention of license renewal.[26]

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16. *Fox*, 129 S.Ct. at 1808.

17. Jess Bravin & Amy Schatz, *Court Backs Fines for On-Air Expletives*, WALL ST. J. (Apr. 29, 2009), http://online.wsj.com/article/SB124091903135863347.html.

18. *Fox*, 129 S.Ct. at 1813.

19. *Fox*, 129 S.Ct. at 1814.

20. Jess Bravin & Amy Schatz, *Don't Read His Lips – You Might Be Offended*, WALL ST. J., April 29, 2009, at A1, *available at* http://online.wsj.com/article/SB122575539538895001.html.

21. *Id.*

22. *Id.*

23. 47 U.S.C. § 307 (2008).

24. *Id.* § 309(a).

25. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1806 (2009).

26. *Id.*

A. REGULATING BROADCAST AIRWAVES

"S***, p***, c***, f***, c***s*****, m*****f***** and t***."[27] These were the seven dirty words that comedian George Carlin famously said were not allowed on the public airwaves. These words that no one could say received plenty of discussion when the Supreme Court addressed them in *FCC v. Pacifica Foundation* thirty years ago.[28] This was the first time the Court was faced with deciding the validity of a government restriction on indecent speech. The Court upheld an administrative sanction—a fine—against a radio station that had aired Carlin's *Filthy Words* monologue in the middle of the afternoon, a time when schoolchildren would likely have an opportunity to hear a program. The Court agreed that the FCC could enforce a regulation prohibiting indecent speech against licensed broadcasters during hours children would mostly watch or listen. Indecent speech was defined as follows: "'language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs . . . .'"[29] The Court held that "contemporary standards" were to be determined by juries on the basis of their own perceptions, not by reference to nationwide standards.[30]

The Court emphasized that the speech's value "lie[s] at the periphery of First Amendment concern."[31] In *Red Lion Broadcasting Co. v. FCC*,[32] the Supreme Court held that broadcasting enjoys the most limited First Amendment protection because of limited broadcast frequencies and Congress's directive that the FCC "consider the demands of the public interest in the course of granting licenses."[33] The Court emphasized that broadcasting is uniquely "pervasive"[34] and "accessible to children, even those too young to read."[35] This means the FCC would crack down more stringently against these broadcast stations because everyone with a television set, including children, has access to them.

The *Pacifica* Court further stated that instead of a criminal prosecution against a media company, an administrative sanction would be appropriate.[36] The opinion focused on the "repeated and deliberate use of vulgar language"[37] in Carlin's comic routine. That opinion only addressed the repeated use of expletives and did not decide that "any word with a sexual or scatological origin, however used, was indecent."[38] The Court did not answer the question of whether a radio or TV network could be sanctioned for a person saying a curse word for its literal meaning rather than an exclamation. Most importantly, the Court did not decide whether "an *isolated* expletive could qualify as indecent."[39] Although the issue was left unsettled in the years following *Pacifica*, the FCC implicitly allowed fleeting expletives, rejecting viewer complaints about them. Thus, the policy of the FCC during those years

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27. FCC v. Pacifica Found., 438 U.S. 726, 751 (1978). The actual words are "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." *Id.* (quoting GEORGE CARLIN, FILTHY WORDS).

28. *Id.*

29. *Id.* at 743.

30. Miller v. California, 413 U.S. 15, 24 (1973). 413 U.S. at 24.

31. *Pacifica*, 438 U.S. at 743.

32. Red Lion Broadcasting Co. v FCC, 395 U.S. 367, 386 (1969).

33. *Id.* at 379.

34. *Pacifica*, 438 U.S. at 748.

35. *Id.* at 749.

36. *Id.* at 738.

37. *See* Bravin & Schatz, *supra* note 19.

38. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1827 (2009).

39. *Id.*

could be inferred from its conduct. The significance of this case was that the Court had to deal with the validity of a government restriction on indecent speech.

For a broadcasted statement to be deemed indecent, it must fulfill two requirements. First, the material must describe or depict sexual or excretory organs or activities.[40] Second, the "broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium."[41] To determine whether material is patently offensive, the full context of the broadcast must be considered. The factors used to evaluate the context include: (1) the explicit or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander, or is used to titillate, or is presented for its shock value.[42]

Unlike indecency, as described in *Pacifica*, there is a different test to determine whether material, like hard-core pornography,[43] is obscene. In *Miller v. California*, the Supreme Court held that material deemed obscene could be regulated in broadcast and other media.[44] In *Miller*, a man mailed adult material as an advertisement to a restaurant owner and his mother, who did not ask to receive the brochures.[45] Although the Supreme Court remanded the case for further consideration, it defined obscenity as follows:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[46]

Material found to fall within this legal definition of obscene is not protected by the First Amendment.[47] The important point to consider is context. For example, medical school textbooks often have detailed photos and descriptions of anatomy, but they also have tremendous scientific value and do not appeal to a prurient interest.[48] On the other hand, just because something is allowed in a small dose for a specific beneficial purpose, it does not mean that it is permissible in an adulterated and unregulated form—"civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine."[49]

This case is especially relevant to *Fox* for that proposition. It is one thing to have a person repeatedly utter the "f-word" multiple times while describing sexual activity. It is entirely different to say the same word suddenly, without referring to intercourse, but rather to express a sudden emotion, which by its nature, is too overpowering to be pondered. Thoughtful introspection might have prevented the use of that word, but this was not possible, given the very nature of the moment which prompted the exclamation.

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40. *Id.* at 1807.
41. *Id.*
42. *Id.*
43. Miller v. California, 413 U.S. 15, 24 (1973).
44. *Id.* at 36.
45. *Id.* at 18.
46. *Id.* at 24.
47. *Obscene, Indecent, and Profane Broadcasts*, FCC, http://transition.fcc.gov/cgb/consumerfacts/obscene.html (last reviewed Apr. 27, 2011).
48. *Miller*, 413 U.S. 15 at 24, 26.
49. *Id.* at 36.

III. INDECENCY ON CABLE TELEVISION

The Court addressed the subject of sexually explicit cable programming in *United States v. Playboy Entertainment Group*.[50] The problem was "signal bleed," incomplete scrambling that might allow children to see or hear some indecent programming.[51] The case involved a provision of the Telecommunications Act requiring cable operators who provide adult programming that is "indecent" to not provide such programming at hours when children may be in the audience, or to scramble or fully block the channel so that non-subscribers cannot receive it.[52] The Court in *Playboy* struck down the law. Although the Court assumed that the programming would be "offensive" to many and that it came "unwanted" into the home, the majority opinion reiterated that adults have a First Amendment right to view non-obscene material.

Since the restriction was content based and singled out particular cable programmers (those primarily presenting adult material), it was subject to strict scrutiny. Justice Kennedy's opinion emphasized that "[t]his case involves speech alone; and even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be established by a less restrictive alternative."[53]

The Court concluded that the availability of "voluntary blocking" at the request of parents was less restrictive than the "time channeling" mandated by the law. It made no difference that blocking required consumers to take inconvenient affirmative action. Further, even on "the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech."[54] As for the argument that adult programming is "not very important" compared to political speech, the Court said that in the past, speech "that many citizens may find shabby, offensive, or even ugly" has been vindicated because, although the Government may have a legitimate interest in regulating such speech, it must do so in a manner consistent with First Amendment principles.[55] Even presuming a legitimate interest, the less restrictive means of *Pacifica* still discourage expletives, but do not overstep constitutional bounds like in *Fox*.

IV. BANNING PROFANITY ON TV BROADCASTS: WHY WE SHOULD GIVE A $#!&

In *Fox*, the Court held that the FCC policy applied because Richie's statement "involved a literal description of excrement and both broadcasts invoked the 'F-Word' which inherently has a sexual connotation."[56] Cher's statement was deemed indecent because she "metaphorically suggested a sexual act as a means of expressing hostility to her critics."[57] "The [C]ourt gave tentative approval to government regulation of the use of even a single curse word on live television, but refused to pass judgment on whether the Federal

50. United States v. Playboy Entm't Grp., 529 U.S. 803 (2000).
51. *Id.* at 825.
52. *Id.* at 803-04.
53. *Id.* at 814.
54. *Id.* at 825.
55. *Id.* at 826.
56. FCC v. Fox Television Stations, Inc., 129 S.Ct. 1800, 1809 (2009).
57. *Id.* at 1809.

Communications Commission's 'fleeting expletives' policy is in line with First Amendment guarantees of free speech."[58] Its failure to do so was erroneous. In *Playboy*, the Court concluded that even if the government has a legitimate reason to regulate a type of speech, it cannot do so unless the rule is constitutional. The Court avoided the question of the First Amendment in *Fox* because it would likely have found that the fleeting expletives rule would not pass constitutional muster.

Additionally, the Court argued the FCC's previous "safe-harbor-for-single-words approach"[59] would make widespread use of profanity more likely. The Court reasoned that an automatic exemption for a one-time utterance would lead to increased usage, stating that "[t]o predict that complete immunity for fleeting expletives, ardently desired by broadcasters, will lead to a substantial increase in fleeting expletives seems to us an exercise in logic rather than clairvoyance."[60] However, the nature of fleeting expletives in live broadcasts is that they cannot be anticipated, like Cher and Nicole Richie's statements. The Court would therefore be asking the TV network to exercise "clairvoyance" in order to avoid a fine. Furthermore, the Court argued that the technological advances, which include mechanisms to bleep out offensive language, have made it easier to comply with the FCC's more stringent rules.[61]

Although in *Fox*, the FCC did not impose fines,[62] the network challenged the FCC ruling. The Second Circuit in *Fox* concluded that the FCC acted in an "arbitrary and capricious manner because it avoided the procedures for changing its rules."[63] The court "sent the case back to the FCC for a more reasoned explanation of its policy."[64] The Supreme Court agreed with the FCC's position and overruled the Second Circuit's ruling. The Court decided "that the agency met its burden",[65] even though "[t]he Second Circuit found that the FCC hadn't adequately explained its rationale."[66]

Fox's argument was that isolated instances of profanity were not as potentially harmful to viewers as other statements that federal regulators had traditionally deemed "indecent." The Court, however, had changed the position it held in *Pacifica*, which, as previously discussed, had avoided deciding whether any word with a sexual origin, no matter how it was used, would be indecent.[67] Instead the Court said that there was no way to divorce a curse word from its origin, arguing "[e]ven when used as an expletive, the F-Word's power to insult and offend derives from its sexual meaning."[68] In addition to Fox's other arguments, the network said that the FCC's regulation would have a "chilling effect" on

58. *It Is So Ordered: The Supreme Court's Big Decisions in the 2008-09 Term*, WALL ST. J., http://s.wsj.net/public/resources/documents/info-ScotusDecisions09.html (last updated June 29, 2009).

59. *Fox*, 129 S. Ct. at 1813.

60. *Id.* at 1814.

61. *See* Vicini, *supra* note 16.

62. David Kushner, *Analysis of U.S. Supreme Court Decision Upholding FCC's Prohibition of Fleeting Expletives*, NEWSROOM LAW BLOG (May 3, 2009), http://www.newsroomlawblog.com/2009/05/articles/indecency/analysis-of-us-supreme-court-decision-upholding-fccs-prohibition-of-fleeting-expletives.

63. Bill Mears, *Supreme Court Rules Against Networks on Indecent Speech*, CNN, (Apr. 28, 2009), http://articles.cnn.com/2009-04-28/us/supreme.court.indecent.speech_1_indecent-speech-supreme-court-federal-appeals-court?_s=PM:US.

64. *See* Vicini, *supra* note 16.

65. *See* Bravin & Schatz, *supra* note 19.

66. *Id.*

67. *See generally* FCC v. Pacifica Found., 438 U.S. 726, 746-48 (1978).

68. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1804 (2009).

broadcasters. They would have to be hyper-vigilant about even one isolated use of an expletive, in order to avoid financial punishment. Finally, the network argued that it is not for the FCC to say what is best for America's children; perhaps parents should have some responsibility in that regard.

V. RELATED CASE LAW: "CENSOR SENSIBILITY"?[69]

Regulating fleeting moments of indecency isn't just limited to sound, it also extends to images. Justin Timberlake sang the lyrics, "Gonna have you naked by the end of this song"[70] as he tore away part of Janet Jackson's outfit, leaving her "right breast . . . exposed on camera for nine-sixteenths of a second."[71] After this incident during the Super Bowl's half-time show in 2004, the FCC began to crack down on indecent content on broadcast TV.[72] The Super Bowl stunt sparked litigation, which is relevant to television networks such as the CW Television Network, whose affiliates are also governed by the FCC's rules.

After the Super Bowl's halftime broadcast, FCC issued a *Notice of Apparent Liability*, saying that CBS violated federal law and FCC rules against broadcasting indecent material, fining CBS $550,000, "the aggregate of proposed penalties against individual CBS stations."[73] In July 2008, the United States Court of Appeals for the Third Circuit ruled in favor of CBS, saying the FCC did not give broadcasters enough notice of changes to the FCC's indecency policy involving "fleeting displays of nudity, and that CBS should not have been responsible for the actions"[74] of Jackson and Timberlake. On May 4, 2009, the Supreme Court handed down a summary disposition for *FCC v. CBS*,[75] remanding the case to the United States Court of Appeals "for further consideration in light of *FCC v. Fox Television Stations.*"[76] However, the Second Circuit seems to have directly opposed the Supreme Court's decision, holding that the FCC's current policy violated the First Amendment.[77] Since the FCC policy was "unconstitutionally vague," the Court of Appeals decided the policy would lead to a "chilling effect."[78] This conflict between the nation's highest court and the most recent Court of Appeals decision further illustrates the enormous implications of how a future decision would resolve the differing judicial opinions.

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69. Cristina Kinon, *Fox's Censor Sensibility: Curses Foiled Again at Emmys*, N.Y. DAILY NEWS, Sept. 18, 2007, http://www.nydailynews.com/entertainment/tv/2007/09/18/2007-09-18_foxs_censor_sensibility_curses_foiled_ag.html.

70. CBS Corp. v. FCC, 535 F.3d 167, 172 (3d Cir. 2008).

71. *Id.*

72. *See* Vicini, *supra* note 16.

73. *CBS*, 535 F.3d at 172.

74. David Stout, *Lower Court Told to Revisit Ruling in Super Bowl Show*, N.Y. TIMES, May 5, 2009, http://www.nytimes.com/2009/05/05/business/media/05fcc.html?partner=rss&emc=rss.

75. *Id.*

76. FCC v. CBS Corp., 129 S.Ct. 2176 (2009).

77. Fox Television Stations, Inc. v. FCC, 2010 WL 2736937 (C.A.2).

78. *Id.*

VI. PRO-BONO?

"This is really, really f***ing brilliant."[79]

—Bono, a rock star with the band U2, in his acceptance speech in the Golden Globe Awards show's live broadcast in 2003.

"'I still think freedom of speech is more important than the risk that some idiot—i.e., me on that occasion—might abuse it.'"[80]

—Bono, referring to his statement at the Golden Globe Awards in 2003.

After the *Pacifica* case, the FCC didn't pay much attention to complaints against broadcasters for fleeting expletives.[81] This changed following an incident at the 2003 Golden Globe Awards when U2 singer Bono uttered an expletive, quoted above, in his acceptance speech on television. The statement led the FCC to say that a "nonliteral [expletive] use of the F- and S-Words could be actionably indecent, even when the word is used only once."[82] The FCC argued that finding the "F-word, [and] any use of that word or a variation, in any context, inherently has a sexual connotation."[83] *FCC v. Fox Television Stations* expanded *CBS* by giving regulators more latitude over the use of "dirty words" on the airwaves.

Given the brevity of the recent Supreme Court decision, the Third Circuit decision in *CBS* provides a more useful background of the issues involved. The court made numerous findings: First, the FCC did not supply notice of and a reasonable explanation of the change in policy that it used to exempt fleeting and isolated cases of expletives from indecency actions. Over the course of thirty years, the FCC's history in regulating indecent broadcast content exempted "isolated or fleeting material" from legal action.[84] This policy was still in place at the time of the 2004 Super Bowl halftime broadcast. The FCC argued that its "fleeting expletives" exemption applied only to words, and not "images." However, the court stated that although the FCC may change its policy at any time, it must supply notice of and provide a "reasoned explanation" for its policy change to the networks.[85] Because the FCC did not do this, the court of appeals found that the FCC's actions were "arbitrary and capricious."[86]

Moreover, the court held that federal law would decide whether musical performers were employees of the TV network. In this case, the court held that the performers were independent contractors of the network. The FCC argued that under the doctrine of *respondeat superior*, CBS would be liable. The court of appeals concluded that Jackson and Timberlake were independent contractors because they were hired for the limited purpose of the halftime show, and because there was no evidence that these performers considered their

79. *See* Bravin& Schatz, *supra* note 22.

80. *Id.*

81. *See* Bravin & Schatz, *supra* note 19.

82. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1807 (2009).

83. Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4978 (2004).

84. CBS Corp. v. FCC, 535 F.3d 167, 174 (3d Cir. 2008).

85. *Id.* at 175.

86. *Id.*

relationship with CBS as that of employer-employee.[87] The network, based on its duties as a broadcast licensee, was not vicariously liable for its independent contractors' actions. The FCC argued that because CBS had a tape delay for verbal statements and not for visual images, it failed to prevent the incident from being broadcast. CBS contended it neither planned nor knew of the performers' actions in advance.

While a licensee does have a duty to avoid the broadcast of indecent material through delegating that responsibility to a third party,[88] the court concluded that the FCC did not provide any evidence that a "broadcaster may be vicariously liable for the speech or expression of its independent contractors."[89] Further clarification from the FCC, the Court argued, would be necessary to determine whether it correctly decided that CBS's actions resulted in a "willful violation of indecency provisions."[90]

Given the recent Court of Appeals decision following the Supreme Court's ruling, CBS could still face the FCC's fine of $550,000 for its Super Bowl halftime broadcast. Even though the Court of Appeals ruled in CBS's favor, by ruling in favor of Fox, the FCC could still appeal to the Supreme Court. If the Supreme Court once again considers Fox, it is likely the FCC will prevail.

VII. PROPOSAL: "AIR" ON THE SIDE OF CAUTION?[91]

"[O]ne man's vulgarity is another's lyric."[92] So wrote Justice Harlan in *Cohen v. California*, where the Court ruled a man was permitted to wear a jacket bearing the "f-word," even in an area where women and children were likely to be present.[93] Just because a word is "distasteful"[94] to some, as long as it does not incite violence, it should be allowed to be said or broadcast, because it may be necessary for others to convey themselves in a specific situation.

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.[95]

Although the content in question was on the man's jacket and not on a television network, the bottom line is this: it is one thing if a network is repeatedly and intentionally airing gratuitous vulgar statements during children's programming for the mere purpose of shocking and disturbing a childhood audience. But there are times when someone, in the power of the moment, such as upon receiving an award or in protesting government action, conveys their feelings using a word not for the purpose of describing a "sexual or excretory

87. *Id.* at 200.
88. *Id.*
89. *Id.* at 199.
90. *Id.* at 205.
91. *See* Kinon, *supra* note 71.
92. Cohen v. California, 403 U.S. 15, 25 (1971).
93. *Id.*
94. *Id.* at 21.
95. *Id.* at 26.

function."[96] The Court wrote, "As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent."[97]

In his dissent to *Fox*, Justice Stevens stated that it was "ironic . . . that while the FCC patrols the airwaves for words that have a tenuous relationship with sex or excrement, commercials broadcast during prime-time hours frequently ask viewers whether they too are battling erectile dysfunction or having trouble going to the bathroom."[98]

The majority in *Fox* argued that major television networks have a several second delay for live broadcasts so that there is enough time to bleep out objectionable language.[99] But the FCC did not address the fact that smaller or independent broadcast stations, especially public broadcasters, are unable to afford "bleeping" technology and would therefore be disproportionately subject to excessive fines.[100] This could influence them not to broadcast live, local events of great public importance.[101] Stated another way, "broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies."[102] Precisely because a national news program would not cover essential community issues, local live news coverage has an important purpose. The majority in *Fox* stated that small-town broadcasters would not run a higher risk of liability for indecent statements, because, in its view, the programming that would be most likely to have fleeting expletives would be a show from a network feed, and networks are be able to afford the more expensive "bleeping" technology.

The Court did not seriously consider the danger that regulation of fleeting expletives poses for locally originated programming: "In programming [small-town broadcasters] originate, their down-home local guests probably employ vulgarity less than big-city folks; and small-town stations generally cannot afford or cannot attract foul-mouthed glitteratae from Hollywood."[103] The Court also mentioned perhaps one of the only redeeming qualities about its decision, a possible exception for fleeting expletives if they are uttered on live TV in the midst of covering breaking news:

> [Small-town broadcasters'] main exposure with regard to self-originated programming is live coverage of news and public affairs. But the [FCC's] *Remand Order* went out of its way to note that the case at hand did not involve "breaking news coverage," and that "it may be inequitable to hold a licensee responsible for aiding offensive speech during live coverage of a public event."[104]

Moreover, critics claimed that the FCC's enforcement is inconsistent: the commission allowed the TV broadcast of the movie, *Saving Private Ryan*, although the film contained the same language that Fox was reprimanded for airing. In contrast to a live broadcast, the network airing the movie knew the expletives would appear because the movie was scripted. However, the Justice Department, representing the FCC, said that the language used in the

96. FCC v. Fox Television Stations, Inc., 129 S.Ct. 1800, 1827 (2009).

97. *Id.*

98. *See* Bravin & Schatz, *supra* note 19.

99. Editorial, *You Can't Say That On Television*, WASH. POST (Nov. 4, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/11/03/AR2008110302608.html [hereinafter Wash. Post Editorial]

100. *Fox*, 129 S.Ct. at 1835.

101. *Id.*

102. FCC, 438 U.S. 726, 743 (1978).

103. *Fox*, 129 S.Ct. at 1818.

104. *Id.*

movie did not titillate or pander to the audience, which is the criterion the FCC uses to determine whether a statement is indecent.[105] Conversely, the Court argued that the movie's extreme violence actually would put parents on notice that this is a program that may include indecent language.[106]

Enforcing the Supreme Court's decision will be unpredictable because as the dissent argues, while an administrative agency is allowed discretion in determining its policy, free from being accountable to voters through elections, it can't make decisions purely for political reasons or for preferences they don't explain.[107] Networks are rather careful in making sure expletives are uncommon, so I would argue the FCC's policy before *Fox* had been effective. Therefore, the FCC should explain the necessity to overhaul this policy. The FCC should have good reason to change more than thirty years of history of not punishing networks for single-use of expletives on live TV, to instituting major fines for such actions. Furthermore, the FCC should be able to articulate the basis for the decision.

Having tougher standards is also irrelevant. The V-chip allows parents to block television programs they decide are unsuitable for children.[108] The V-Chip, in combination with ratings that indicate whether a TV program is suitable for children, gives parents enormous power in determining which television shows their children are exposed to because they can block programs with a certain rating from coming into their home.[109]

The ruling may also be irrelevant because it only applies to U.S. network television, and not to "unregulated medi[a]."[110] Although very young children may not surf the web, children who are a few years older can easily access the Internet. It is no more difficult to access live video streaming on the Internet than to access a network television show, given the pervasiveness of videos on the web, especially on web sites such as YouTube. Even Justice Thomas said that he "saw little reason to restrict broadcast speech when other media face few limits."[111] The Parents Television Council, however, argued that broadcast TV is "uniquely available to children, compared with cable, and should be protected from indecent outbursts."[112] Moreover, the Justice Department argued that the FCC wanted to "protect young viewers from the 'first blow' of offensive comments, not only from [repeated] vulgarities."[113] Instead, the FCC could mandate a more advanced warning system. For example, in addition to warning the viewers of the content of the show and suitable audience for the program before each program and in the beginning of the program with an icon, each program should have the ratings icon appear during the first twenty seconds after each commercial break. Broadcast stations are no longer scarce; "the number of over-the-air broadcast stations grew from 7,411 in 1969 . . . to 15,273 by the end of 2004."[114] With the transition from analog to "digital transmission," even more channels will be able to be broadcasted.[115]

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105. Joan Biskupic, *Supreme Court Ruling Bans Broadcast 'Fleeting Expletives,'* USA TODAY (April 29, 2009), http://www.usatoday.com/news/washington/judicial/2009-04-28-scotus-fcc-expletives_N.htm.

106. *Fox*, 129 S.Ct. at 1814, 1827.

107. *Id.* at 1829.

108. *See* Wash. Post Editorial, *supra* note 101.

109. *See* FCC, *V-Chip: Viewing Television Responsibly*, http://www.fcc.gov/vchip (last reviewed July 8, 2003).

110. Jill Serjeant, *Critics Say U.S. TV Obscenity Ruling Out of Touch*, REUTERS (Apr. 28, 2009), www.reuters.com/article/oddlyEnoughNews/idUkTRE53R7JD20090428.

111. *See* Bravin & Schatz, *supra* note 19.

112. *See* Biskupic, *supra* note 107.

113. *Id.*

114. FCC v. Fox Television Stations, Inc., 129 S.Ct. 1800, 1821 (2009).

115. *Id.*

So where does the First Amendment's guarantee of free speech come in? The Supreme Court skirted the issue by remanding for further consideration by the Court of Appeals.[116] But the dissent in *Fox* did not ignore that omission: "there is no way to hide the long shadow the First Amendment casts over what the Commission has done."[117] As opposed to Carlin's monologue in *Pacifica*, which repeatedly used vulgar language to "satirize broadcast censorship,"[118] and engage in "'verbal shock treatment,"'[119] the incidents involved in *Fox* were neither intentional nor repetitive.[120] Furthermore, the Court in *Pacifica* said that the case did not address cases involving "the *isolated use* of a potentially offensive word," which the dissent in *Fox* argued could be interpreted as leaving the prospect open that the FCC punishing a fleeting expletive would be unconstitutional.[121] The FCC in both 1978 and 1983 wrote that it understood *Pacifica's* decision to rest on the repetition of indecent words. In 1978, the FCC wrote that the First Amendment curtails the FCC's power in regulating indecency.[122]

The Supreme Court's decision in *Fox* went too far. Based on the FCC's stringent policy, a network may decide to blur or cut away to a different camera shot altogether to play it safe, in addition to cutting out the sound or bleeping a fleeting expletive. That is completely unreasonable in a live broadcast, even with a several-second delay. But that could be a reality, given the FCC's new policy, because if a viewer can see what the speaker is saying, the network could face a fine of more than $300,000 per occurrence.[123]

VIII. CONCLUSION

The FCC is now saying that there are some words that are so dangerous that even if someone says that word only once, the networks should have to pay. The agency also argues that the isolated expletives cannot be divorced from their origin. It is a foregone conclusion that young children watch television, even those too young to read. The government has felt a need to protect the youngest members of society by limiting when "indecent" words can be broadcasts, and punishing networks that air offensive content without bleeping it out. In recent years, the FCC's approach to broadcast indecency has taken a different course than the previous three decades in its treatment of "fleeting expletives." The culmination of this trend was in the *Fox* decision, which "upheld the FCC's zero-tolerance policy for the broadcast of 'fleeting expletives,'"[124] even if they were isolated and were not in the program's script. While protecting America's children from negative messages and crude language is a just cause, it is not up to the government to police the airwaves for children; it is up to their parents.

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116. *See* Vicini, *supra* note 16.

117. *Fox*, 129 S.Ct. at 1828 (Ginsburg, J., dissenting).

118. *See* Bravin & Schatz, *supra* note 19.

119. *Fox*, 129 S.Ct. at 1828 (quoting FCC v. Pacifica, 438 U.S. 726, 757 (1978)) (Ginsburg, J., dissenting).

120. *Id.*

121. *Id.* at 1833 (Breyer, J., dissenting) (quoting *Pacifica*, 438 U.S. at 760-61 (Powell, J., concurring)).

122. *Id.* (Breyer, J., dissenting).

123. *See* 47 U.S.C. § 503 (2010).

124. David G. Savage, *Supreme Court: Take Another Look at Janet Jackson Wardrobe Malfunction*, L.A. TIMES, May 5, 2009, http://articles.latimes.com/2009/may/05/nation/na-court-janet-jackson5.

Organizations such as the Parents Television Council have set up a web site providing the resource, "Family Guide to Prime Time Television."[125] It explains specific statements or scenes in previous episodes so that someone can anticipate the type of language and content that will appear. Also, for every show the Council features on its web site, they also list the local station's affiliate.[126] But perhaps the most effective way that the Parents Television Council allows concerned viewers to show their dissatisfaction and effect change in a show is by hitting the program in its pocket. The web site also features the show's sponsors and their contact information.[127] The advertiser cares about the viewers because that is their potential customer base. Thus, television shows will generally police themselves. "Self-discipline and market forces – in the form of advertisers that are often loath to be associated with off-color programs – have worked."[128] Since cable stations that run commercials are in fact not regulated by the FCC, this argument is even more powerful, since these stations often still self-censor their content. It is redundant to use valuable government resources for the frivolous purpose of having a regulatory agency decide what is appropriate for each family. These funds could be spent in a much more useful direction, such as to encourage reading in addition to television, as a source of entertainment and language development.[129]

It makes no more sense for a governmental agency to punish a network for its inability to bleep an expletive spontaneously uttered on a live broadcast, than to punish a supermarket for a grocer not blocking a child running into an aisle that sells contraceptives. The FCC's restriction is vague and too broad. While it would be acceptable for the FCC to advance directives to encourage networks to air adult programming during late-night broadcasts to make it less likely that children would watch such a show, there is a huge difference between that and sanctioning a network and its affiliates because of a guest who utters a fleeting expletive. A fleeting expletive is uttered not for its literal meaning, but rather as an exclamation of an emotional moment. It is time to scale back the FCC's overarching reach, and at the minimum, go back to the standard described in *Pacifica*.

The slight concern about what children may hear is outweighed by the need to keep the FCC in check and preserve the First Amendment guarantees of free speech. It is vital to ensure government does not curtail information or words to which people are exposed. Children, and the adults that should be supervising their children if they are concerned about what they may be watching or listening, are not vulnerable captive audiences victimized by profane images and words.[130] They have control over what they see or hear—after all, they have a remote.

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125. PARENTS TELEVISION COUNCIL, *Family Guide to Prime Time Television*, http://www.parentstv.org/PTC/familyguide/weekly.asp.

126. PARENTS TELEVISION COUNCIL, *Network Affiliate Contact Info*, http://www.parentstv.org/ptc/networks/CW_affiliatelookup.asp.

127. PARENTS TELEVISION COUNCIL, *Who Is Sponsoring?*, http://www.parentstv.org/PTC/familyguide/weekly.asp (follow the hyperlink for any show listed; then follow "Click here to find out who's sponsoring [the selected show]" button).

128. Wash. Post Editorial, *supra* note 101.

129. *See* Parents Television Council, *PTC Ranks the Best and Worst TV Sponsors of 2010* (Nov. 3, 2010), http://www.parentstv.org/ptc/news/release/2010/1123.asp (describing the best and worst family friendly advertisers); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 230 (1982) (emphasizing the role of market forces in protecting First Amendment rights of those who operate commercial stations).

130. Fowler & Brenner, *supra* note 131, at 230.

An Introduction to the Arthur Miller Dialogue on "Sports, Media and Race: The Impact on America"

ARTHUR REYNA, III

INTRODUCTION

There have been many American athletes throughout our nation's history who have chosen to do the morally right thing in the face of race-based adversity. While the individual acts of those athletes symbolized small steps in the larger process of improving race relations, the publicity that often accompanied those acts lent to iconic imagery that helped fuel the betterment of race relations in America. Simply by virtue of their projection in the media, Americans were able to draw inspiration and encouragement from those fighting for their civil rights on the public stage. American history is rife with examples in which small, initial efforts for social change were then fostered by the efforts of citizens and activists who followed the footsteps of leaders. Where Jackie Robinson began, Jim Brown, Muhammad Ali, and others during the last 60 years, picked up. Although no discussion on the intersection between race and sports in the United States can touch on all the topics of interest or address every viewpoint, this article aims to focus on several key events and individuals in America after *Brown v. Board of Education* in 1954 through the present.

CASE LAW AND LEGISLATION FROM THE CIVIL RIGHTS MOVEMENT

The Supreme Court's decision in *Brown I* (1954) declared that state laws establishing "separate but equal" public schools for black and white students were unconstitutional.[1] Specifically, it was established that de jure segregation was a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.[2]

Between 1953 and 1969, the Warren Court expanded civil rights and civil liberties with decisions like *Brown I*. In fact, *Brown* set off the Warren Court's involvement in race relations law.[3] Subsequent Court decisions soon eliminated segregation in public parks,[4] in intrastate[5] and interstate[6] commerce, recreational facilities,[7] airports,[8] libraries,[9] public

1. Brown v. Board of Education of Topeka, 347 U.S. 483, 495 (1954).
2. *Id.*
3. Robert L. Carter, *The Warren Court and Segregation*, 67 Mich. L. Rev. (No. 2) 237, 238 (1968).
4. Watson v. Memphis, 373 U.S. 526 (1963); New Orleans City Park Improvement Assn. v. Detiege, 358 U.S. 54 (1958) (memorandum decision).
5. Gayle v. Browder, 352 U.S. 903 (1956) (memorandum decision).

buildings,[10] and courtrooms,[11] among others. At the outset of the Civil Rights Movement, the Warren Court made progressive decisions that helped stimulate real change.

In *Brown II,*[12] the Supreme Court's mandate that school integration proceed "with all deliberate speed" was vague, which unfortunately allowed school districts to circumvent *Brown I* by delaying integration for nearly a decade in some cases.[13] Southern legal resistance took two forms—school closing and fund cut-off laws—that were adopted by many Southern states.[14] In Virginia, for example, the law required the governor to seize and close any school threatened with integration.[15] On the other hand, if a school reopened or was ordered to be reopened, then the state would terminate funds to all schools in that class in that district.[16] Those funds would then be directed to localities to use for tuition grants for students to attend either private or segregated schools.[17] The Supreme Court later overturned *Brown II*, but not until 1964 with their ruling in *Griffin v. County School Board of Prince Edward County* that stated, "the time for mere 'deliberate speed' has run out."[18]

As a response to the decade of resistance to integration in the American South, Congress passed the Civil Rights Act of 1964, a landmark piece of legislation that outlawed major forms of discrimination against blacks and women, including racial segregation. Indeed it was not until the passage of the Civil Rights Act of 1964 that the federal government enforced public school desegregation using fund termination enforcement provisions against schools that failed to comply with the law.[19]

BEYOND THE COURTS AND LEGISLATION: THE WATERSHED YEARS

Though important and necessary, Supreme Court decisions and legislation could not alone breed widespread societal rejection of racism. It took leaders to do that—people who personified the Civil Rights Movement in the public eye and who, while defending their own rights, acted as moral archetypes who also advocated on behalf of the American public. Given the racial climate of the 1950s and 60s, it was no surprise that the first African Americans to experience widespread exposure via the news media were athletes. Sport has a tendency to unite across race and ethnicity because athletic competition is inherently equalizing. Sport is the ultimate meritocracy wherein only ability matters, not the color one's skin. During the watershed years of the Civil Rights Movement, several key black

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6. Boynton v. Virginia, 364 U.S. 454 (1960) (application of Interstate Commerce Act).
7. Watson v. Memphis, 373 U.S. 526 (1963); Mayor & City Council of Baltimore City v. Dawson, 350 U.S. 877 (1955) (memorandum decision).
8. Turner v. Memphis, 369 U.S. 762 (1962).
9. Brown v. Louisiana, 383 U.S. 131 (1966).
10. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
11. Johnson v. Virginia, 373 U.S. 61 (1963).
12. Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).
13. *Id.*
14. Wilkinson, *supra* note 14, at 82.
15. *Id.*
16. *Id.*
17. *Id.*
18. Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 234 (1964).
19. School Desegregation and Equal Education Opportunity, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, http://www.civilrights.org/resources/civilrights101/desegregation.html (last visited May 8, 2011).

sports stars, as well as two college coaches, joined the fight against racism in America and inspired others to do the same.

JIM BROWN: THE RUNNING BACK

Jim Brown was a powerhouse of a football player who began his 9-season career in 1957 for the Cleveland Browns.[20] Once Jim began playing professionally, he soon showed himself as a leader.[21] Jim wanted to change the perception of black players. He talked with his teammates about racism, told them not to tolerate it from the team or anyone else, and instilled in them a deeper sense of racial pride.[22] Jim set the tone for the league as to how black players should carry themselves in public; he and his teammates spoke seriously and politely to the news media, and kept their partying behind closed doors.[23] He helped validate the black man in America by showing the world an athlete, an actor, an orator, and an activist.

Jim was a rare athlete who not only possessed the physical skills necessary to dominate the NFL in the 1950s and 60s, but also an intelligence, charisma, and attitude that propelled his personality, and social causes he tackled, into the spotlight.[24] He knowingly used his fame and stature to challenge the notions of American society at the time and "he did not tone down his feelings on civil rights."[25] When Muhammad Ali decided to forgo participation in the draft, Jim called the "Muhammad Ali draft summit" in Cleveland to publicly discuss Ali's anti-draft stance.[26] This was a controversial move for Jim because, after his refusal to be drafted, Ali went from being one of the most loved athletes in America to one of the most disliked,[27] and Jim put himself directly in that line of fire of public disfavor when he sided with Ali.

MUHAMMAD ALI: THE BOXER

Best known for his boxing achievements, Muhammad Ali is one of the most famous athletes of all time. But he is probably just as well-known for his activities outside the ring, particularly those that involved his role in the Civil Rights Movement. Author Michael Ezra argues that Ali began to think of himself as a "race man," or someone "whose standing up for African Americans gains widespread recognition and legitimacy within black communities," between his 1965 defeat of Floyd Patterson and his 1967 conviction for draft evasion.[28]

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20. Mike Freeman, JIM BROWN: THE FIERCE LIFE OF AN AMERICAN HERO 13 (2007).
21. *Id.* at 107.
22. *Id.*
23. *Id.*
24. Jim established the Negro Industrial Economic Union, which changed the financial fortunes of many blacks by providing loans to small businesses that otherwise would not have received them. *Id.* at 175.
25. *Id.* at 175-176.
26. *Id.* at 176.
27. *Id.*
28. Michael Ezra, MUHAMMAD ALI: THE MAKING OF AN ICON 120 (2009).

When Ali joined the Nation of Islam in 1964, many civil rights leaders disagreed with his choice.[29] The Nation of Islam was not in favor of integration, and Ali supported that view stating: "Integration is wrong. The white people don't want integration. I don't believe in forcing it, and the Muslims don't believe in it."[30] Despite Ali's radical stance on integration at the time, he was an inspiration to those involved in the movement whether the official leaders accepted him or not. One Mississippi organizer described Ali as a "beautifully arrogant young man who made us proud to be us and proud to fight for our rights."[31]

Ali's persona eventually beat out the negative public perception based on his affiliation with the Nation of Islam, which was viewed by many civil rights leaders as "ideologically reprehensible and a danger to the very cause they had dedicated their lives to."[32] Ali became more of an anti-war symbol during the Vietnam War and he effectively connected that cause with the struggle for racial equality. At a protest for fair housing in Louisville, Ali joined Dr. Martin Luther King to speak to protesters and said about the war, "No, I am not going ten thousand miles from home to help murder and burn another poor nation simply to continue the domination of white slavemasters of the darker people the world over."[33] After his official refusal to be drafted into the military, Ali was stripped of his heavyweight championship title and faced the possibility of a five-year prison sentence.[34] Ali's sacrifice illustrated his steadfast opposition to the war and galvanized supporters in the peace movement.[35] Dr. King noted, "no matter what you think of Muhammad Ali's religion, you have to admire his courage."[36]

Ali's refusal to be drafted also resulted in a conviction for draft evasion that culminated in a Supreme Court case—*Clay v. United States*.[37] In a per curiam opinion, the Court found that Ali had met the requirements to be classified as a conscientious objector[38] and stated "that the Department [of Justice] was simply wrong as a matter of law in advising that [Ali's] . . . beliefs were not religiously based and were not sincerely held."[39] While this decision vindicated Ali, it came three years after his boxing license was revoked, depriving him of his livelihood during the prime of his career. Yet the reasoning behind his decision to forego the draft was not complicated—he was simply standing up for what he believed.[40]

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29. *Id.* at 121.

30. *Id.*

31. *Id.* at 122.

32. *Id.*

33. DAVE ZIRIN, A PEOPLE'S HISTORY OF SPORTS IN THE UNITED STATES: 250 YEARS OF POLITICS, PROTEST, PEOPLE, AND PLAY 146-47 (2008).

34. Champion Cassius Clay Meet Top Negro Athletes During Negro Industrial and Economic Union in Cleveland, Ohio, UNIVERSAL NEWSREEL SPORTS (June 9, 1967), *available at* http://www.criticalpast.com/video/65675072489_Cassius-Clay_World-Heavyweight-Champion_Jim-Brown_founder-speaks.

35. Ezra, *supra* note 36, at 123.

36. *Id.* at 124.

37. Clay v. United States, 403 U.S. 698 (1971).

38. *Id.* at 700. The requirements are as follows: "(a) a showing that he is conscientiously opposed to war in any form; (b) that that opposition is based on religious training and belief; and (c) that his objection is sincere." *Id.*

39. *Id.* at 704.

40. David W. Zang, *The Greatest: Muhammad Ali's Confounding Character*, in SPORT AND THE COLOR LINE 289, 299 (Patrick B. Miller & David K. Wiggins eds., 2004).

TOMMIE SMITH AND JOHN CARLOS: THE OLYMPIC PROTEST OF AMERICAN RACISM

While Jim Brown and Muhammad Ali fought at home, two intrepid young men took the race relations fight to the international stage. Tommie Smith and John Carlos were the 200 meter gold and bronze medalists, respectively, in the 1968 Summer Olympics in Mexico City.[41] The photograph taken of them, two African American males on the awards podium with fists raised in silent protest, has become one of the most iconic of the civil rights generation. Though the International Olympic Committee condemned their actions within hours, Smith said afterward, "Black America will understand what we did tonight."[42]

The inspiration for this action came from a professor of sociology at San Jose State University, and friend of Tommie Smith, Dr. Harry Edwards. Dr. Edwards[43] helped establish the Olympic Project for Human Rights (OPHR) to protest racial segregation and racism in America.[44] The idea for the OPHR grew out of a peaceful protest against San Jose State University housing policies that Edwards tried to organize for the first home football game of the 1967 season.[45] But when word got out that local Black Panthers were planning on being more disruptive than Edwards had planned, panic spread around campus and the state of California.[46] Dr. Robert Clark, then president of San Jose State, agreed that the housing policies needed to be changed, but he was afraid of a race riot at the game regardless of what he did, so he cancelled the game.[47]

According to Smith's autobiography, "the cancellation of that football game put action behind the few scattered words about an Olympics protest;" Smith admits that some of those words came from him.[48] When he competed in the World University Games in Tokyo, a Japanese reporter asked Smith about the possibility of an Olympic boycott; Smith told him that it was being discussed and considered.[49] Though a boycott of the games never materialized, what did was the silent protest of Tommie Smith and John Carlos, which was arguably a much more succinct message than the broad strokes of a boycott would have

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41. *1968: Black Athletes Make Silent Protest*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/october/17/newsid_3535000/3535348.stm (last visited May 8, 2011).

42. *Id.* According to Smith, he raised his right fist to represent black power in America, Carlos raised his left fist to represent black unity, and together they formed an arch of power and unity. Smith wore a black scarf around his neck, which he said stood for black pride, and both men wore black socks with no shoes, to represent black poverty in racist America.

43. Dr. Harry Edwards joined the panel for the Arthur Miller Dialogue on "Sports, Media and Race: The Impact on America" held on November 11, 2011 at the University of Texas at Austin. A transcript of the panel follows this introduction.

44. *Race and Ethnicity in the Olympic Games, HLST Learning Legacies: Case Study - February 2010*, HIGHER EDUCATION ACADEMY, http://www.heacademy.ac.uk/assets/hlst/documents/olympic_sig/case_studies/CS15_RACE_AND_ETHNICITY_IN_THE_OLYMPIC_GAMES.pdf.

45. Tommie Smith & David Steele, SILENT GESTURE: THE AUTOBIOGRAPHY OF TOMMIE SMITH 158 (2008). The protest was planned partly in response to racism from landlords in San Jose regarding housing the university's African American athletes, who made up 50% of the university team rosters.

46. *Id.* at 159.

47. *Id.* Dr. Clark's actions did not stop there, and he helped secure a victory for the athletes' cause by convincing the school and the city to open up their housing policies to African American students.

48. *Id.*

49. *Id.* When Smith returned home, he was inundated with requests and calls that he take back what he said in Tokyo. Smith issued a statement through the athletic office that read in part, "From now until the Games, the events which occur in our society will probably influence the decision of many Black athletes . . . . [I]f a boycott is deemed appropriate, then I believe most of the Black athletes will act in unison." *Id.* at 160.

been. Like Muhammad Ali, these two men simply stood up for what they believed and left their indelible images on the Civil Rights Movement and the American sports landscape.

PAUL BRYANT AND DON HASKINS: THE TWO BEARS

Some coaches made choices that helped further establish integration in sports. Viewed as an icon in college football, Paul "Bear" Bryant, former coach of the University of Alabama, helped connect integration to the institution of Alabama football, a state where segregation lingered long after *Brown*.

In the late 60s, however, it was not altogether clear that Bryant's and Alabama's recruiting activities were fair to black players. On July 2, 1969, the Afro-American Student Association at the University of Alabama filed a suit in federal court.[50] The suit charged that representatives of the Alabama athletics department, which included Bryant, had not recruited black athletes with the same diligence it showed toward recruiting white players.[51]

Though the suit was eventually dropped,[52] it did foreshadow a change that was already stirring. In April 1970, Bryant met with John McKay, then coach of the University of Southern California, to ask if USC would come to Birmingham to play Alabama at home during the coming season; McKay agreed.[53] With a handshake, the two men agreed to play the first integrated college football game in Alabama during the 1970-71 season.[54]

The USC-Alabama game was one of Bryant's most famous defeats in a 38-year career with only 85 losses.[55] An Alabama crowd watched in silence as their white team was "outweighed and outmanned" by a superior black USC team.[56] Sportswriter Jim Murray wrote, "[T]he point of the game will be reason, democracy, hope. The real winner will be Alabama."[57] With this 42-to-21 loss against USC, Bryant helped set the stage to convince university administrators, who were dragging their feet on integration, to allow black players on the football team. Bryant showed the administration and fans alike that Alabama could not compete at the same level as integrated teams.

Similarly, Don Haskins—also nicknamed "The Bear"—made a coaching decision in 1966 that is viewed as the starting point for integration in college basketball. As coach of the Texas Western Miners, now the University of Texas-El Paso Miners, Haskins led the first team with an all-black starting five to a national championship.

In the championship game, Haskins played only its seven black players and beat the top-ranked University of Kentucky 72-65; the Miners finished that season 28-1.[58] When

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50. Allen Barra, THE LAST COACH: A LIFE OF PAUL "BEAR" BRYANT 358 (2005). The suit named Bryant, the University of Alabama, the Board of Trustees, and Alabama's new president, David F. Matthews, as defendants. *Id.*

51. *Id.*

52. John David Briley, CAREER IN CRISIS: PAUL "BEAR" BRYANT AND THE 1971 SEASON OF CHANGE 129 (2006).

53. Barra, *supra* note 66, at 365.

54. *Id.* at 366.

55. Mike Puma, *Bear Bryant 'Simply the Best There Ever Was,'* ESPN CLASSIC, http://espn.go.com/classic/biography/s/Bryant_Bear.html (last visited May 8, 2011).

56. Barra, *supra* note 66, at 366. USC fullback Sam Cunningham and running back Clarence Davis, both African American, performed spectacularly, running for 135 yards and scoring two touchdowns, respectively.

57. *Id.* (quoting Jim Murray, LOS ANGELES TIMES, Sept. 13, 1970).

58. http://www.baseball-statistics.com/Greats/Century/basketball-coll.htm.

questioned about the famous game years later, Haskins said, "I really didn't think about starting five black guys. I just wanted to put my five best guys on the court."[59]

In contrast, Haskins and the Miners defeated the University of Kentucky, led by Adolph Rupp, the coach who became "college basketball's leader in games won without playing a single black player in his thirty-six years."[60] Like Bryant in Alabama, after Kentucky's loss it was difficult to argue against black athletic competency. Though Kentucky had been slow to integrate until that point, the university increased the number of black players on its rosters thereafter.[61]

VIEWS OF RACISM FROM THE 1980S, 90S, AND 2000S

Though much progress was made between the 1950s and 70s, one can hardly argue that racism ceased to be an issue in America through the 80s, 90s, and 2000s. While the issues that African Americans have faced over the past thirty years were not nearly as pronounced as segregation, they were complex in their own respects. The 90s saw the passage of the Civil Rights Act of 1991, which allowed the recovery of punitive and compensatory damages for intentional discrimination in employment and the right to a jury trial in such cases.[62] This legislation represented an unfinished battle against racism, but it was hardly something that would affect a professional athlete. Instead, racially tinged events were occurring in America—such as the police beating of Rodney King and the subsequent Los Angeles riots that garnered international attention—and the voice of the African American athlete seemed to be missing from this media conversation around that time.

MICHAEL JORDAN AND THE "TRANSCENDENCE OF RACE"

In the late 1980s, Michael Jordan became the most recognized person in the world thanks to his performance on the basketball court and the myriad endorsement deals that followed. An Associated Press survey determined that he was the most popular person alive between 1987 and 1993, and he tied God as the person who black children admired most.[63] As one commentator argues, "Jordan was perceived as both black and not black, as a superior athlete and an all-American clean-cut young man who transcended race and yet was obviously an African-American."[64] This image resounded with not only America, but also the world, and promoted a positive representation of African Americans in popular media.

However, author Jack White argues that one "can hardly imagine contemporary black sports superstars taking [a] . . . brave stand on a divisive moral issue."[65] Though the civil rights issues in the 1980s and 90s were not as severe as those in the 60s, there were

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59. Iliana Limón, *Ex-Miners coach Don Haskins wasn't playing the hero during a racially charged 1966 championship, but Hollywood doesn't seem to mind*, Jan. 11, 2006, http://www.abqtrib.com/news/2006/jan/11/ex-miners-coach-don-haskins-wasnt-playing-the-a/.

60. Zang, *supra* note 54, at 297.

61. *Id.* at 297.

62. 42 U.S.C. § 1981a (2007).

63. Douglas Kellner, *The Sports Spectacle, Michael Jordan, and Nike*, in SPORT AND THE COLOR LINE 305, 313 (Patrick B. Miller & David K. Wiggins eds., 2004) (quoting Jeff Coplon, *The Best Ever, Anywhere*, N.Y. TIMES MAGAZINE, April 21, 1996, at 37).

64. *Id.* at 311.

65. *Id.* at 315. (quoting Jack E. White, *Stepping Up to the Plate*, TIME, March 31, 1997, at 90).

opportunities to speak out against racial injustice. Unfortunately, Jordan and many other black athletes did not take advantage of those opportunities like Brown and Ali did. For example, when questioned about Nike's manufacturing processes and the low wages it was paying workers in Indonesia, Jordan claimed to simply endorse the product and that it was Nike's job "to be up on that."[66] In 1992, when asked what he thought about the uprisings in Los Angeles that followed the not-guilty verdicts of the police who beat Rodney King, he replied that it was his jump shot he was more concerned with.[67]

Though there is value to Jordan's portrayal of a positive role model in the African American community, it comes at the expense of the kind of example that Brown and Ali set during the Civil Rights Movement. I would argue that given the media access available today that the voice of the black athlete is still necessary to the ongoing conversation on racial equality in America.

ATHLETES, LEAGUES, AND RACISM IN THE NEW MILLENNIUM

There have been recent examples of athletes using their access to media to comment on race, but not always in entirely positive ways. In 2010, Torii Hunter, right fielder for the Los Angeles Angels, said that Dominicans and other black Latin players are treated worse than other players.[68] Though he brought this disparate treatment to the public's attention, he also called black Latin players impostors and said that teams pursue those players because they can feign diversity with a black face on the field.[69] Hunter mentioned financial motives because a team can get a Latin player cheaper compared to an African American player from Chicago who has an agent and will not sign for less than $5 million.[70]

Though Hunter's comments are xenophobic, the reality is that more and more leagues in America, and around the world, are increasingly relying on foreign talent as teams recruit internationally. There has been discussion over the last several years surrounding foreign player limits in several sports leagues including Nippon Professional Baseball (NPB),[71] the Japanese professional league, and the Union of European Football Associations (UEFA).[72] However, American sports leagues are not subject to foreign player limits and cannot legally discriminate on the basis of race or nationality. In fact, Major League Baseball (MLB) itself did speak out against Arizona's controversial anti-immigrant bill SB 1070, calling it racist and citing the high number of Latino players in the league.[73]

The National Basketball Association (NBA), with its increasing foreign talent pool, has attempted to show it is in tune with the Latino populations in the United States through

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66. *Id.*

67. *Id.*

68. *Hunter Talks About Race*, ESPN (March 11, 2010), http://sports.espn.go.com/los-angeles/mlb/news/story?id=4983236.

69. *Id.*

70. *Id.*

71. *See generally* Ross Appel, *Head East, Young Man (And Comparatively Older Men Who Are Likely to Languish in the Minor Leagues)*, 12.1 Tex. Rev. Ent. & Sports L. 109 (2010) (examining the NPB's foreign player limit).

72. *Clubs Cautious on Foreign Players Limit*, MAIL ONLINE (Sept. 10, 2004), http://www.dailymail.co.uk/sport/football/article-317400/Clubs-cautious-foreign-players-limit.html.

73. Dave Zirin, *"This is Racist Stuff": Baseball Players/Union Speak Out Against Arizona Law*, HUFFINGTON POST (May 1, 2010), http://www.huffingtonpost.com/dave-zirin/this-is-racist-stuff-base_b_559738.html.

its Ene-Be-A and Noche Latina endeavors.[74] So while athletes may not be using their individual voices as frequently to discuss difficult and divisive issues, at least two leagues in the United States are using their media access to take stands against xenophobia and promote Hispanic cultural awareness.

LEBRON JAMES AND "THE DECISION"[75] TO CITE RACISM

LeBron James's decision to "take his talents to South Beach"[76] and play for the Miami Heat created an outpouring of both fan favor and rejection. The fallout from James's decision continued to be a topic of conversation as the 2010-2011 NBA season approached. Polls taken by ESPN showed that favorability of James as of October 2010 was split down racial lines, with blacks tending to have a favorable view of James (65.2%) compared to whites (32.6%).[77]

Additionally, "The Decision" sparked a conversation in the media between Dan Gilbert, the owner of the Cleveland Cavaliers, and James. Gilbert wrote a letter to James accusing him of betraying his hometown and posted it on the Cavaliers' website.[78] Reverend Jesse Jackson commented that Gilbert's "feelings of betrayal personify a slave master mentality."[79] Jackson stressed that James and Gilbert had an employee employer relationship, and said that Gilbert, in his letter, "[spoke] as an owner of LeBron, and not the owner of the Cleveland Cavaliers."[80]

In an interview with Soledad O'Brien, James was asked whether he thought issues of race might be connected to the rage in Cleveland and his plummeting popularity and he responded by saying, "I think so at times. It's always, you know, a race factor."[81] Author Dave Zirin agrees with James on this point and writes that it would be absurd to think "that racism doesn't shape our perceptions of controversial, narcissistic or outspoken athletes."[82] Zirin mentions the advertising industry's annual Q-rating score, which measures the likability of brands, celebrities, characters, and television shows,[83] and wrote that at the time "[t]he six least popular athletes in America are Michael Vick, Tiger Woods, Chad

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74. Noche Latina, or Latin Night, is a program "which celebrates the league's Hispanic heritage with special telecasts and in-arena festivities, including distinctive NBA team uniforms." *Noche Latina 2011 Presented by Right Guard® Schedule Tips Off March 4*, NBA.COM (March 2, 2011), http://www.nba.com/enebea/news/right_guard_noche_latina_2011_02_17.html.

75. "The Decision" was an hour-long, ad-sponsored television broadcast on ESPN where LeBron James publicly announced his decision to leave the Cleveland Cavaliers to play for the Miami Heat during the 2010-2011 NBA season.

76. *The Decision* (ESPN television broadcast July 8, 2010) (*transcript available at* http://espn.go.com/blog/truehoop/post/_/id/17853/lebron-james-decision-the-transcript).

77. Poll *Finds Public Views LeBron James Favorably After Free Agent Decision*, ESPN (Oct. 22, 2010), http://sports.espn.go.com/espn/otl/news/story?id=5708354.

78. John Krolik, *Here's Dan Gilbert's LeBron Rant Letter*, CAVS: THE BLOG (July 8, 2010), http://www.cavstheblog.com/?p=2616.

79. *Jackson Rips Gilbert's LeBron Comments*, ESPN (July 12, 2010), http://sports.espn.go.com/nba/news/story?id=5372266.

80. *Id.*

81. Dave Zirin, *The Nation: LeBron's Charge of Racism Rings True*, NPR (Oct. 5, 2010), http://www.npr.org/templates/story/story.php?storyId=130346094.

82. *Id.*

83. *The Value of Q Scores*, Q SCORES, http://www.qscores.com/Web/value.aspx (last visited May 8, 2011).

Ochocinco, Terrell Owens, Kobe Bryant, and LeBron."[84] Though these six men have been mired in controversy, so too have white athletes like Ben Roethlisberger, Brett Favre, and Tom Brady.[85] He contends that racism shapes the level of anger directed at black athletes and that it influenced "the near-lockstep hostility LeBron provoked from the sports media."[86]

Zirin mentions James' self-proclaimed goals for his life, "to be a 'global icon like Muhammad Ali' and to become 'the richest athlete in the world,'" and argues that these goals are contradictory.[87] He states that Ali became a global symbol "because of what he sacrificed—professionally, personally, financially—in the name of political principle."[88] However, despite Zirin's view that James may find it difficult to become a global icon like Ali, there exists the possibility that James can still use his image to help African Americans in other ways. Though "The Decision" was an exercise in self-aggrandizement, James made sure that several companies with whom he had endorsement deals funded the show. Companies like Microsoft, VitaminWater, and McDonald's[89] advertised during "The Decision" and helped James raise $6 million in ad revenue, which was distributed to several charities, including the Boys & Girls Clubs of America.[90] In his interview with O'Brien, James claimed that the charity was lost in the controversy; he said, "For me to have an opportunity to give back . . . I would never change that. And if I have to take heat to give back to kids, I would do it the same way every single time."[91]

CONCLUSION

From the first moves of the Civil Rights Movement in *Brown v. Board of Education* to the Civil Rights Act of 1964 and beyond, sports have helped give African Americans a voice in American society and allowed youth around the world to look toward those athletes as role models. American interest in sports has promoted racial equality and multiculturalism; as black athletes enter professional sports, they also enter "mainstream media culture as entertainment icons, as role models for youth, and as promoters (often unaware) of racial equality and integration."[92] And though Jim Brown and Muhammad Ali were well aware of the public perception of themselves as "race men," contemporary athletes on the whole do not seem as eager to embrace that activist role in the same ways as their predecessors. On the other hand, the views of the current generation on racism are different, and so too are the ways in which American athletes use their positions of power and media access to help promote positive change.

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84. Zirin, *supra* note 109.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Rich Thomaselli, *How LeBron's Entourage Got His 'Decision' on ESPN*, ADVERTISINGAGE (July 12, 2010), http://adage.com/article/news/lebron-s-entourage-decision-espn/144882.

90. Starting Blocks, The Plain Dealer, *LeBron James' 'Decision' Generated $6 Million in Ad Revenue*, CLEVELAND.COM (July 12, 2010), http://www.cleveland.com/ohio-sports-blog/index.ssf/2010/07/lebron_james_decision_generate.html.

91. Michael McCarthy, *LeBron Blames Race for Backlash to ESPN's The Decision*, USA TODAY (Sept. 30, 2011), http://content.usatoday.com/communities/gameon/post/2010/09/lebron-james-blames-race-for-backlash-to-espns-the-decision/1.

92. Kellner, *supra* note 87, at 312.

As Stetson Kennedy, longtime human rights activist and civil rights supporter, said in a 2011 interview:

> The struggle for human rights is a continuum with no beginning and no end. I don't think there's any such thing as "postracism." Racism is a phenomenon that exists not just in America but also throughout human society and history, almost without exception. But the progress of race relations in America has been very appreciable. It has turned out better in many ways than even I dared to hope for.[93]

If anyone should know how race relations have progressed in America during the last seventy years, it would be Kennedy, who was born in 1916 and infiltrated the Ku Klux Klan in the 1940s to expose their rituals and secrets to the public.[94] At the very least, we can only hope that the progress of race relations continues at the same pace that Kennedy has witnessed in his lifetime and that sports will continue to unite people as it has in the past. If so, American society may indeed prove Kennedy wrong by reaching an era of "postracism."

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93. Bill Bryson, *Busting Up the Klan and Sticking It to the Man: Stetson Kennedy Is Tyranny's Greatest Enemy*, VICE MAGAZINE (April 2011), *available at* http://www.viceland.com/int/v18n4/htdocs/busting-up-the-klan-771.php?page=1.

94. *See generally* Margaret Anne Bulger, Stetson Kennedy: Applied Folklore and Cultural Advocacy (1992) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with the University of Pennsylvania Library system) (chronicling the life and work of Stetson Kennedy).

Arthur Miller Dialogue on "Sports, Media and Race: The Impact on America"

NOVEMBER 11, 2010 – THE UNIVERSITY OF TEXAS AT AUSTIN*

Mark Updegrove: Good afternoon, I'm Mark Updegrove the director of the LBJ Library and on behalf of Michael Cramer, the director of the Texas Program in Sports and Media I want to welcome you here today for what promises to be a very stimulating program on sports, media, and race, and its impact on America. May I just have a show of hands for the folks who have been to the LBJ Library before? Well welcome back and for those of you who haven't been in here, we'd love to see you again. We have a wonderful institution here that many of you know about, but some of you don't know about, and there's lots for you to do here, and lots for you to learn here, so please come back when you have an opportunity. This is also the first of a collaboration that I hope will continue between the LBJ Library and the Texas Program in Sports and Media, so, please be looking for other things that we'll be doing together. And now it's my great pleasure to introduce Rod Hart, the Dean of Communications here at the University of Texas, who'll introduce Mike Cramer, who'll in turn introduce our panelists. Welcome again.

Rod Hart: Welcome, the Texas Program in Sports and Media is a new child of our college and of the University. The thought was that we have sports and we have Texas, how could that fail? And then you add media into it, and it seems like a perfect trifecta, and so we're getting started. It's a young program, it'll ultimately involve curricular work here at the university across disciplines, and I think we've got a number of other things that we're cooking up so I hope you'll pay attention to that. Just want to make a couple of introductions of members of our advisory council here, and I know that there at least three—Jim Ritz is here, I think somewhere. Here he is, former head of the LPGA. Chris Plonsky, Director of Women's Athletics. Steven Ungerleider, a sports psychologist, is one of the formative thinkers in this area, and we're really honored to have him. I don't know if any of the other advisory councilmembers are here, but we're indebted to them. When we announced the job for Director of the Program in Sports and Media last year, we really didn't know what we were going to get, but what we did get was just about 150 applicants from all across the country, and a great many of them said in their letters of application, that this was such a unique program and they thought that the job description had been written expressly for them, and that was said by about a hundred of the 150, and I don't know what was in their head, because we really didn't know what was in our head about it. But we went through a very painstaking process, we did phone interviews, we brought a number of people to

* The following in an edited transcript of the Arthur Miller Dialogue on "Sports, Media and Race: The Impact on America" held on November 11, 2010 in the Lyndon B. Johnson Auditorium at the Lyndon Baines Johnson Library and Museum on the University of Texas at Austin campus. The event was sponsored by the Texas Program in Sports and Media, the University of Texas at Austin College of Communication, and the Lyndon Baines Johnson Library and Museum.

campus. But one person just stood out above all the others, and that's Mike Cramer, who has had a checkered life I must admit. Started out with the fact that he is in fact an attorney, and that was really a mark against him, but then we found out that he had been, for a number of years, President of the Texas Rangers, and had been involved in any number of activities connected to sports and sports management, and has most recently come from NYU where he had been teaching sports management for a number of years, so we're really honored. It's such a privilege, to have Mike as Director for this program, and it's my pleasure to introduce him to you now.

Michael Cramer: Thank you, Dean Hart. Welcome to everyone today. This is really our first program since the Texas Program in Sports and Media was formed. We actually had a wonderful lecture last April before we were all on board with Frank Deford, but this is our first program, so it's important to us, and we love the fact that we're here in the LBJ Library and Presidential Museum and we appreciate all the help from the staff and Mark Updegrove and we really do expect that we're going to do programs together in this building and across campus and who knows maybe elsewhere. But we have a short enough program as it is that you don't need to hear me, we need to hear these folks, who came, in many cases, a long distance. I think Brian you probably flew in from the Dominican Republic today.

Brian Jones: Actually, New York.

Cramer: New York, well, from the Dominican I think, so we have a whole lot of people who have come a long distance to talk, so you don't need to hear me. So let me introduce our panel and because they have resumes that would take two and three pages of necessity, I can't introduce all of the things that they've done. I'm going to give you highlights, so we'll start with **Brian Jones** to my immediate right. Brian is a former UT football player, and enjoyed a little success in that because he went on to be a pro football player with the Oakland Raiders, and is now an employee of CBS Sports and does in-studio analysis, and you'll probably find him if you pay attention to college sports. To Brian's right we have **Dr. Craig Watkins** who many of you will know as a professor here in the College of Communication, specifically, in RTF. He is an author, he's a lecturer, he studies social media, has written a wonderful book on social media, and is a tremendous asset to the university, so there you go, there's an advertisement to sign up for his class. To his right is **Dr. Rob Fink**, who comes to us today from Hardin-Simmons in Abilene. He's written a wonderful new book that by the way, he will be signing copies of his book afterward, right after this program is done, out in the lobby, he'll be signing copies of the new book that he has written on Negro League Baseball in Texas. So if you get a chance to stop there afterward. To his right, if anyone saw the Daily Texan today, you will see his face, not once, but twice on the front of the Daily Texan, **Julius Whittier**. Julius has the honor, and really Texas has the honor of having had him here, of being the first African-American player at the University of Texas in 1969. Yesterday, I know, he addressed the members of the football team, and so Julius will see how well, what kind of advice you gave them, hopefully, tomorrow. So it's all on your shoulders, buddy. He is a district attorney in Dallas, assistant district attorney in Dallas, and attended both the graduate school of public affairs here, and the University of Texas law school, and even though I said I wouldn't linger, we're in the house of LBJ, and Julius was inspired personally in discussions with Lyndon Baines Johnson to attend the graduate school of public affairs, and then go on to law school, and I think that was pretty good advice. So, Julius. To his right, one of my friends and I hadn't seen him in several years when I left Dallas in 2004, but when I picked up the phone

and called him and asked him to come back and do this panel, it was as if we had talked just yesterday. **Talmage Boston** is a wonderful, good lawyer, so if anybody needs a good lawyer in the room and you don't want to hire Arthur, Talmage is your guy. A partner at Winstead in Dallas. He's also authored two wonderful books, and he will also be in the back signing copies of his book at the end of the panel today. He's written two wonderful books on baseball and American culture, and I've actually used one of them in a class in NYU last year, and created probably 25 book sales for him that he didn't know. So there's your fee for today, Talmage. To his right, a wonderful woman who I was just given the privilege of meeting a few weeks ago because of Talmage, former reporter for the *Washington-Post*, **Jane Leavy**. She now has a wonderful book on the bestseller list, the *New York Times* bestseller list, about Mickey Mantle called *The Last Boy*. She is the last of our authors who will also be in the back signing copies of her book today. It is a wonderful book. It's an interesting book. It makes you think about the heroes that we've had as we were children. To her right, a part-time colleague of mine at NYU over the last few years. He's been an adjunct professor there, **Ted Shaker**, former executive producer at CBS Sports. He only has, and I'm sorry you only have, but a lot of people probably have more than this, Ted, he only has 13 Emmy Awards. He saws they're all in his bathroom. I'm not sure, but Ted did a tremendous job growing CBS Sports in the 1980s and early 90s. He has a number of firsts that I don't have time to tell you about, but he did a wonderful job helping to build CBS Sports, and hopefully we'll be seeing him again here, I expect we'll be seeing him again here. To his right, an old friend of mine, that it was wonderful when he pulled in today, and I got the chance to jump out of the car to say "Hello." **Otis Birdsong**, four time, I think, NBA All-Star. Played at the University of Houston and was a consensus All-American, and actually has the distinction, not a small thing in this age of big money, of being the first million-dollar contract guard in the NBA. When we think of million-dollar players, we think of Michael Jordan, which we should, and a few other guys like Magic Johnson but the first guy to get a million dollar contract in the NBA was Otis Birdsong. He was highly thought of, he was a great teammate, played for several teams during his career and is now actively involved as a consultant with several of the professional sports leagues in the United States, and I'm glad that we got him between trips, just came back from China, I think. To his right, I have to say, this is the man that I wrote a letter to. I didn't know him, but I told him in the letter that I'll paraphrase, "Harry, I can't have this conference without you." He had to be here, he had to be part of this conversation. He's held in the highest respect across his country. Harry Edwards, **Dr. Harry Edwards**, a professor emeritus at Cal-Berkeley, has been an outspoken advocate for not just rights of African-Americans, but rights of all people, in the United States, and, just happy that he said he would be here and join this conversation. He's also a consultant, I wasn't sure if he wanted me to tell you this or not, because then we wonder "Gee, have you lost it Harry?"—he's a consultant to San Francisco 49ers, so in spite of that, he's here today, and someday they'll play well again. And to his right, another old friend of mine that it was wonderful to see today, hadn't seen him in a while, **Norm Hitzges** is, when you think of sports talk radio in the United States, certainly in Dallas, you have to think of Norm Hitzges. I think he has the distinction of being the first, full time really talk show host in the United States, and was a long-time announcer for the Rangers and several other sports. If there is a face that you can put on radio, it's Norm Hitzges because he's every man and every fan and represents the interests well of the fans in North Texas. So, Norm Hitzges. To his right, and we're down to the last two, but not the least. To his right, a scholar, gentleman from, runs the Martin Luther King Institute, **Dr. Clay Carson**. The Martin Luther King Institute at Stanford, I think that's 25 years old now, the Institute, actually formed the institute with Coretta Scott King, at her request, and has been a long-time scholar of Martin Luther King, his writings, and his research and his

thoughts. So thank you for coming all the way from Stanford. And finally, but last but not least, a woman who I met only a couple of months ago, and am thrilled. She is a UT alum, and as Ted Shaker mentioned to me today when I was, or last night, when I was describing Fran, because he didn't know Fran, his first comment when I told about **Fran [Harris]**'s accomplishments was, "Wow, she's a champion." A high school champion, an NCAA champion, the first undefeated women's NCAA team, and the only NCAA champion basketball for women's basketball at Texas in 1986, and then after several years of a layoff where I think she was goofing off a little, joined the WNBA Houston Comets, and won a championship with the Comets. So a champion at every level that she's ever played at. She's now a television host, and an entrepreneur, and somebody who I want to see more involved in the university, so there's the challenge, Fran, I'll be calling you again. Alright, and I said last but not least, but there is one other person who's probably saying, "Cramer, let's go." The moderator for today, we could have a wonderful panel with these folks, we could just sit and have coffee and it'd be worth coming, but the moderator holds it all together, and there probably is no better person at moderating a discussion like this than Arthur Miller. Arthur, I've come to know over the past several years at NYU. He's a long-time, probably what, 80 years or more you've been teaching at Harvard?

Arthur Miller: No.

Cramer: A long-time professor of law at Harvard, came home if you will, he's a Brooklyn native, came home to NYU about four years ago, and was named a university professor at NYU, is on the faculty at the law school, but one of the most distinguished legal scholars and law professors in, not just the United States, in the world. A true gentleman, also an Emmy Award-winner for moderating the Fred Friendly seminars on PBS in the 1970s, 80s, and into the 90s, and just, I couldn't think of a better person to do this, and so let's just let him go to town. I'm going to take the last seat over on the right because Arthur told me I had to do it, so I'm doing anything he said, but without further ado, Arthur Miller.

Miller: Thank you, Michael. You'll forgive me. I left my voice in Brooklyn. An amazing group of people. An amazing group of people. Let me tell you what we're going to do. Other than two people on this panel, my friend Ted and my friend Michael from NYU, I've never seen any of these people before. So we gathered together about a half hour ago, and I said, "we're going to have a bull session." To understand, anything that happens from this point on is unscripted, unrehearsed, spontaneous, and since there is a bit of an imp in me, I hope unpredictable. We're just going to have bull session and where we'll go I'm not quite sure. Now I'm stung by the fact that so many of you are so young. I guess that makes me very old. And some of these panelists very old. Normally, I would not do this, but because so many of you are so young, I think I have to give you mercifully short form, about a hundred years of history. So treat this as the comic book edition of history. In the year 1909, Jack Johnson won the heavyweight boxing title. He was the first non-Irish-American to hold that title. More importantly, he was not white. He was a revolutionary in his own way. Some people would say he was a big pain in the ass. And as a result, the law came down on him in quite clearly, an unjust way. Society was just not able to accept a black man as champion. Moving forward to the Depression, we're talking now 1929 to '36, the NFL began as an integrated league, but it decided to ban black players in the Depression, even though one of its great stars was a black man by the name of Fritz Pollard. Then on the eve of World War II, this entire country embraced two black men: Jesse Owens and Joe Lewis. They defended our national honor against Nazism, but despite that, this country would not let them sit at a lunch

counter, or ride in the front of a bus in many parts of our land. Then in '46, Paul Brown integrated the Cleveland Browns, of the then All-American Football Conference. The NFL followed suit with Kenny Washington and Woody Strode. Those of you who are movie buffs, Woody Strode, had a distinguished acting career in the following years. The NFL, believe it or not, was a minor, minor sport element in 1946. It was the next season, 1947, that Branch Ricky's Brooklyn Dodgers opened the season with Kenny Washington's former UCLA teammate, Jackie Robinson. For all of Robinson's greatness, you must remember he was an experiment. He was Branch Ricky's experiment, and it really wasn't until 1955, a year that lives in my personal infamy, since I am a Yankee fan, that the Brooklyn Dodgers, then completely integrated, defeated the all-white New York Yankees for the World Series. In 1960, at the height of the Cold War, there were three great American heroes at the Rome Olympic Games. That's only 50 years ago. There was Rafer Johnson, a very dignified track star; there was the revolutionary Cassius Clay, who we know as Muhammad Ali, and the very, very graceful Wilma Rudolph. She, of course, brought a new player to the table—women. But in the 60s, the dam really broke. In 1966, Texas-El Paso, had an all-black starting five in basketball, and they won the NCAA basketball championship against the all-white, segregated Kentucky. Arthur Ashe claimed the first US Open title in tennis. The Texas Longhorns, ironically, were the last all-white football team to win the NCAA. In '68, probably at the instigation of Harry, Tommy Smith and Juan Carlos did the Black Power salute that shocked the world. In the 70s, we had Billie Jean King defeating Bobby Riggs in a nationally televised tennis match. And so today, as you sit there, and as they sit there, you can't think of a sports team, you can't imagine a sports team without African-Americans, or think about women being excluded from sports. It wasn't always thus. And even today, very, very talented writers like William Rhoden, ask whether sports is another form of plantation, where African-Americans and women and others still toil for white, male owners. And that's our background. That's our background. So, panelists, I'm going to ask you to enter a hypothetical world with me. Let's suppose, let's just suppose that we have Jackie Robinson, Jesse Owens, Wilma Rudolph, and Arthur Ashe, and they're sitting around in heaven. We can all assume that the four of them did indeed go to heaven. And they're sitting around, and they're looking down at us. They're looking down at sports in 2010. And I just wonder what you think their reaction is to sports as we know it versus sports as they knew it. Norm, a reaction?

Norm Hitzges: I wonder if they wouldn't be astounded at how sports has changed, the money in sports, and the fact the black athlete is now so appreciated across the board in sports for his or her talent, and that the black athlete now is a necessity. It was not a necessity at their time. It was not. Many people, many, many, many people wanted nothing to do with Jackie Robinson. Many of his teammates wanted nothing to do with him. They didn't want to sit with him. They didn't want to defend him. They didn't want to do anything. He was forced upon them. I wonder now if they'd look down and say, with all the problems sports still has, isn't it amazing now the acceptance level.

Miller: You would think that would please them, that the African-American athlete is accepted, that women are accepted in sports, as legitimate sports participants? Jane, do you have a reaction?

Jane Leavy: Well, I knew Arthur Ashe pretty well, and I think Arthur would be appalled, personally, I think he would be appalled at the amount of money. I think he would be appalled at the lack of civility.

Miller: What do you mean "lack of civility?"

Leavy: Anybody watch a touchdown dance recently? Or a chest thump? Or a fist pump that comes perilously close to, like that? I mean, we don't compete the same ways that we used to.

Miller: We don't shake hands. We don't bow. We don't curtsy.

Leavy: We don't respect each other.

Miller: Why aren't those signs of respect in a different language?

Leavy: That's a very good question, Arthur.

Miller: That's why I asked it.

Leavy: I actually think that the level of the lack of respect in sports from one competitor to the other is the biggest change that I've seen, and I don't think it's racial at all by the way, I just think it's pervasive and it's corrosive.

Miller: And the money? You mentioned money.

Leavy: And it has a lot to do with the money sure. I mean, it's, when I started out being a sportswriter in 1979, I was sent to the University of Virginia on my first assignment, and I was five minutes late and I was scared to death, and I walked in and the football coach—and I hate football, I just told some people here I think it should be banned from the universe because of what it's doing to men's brains and to their families.

Miller: And you're going to announce that at the stadium on Saturday?

Leavy: Yes, I am. I walked in, and the guy looked at me and he said, "I hate Jews as a group." And I said, "Well, what about as an individual?" And he sort of went, he hadn't thought about it like that before. And then he said, "I hate women reporters. And I don't want you in my locker room." And I said, "Oh, shit, I'm in trouble." After the game, I'm standing talking to a running back, I can't remember his name, he was in the corner, he was naked, I was avoiding looking at him, which is by the way the thing you have to do, you just carry a Bic pen, you know something that will write up like this, and the weight coach came and picked me up, white guy, came and picked me up by the scruff of my neck as if I was a kitten, deposited me outside the door of the locker room. It was the beginning of money, 1979, it was just after free agency, it was when the college programs were beginning to become so fat, so squalid, and it was coincident with the influx of black people in the media—there were no black folks in the *Washington-Post* sports section when I arrived there, and I was the only woman, and we were expected, the thing we were expected to do,

was to make ourselves, if we were black, we were supposed to write white, if we were female, we were supposed to write male. It was a badge of honor to be able to write a story and have nobody be able to tell that I was a woman. Sometimes I wrote with my initials, so nobody would know, sometimes colleagues and I would switch stories and see, dare people, "Could you tell it was written by a woman? Could you tell it was written by a black guy?" And it was, that was only 1979. Now, I've come to believe that the influx, and it's still not enough, of women and of black reporters, is fundamentally changing the way we look at sports and the way we look at these people.

Miller: So in terms of my heavenly quartet, you think Wilma Rudolph would look down and smile? You say, Arthur, for Arthur Ashe, it would be a downer.

Dr. Harry Edwards: I'm having a difficult time taking this, let me just say a couple of things. First of all, there hasn't been an influx of African-Americans in sports. A couple years ago, there was a survey of 300 newspapers. Only 6.2% of the writers were African-Americans. Out of 300 sports editors, only 5 were African-Americans. When you look at baseball, I think Jackie Robinson would be appalled, I think Rachel hit it right, his widow, when she said, "This is not what we expected." We have a situation where in 1973, there was 23% African-Americans in major league baseball. Today there are 8%. Forty percent of baseball people, players, both in the system and on the field are foreign-born. Twenty-six percent of this year's baseball rosters were of Latin origin. This past season there were just as many African-Americans on the Dodgers' roster as it was the day that Jackie Robinson took the field. One. And we have to understand what is happening here. We have a situation where African-Americans are literally being phased out. The NBA, even the quintessential black sport, has the highest proportion of foreign-born players in its history. Out of 417 players, 104 of them are foreign-born, and these are not guys that are riding the bench. If you go back and look at MVPs, Nowitzki got it once, he's from Germany, Nash got it twice, he's from Canada. Kobe got it twice, but Kobe actually was raised in Italy, so when you look and see what is happening, with African-Americans in sports, we are losing ground. I knew Jackie, I knew Wilma very well. I was very close friends, Arthur and I talked two or three times a month on the phone. They would be absolutely appalled at where we are now, and this is not even counting the clownish kind of character that the media has painted of black athletes, you're either a clown or a criminal. There's nobody in between. That's another whole story, but where we are in terms of race, this is not the golden age of African-American sports participation, at any level.

Hitzges: Harry, you knew Arthur Ashe.

Edwards: Very well.

Hitzges: Would he be appalled that the goal has become to play sports, instead of the goal being self-improvement?

Edwards: No, he would not be appalled at that, because he and I probably would have had that conversation. The reality is that anyway you can get African-American youth tied into sports, since it's the last hook and hammer we have on so many of them, they have given up, they don't go to church anymore for all practical purposes. You go to an African-American

church you generally find women and their younger children. We have 40% graduation rate nationwide, and some communities it's even less than that. You look at, they've given up on mainstream economics, the underground and underworld economy have taken over so many communities, but they still want to be like Mike. So I think he would look at that, and look at whether it's a goal, whether it's an occupation, whether they think they're going to be the next Jerry Rice or LeBron James, if we can hook into them some way, there's a chance that we can begin to turn them around. You eliminate sports, and now we've lost these kids altogether. So no, I don't think he'd be appalled at the situation, I think he would look at it for what it is.

Miller: Let me get a baseball philosopher, Talmage, in here.

Talmage Boston: Harry, I'd like to ask you when you talk about African-Americans being phased out of baseball, the main thing is, for reasons that you understand I am sure, not as many African-American children are growing up playing baseball the way they did in the days of Jackie Robinson, the Negro leagues.

Edwards: Absolutely.

Boston: And so, I don't think it's a situation of where Major League Baseball has phased out African-Americans, there's just not much in the pipeline.

Edwards: Well, here, look, we can be honest when we can't be right. We need to look at the fact that what Branch Rickey did was far less about brotherhood than it was about business. They came out of World War II with a manpower and talent shortage, and here is Branch Rickey, looking over at these black teams, the Homestead Grays, the New York League Giants, and so forth, and all of this talent, not to speak of those fan dollars, and he decided, as a business arrangement, it's smart for us to move beyond this racism, not that he wasn't a caring and compassionate man, but it was business, and where we do not plug into the business we do not get the chance. This is what has been the greatest barrier to blacks becoming managers and head coaches. This is why you only find us, for all practical purposes, in the revenue-producing sports, in the college ranks. You find us in basketball and football, revenue-producing sports. You don't find us in skiing, water polo, swimming, diving, gymnastics, golf, tennis, not even baseball in representative numbers, so it was a business situation. That business situation is dissolving, and you're absolutely right. Blacks are not playing baseball. They don't even watch it anymore. The parks have degenerated in these communities which were abandoned in the wake of one-way selective integration, gangs have taken over oftentimes, kids have exchanged team colors for gang colors, so it's a combination of factors that are involved, but at the end of the day, blacks are being phased out.

Fran Harris: Arthur, before this becomes the all-male review, because I know we could easily go there, I want to say that I think Wilma Rudolph would be looking down saying, "You know there was a time in basketball when we would wait till that Easter Sunday to see that one women's basketball game, and now there's a WNBA, there was an ABL, there was a professional soccer league, so I think while there are certainly things we can lament and complain about, there are also some things that we can applaud. I'm very happy to have

been part of the WNBA and very happy that it still exists. So yeah, I mean we could talk, when we talk about money in sports, clearly we're talking about men. We're not talking about women. So that could go on and on and on and on.

Edwards: But even with regard to women, if you look at the statistics from 1995, from 2002 to the present, the number of white women involved in intercollegiate athletics, went, improved in numbers, not just the people who are already slotted, but the number of scholarships given out improved by 2,999, the number of black women improved by 326, the number of foreign-born women, the numbers improved by 1,000 over that same period of time. So the same elements that are afflicting African-American men athletes are afflicting African-American women. They, too, are increasingly in danger.

Miller: You believe that Fran?

Harris: No.

Miller: You don't believe that? You're on record as saying the balance sheet is a positive?

Jones: Isn't that more of an indictment of our educational system instead of just blaming it on the leagues and saying they are trying to phase out certain athletes?

Edwards: No, I'm not blaming it on the leagues. That's an indictment of American society. What this tells us is that something terrible is happening in the African-American community, and what I'm saying is when I look at baseball, when I look at the heavyweight championship, when I look at heavyweight boxers, from a time when it was Ali, Foreman, Frazier, Buster Mathis, Eddie Machen, Ernie Terrell, Jimmy Young, when you had Floyd Patterson, when you had Sonny Listman, when you had Archie Moore, all of those legitimate heavyweight champions between 1960 and 1975. Today, we have James Toney, Chris Byrd, and Shannon Briggs, neither one of whom you would recognize if they walked down that aisle. So what I'm saying is that when you see those kinds of deficits, that tells you not that something is just happening to black athletes, black athletes are the canaries in the mineshaft. Something is happening to black society. And in the long haul, what this means is that the issue is not just what is going to happen to the black athlete—who needs the black athlete—but who needs black people? That's what I'm concerned about.

Miller: Hang on, hang on, hang on, hang on, hang on. Otis, go ahead.

Otis Birdsong: Yes, to be fair though Harry, I know Major League Baseball hasn't done enough but we do need to let the audience, or make them aware that Major League Baseball has an initiative or program that they were going to urban communities and rebuilding those parks that you're talking about, trying to get the youth interested in baseball again. They are putting money in all of these black communities to try to get them interested in baseball again.

Jones: Well you can't force them to be interested in baseball.

Birdsong: No you can't, but at least they're trying.

Jones: I live in the Dominican Republic. I see kids playing with brooms, they're making balls out of anything they can make a baseball out of, and they're out there in the middle of the street, no shoes, no gloves, they're playing on fields that look like rocky road ice cream, and they're out there because they love baseball. Now, you can't force kids here in America to play a sport if they don't love it, they're not going to watch it. What's more appealing to them right now is basketball. What's more appealing is football. That's just the lay of the land right now, I don't think you can blame that on baseball and you can't force these kids to play a sport they're not interested in.

Miller: Rob.

Dr. Rob Fink: Kind of adding on that, I think it's a broader society change, talking about "do they love it?" Because our kids now, and Fran was talking, she coaches an AAU team, by the time the kids are 8, they're already told, "Okay, you have to specialize in a sport. You are a basketball player, you are a baseball player." And especially in basketball and baseball, you have the elite touring teams that you try out for, and it's not well I go to Little League and then I played in my high school, and you might work your way up that way, but it's by the time they're 8 or 10, they've already been told, "Okay, you're going to be good, or you're not going to make it." And so they, which, I think is, you know, what Dr. Harry was saying.

Edwards: You know I was in the Commission of Major League Baseball's office for five years on period overall. During that period of time, this was during the Al Campanis era, during that period of time I worked with John Young to establish the RIB program. Reinvigorate Baseball Program in inner cities. The issue is not just the availability of a program, even in the world of Major League Baseball, because I'm quite certain they want as much talent as they can get like any other professional sport. The issue is, the fact that you have parks, and the places that they would play, which are simply not accessible. Go back and check Willie Randolph's assessment of the Betsy Head Park where he grew up playing in Brooklyn, which he now states, and has stated on a number of occasions, is infested with crack addicts and dope pushers and broken beer bottles and it's too dangerous for anybody to go out there who is not in that business. The same thing in Oakland where I was Director of Parks for three years. The situation is so tragic that I don't care, RIB program or no RIB program, those kids are not going to go out there in those parks, and they're not going to get on the bus and cross turf where they may go and win a baseball game only to be shot on the way trying to get back home. That is where we are in terms of a lot of these situations.

Jones: Should that concern be with the local municipalities instead of Major League Baseball?

Edwards: No, it's an American problem.

Miller: Hey, Brian, I have a completely different take on this, maybe I'm not up there in heaven, maybe I'm down there, but if I hear that man right and he may punch me in the nose, in part what he's talking about is displacement. Are you angry, that there are now Samoans in football?

Jones: I have no problem with it. If you can produce, if you can play.

Miller: Should he be angry when he refers to foreign-born and what he's really saying is Hispanic?

Boston: No and getting back to the original question, the people in heaven looking down, what makes sports sports is it's the ultimate meritocracy, and I think those people would look down and say the best baseball players in the world now, as a matter of merit, are playing in the major leagues, some of them are from Latin America, and some of them are from Asia, et cetera, et cetera. Football, some of them are Samoan, some of them are coming from other places. NBA, Eastern Europe, wherever it is. And so as long as sports is in the business of having the best athletes on the field and giving them the opportunity, unlike a Jackie Robinson, where great, incredibly talented baseball players couldn't play because of the segregation, I'm satisfied. But Harry, I'm sure you think otherwise, we have a meritocracy where the greatest players are now given the opportunity in the professional leagues where some who can't even go to college because of the lack of educational opportunities, which is a social problem and an educational problem, don't know that it's a sports problem, but as long as sports is ultimately about meritocracy and the best athletes competing at the highest level, I think that's what it's about, in terms of how do we feel about sports today or is anybody being denied the opportunity who truly is a better athlete in a sport but he or she is not given a chance.

Edwards: I agree with you on that, but globalization ultimately is going to overtake us all, there's no question about that, but the issue that I'm pointing out is why at this point are we saying what we see. That's not because of globalization alone. Globalization is exacerbating the situation. The principal collapse is owing to the collapse of the infrastructure in the African-American community and knowing Arthur Ashe the way that I did, knowing Jackie the way that I did, I know while even as they applauded the globalization of baseball, they would be tremendously concerned and maybe even primarily concerned about what this says about what's happening to 31 million people inside of this country.

Miller: Julius, you broke a barrier. And I'm sure that there were some elements of pain in breaking that barrier. How do you react to what you see in 2010, knowing what it was in 1969, when you broke through?

Julius Whittier: Well, first of all, I'd like to say that I adhere to some of the ideas that Harry's putting on the table, but I can't offer any horror stories about my accepting a scholarship here at the University and coming in as the one recruited black athlete in 1969. I can't say that my career suffered from the way I was treated at the university, both in the academic disciplines as well as in football where I played. What I do agree with Harry about and I think this point is probably at the heart of really, foundationally, black culture and secondarily about our entertainment culture, which, football and sports are at the heart of,

and that is that our culture has driven the idea that, and I think probably there is some physiology somewhere that says that, you know, black kids have per person or percentage number of people, unending athletic skill that can be exploited in the professional sports, but I think that probably the more important thing is, what is happening to the black community? And I think that how we live, how we go and matriculate through school and so forth is probably an ignored idea when we talk about sports, how well they play, where they get scholarships to, what the scholarships are worth, and we're really talking about a fraction of black youth. And I think the bigger problem ought to be about how we go about structuring or restructuring the matriculation of kids in the black community through the educational process. I think that is far, far more important than worrying about who gets a scholarship.

Miller: Right. No question about that.

Boston: And that's the big problem with baseball. Because with the decline of the African-American family, so many children born out of wedlock, so many children reared in families that don't have two parents, these days, if you're going to be a baseball player, you'd better have a dad around, or you'd better have a male mentor around, who's going to play catch with you, and throw batting practice to you, you do all those things, because the pickup games are gone. Doesn't happen anymore. And so if you don't have somebody who can bring you into that world of baseball, it isn't going to happen. You're not going to be interested, as opposed to basketball. The hoop's there, the ball's here. You don't need a mentor to enjoy and develop yourself as a basketball player the way you do as a baseball player. So I think the sports angle is very definitely related to the family angle and who is it that brings people up and develops their skills at a young age.

Dr. Clay Carson: You better have some money also. Because you can't play competitive sports as a young kid, most of it is around clubs today, it's about getting enough money to actually compete, and to get coaching and get training and by the time you're 15, in a lot of sports, you're either in it or you're never going to have a hope of getting a college scholarship in it.

Miller: Clay, I want to focus you on something. I've just put a fifth person up there, in heaven, and that's Martin Luther King. And he's looking down, he's looking down, what do you think his reaction would be to the current state of sports either viewed as an African-American, or viewed as an American without qualifier?

Carson: Well I think your question and the commentary so far leads us to the basic divide in terms of discussions of sports, because it tends to be either a discussion of what I call "between the lines, on the court, on the field"—that is, if it takes place within the sport itself, that's what gets written about in the sports pages, that's what gets written about in bestselling books about sports. What Harry is getting at is the connection between sports and I think that this is what the panel is about, is the connection between sports and the rest of society. I think most people who like sports basically have this divide on the one side, it's a kind of like the Greek notion of sports as the Olympic Games, the notion of the sports champion as the ideal, the model for the society, so you have that kind of purist model of sports which, you know, that sometimes still gets written about but never really existed even

in Greece, but then you have the other model and that's Rome, sports as spectacle, sports as a distraction, a purposeful distraction so that people are not thinking about the class divides and the enormous gulf between rich and poor, sports as the plaything of the rich and the society who would go out and buy gladiators and have them compete against each other and have that represent their prestige and their role in the society, and clearly sports is something that is connected to a larger, inequitable social order, and I can imagine back in the Roman days that there were sportswriters who were talking about what happened in the latest contests between the gladiators and the tiger or whatever, and admiring the prowess of the athlete, the trainee and all of that sort of stuff, and missing completely the larger picture of the role of sport in that society, in an empire, and I think that that's what I see happening on this panel, is that there is this, you know, for example, I don't mean to focus entirely on your remarks about the, I guess you put it, the civility. When I think of these people up in heaven looking down, and have, know something about their circumstance, they didn't experience civility during their time.

Leavy: I didn't mean to imply that, what I meant. . .

Carson: Yeah, but I'm just saying that the notion that there was this kind of wonderful time before, sometime in the past, where a greater degree of civility ruled in sports, I, as a historian, I'd like to know when that time was.

Leavy: I think I did not adequately explain myself. I did not mean, I meant between individuals.

Harris: Well if you're civil, you don't get a reality show though, I mean that's, if you're civil towards each other and there's no showmanship, you don't a the reality show, you don't get a deal, you're less likely to get the endorsements, so I think what's different now is that when Arthur Ashe was playing, when Wilma Rudolph was running, first of all, who was really watching to be perfectly honest with you? I mean who was watching, and I don't mean us, but I mean in terms of sponsors and those kinds of things, so there wasn't as much to gain from, as you were mentioning, Jane, from being from chest bumping and those kinds of things. I mean, T.O. gets a reality show because he behaves that way. So, right or wrong it doesn't matter, those are the rewards and those are the perks of being an athlete today.

Leavy: What I was trying to say, and I apparently said it badly, was that I think that the sports, the way they are played, particularly professional athletes and the way it's played is a reflection of what's happened in our society in terms of lack of civility, lack of respect for each other. I wasn't making a particular point about, that was the nexus that I saw.

Watkins: So this is a panel about sports, media, society, race, and all of those different elements. I mean, there's so much going on here, and so much to say, but to this particular point, sports over the years, and this has always been the case, particularly as sports has become bigger, as the presence of media in sports has become bigger, as it has become corporatized. Sports, and we don't necessarily like to think of it in this way, but it's also theater, and performance, and what we need to understand as well is what some people see as black athletes maybe being less civil or unsportsmanlike, and sort of recognizing, right, that that camera's on, recognizing that the lights are on, recognizing that it's primetime. So

they go into character, and I think sometimes, I think we make a mistake between how they understand theater and performing in that space.

Leavy: Listen I think that white athletes behave as badly in this arena, and I would agree that it's partly theater, I wasn't specifying that it was racial, I just think . . .

Edwards: Well I am specifying that it's racial. When you look at T.O. and Ochocinco and some of these others, I mean where is the white Ochocinco? I mean where is the white T.O.? The reality is that the media, I'm less concerned about T.O. and Ochocinco and some of this other clownish and foolishness and stuff that goes on, than I am concerned about the media that projects and portrays it, and the fact that so many people in this society want to see it. Now let me say one last thing, I knew Dr. King, Dr. King was the first . . .

Miller: That's an important point.

Edwards: Getting back to your original question, Dr. King was the first national leader to endorse the Olympic Project for Human Rights, and when he came to New York for us to hold that press conference, we sat down and talked about two things. One was a debate that I had had with William L. Buckley that he thought was just outlandish, just hilarious, and the other thing was how did we get into a situation where black athletes could be this angry? I think that knowing him the way that I did and what he thought about sports, and the way he thought about sports, he would be outraged at what we see in the African-American community now and the things that these kids are coming out of. To have a situation in the African-American community, where over the first five years of the Afghanistan and Iraq Wars, just over 5,000 Americans of all genders, races, ethnicities, and so forth were killed, but over that same five years, 27,365 black men were killed by gunfire alone in African-American communities, urban centers across this country. I think he'd be appalled at that. The fact that a young black male has five times the chance of dying of gunfire in his own community, in his own city, as he would have of dying in Kabul or in the capital of Iraq. So he would be appalled at that, and he would not be surprised that we have the kinds of images being projected of black males coming out of that situation, that 48 of the 50 black athletes in the NFL who had been, quote, "troubled athletes" and suspended, were black. He would not be surprised. He would be appalled at it, but he would not be surprised.

Miller: A quick question for you, Craig. Is this a generational thing that the people you sort of study, youth, they like the displays, the Ochocincos, the T.O.s, whereas Jane's generation, the old fogeys, they don't buy into it?

Dr. Craig Watkins: I think clearly there is a sort of generational, you know, dynamic. I write about sort of these issues, and I've written about hip hop culture for example, and what we haven't necessarily talked about today is how elements of hip hop culture have kind of, you know, from some perspective, sort of invaded the sports world. From other perspectives, right, sort of revived the sports world. So it's kind of if you like it or dislike it, that sort of depends, but it's clear, right, that a different type of athlete is now entering both collegiate athletics and professional athletics. They come from a different culture, they come from a very different disposition, and so you do have a community . . .

Boston: Than who?

Watkins: I'm sorry?

Boston: Different than who?

Watkins: Different in sort of prior generations of athletes. So what we see in today's athletes is in some ways, right, this kind of embrace of a kind of hip-hop culture, a kind of hip hop aesthetic, that is oftentimes sort of in its own sort of unique, stylized way anti-establishment, in its own unique sort of interesting way sort of creative, but very important, sort of expressive, and sometimes expressive in ways that some don't understand. And I think what has happened is some sports leagues have embraced that. The NBA, at least once upon a time they did, and then when it began to tilt too far, they implemented dress code. When it began to tilt too far, they began to start establishing what they considered greater discipline to protect the brand, and how it's being projected. But other leagues have sort of rejected those kinds of cultured sensibilities and I think that's part of what you see in baseball. They never once embraced hip hop. You never saw Major League Baseball incorporating hip hop and rap and these kinds of artistic expressions into the way it branded the sport, the way it marketed the sport. So I think in some ways, it's sort of, young people looking at that, right? They understand that, they feel that, right? And they sort of perhaps develop a perspective that maybe this sport isn't as open or isn't as sort of willing to accommodate, right, the kinds of expressive behaviors that we like.

Jones: But what that athlete fails to understand is that he's going to be a retired athlete, or she's going to be a retired athlete, longer than she's going to be an active athlete. So how far can that caricature carry them? That's the one question they have to ask themselves.

Watkins: And let me say one other thing, and you know I don't write as much about hip hop today because I write more about sort of social media and digital media, and there's a whole sort of element here in terms of how social media is transforming the sports world that we may or may not get a chance to talk about today, but when I write about hip hop, you know something happened to hip hop in the late 1980s and early 1990s. Record companies sort of discovered that it wasn't just black kids buying rap music, it wasn't just black kids who were sort of embracing hip hop, and who were sort of consuming hip hop, in fact it was more often than not, white kids, young white suburban males. And so what you had, right, was this transformation of the culture, the way it's been packaged and marketed, so when I think of your question, a lot of the ways in which hip hop has been sold, not only to kids in this country but around the world, has been sold primarily using black culture, using black style, using black expression, but packing it primarily, I think, for white consumption, and that's what we've seen happening in music, we've seen it happening in other industries, we've certainly seen it happen in sports as well.

Miller: I want to get two other disciplines in, both of which have been sort of mentioned. Now, you've taken a few body blows here, Mr. Shaker.

Ted Shaker: I think I should go out on the bus.

Miller: You're an unindicted co-conspirator. It's the media that everybody is pandering to.

Shaker: Right.

Miller: In other words, we could start this in terms of why are you showing some of the things that Jane thinks are uncivilized. Or you could go all the way over to any of the things that have occurred since Jackie Robinson appeared on the scene, have occurred without the media. What's your contribution or deduction from the situation?

Shaker: Well, I mean, this is a fascinating conversation. I have tremendous respect for Dr. Edwards and what he has done in his career. I deal in images. My work, my adult life has been images, and trying to put images up that cover the story, you know, of the event. Now, I think that we have made progress. I mean, to listen here, it's like we didn't make any progress. If those four or five, how many people you put up there in heaven, are all disappointed, appalled, by what's happening here, I'm disappointed to hear that, because I think there's a role that sports has played to where when we see on our TVs, in our living rooms, this team playing, and we see this athlete who is an African-American, or this athlete who is Hispanic, or this athlete who is white, people don't see that color so much anymore, and I think sports has done that.

Carson: I think it comes back to a misunderstanding about what Dr. King and the movement was all about. It was not just about breaking down the barriers. I think that's the part that gets emphasized, you know, that it was one, and they would be applauding the fact that barriers that kept Jackie Robinson from playing in the major leagues no longer exist. But it was also about what happens after the barriers have been broken. King was a critic of American society, as it is, and not as it was, but as it is. You know, his last campaign was not about breaking down the barriers, his campaign was about poverty in America. That was the central focus, and he would be even more concerned about that today than he would be in 1968. So I think that, and often part of the role, and I guess this gets to the question of the displays. Athletics today is also about personality, and it's about what can be sold as a commercial product. It's never been the case that what is sold is simply what goes on between the lines. What is sold is, and back in the day, it might have been a coach, it might have been Bear Bryant, it might have been Red Auerbach. And if they were around today, the cameras would be focused, as they often are, on the sidelines, at some ranting coach doing his thing. What happened is that you had a generation of black athletes who came in who said, "I am not going to be the sideshow. I am going to be the center of attention." People don't want to go to see basketball and see the coach on the sidelines, they go to see Kareem Abdul-Jabbar back in his time, and there's been this struggle between the athlete and the structure of sports over who gets the attention. When dunking came in, that was about the same time that basketball got integrated at the college level. What did they do? It was too much of a display. It somehow violated the decorum of basketball, so they banned it.

Boston: Well and also dunking, well that's a competitive advantage. And so they banned it.

Carson: No, they banned it because black athletes did it. That was the reason why.

Shaker: I became the executive producer of the NBA on CBS in 1982. I was 30 years old, and I was the last guy to be asked to do it because no one else would, because people were giving up on the NBA then. It was the year before David Stern became the Commissioner, he was Executive Vice President then.

Edwards: And what David did was brilliant. He marketed, he found out how to market the sport.

Shaker: But I want to tell you, I was his partner in this.

Edwards: And having marketed it, he had to put a face on it, and the media was the perfect medium to project that and that's what CBS did.

Shaker: I'd agree, and so what we did, was we had, I remember reading a story in the *Washington Post* written by a guy named Norman Chad, who was a critic, and he's a hilarious guy, but anyway he's a tremendous writer, and he wrote about how, what inner-city kids are seeing on TV, all they see are some players. They don't see coaches. They don't see owners. They don't see announcers on TV. They don't hear announcers on radio, who are non-white. And so what we did at CBS Sports is we began to hire people that we thought could do a really good job, calling games, not just analysts, okay, so, you know 1984, it was a game in San Francisco, it was a game, you got the Warriors playing the Lakers. The host of the program was James Brown. The play by play of the program, of the game, was Greg Gumbel. The analyst of the program was Quinn Buckner.

Edwards: Terrible crew. Absolutely horrid.

Shaker: And they never worked again! No, but the point is, we tried then, and we're talking almost thirty years ago.

Harris: But I have to ask you, those who've watched announcers, I've listened to the three people you have. Could a Deion Sanders, someone as flamboyant and showy as a Deion Sanders, have been named to your broadcasting team?

Shaker: I wouldn't have done it.

Harris: Okay.

Miller: Why?

Shaker: Because he's drawing more attention to himself than covering the event.

Miller: But Terry Bradshaw is a clown.

Shaker: Ehhh.

Harris: You hired three black guys who would fit into, they were like chocolate-covered white guys, kind of.

Shaker: Yeah.

Harris: Basically. They would have no flavor, no flair.

Shaker: Do you say that about Dan Jenkins?

Harris: What's that?

Shaker: Do you say that about Dan Jenkins, or Len Elmore? Do you say that?

Harris: Len's gotten better, yeah, and Clark Kellogg, I love. He, his personality is into it a little bit more, but my point is yeah, you hired three black guys, but you hired three black guys who, if you closed your eyes, you couldn't tell them apart.

Miller: But Fran, Fran, in the moment he did it, he did it. Now, you're among friends, Ted.

Shaker: I'd like to think so.

Miller: I want to know. I want to know. Did you do it for business, or did you do it for principle?

Shaker: Probably a bit of both, but to me, going back to Norman Chad's story, where he said there are these kids in the inner cities, who watch these games, sports is great to them, this is one of the ways they see to get out of their situations is to play the games. And then a little bit more as time goes on, maybe to be an analyst of the games. So what my point of view was, and we did this in every sport we covered, starting there, was to put a variety of different people, women. Lesley Visser, hosting the Super Bowl, the post-game, you know, where they present the trophy and all that stuff, maybe one of the highest-viewed moments of the year, Leslie Visser was the host, okay? So they could see it, and people at home would say, "Okay, I can do that, too."

Miller: You look at the CBS, and the Fox. You know, the NFL Today kind of program, that twelve to one.

Shaker: Yeah, yeah.

Miller: That's out of central casting, right? You got a black host?

Shaker: Right.

Miller: You got a broken-down white quarterback, hmm?

Shaker: Right.

Miller: You got a black jock, hmm?

Shaker: Right.

Miller: And then you've got a coach who either has a beard or slicked-down hair. But there's no woman.

Shaker: There's probably someone out there who's being a contributor to the piece in some fashion . . .

Watkins: Ted-

Shaker: Let me finish one thing. What I will say is, I don't think the medium pushes itself. I don't think the medium is looking to improve. I think the medium is safe, too safe, I think some of us made some real progress. I'm really proud of what I did.

Watkins: Ted, I know during the period that you were at CBS, I think at least history suggests that that was really sort of a troubled period for the NBA. There was a perception that it was too black.

Shaker: Hugely so.

Watkins: There was a perception that it was a drug-infested league.

Shaker: Absolutely.

Watkins: There was a perception that it was a sport that you couldn't sell.

Shaker: No one would play until the last two minutes of the game.

Watkins: And I'm wondering . . .

Shaker: And so what we did with David Stern is we tried to find ways to prick holes in all those things, and the sport in the 80s became, had greater growth than any other sport on television.

Edwards: The thing that saved basketball in the 80s was Larry Byrd and Magic Johnson. That's what saved it.

Miller: And Michael Jordan.

Edwards: And Michael Jordan came along and picked it up after that. Progress is like profit. It's a very tricky concept. It depends upon how you're keeping the books. What a lot of people think was progress was point in fact, merely change. We also tend to get caught up on stuff at the end of the day that really doesn't matter, like there was a huge outcry, in some sectors of the African-American community by David Stern's thing on the clothing deal, on where the guys would come, and all David was really saying, as I told brother here backstage, you don't have to come in here looking like you were dressed by Brooks Brothers, but don't come in here looking like you was dressed by Ringling Brothers. We're running a business here.

Shaker: Was that a positive or a negative?

Edwards: It was just that simple.

Watkins: But what I found interesting about that, Harry, was the fact that for much of Stern's so-called revival, and coming in and saving the League, that much of that was predicated on incorporating elements of the very thing at that moment that he was policing in saying, "Hey, we no longer want in this league." But it's to say that the way in which the NBA marketed itself, they embraced hip hop. The long shorts, the black-soled shoes, I mean all of that.

Edwards: I've had this conversation with David.

Watkins: And so my point is, it was in some respect for at least some of us who sort of grew up respecting hip hop, vibing with hip hop, it was in some ways a kind of a slap in the face, and I get you in terms of Brooks Brothers and Ringling Brothers, I understand that, but all I'm saying is that it seemed to smack of kind of a contradiction.

Jones: How is that a contradiction if you go to a place of business with your pants hanging off your ass? How is that going to further you once you get out into the real world?

Birdsong: I agree, as a former NBA player, it was embarrassing.

Edwards: What people don't realize is that all of this stuff, including a lot of the elements of hip hop, come as a consequence of prison culture. When you lock up, when 43% of the people in prison are black men in this country, and this country locks up a greater proportion, and a greater number, of its citizens than any other nation on earth, including China, which has six times the people, and you're releasing them back into the community, it's only a matter of time before prison culture hijacks traditional black culture, which is what has happened. This is what the tattoos are about. This is what the pants down cross the ass is about. And so at the end of the day, David was trying to police something that was already out of hand, and that he felt compelled to embrace in order to be able to market the sport, but he tried to put the brakes on it with the guys coming in with the baggy pants, and the hats on sideways, and the do-rags underneath, and sitting on the end of the bench when they couldn't play, but that was no contradiction.

Watkins: But Harry, back in, and this is out of respect, but back in 1965, '66, '67, '68, when you guys are wearing the goatee, when you guys are sitting in the afros, what were people saying about you?

Edwards: Yeah, but you know what, not only did I cut my afro off, I cut it all off, but you stuck with them tattoos. I mean, them tattoos are there. When you got a guy running around out there during the playoffs with a big set of lips on his neck, I'm telling you, you got an issue there that the league has to deal with.

Watkins: So what's the issue? That you can no longer sell this sport to the clientele and to the audience that you most desire.

Edwards: Look, we understood exactly what the 1960s were about, and there are parallels. I'm convinced that if T.O. and Ochocinco and Randy Moss were around in the 1960s they'd have been right there with me and John Carlos and Kareem and some of the other guys who were saying, "We don't understand why we should be playing where we can't work." There's no question about that. But this is the 21st century. We've got to begin to deal with these problems, and quit trying to cram these issues into old paradigms and obsolete perspectives.

Miller: Alright, alright, alright. I have unlimited power out here. There've been various references, it's almost like a continuing melody, and it's about business. You exploiters. Think of yourself as you once were, an owner. Management. A big shot, and all of that. And now you're being told that basically you guys, you white guys, are running a plantation. That all of this is about business. And it's exploitation of the slaves. And it really bubbled up just a few months ago when LeBron went from the Cavaliers to Miami, when Dan Gilbert blasted LeBron as a traitor to Cleveland, which seems to me like an oxymoron, how you can be a traitor to Cleveland, and then Jesse Jackson exploded on this plantation theme. That

Gilbert was the slave owner, and LeBron was a $40 million slave. Is that the way you guys thought?

Cramer: I thought you'd never ask, Arthur. No, I don't think there's a whole lot of owners sitting around big tables, thinking about the ways that players, whether they're African-American, white, increasingly Hispanic, certainly in baseball, actually seeing a whole lot more foreign players in hockey, which is a sport that I had to deal with as well, wanted to deal with as well, not had to. I don't think there's any chance that you'll find more than a couple of closet owners, and I don't even know who they are, that would be out there suggesting that, "Let's figure out a way to make sure that we have the right number of white people, the right number of African-American people, the right number of foreigners." I don't believe it. I do believe that this is not, Harry and I were talking this morning, I do believe that we don't have what's been called in the press, a post-racial America, because Obama has been elected President. That's not happening. We have issues. We're going to continue to have issues, and we'll have disparity in our baseball teams, our NBA teams, our hockey teams, our football teams. But I do believe we're seeing somewhat of a natural order of things. If you look back at the 1900s, where you started today, Arthur, all of the boxers were Irish, and one of the reasons why the boxers were Irish is they were looking for a way out of what was their ghetto. They got off the boat with nothing. And one of the ways that they survived was to be boxers. It's not a surprise to me that as America struggled to integrate that we ended up with African-Americans taking over as almost the Irish handed it off as they got better jobs, integrated into the community, and spoke English. "Boy this was easy, it won't take me more than a generation." And it was the more hungry athletes that were taking those jobs. And it's not a surprise to me today that we don't have this many great black boxers, because you know what, and this may be, Harry and I may have some differences on this one, as hard as it is to believe, I think that there's a lot of African-American possible boxers that maybe don't feel like they need to do that anymore, maybe they're too comfortable.

Hitzges: Maybe they're playing football.

Cramer: Yes, maybe they're playing football.

Hitzges: Maybe they're in prison.

Edwards: Maybe they're in prison. Or in the cemetery.

Cramer: I don't know that it's out of order from what we've seen over the past 100 years.

Hitzges: Is sports a fake carrot, especially in that community?

Leavy: Yeah, I think it is.

Hitzges: Brian, you live in the Dominican Republic. Baseball is a way out down there. There's thousands hoping one or two get out. Has sports become a fake carrot in the community?

Leavy: I think, you know, every professional sport that I have ever covered, and I've covered all the major ones, treats players as fungible parts.

Hitzges: Commodities.

Leavy: Commodities. And, you know, you used to see it in the NFL when they didn't put people' s names on the jerseys, it was an NFL player rep who, a black guy, who told me about that, you know, there's a reason they don't want people to know who you are. They want to make it easier to have those, you know, built-in obsolescence of the human body, and as the sports get more and more violent, and more, particularly football, you know, it's easier to replace them if you don't know who they are.

Carson: Along those lines, I think it would really be a mistake for this panel to go along this long without mentioning Curt Flood. Because he's the one person who changed the power relationship between owners and players in a way that has affected every player since. I think every player who gets a million dollar contract should probably send money to a Curt Flood Fund.

Hitzges: In fact, he sacrificed himself too.

Carson: He sacrificed his own career in order to achieve that, and that gets back to that analogy of the plantation, you know I threw out the analogy of the gladiator, but the plantation would d, in the sense that that notion that a team owned a player for that player's career, was so fundamentally alien to every idea of American liberty that we have, and so close to the thing that the Thirteenth Amendment was supposed to outlaw, that it's hard to imagine why it took so long to get to the point where we understood that that was wrong. And we haven't really eliminated that kind of fundamental imbalance between the player and, who is using that as a means to get out of a, you know, poor conditions.

Miller: What do you think, or how do you react, to Michael's statement, "It's evolutionary." Or to put it more crudely, "Be patient."

Carson: We don't ask anybody, you know, we don't ask lawyers to be patient and put up with the system, you know if every person coming out of law school was drafted by a law firm, and you had to essentially accept the conditions offered by that law firm, even to the point of dress, how you appear, and all aspects of your personal life, could deny you your future in that profession.

Miller: But the Flood battle was won.

Carson: I don't think it's been completely won.

Miller: How do we win the ownership-management battle? He says it will be evolutionary.

Edwards: No. You know, everything, if you go back and study the history of sport, and particularly at the interface of race, sport, and society, what you find is that time is neutral. There has been nothing, absolutely nothing that took place except as a consequence of active intervention and involvement by people. I think that when you, another thing, the plantation concept was something that I wrote in a book when I was a student, I published a book called *The Revolt of the Black Athlete*, and I talked about the plantation structure of sports, where you had whites in positions of domination, and dominance decision-making, blacks consigned to the status of twentieth-century gladiators, essentially, as athletes, and that concept has been expanded now, and Jesse Jackson in talking about the LeBron James thing was just being Jesse Jackson. That had nothing to do with the plantation structure. If there was an analogy, it was an acrimonious divorce. Here was a man who was willing to give not just $126 million to LeBron, but anything else he wanted, the keys to the city, a palace downtown, a penthouse, whatever he wanted, to stay there. Instead, LeBron went on television and not only said that he was leaving the Cleveland Cavaliers, but he was saying, "I'm going with this lady over here in South Florida." Now anybody in a divorce situation would be very angry and upset, and that's what happened with the owner. It wasn't a racial thing. It was an acrimonious divorce.

Cramer: I agree.

Edwards: The plantation structure did not apply to that LeBron James situation, and in point of fact, aside from the power and decision-making authority and ownership and the rest of it, if anything, the plantation as far as the athletes are concerned, has been turned on its head. This is why a Brett Favre, can go in and do what he does. It's been turned on its head, in some cases. It's not as applicable as it was when I first began talking about that concept, in 1967 and '68.

Miller: Harry, what's the next battle?

Edwards: The next battle?

Miller: Yeah, what's the next battle?

Edwards: I think that we're confronted with two things, and I'll talk about the colleges and universities. The first is based on an article that I wrote in 1984 called "The Collegian Athletic Arms Race." Today it is commonplace to talk about arms-race issues, but even then, what I pointed out that we're in a situation, and the thing that it kept the black athlete in collegian athletics, despite poor SAT scores and so forth, the thing that kept the black athlete in collegian athletics was the collegian athletic arms race, where they're going to get this big gun and so forth, they're expanding stadiums, the costs are becoming greater and greater, coaching salaries are exploding, and what I pointed out, that it was going to become

increasingly unmanageable, absolutely unsustainable, and, at some point, unconscionable, because it takes funds out of academic salaries at the university. Layered on top of that is what I call, which is the talk that I'm going to give before the NCAA Convention this year, is the sports technology complex. Pharmaceutical technology, medical technology, training and nutritional technology, and so forth, are so far outpacing our capacities to manage their impact, all driven by media technology, which is providing the money, the exposure, and so forth, to support this whole system, they're so outpacing our capacities to manage the situation that at some point, it's going to be circumstances where literally nobody is in control and nobody is willing to unilaterally disarm. At that point, we have some serious problems even beyond situations like at Cal, the University of California, where they just cut out five sports, took 163 scholarships away from athletes, cut three coaching positions, all for football, and one off of basketball, in an effort to at least try to deal with the arms race issues that they're confronted with. This is going to get worse.

Miller: Okay, Fran, for women. The next battle? The future? What's the short-fall from the gender perspective?

Harris: Well, that's a big question. I think one of the issues facing women now is, those of you who follow the WNBA—who follows the WNBA? Anybody in here? Pretend that you do if you don't, go ahead, clap. Thank you Dr. Edwards, thank you. I was speaking to someone last week as a matter of fact who wants to bring a team to Dallas, and you know, just learning some of the ins and outs of ownership and establishing a team, and one of the comments that he made was, you know, a lot of people don't know how to market women's sports. And so even though there is the existence of a league, the sustainability and the success of that league is dependent on the people who own it or whatever, who understand how to truly market it, and I think that's one of our biggest challenges at this point. And that's at the college level as well, that's not just at the professional.

Miller: Now Norm, you've been hanging around the microphone for a long time. What do you think tomorrow will bring or not bring?

Hitzges: I'm sorry, say again?

Miller: What's tomorrow going to bring?

Hitzges: Well, understand the media is not an innovator. We'd like to think of the media as an innovator. For the great portion, we're not innovators at all. We're followers. We're followers. And if somebody comes up with a better trained dog, he goes on our air. The better the show, that person goes on our air. Look at LeBron. What did he do? He played his heart out for Cleveland for years. He earned his right to be free. Okay. He did an hour of bad television. If we're going to rip everybody in America who did an hour of bad television, the list is hundreds of thousands of names long, and it covers every race out there. We ask our athletes, "Take less money in pursuit of a championship." He did. "Sacrifice your statistics in pursuit of a championship." He will. His statistics will go down playing in Miami. We then say, "Pursue a championship. Don't pursue numbers. Don't pursue money. Pursue a championship." He decided to pursue a championship. And for that, he's been roundly ripped in America. What the hell do we want our athletes to be, is my

question? He's never beaten up anybody. He's not on drugs. He doesn't abuse women. He was wonderful for Cleveland. And yet the round, the bottom of it all, when it was all over, is LeBron got ripped for doing the very same thing Cliff Lee may be about to do for the Rangers. He played out his contract, and he chose another place in the world to live and play. I don't, I don't understand sometimes what we in the media want, or can justify in our opinions. I just don't understand it.

Miller: Otis. Otis, you shook. You seemed to be in agreement with what Norm was saying. I mean, you. You were LeBron thirty years ago. Do you resent LeBron?

Birdsong: Absolutely not.

Miller: Do you think it's the right direction? You think it's moving in the right direction?

Birdsong: Well, I was disappointed in the way he did it, in going on ESPN and making a big show out of it, and that's one of the reasons I blame the media also, you know they're always looking for a great story, but he had the right, he signed a contract, his contract had expired, and he had the right as a free agent to sign with any team he wanted to sign with.

Harris: Would you have been angry or upset with him had he gone onto ESPN to announce that he was going to stay in Cleveland?

Birdsong: No, I wasn't upset with him.

Harris: Okay. So you said but if he went on and did it the way he did it . . .

Birdsong: Oh, yes, I'm sorry, I didn't understand your question.

Harris: Yeah.

Birdsong: I would have been disappointed, because first of all, to me, it's not a big story. I mean, the media builds it up and builds it up. He's a free agent. So was Chris Bosh. You know, like Greg Anthony now, he's a free agent. It's not newsworthy that you gotta give him two hours of . . .

Harris: Yeahhhh, but they're not really LeBron James, though.

Birdsong: Says who?

Watkins: I mean, the other thing about sports is, I mean, you know, sports has also become part of the sort of celebrity cultural industry complex that sort of drives not only our culture, but sort of global culture as well, in terms of media and globalization and those kinds of

things. I mean, I think part of what happens with an athlete like LeBron, and I know power works in so many different directions, but you know, this idea that with celebrity comes a certain amount of visibility, with celebrity comes a certain amount of some element of power, and so I think for some, some were just sort of offended by the way he flexed, you know? In terms of that special, whether you like it or not, it was a one hour special. He dedicated the proceeds to the [Boys & Girls Clubs of America], but there is a sort of interesting perception that if black athletes don't fit within a certain box, right? If they don't play by certain types of rules, that they get penalized, they get criminalized, and in this case, you know, they get beat up, and I think that's just part of what comes with the territory.

Hitzges: And yet when we go so far out of the box, we love that it makes stars of them in the media.

Watkins: Yeah, but how quickly we turn.

Hitzges: Yes.

Watkins: On black athletes in particular.

Jones: It goes back to something Bill Russell said a long time ago, I believe it was Bill Russell, He said, "Athletes are like beautiful women, no one cares what they think or how intelligent they are." And I think we see that double standard all the time in terms of athletes, and it goes back, Norm, what you were asking, is it a fake carrot? No, it's not a fake carrot, it's what you make of that carrot. You've got an opportunity to play sports. It's difficult. It's not easy, if it was, everyone would be able to do it, and it's what do you do with that opportunity, and are you, do you have the wherewithal to know this is just one stop along that journey, there's more life after.

Watkins: And it goes back to something that Harry mentioned earlier, is why do we watch? You know? I mean, part of the reason that the whole LeBron debacle, or spectacle, was so media-hyped, I mean he is being poised to be a global brand, in this sort of sport industrial complex.

Miller: Alright, alright, alright.

Birdsong: Can I ask you a question?

Miller: Hmm?

Shaker: He has a question for you.

Miller: For me? I ask the questions. Go ahead.

Birdsong: One thing that we didn't touch on, in the hypothetical heavenly scenario, in regards to Jesse Owens, Wilma Rudolph, they had the weight of the entire, or they represented the entire black community, in the way, in what they did. Jackie Robinson. They couldn't afford to have a mishap, because they represented their entire race. Joe Lewis. When he fought, my mom was telling me the entire black race was glued to the radio. Today's athletes, they don't have the weight of the world on their shoulder.

Miller: Then look at what happened, and we're not continuing. I just ask you to think about the utter, and this is me, I'm a moderate, but I'll close with a thought, the utter insanity that stopped almost everything in the United States when Tiger Woods decided to apologize to his wife. Crazy. Okay. It's your turn. Questions, questions, comments, yells, screams, no hard objects, though.

Comment 1: I'm appreciative that you started off the program with history, I think a lot of the issues is that we don't study our history enough, and to know, and I'm not saying this in jest, to know what Jackie Robinson went through, is to observe what your President is going through. Barack Obama has to behave with such a civil manner so that he won't be the only black president, but there will be someone behind him. Jackie Robinson didn't appreciate all the things he went through, but he was chosen because he had a maturity to behave and handle so that there would be others coming behind him. It would have been better for Major League Baseball to integrate with Rube Foster, than Jackie Robinson. Now, I know there are authors up there, but the second thing I want to say is, and you've alluded to it, [William] Rhoden wrote a book called *Forty Million Dollar Slaves*. The phasing out part, what Dr. Edwards was talking about, is talked about in a chapter called "The Jockey Syndrome." When's the last time you've seen a black jockey? And there was a time where we dominated that sport. The second this is, Rube Foster is probably the greatest black entrepreneur of this country's history. There's also a story in there about that, so I just appreciate the history, and again, watch your President. He has to take it, so that there will be somebody behind him. Thank you.

Miller: Over here.

Comment 2: I'm happy to be able to say this publicly, in front of this panel, and actually kind of addressing what the last gentleman mentioned. I am sick of slave metaphors. To compare an athlete, who is basically set for life once he signs his or her name on a piece of paper, to a slave—my ancestors—is absurd and insulting, and I really, really wish people would stop it. Second thing is there was discussion about what's going on in poor black communities in regards to the lack of kids playing baseball, and those types of things. I think there's a greater tragedy than foreign athletes coming in and playing in the NBA or black kids not playing baseball. We have an educational crisis in this country. We need American mathematicians and scientists and engineers and doctors and nurses and maybe if we put the carrot of athletics away, I think that would go a lot further in helping the black community than helping black kids play baseball. Thank you.

Hitzges: Those on the staff who know Arthur Ashe know that Arthur got in big trouble. Remember the article he wrote, I believe for the *New York Times*, saying black parents

should be sending their children to the library, instead of to the field or the court, and he was just pounded for that.

Edwards: Well, you know, the libraries in these communities are closed. The schools that these kids go to, you know, whatever they learn at school they forget on the way back home while they're ducking some of the gangs and the bullets and the problems and the drug sellers, and so forth, and so on. You know, we talk about, and you know I was with Arthur, but long before Arthur I was saying that we are sacrificing generations of athletes on an altar of athletics, sacrificing textbooks for playbooks. Now, if I can get a kid, who is interested in something, even if it's just sports, maybe I can bring him the mentors and hook him up, and hook her up, with people who are really going to help them to get their lives together and on the right track. To say, "Go the library." The libraries are closed.

Jones: Why can't you do both? I disagree with your assessment that we should steer them away from athletics. A couple years ago here there was a professor on the campus here at the University of Texas who wrote an op-ed along the same lines of what you just outlined, and I disagreed with him wholeheartedly. I grew up in an impoverished upbringing, and never met my father, and my biological mother was never there. Sports was my daddy. Those father figures I met were through sports, and I was able not only to excel in sports, but I was able to excel in the classroom, so I think sports plays a prominent role, in a lot of kids, their upbringing, as far as teaching them values, teaching them discipline, and teaching them some sort of success, and so I would disagree. And I also disagree that, I wasn't set for life after I played in the NFL.

Watkins: And the only other thing I would add in terms of this sort of critique of sports is if you think about, in this country, the way health trends are going, in terms of our population: who's most likely to get diabetes, who's most likely to be obese, and how these issues are impacting, you know, heart disease and things of this sort, and who they're impacting. I think it's just your perspective about sports. In other words, we need our kids to be active, we need our kids to be in something. We need our kids to be involved. And if you're playing sports because you want to be the next LeBron James, that is a problem. But if you're playing sports, right, because it's a healthy lifestyle, if you're playing sports because in some ways it helps you to develop discipline and focus and things of that sort, then I think your perspective on sport perhaps becomes somewhat different, and my own perspective here is that when I see what's happening in our communities, right, when you see the health trends in our communities, kids being less active, kids become more sedentary, not to be provided those kinds of outlets, recreationally, but also just in terms of organized leagues, I think it would be a major public health disaster.

Carson: I wanted to just respond to the part about the use of the plantation metaphor. I actually brought it up in terms of the Thirteenth Amendment, and I think anyone who, the problem is, whether you like it or not, the notion of involuntary servitude does not just apply to slavery. It's something, there are Thirteenth Amendment cases going on as we speak today, and I brought it up particularly with respect to the Curt Flood case, where it was used explicitly as a, in comparison to the reserve clause in baseball.

Miller: Over here.

Comment 3: Yeah, first of all, honor for all of you people to be here, really nice panel. I guess I had a couple things, first I wanted to ask a question for Mr. Whittier in particular, and then maybe just propose what I believe to be the biggest problem facing athletics, from a social aspect. So Mr. Whittier, first of all, I've read a lot about you, so it's nice to finally meet you. One thing I always wanted to know was you integrated the University of Texas football in 1970. Do you feel more a sense of honor becoming the first African-American player, or disappointment that you were the first player in 1970, even though the Southwest Conference allowed integration within the Conference in 1963, seven years earlier, but the University of Texas did not do so?

Whittier: Do I feel a sense of what?

Comment 3: So I mean, do you feel more honored to be the first player, or do you feel more disappointed to be the first player?

Whittier: I'd like my name as the first African-American player at the University of Texas to kind of fade into history. I enjoyed my time at the University. I, in fact, have discovered reasons to revere this University as one of the first-class universities in the world, but I don't want to be marching down the street in heaven—"I integrated the University!" My time here at the University was really, I think, akin to what many of my colleagues in the day went through. We had excellent coaching. We had access to a world stage. We had the opportunity to engage in any academic discipline we wanted to, and I did those things. And the fact that I don't play with any pride, the fact that I opened the door, so to speak, for other guys to feel comfortable about coming to the University of Texas, I think that probably the biggest hindrance to the accretion of black athletes at the University was of the fact that they had no information about it, on the basis of no other blacks having gone to the University of Texas in the past, and none of them knew anybody who had. So, I'm glad I came here, I enjoyed my time in academia here, and I enjoyed the opportunities that it has provided for me in work and life generally. So, if that answers your question, then that's the way I'd phrase it.

Jones: Well, before you fade to black, and no pun intended there, I want to thank you for the trail that you blazed for all of us that came after you. We appreciate it and it wasn't lost on us.

Miller: Go ahead.

Comment 4: Okay, I just wanted to touch on a few points as far as, like, why the community is the way that it is. I was raised in the church so I believe, like, where there is no vision, the people perish, so, like, I had, I only met my dad like, maybe, two days my whole life, so the fact that a father isn't there doesn't mean anything. So, with the athletics, just like you, sir, on the end, football and soccer and track were my life. For my high school, we were academically unacceptable and the only time that about 90% of all the people actually had passing grades was when it was football, or track, vice versa, because they know they couldn't play unless their grades were better, so as far as that is, as far as taking athletics

away, I totally disagree with that, and as far as the kids growing up in the church, I believe everything starts at home, so just because the mother is just one mom, I believe that every black woman is strong as hell, so, I mean, just because it's one woman doesn't mean anything, and basically it just starts at home. That's all I got to say.

Edwards: This brother ought to be sitting up here. You need to be sitting up here with us.

Miller: Alright, you're the last person. Are you going to the microphone? Alright, you go ahead. Tell us.

Comment 5: Okay, I was just wondering, we learned about recently in one of my classes, about a Minnesota, University of Minnesota basketball cheating case where there were teachers being paid to help write papers for the athletes, and I don't personally know the statistics of athletes' SAT scores versus regular students' in general, or instances of cheating, I was just wondering if any of y'all had comments on, because I know at least, it's a pervasive idea that athletes are favored for their athletic ability, and they take, and universities take that into account over their academic ability.

Edwards: Well, in basketball, African-Americans are disproportionately represented among both the players, scholarship players, and tremendously overrepresented among the stars. The average for SATs over the last decade of black scholarship athletes coming into Division I-A schools is 752. That's their SAT score. Sixty percent of them are B- or below in terms of grade point average, coming out of high school. The thing that has kept black athletes in the fold has been the collegian athletic arms race. Not only do you have circumstances of special majors and special tutoring and counseling and help and so forth going to these athletes, some of which crosses the line, but the expenditures involved in the arms race is accelerating at a phenomenal way, especially in terms of debt service to some of these facilities expansions and so forth, which they feel they have to have in order to be able to compete for that athlete. The Knight Commission projects that by 2020, a Division I school in one of the six major conferences, what used to be the Big 10, and the Pac 10, and the SEC, and the Big 12, and so forth, the average, *the average* athletic department budget would be $250 million a year. Now, with that kind of money on the line, and those kinds of challenges, they're going to continue to bring as many of these athletes in, and to keep them in, almost by any means necessary. If the NCAA was really a regulatory agency, as opposed to a snitch agency, in terms of its enforcement, usually when they catch somebody it's because somebody spilled the beans, whether it's Mississippi State or Auburn, or whether it's somebody on SMU, and next thing you know, a whole conference is snitching on each other, that's the way they operate. If the truth be known, there's a lot of that going on. Somebody simply snitched on Minnesota.

Watkins: Can I also say that universities also admit students who have musical talents, who have dramatic talents? So it's not just, you know, that they're given some type of preferred, or special treatment to athletes. The issue though is academic preparation and readiness. There was a report that just came out two or three days ago, and some of you may have read it or heard about it. I think it's titled something like "A Call for Change and the Crisis in Education." This report, specifically, about the achievement gap in terms of race and ethnicity, black and white, reading levels, math levels, but this report that came out this

week is specifically on black males, and a lot of what we're talking about here are the sports that black men thrive in, young black men thrive in, and what that report identifies, right, is that there is a significant crisis in terms of young black boys not being able to read, compared to their white counterparts.

Edwards: And still being brought onto these campuses as 21st century gladiators.

Watkins: And still being brought onto these campuses. And when you talk about, for me, to talk about the plantation, to use the plantation, sort of, language in professional sports, that, I'm less convinced about that, but in terms of what's happening on collegiate campuses, I think you got a conversation there.

Edwards: That's an arms race issue.

Cramer: Alright. Did you have one more?

Comment 6: Yeah, I just had one.

Cramer: Go ahead. Last question.

Comment 6: Sorry about that, guys. I know you guys go from black to white, and black to white, back and forth, about how there's, you know, whites obviously have been superior for so long, and then black has been discriminated against for so long. I come from the middle. I'm Hispanic and I have never gotten a straight answer about their placement in sports and media and discrimination. Do you guys have any say, particularly in more media, since I'm an advertising major, and how it is in sports, if there is an, I don't know, if they stray from one side to the other, and I don't like the answer that they're just in the middle.

Edwards: You know, the Latino population, I'll give you one sport. I talked about the decline in heavyweight championships. As soon as the media found out that they could make more money on a De La Hoya-Chavez fight than they could ever make on an Ali-Frasier fight, or even on a Tyson-Holyfield fight, because they went international, there are nations all over this world who've bought licenses and so forth to see it, then they switched and started moving in that direction. Boxing hasn't lost any money. They simply found a more profitable population to focus on. And as Latinos increase in numbers, right, they will be the largest minority in this country before the end of this coming decade.

Watkins: They already are.

Edwards: Yeah, and become more and more involved centrally in institutions because they're also the fastest-growing college-age population in the country. If we can ever get the thing together in terms of the high schools, and so forth, in learning how to teach blacks and Latinos, then they will move in and take their places in other sports as well, even football, because football is becoming a sport of specialization. You're not looking for a football player. You're looking for a short-yardage running back. You're not looking for a football

player, you're looking for a third-down back, you're looking for a rush-end, you're looking for a cover corner, and as they become more and more involved in the mainstream, they will move into those sports as well.

Shaker: I don't agree with the boxing analysis because basically I believe that boxing is not that popular. People don't care. People who do care are the Hispanic community, and Latin America.

Edwards: That's all I'm saying.

Shaker: But I think it's a cause and effect. That's where the business is.

Edwards: That's all I'm saying. It's a business deal. It's not personal. It's strictly business.

Shaker: And boxing's in deep trouble, you know, I mean, as a sport.

Watkins: Can I? I mean, one of the things that comes to mind is there's a really interesting book written by a classic gentleman and scholar named C. L. R. James called *Beyond a Boundary*, and he wrote about, I think maybe the opening sentence, he's writing about cricket, and West Indies, and some of the sort of political economy issues kind of related to that, immigration, a whole range of, he gets into a really fascinating history, but he talks about, you know, what happens to a community or to a population or to a group of people when their only primary source of capital is their bodies, right. And once that becomes kind of the situation, right, you do become endangered, and I think that's a situation, you know, that we haven't, we talked a lot about race, but a lot of this also transcends into issues of class and socioeconomics, and so for those populations that find themselves on the socioeconomic margins, sports, for better or worse, oftentimes become sort of the way out or the way up, and insofar as our population is shifting and insofar as Latinos are becoming more and more dominant, more and more present, and as you begin to think about the socioeconomic distribution of Latinos in this country, the question of sports, the politics of sports, the economics of sports is going to change in some really powerful ways.

Edwards: Absolutely, absolutely.

Cramer: Thank you to Arthur Miller and to our panel.

Cramer: A handful of our authors will be in the back for a few minutes and the rest will be mingling about. I'm going to ask you to stick around, the rest of the panel members, for a few minutes. So if you want to visit, come on down.