

RACISM IN ATHLETICS: SUBTLE YET PERSISTENT

*Timothy Davis**

I. INTRODUCTION

In 1995, I published an article entitled *The Myth of the Superspade: The Persistence of Racism in College Athletics*.¹ The article maintained that racism has been an enduring and central feature of intercollegiate athletics. It proposed that during the early years of college sports, racism manifested in overtly discriminatory conduct such as the formal and informal rules that either precluded or severely limited African-Americans' participation in sports at predominately white colleges and universities.² The article also contended that following World War II, overt acts of discrimination against African-Americans gradually were replaced by subtle forms of racism in intercollegiate athletics.³ According to the article, this aversive or unconscious racism is fueled in large measure by many of the same stereotypes and derogatory images, such as those that attribute the success of black athletes to innate physical skills rather than hard work and determination, that underlie overt discrimination against blacks.⁴ The article posited, however, that despite its more subtle form, unconscious or aversive racism harms the interests of African-Americans in college sports in at least two broad ways: "(i) denial of unqualified participation in the college sport infrastructure; and (ii) marginalization of the academic, social, and psychological well-being of the African-American student-athlete."⁵ Specific illustrations of harms that fall within these broad categories include limited access for African-Americans to coaching and other administrative positions in college sports⁶ and the intellectual marginalization of African-American student-athletes.⁷ The article concluded with the observation that because of the subtle nature of aversive racism, traditional anti-discrimination laws are of dubious value in ameliorating its adverse impact on African-Americans in sports.⁸

After the article's publication, I pondered whether I had overstated the extent of racism in college athletics. My reconsideration was triggered by events that focused on the achievements of African-Americans in overcoming

* Professor, Wake Forest University School of Law. The author gratefully acknowledges the research assistance of Ahmad Washington.

1. 22 FORDHAM URB. L. J. 615 (1995).

2. See *id.* at 624-30.

3. See *id.* at 633-39.

4. See *id.*

5. *Id.* at 653.

6. See *id.* at 657.

7. See Davis, *supra* note 1, at 668-69.

8. See Davis, *supra* note 1, at 682.

barriers to entry and other forms of racial discrimination in sports. These events included Tiger Woods' impact on breaking down racial barriers in professional golf;⁹ improving graduation rates for African-American student-athletes;¹⁰ greater salary equity for African-Americans and Latinos who play professional baseball, football, and basketball; and the celebration of the fiftieth anniversary of Jackie Robinson's integration of major league baseball.¹¹ Further reflection led me to conclude, however, that despite Tiger Woods' golfing success, racial, ethnic, and gender discrimination persist at country clubs.¹² Notwithstanding, increased participation opportunities for African-American athletes in professional baseball, football, and basketball,¹³ black Americans' access to management and ownership positions in those sports remains negligible. Marginal improvement in graduation rates for African-American student-athletes belies the significant degree to which, when compared to white student-athletes, they fail to graduate from college and diverts attention from assessing the degree of educational attainment experienced by African-American student-athletes. Not only may pay disparities based on race persist within certain professional sports,¹⁴ but greater pay equity may have produced a negative racial backlash against black athletes.¹⁵ In short, momentous events in sports are cause for celebration in that they provide indicia of progress in moving beyond racial stereotyping and insensitivity in sport. Nevertheless, they fail to negate the reality of the persistence of racism in professional and amateur sports in the United States.¹⁶

9. See Richard E. Lapchick, *Lessons of Tiger Woods Will Not be Easy Ones*, N.Y. TIMES, May 18, 1997, at § 8, at 9 (commenting on the speculation by some that Tiger Woods' victory at the 1997 Masters golf tournament would be the golf equivalent of Jackie Robinson's integration of major league baseball).

10. See *Study Shows Continued Grad-Rate Progress*, THE NCAA NEWS Jul. 1, 1996 at 1, 20 (noting that the graduation rate increased significantly for black student-athletes who matriculated at colleges and universities in the years immediately following the implementation of Proposition 48).

11. See Kenneth L. Shropshire, *Where Have You Gone, Jackie Robinson?: Integration in America in the 21st Century*, 38 S. TEX. L. REV. 1043 (1997).

12. See Jennifer Jolly-Ryan, *Chipping Away at Discrimination at the Country Club*, 25 PEPP. L. REV. 495 (1997).

13. See generally Shropshire, *supra* note 11 (commenting on African Americans' limited access to ownership and management opportunities in professional baseball).

14. See generally Jack F. Williams & Jack A. Chambless, *Title VII and the Reserve Clause: A Statistical Analysis of Salary Discrimination in Major League Baseball*, 52 U. MIAMI L. REV. 461 (1998) (examining the correlation between disparities in pay and players' race).

15. See *infra* text accompanying notes 51-55.

16. See generally Lapchick, *supra* note 9 (questioning speculation that Tiger Woods will have a substantial influence in enhancing minority accessibility to professional golf); Shropshire, *supra* note 11, (applauding Jackie Robinson's achievement, but questioning whether it is an effective gauge for measuring progress in civil rights).

II. RACISM PERSISTENCE AND CENTRALITY IN SPORTS

A. The Nature of Modern-Day Racism

What accounts for the disjunction between distributive justice on the playing field in sports, in which African-American athletes participate at unprecedented levels,¹⁷ and the absence of African-Americans and other minorities from upper echelon positions in sports? Why, despite improvement in race relations, does access to higher status positions in corporate America appear beyond the reach of African-Americans and other minorities?¹⁸

The explanation, for society at large and sports specifically, lies in the nature of modern-day racism, which is both subtle and persistent.¹⁹ Modern-day racism—aversive racism—has been described as follows:

In contrast to “old-fashioned” racism, which is expressed directly and openly, aversive racism represents a subtle, often unintentional, form of bias that characterizes many white Americans who possess strong egalitarian values and who believe that they are nonprejudiced. Aversive racists also possess negative racial feelings and beliefs of which they are unaware or that they try to dissociate from their nonprejudiced self-images. The negative feelings that aversive racists have for blacks do not reflect open hostility or hate. Instead, their reactions involve discomfort, uneasiness, disgust, and sometime fear. That is, they find blacks ‘aversive,’ while, at the same time, they find any suggestion that they might be prejudiced aversive as well.²⁰

Professor Charles Lawrence uses the term unconscious racism to describe modern-day racism. He states that:

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and

17. See NORTHEASTERN UNIVERSITY’S CENTER FOR THE STUDY OF SPORT IN SOCIETY, 1997 RACIAL REPORT CARD (Richard E. Lapchick & Kevin J. Matthews, eds. 1998) (finding that in 1996-97, blacks accounted for 79% of NBA players, and 66% of NFL players. See also Gary A. Sailes, *The African American Athlete: Social Myths and Stereotypes*, in AFRICAN AMERICANS IN SPORT 183 (Gary A. Sailes, ed. 1998) (commenting blacks’ disproportionate representation as players in certain sports).

18. See John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 3, 21 (Jennifer L. Eberhardt & Susan T. Fiske, eds. 1998) (commenting on “glass ceilings” that limit opportunities for advancement for African Americans and other minorities).

19. See *id.* at 4.

20. *Id.* at 5.

opinions about nonwhites At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.²¹

Modern-day patterns of discrimination manifest in multiple ways. According to Dovidio and Gaertner, manifestations of aversive racism include not only negative feelings toward blacks, but greater bias toward higher-status minorities, and opposition, ostensibly on factors other than race, to efforts to improve the status of blacks.²² Another author adds that modern patterns of racism often turn on the question of "Who gets the slack, and who does not?" For example, [w]hen an ambiguous aspect of a person's background can be interpreted in various ways, one negative, one neutral, which attribution is made?"²³ In the employment context, the question of who gets the slack manifests in the ingroup favoritism that often limits employment opportunities to those who are a part of certain circles.²⁴ It also manifests in the ways identified by Dovidio and Gaertner above.²⁵

B. Aversive or Unconscious Racism in Sports

1. *Coaching and Management*

Several commentators have addressed the presence and repercussions of unconscious racism in sports.²⁶ In his book, *In Black and White: Race and Sport in America*,²⁷ Professor Kenneth Shropshire argues that unconscious racism fueled by the internalization of stereotypes associated with black intellectual inferiority are "largely responsible for African-Americans' exclusion from power positions today [in sports]."²⁸ Quoting a sports

21. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

22. See *id.* at 318.

23. Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1322 (1998).

24. See *id.* at 1325-26.

25. As noted above, aversive racists will exhibit greater bias toward minorities in higher-status positions based upon beliefs that they are undeserving for reasons that include the stereotypes regarding the intellectual acumen of blacks. See Dovidio & Gaertner, *supra* note 18, at 17-21.

26. See generally Sailes, *supra* note 17, at 183; Davis, *supra* note 1; KENNETH L. SHROPSHIRE, IN BLACK AND WHITE: RACE AND SPORTS IN AMERICA (1996).

27. SHROPSHIRE, *supra* note 26.

28. See SHROPSHIRE, *supra* note 26, at 26. See also Sailes, *supra* note 17, at 188 ("Whites

executive, Professor Shropshire emphasizes the impact of racial stereotypes, in conjunction with the “good old boy” system of hiring, in excluding blacks from authority positions in sports.²⁹ “If you’re starting off with a predominantly white male workforce and who they know and who they network with is predominantly other white males, that’s what I think has happened in the business years ago and even now”³⁰

Recent events support Professor Shropshire’s conclusions. A 1997 study conducted by a daily newspaper regarding hiring patterns of head coaches in the National Football League concluded that “when the league filled a record 11 head-coaching vacancies . . . , only one of the 95 African-American assistant coaches was included in the interview process. . . .”³¹ The report noted that potential black candidates were not interviewed even though they possessed credentials that on paper appeared as favorable as their white counterparts when they were first hired as head coaches. The report added that “[f]or many candidates, it’s a question of developing connections with decision-makers who have been slow to reach a level of comfort with the notion of hiring a minority coach.”³² If we pose the question of who gets the slack with respect to hiring, the statements of NFL executives are illuminating: “white owners may view the notion of hiring an African-American head coach as ‘an experiment.’ But when a white head coach fails miserably, that often is overlooked as an acceptable mistake.”³³

Commentators, since the 1997 report, have also noted the absence of African-Americans from coaching and management in certain sports. Commenting earlier this year on the absence of blacks from power positions in professional football, sports columnist William C. Rhoden pointed to the increasing anger over the existence of a “granite ceiling” in the National Football League that has effectively “prevented the N.F.L.’s black presence on the field from becoming equally pronounced in head coaching and front-office positions.”³⁴ The existence of such a ceiling led him to conclude that “African-Americans have been the most prominent casualties of a process that

are reluctant to hire African-Americans into management and head coaching positions in professional and major college sports because they do not have confidence in the intellectual capabilities of African-Americans to manage or coach professional or major college ball clubs”).

29. See SHROPSHIRE, *supra* note 26, at 83.

30. SHROPSHIRE, *supra* note 26, at 83.

31. Greg Logan, *Race in Sports*, NEWSDAY, June 1, 1997, at B04.

32. *Id.*

33. *Id.*

34. See William C. Rhoden, *N.F.L.’s Silent Majority Afraid to Force Change*, N.Y. TIMES, Jan. 29, 1999, at § D, at 1.

often combines the most exclusionary elements of the old boy network, a plantation, and the country club."³⁵

Access by blacks and other minorities to opportunities in top level management (e.g., chairman of the board, chief executive officer, vice president, and general manager) in football, baseball, and basketball remain limited as well. In this regard, Northeastern University's *Racial Report Card* concluded that in 1996-97, "[t]he data clearly shows that the proverbial 'glass ceiling' was very prominent for women and people of color at this level in baseball and was better, but had not disappeared in the NFL and the NBA."³⁶

The same barriers to upward mobility exist within the administrative channels of intercollegiate athletics. Like their professional counterparts, blacks are under represented in head coaching positions and administrative positions in intercollegiate football. According to a National Collegiate Athletic Association published report,³⁷ during the 1997-98 academic term, eighty-seven percent (87.2%) of Division I head football coaches were white, while only twelve percent (12.3%) were African American.³⁸ These numbers become more dramatic when data for historically black institutions are removed. Excluding those institutions, the percentages of white and African American Division I head football coaches are ninety-four percent (94.6%) and five percent (5%), respectively.³⁹

At the Division IA level, African Americans held seven percent (7.8%) of head football coach positions (excluding historically black institutions).⁴⁰ Moreover, excluding historically black institutions, the number of white and African American head football coaches at Divisions I through III institutions was ninety-seven percent (97.0%) and two percent (2.6%), respectively, during the 1997-98 academic term.⁴¹

The foregoing statistics paint a more dramatic picture when viewed in the context of the degree to which African Americans participate as student-athletes in Division IA football. African Americans comprised fifty-two (52%) of all Division I football players in 1997-98.

Yet, statistics alone fail to tell the complete story. The 1997 Northeastern University *Racial Report Card* found that:

35. *Id.*

36. NORTHEASTERN UNIVERSITY'S CENTER FOR THE STUDY OF SPORT IN SOCIETY, *supra* note 17, at 13-14.

37. See NCAA Minorities Opportunities and Interests Committee RACE DEMOGRAPHICS OF NCAA MEMBER INSTITUTIONS' ATHLETICS PERSONNEL (1998).

38. See *id.* at 85. These percentages represent a total of 212 institutions.

39. See *id.* at 87. These percentages represent a total of 202 institutions.

40. See *id.* at 11. The percentage of African Americans head coaches at Division I-AA is 2.1%, excluding historically black institutions.

41. See *id.* at 83. These percentages represent a total of 537 institutions.

At the end of the 1996 season, there were 25 openings for head coaching positions in Division IA [football]. New Mexico State, the last of the 25 to choose, was reportedly the only school to even interview a Black candidate. There were 12 openings at the end of the 1997 season. No blacks received interviews.⁴²

At an earlier point in time, the under-representation as reflected in the above statistics could have been explained on the basis that too few qualified African Americans were in the coaching pipeline. This was especially true given historical segregation that precluded African Americans from playing intercollegiate football at predominantly white institutions. However, this explanation is inadequate today inasmuch as the numbers of African Americans playing football has mushroomed since the late 1960's.⁴³

Northeastern University's report suggests that access to hiring networks is a significant factor in the low percentages of African American head coaches in intercollegiate football. In other words, African Americans are not being afforded the same mentoring and other opportunities that would allow them to gain the experience and connections that will improve their access to and possibilities for obtaining head coaching positions.

2. *Perceptions of African American Athletes*

Unconscious racism also impacts the perceptions of and attitudes toward African American players. These beliefs are a product of unconscious bias premised on long-held stereotypes and myths regarding black athletes.⁴⁴ For instance, African American student-athletes must contend with stereotypes that question their interest in and ability to handle intellectual and educational pursuits. As a consequence, their educational interests are marginalized. Professor Harry Edwards summarized the educational obstacles that confront African American student-athletes as follows: they must contend with the "dumb jock" stereotype that transcends racial lines, endure the implications of the innately superior black athlete, and the stereotype of the intellectually inferior "dumb Negro."⁴⁵ In short, for some, race is a primary factor that

42. NORTHEASTERN UNIVERSITY'S CENTER FOR THE STUDY OF SPORT IN SOCIETY, *supra* note 17, at 10.

43. See generally David K. Wiggins, *Prized Performers, but Frequently Overlooked Students: The Involvement of Black Athletes in Intercollegiate Sports on Predominantly White University Campuses, 1890-1972*, 62 RES. Q. FOR EXERCISE & SPORT 164 (1991); Forest J. Berghorn & Norman R. Yetman, *Racial Participation in Men's and Women's Intercollegiate Basketball: Continuity and Change, 1958-1985*, 5 SOCIOLOGY SPORT J. 107 (1988).

44. See generally Sailes, *supra* note 17, at 183-98; Davis, *supra* note 1.

45. See Harry Edwards, *The Black "Dumb Jock": An American Sports Tragedy*, 131 C.

explains African American success in sports as a product of genetic and experiential factors rather than merely as consequence of "combinations of cognitive, emotional, and experiential factors, in addition to many different physical factors."⁴⁶

Moreover, unconscious racism may manifest in NCAA rules and regulations that have been challenged as insensitive to the particular concerns of African Americans. Although several NCAA rules and regulations have been challenged as racially biased,⁴⁷ NCAA initial eligibility rules, commonly known as Propositions 48 and 16, have been subjected to the harshest criticism.

In January 1997, Trial Lawyers for Public Justice, a public-interest group, filed a lawsuit alleging that the NCAA's eligibility requirements discriminated against African American athletes. The lawsuit was initially filed on behalf of two freshmen—Tai Kwan Cureton and Leatrice Shaw—recruited by track programs at Division I colleges.⁴⁸ Both students had grades that placed them in the upper quartile of students from their respective high schools. Yet neither received at least an 820 on the SAT, and therefore, both were barred from competing as freshmen under Proposition 16. The suit alleged in part that the:

NCAA's use of scores on standardized college-admissions tests in deciding eligibility was "determined, implemented, and enforced by the NCAA without proper validation studies and with disregard for the unjustifiable disparate impact that the minimum test-score requirement would have on African American student-athletes."⁴⁹

According to the lawsuit, the NCAA's Proposition 16 requirements violated Title VI of the Civil Rights Act of 1964.⁵⁰

Unconscious racial bias toward African American student-athletes endures after they become professional athletes. One manifestation of such

BOARD REV. 8, 8 (1984).

46. See JAY J. COAKLEY, *SPORT IN SOCIETY: ISSUES AND CONTROVERSIES* 254-55 (1998).

47. See generally Timothy Davis, *African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure?*, 6 MARQ. SPORTS L.J. 199 (1996) (identifying and discussing NCAA rules alleged to reflect racial, cultural and economic insensitivity).

48. See Complaint, *Cureton v. National Collegiate Athletic Ass'n*, 37 F. Supp. 2d 687 (E.D. Pa. 1999).

49. *Id.* ¶ 28.

50. See *id.* ¶ 1. In an important decision, the federal district court held that the standardized test component of the NCAA's initial eligibility rule unjustifiably discriminates against African-American student-athletes in violation of Title VI. See *Cureton v. National Collegiate Athletic Ass'n*, 37 F. Supp. 2d 687 (E.D. Pa. 1999). The NCAA has appealed this adverse ruling.

bias lies in the attitudes of some whites toward successful and highly paid black athletes. Such attitudes were captured by one commentator as follows:

Pick up most American sports dailies, and along with last night's scores, player transactions and racing results, are page after page of the black athlete in pictures, rich, superrich, bald-headed, super bald-headed. The downside of such visceral overflow is that it creates a false sense of equity about the American workplace, while simultaneously pricking insidious fears and hostilities some whites carry about blacks.⁵¹

Query whether animosity toward highly paid African American athletes, who are perceived as unworthy, is merely an illustration of two specific biases found to be held by the aversive racist: bias toward blacks who achieve a higher status and opposition to black progress.

Racial attitudes have also influenced interrelations between players and management. Although management, commentators, and some players downplayed its significance, race was no doubt a factor in the 1998 NBA lockout of players.⁵² One player commenting on what he perceived as the breakdown in relationships between predominantly black players and predominantly white owners, stated "I think there is a perception from the owners to even some fans that we're blacks who should be happy with what we got, fair or not There's a lack of respect given us in large part because we're athletes. I'm not saying its all about race because its not—but it plays a factor."⁵³ Adds another player, "I think the owners look at us as black, ghetto guys with tons of money that we don't deserve"⁵⁴ The existence of such attitudes was characterized by sociologist Jay Coakley as follows:

Race logic also may be expressed in code forms such as this: "I'm sick and tired of those ungrateful self-centered NBA players making all that money and ignoring us loyal fans; so I'm going to skip NBA games this year and watch hockey where the players are hard working." Of course, this is not to say that all people who turn their attention from basketball to hockey are reflecting racial ideology. However, some whites may view

51. Thad Mumford, *Affirmative Action is Kayoed in the Sports Section, Too*, N.Y. TIMES, Feb. 2, 1997, at A21.

52. See Allison Samuels, *Race, Respect and the NBA*, NEWSWEEK, Dec. 21, 1998, at 55.

53. See *id.*

54. *Id.* Another incident that may have reflected evidence of this cultural and racial gulf was the infamous choking incident involving NBA player Latrell Sprewell and his coach P.J. Carlesimo. See Phil Taylor, *The Race Card*, SPORTS ILL., Dec. 15, 1997, at 70 (noting that some black NBA players believed the incident and the severe punishment meted out against Sprewell was the NBA's effort to "send a message to the public that the NBA it knows and loves was not becoming too dangerous, "too black").

and evaluate the performance and behavior of black basketball players, who look, talk, and act differently from them, through a different cultural lens from the one they use to view white hockey players who look, talk, and act more like they do.⁵⁵

3. *African American Women and Other Ethnic Groups*

The forgoing discussion focuses on African American males in sports due to their predominance as players in the three major professional sports and the revenue-producing intercollegiate sports. This is not intended to suggest, however, that African American women or other persons of color are not subjected to aversive racism and its harmful consequences.

Professor Mathewson has noted that like black men,

African American women have encountered stereotyping and stacking within the sports world which steers them into basketball and track. The steering into basketball and track and away from other sports reduces the participation opportunities for which they may compete Training and development at the higher levels of competition in other sports depend upon access to the lower levels of organized competition in those sports. Sports such as ice hockey, field hockey, tennis, and golf have socio-economic dimensions that limit their accessibility to Black girls at the lower levels of the amateur systems.⁵⁶

The above underscores what he and Professor Marilyn Yarborough characterize as the dual prohibitions that confront African American women, as well as women of other ethnic groups in sports:⁵⁷ their race or ethnicity and their gender.⁵⁸ These women are adversely impacted by race and gender, but eradicating one does not necessarily prevent or remedy harm caused by the other.⁵⁹

Latinos and Asians must also endure the consequences of racism in American sports. For example, those Latinos who initially entered American professional baseball systematically received lower-paying contracts than their white counterparts.⁶⁰ Like African Americans, Latino blacks were excluded

55. See COAKLEY, *supra* note 46, at 261.

56. Alfred D. Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239, 257 (1996).

57. See *id.* at 266.

58. Speaking on this issue, Professor Mathewson states that black women in sports face two obstacles: "No Blacks Allowed" and "No Women Allowed." *Id.* at 252. See generally Marilyn v. Yarborough, *If You Let Me Play Sports*, 6 MARQ. SPORTS L.J. 229 (1996) (reaching similar conclusion).

59. See Mathewson, *supra* note 56, at 252-53.

60. See SAMUEL O. REGALADO, VIVA BASEBALL: LATIN MAJOR LEAGUERS AND THEIR

from participation in major league baseball.⁶¹ Although white Latinos were permitted to play major league baseball prior to World War II, they were nevertheless subjected to images that depicted them as 'lazy, passive, and inferior'⁶² and other forms of discrimination that continued into the post-World War II era.⁶³

The modern form of racism encountered by Latinos and Asians in sports will most likely be subtle and premised on negative stereotypes. Thus, the diversity that exists within the Latino community has spawned a variety of racial stereotypes and ethnic ideologies that seek to explain their success in sports. These stereotypes and ideologies impact Latinos' "sport participation patterns and experiences in diverse ways."⁶⁴

Asian Americans have not escaped the sting of racism in American sports. For example, the success of Michael Chang, a Chinese American tennis star, and of Kristi Yamaguchi, a Japanese American figure skater, creates issues concerning the extent to which Anglo Americans will accept them as cultural heroes.⁶⁵ Moreover, even positive comments regarding Tiger Woods and his Asian ethnicity were based nevertheless on stereotypes.⁶⁶

C. Addressing Unconscious Racism In Sports

1. *Ineffectiveness of Traditional Remedies*

a. Difficulty of Establishing Discriminatory Intent

The evolution of racism in American into more subtle expressions of bias has made it more difficult to identify and thus to combat.⁶⁷ In commenting on the inadequacy of intent-based traditional antidiscrimination norms for combating unconscious or aversive racism toward blacks in prosecutorial decision-making, Professor Angela Davis concluded "[u]nconscious racism, although arguably less offensive than purposeful discrimination, is no less harmful. In fact, in many ways it is more perilous because it is often

SPECIAL HUNGER 59-60 (1998).

61. *See id.* at 31.

62. *See id.* at 23, 27.

63. *See id.* at 72-75.

64. *See* COAKLEY, *supra* note 46, at 274.

65. *See* COAKLEY, *supra* note 46, at 276 (adding that some corporations hesitated in Yamaguchi's endorsement of their products due to fears that many Americans would not identify with her).

66. *See* Lapchick, *supra* note 9 (noting that comments regarding Tiger Woods' intelligence, family centeredness and respectfulness were based, for some, on stereotypes of the inherently intelligent, family oriented, and respectful Asian).

67. *See* Dovidio & Gaertner, *supra* note 18, at 25.

unrecognizable to the victim as well as the perpetrator."⁶⁸ Adds Dovidio and Gaertner, "[b]ecause of its pervasiveness, subtlety, and complexity, the traditional techniques for eliminating bias that emphasized the immorality of prejudice and illegality of discrimination are not effective for combating aversive racism."⁶⁹

Moreover, a shift in judicial attitudes toward what constitutes actionable discrimination weakens the adequacy of traditional civil rights laws to combat unconscious racism. For example, the judicial consensus that invalidated hiring decisions resulting from ingroup favoritism that manifests in the filling of employment positions via "word-of-mouth recruitment,"⁷⁰ has eroded over time.⁷¹ Consequently, traditional antidiscrimination norms such as Title VII, are ineffective tools for providing redress for harms caused by unconscious racism.⁷²

Observations regarding the limited effectiveness of traditional antidiscrimination norms to address unconscious racism are applicable to sports. For example, in seeking redress for barriers to entry and promotion, coaches and administrators would more than likely turn to Title VII and Section 1981 of the Civil Rights Act. Yet features of sports hiring create potentially insurmountable evidentiary barriers to sustaining a Title VII disparate treatment or disparate impact claim. In making hiring decisions in sports, employers typically will not use a selection device or specific hiring practice. In this regard, Professor Shropshire concluded that:

Employers in sports tend to use a series of subjective criteria that vary among employment decisions, with no elements necessarily being weighed more heavily than others. With no unique employment practice to target as discriminatory, it is difficult to bring an action under Title VII, no matter what the statistics show regarding the underrepresentation of any group at any job level"⁷³

The hard-to-quantify factors on which hiring decisions are based in sport were inadvertently identified by former University of Colorado President Judith Albino as including "proven coaching ability, recruiting ability,

68. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 34 (1998).

69. Dovidio & Gaertner, *supra* note 18, at 25.

70. See Krieger, *supra* note 23, at 1325 (describing this as "a process by which current employees disseminate to their friends information about job opportunities or suggest those friends to hiring officials as a means of identifying candidates for openings").

71. See Krieger, *supra* note 23, at 1325 (noting the split in the circuits on whether such employment practices violate Title VII).

72. See Krieger, *supra* note 23, at 1325.

73. See SHROPSHIRE, *supra* note 26, at 65.

management skills, communication skills, public relations skills and ethical standards.⁷⁴ The controversial hiring of Rick Neuheisel, who is white, rather than Bob Simmons, who is African American, as head football coach for the University of Colorado illustrates the application of such subjective considerations. In choosing Neuheisel, Judith Albino stated:

[o]ver all, we found that our appraisal of [Neuheisel] was the highest of those we interviewed Any one of the four candidates could have done the job. But we weren't in the business of picking an acceptable coach. We were in the business of picking the best possible coach.⁷⁵

Thus, the absence of objectively quantifiable factors on which employment decisions are made will pose difficulties for African Americans challenging hiring and promotion decisions. As noted by Professor Shropshire, such a challenge is all the more difficult to establish inasmuch as courts—which presume to lack the requisite expertise—are reluctant to second-guess hiring decisions in sports.⁷⁶

b. Judicial Response in Sports Cases

Courts have not been receptive to the very few cases in which student-athletes or professional athletes or administrators have asserted claims of racial discrimination. With respect to student-athletes challenging unconscious racism in college sports, Dean Rodney Smith states that the “intent requirement, coupled with the Supreme Court’s present unwillingness to permit ‘affirmative action’, makes it unlikely that student-athletes of color will be able to address racial inequities of the sort that exists in the intercollegiate context . . . through federal constitutional or related means.”⁷⁷ He further notes that because traditional anti-discrimination laws are of dubious value,

74. George Willis, *College Football Coaching Picture (In Black & White)*, N.Y. TIMES, Jan. 8, 1995, at 6F.

75. Terry Frei, *Separate Ways*, SPORTING NEWS, Oct. 30, 1995, at 24. The nature of the subjective factors on which such decisions are based are also illustrated by the comments of a columnist who defended the hiring decision:

Neuheisel was the right hire at Colorado because he was an extraordinary coaching prospect, and because, not incidentally, he was a good fit for Colorado, a maverick campus, and for Boulder, a cosmopolitan college town along the picturesque Flatirons. Bob Simmons wasn't rejected; he just wasn't the No. 1 choice.

Id.

76. See SHROPSHIRE, *supra* note 26, at 55.

77. Rodney K. Smith, *When Ignorance Is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics*, 61 MO. L. REV. 329, 362-63 (1996).

student-athletes have turned to common-law theories as a means of attempting to achieve racial equity in intercollegiate athletics.⁷⁸

Courts have rejected the challenges referred to by Dean Smith. In *Jackson v. Drake University*,⁷⁹ an African American student-athlete recruited by Drake University to play basketball brought suit alleging that the institution engaged in conduct that amounted to a breach of contract and educational malpractice. Jackson also alleged that a pattern of abusive conduct by Drake's basketball coach constituted a civil rights violation pursuant to the Civil Rights Act of 1870.⁸⁰ The federal district court rejected Jackson's claims.

A few years earlier in *Hysaw v. Washburn University of Topeka*,⁸¹ several African American student-athletes recruited to play football alleged that the college's coaching staff and administration treated them in a racially discriminatory manner. In addition to allegations that the college infringed upon their contractual right to play football, the plaintiffs asserted that the institution afforded white football players more favorable treatment than the treatment given to their African American counterparts. The preferential treatment allegedly included the provision of better opportunities for white players to enter into favorable scholarship arrangements and to participate in Washburn's football program. The federal district court rejected these claims.

In 1990, Marvin Cobb, assistant athletic director for the University of Southern California, filed racial discrimination and breach of contract claims against the University.⁸² He charged that he was denied promotions and harassed because of his complaints regarding the academic abilities and preparation of African American student-athletes. Specifically, Cobb alleged that the University failed to afford many of its African American student-athletes an educational opportunity. He also alleged that USC's recruitment of academically under-prepared student-athletes, with only a minimal likelihood of succeeding academically, constituted exploitation. Cobb's discrimination claims were eventually rejected by a California appellate court.⁸³

78. *See id.* at 363.

79. 778 F. Supp. 1490 (S.D. Iowa 1991). *See also* *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992).

80. 42 U.S.C. § 1981 (1994).

81. 690 F. Supp. 940 (D. Kan. 1987).

82. *Cobb v. University of Southern California*, 45 Cal. App. 4th 1140 (1996).

83. *Cobb v. University of Southern California*, Unpublished Opinion (May 21, 1998). *See also* *Wallace v. Texas Tech Univ.*, 80 F.3d 1042 (5th Cir. 1996), in which a court dismissed an African American coach's claims alleging racial discrimination by the university in refusing to renew his contract, paying him less than a white coach, disparately disciplining him, and maintaining a racially hostile environment, due to his failure, among other things, to establish discriminatory motive. *See id.* at 1048-50.

In a particularly unique case alleging racial discrimination in sports, an African American

2. *Nontraditional Approaches to Addressing Unconscious Racism in Sports*

The limited usefulness of traditional antidiscrimination norms and common-law theories as methods of ameliorating racism in sports has spawned alternative approaches. On a theoretical level, these include adopting a more comprehensive and contextualized intent standard that would enhance the effectiveness of existing antidiscrimination norms. Adoption of such a standard would require courts to “consider whether the alleged discriminatory conduct conveys a symbolic message to which our society attaches racial significance. The determination that society views the alleged differential treatment in racial terms would constitute a finding that the defendants’ conduct flowed from racially discriminatory intent.”⁸⁴ Inherent in a comprehensive approach to intent is the notion that the self is non-unitary rather than unitary.⁸⁵

Broad based alternatives have been suggested to address racism within the sports context. These include Dean Rodney Smith’s proposal for legislative initiatives, at the NCAA level, as well as state and federal levels, to address unconscious racism in sports.⁸⁶ I would add to the generalized approaches the need to undertake racial impact studies to determine the extent

professional football player sued the NFL for retaliatory employment discrimination in violation of Title VII. *See Cox v. NFL*, 29 F. Supp. 2d 463 (N.D. Ill. 1998). Bryan Cox sought an injunction requiring the league to implement measures to prevent players from being subjected to racial epithets by fans of the sort that he had encountered when he visited Rich Stadium in Buffalo, New York to play a football game. *See id.* at 466. Shortly after he filed his Title VII action in 1994, he was required to participate in the NFL’s drug abuse program. Cox was also disciplined for a 1996 incident in which he engaged in a confrontation with a league referee during a game. Cox alleged that the disciplinary actions taken against him were in retaliation to his filing of the lawsuit. The court granted the NFL’s motion for summary judgment concluding that Cox had failed to establish the causal link between his filing of the lawsuit and the actions taken by the NFL. *See id.* at 471. The court ruled that the evidence established legitimate nondiscriminatory reasons for the league’s action. *See id.* at 473. For a discussion of fan racial violence against athletes and the responsibility of teams and leagues, see Phoebe Weaver Williams, *Performing in a Racially Hostile Environment*, 6 MARQ. SPORTS L. J. 287 (1996).

84. Justin D. Cummins, *Refashioning the Disparate Treatment and Disparate Impact Doctrines in Theory and in Practice*, 41 HOW. L.J. 455, 469; *see also* Lawrence, *supra* note 21, at 324 (arguing for a test that would “evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance”).

85. *See* Cummins, *supra* note 84, at 467 (explaining that the notion of a non-unitary self embodies the recognition that the individual is unique, yet interwoven circumstances and realities that are derived from certain commonalities with others such as race, gender or income status).

86. *See generally* Smith, *supra* note 77.

to which the disparate treatment of minorities in sports is a result of racial discrimination or legitimate factors.⁸⁷

With respect to specific approaches to racial discrimination in sports, much will depend on the nature of the harm caused by unconscious racism in sports. For instance, in the context of enhancing opportunities for minorities in positions of power in both professional and collegiate sport, I endorse suggestions to open up hiring networks⁸⁸ given that the access to such positions seems tied to professional network contacts.⁸⁹ This can be accomplished through sports league and associational sponsored programs such as that adopted by the NFL. In 1987, the NFL instituted a fellowship program that provides an opportunity for participants—college and World League coaches, and former NFL players—to work with the coaching staffs of NFL teams during the summer. Participants' responsibilities include: directing and planning workouts, formulating scrimmage and preseason game strategies, breaking-down video tape and evaluating players.⁹⁰ Although none of the program's participants have moved on to a head football coach position, thirty-one current NFL assistant coaches are products of the program. Disturbed by the lack of head coaches and coordinators, in 1998, the NFL implemented a pilot project "in which an independent consulting company will videotape interviews of selected assistant coaches, most of them black, who have been recommended by teams as having the high potential to become head coaches and coordinators."⁹¹ The goal of the program is to open up hiring networks by introducing owners and team executives to new faces by attempting to identify a diverse talent pool. In commenting on the NFL's commissioner's active support for the project, one NFL team executive

87. See Davis, *supra* note 68, at 54 (suggesting that a first step in eliminating discrimination in exercise of prosecutorial discretion is racial impact studies to determine the sources of dissimilar treatment of similarly situated persons).

88. See SHROPSHIRE, *supra* note 26, at 144 (calling for proactive efforts by professional and collegiate sports power brokers to enhance racial diversity); Dana D. Brooks et. al., *African American Male Head Coaches: In the "Red Zone," But Can They Score?*, in *AFRICAN AMERICANS IN SPORT* 217, 233 (Gary A. Sailes, ed. 1998) (proposing the same).

89. See Brooks, *supra* note 88, at 232 (concluding based on empirical research that "African American football coaching success is tied to professional network contact, previous playing and coaching experience, and affiliation with 'big time' football programs It is therefore unlikely that we should expect to see additional African American head football coaches unless they get this coaching experience"); see also SHROPSHIRE, *supra* note 26, at 143 (arguing that the key to providing access to African Americans to sports administrative and coaching positions is breaking down the old boy network of hiring in sports).

90. *Minority Coaching Program draws biggest class*, <<http://www.nfl.com/news/0805minority.html>>.

91. Mike Freeman, *N.F.L. Opens a Path for Black Coaches*, N.Y. TIMES, Dec. 27, 1998, at 28.

commented, “[b]asically the commissioner is trying to encourage teams to be fair.”⁹²

Other specific initiatives aimed at enhancing racial equity for coaches and administrators as well as student-athletes might include:

Coaches and Administrators: (a) Development of a collegiate program similar to the NFL’s program that operates off season coaching clinics for assistant coaches and others who seek to become head coaches at the collegiate level; (b) expansion and extension of programs such as the NCAA’s minority internship programs;⁹³ (c) development at the institutional level of detailed and comprehensive plans to create racial equity (including establishment of proactive goals and policies to enhance the opportunities for African American administrators and coaches); (d) development by NCAA and member institutions of a mentoring program whereby prospective minority coaches and others are assigned to an experienced coach; (e) make scholarships available to prospective college coaches to enable them to take college level classes that will allow them to obtain the range of skills, such as management and financial skills, required of head coaches; and (f) affirmative efforts to involve minority coaches into the infrastructure of various league and coaching associations.

Student-Athletes: (a) Requiring institutions to account for funds generated in the revenue-producing sports—basketball and football—as a means of avoiding the exploitation of African American student-athletes;⁹⁴ (b) recognition by state legislatures that student-athletes possess certain contract and torts claims as a means of holding their institutions accountable for providing educational opportunity and avoiding exploitation;⁹⁵ (c) collaboration between the NCAA and colleges and universities to identify and develop academic assistance programs geared toward the complete education and development of student-athletes; and, (d) distributing larger percentages of revenues for academic development of student-athletes.⁹⁶

III. CONCLUSION

A student once asked me why efforts should be directed toward examining the existence and impact of racism in sport. I believe this question reflects the belief that assuming racism impacts relationships within collegiate and professional sport, the adverse consequences that flow therefrom may be

92. *Id.*

93. *See* Freeman, *supra* note 91, at 28.

94. *See* Smith, *supra* note 77, at 379-80.

95. *See* Smith, *supra* note 77, at 379-80.

96. *See* Smith, *supra* note 77, at 379-80.

fairly well circumscribed. Perhaps it can be argued that racism's effect in athletics is limited to a finite number of participants in the athletics industry—principally athletes and athletic administrators. Thus it might be asserted that greater dividends would accrue from directing efforts toward addressing the harmful effects of racism in other segments of our society.

Apart from the harm that unconscious racism inflicts upon individuals who are denied opportunities to progress and to develop their potential, the significance of addressing racism in sport lies in the fact that sport represents a microcosm of society.⁹⁷ As such, sport is viewed as an opportunity for examining the impact of certain issues within a discrete context. As articulated by Professor Harry Edwards:

The first principle of sport sociology is that sport inevitably recapitulates the character, structure, and dynamics of human and institutional relationships within and between societies and the ideological values and sentiments that rationalize and justify those relationships. No realm of institutionally interdependent relationships better illustrates this principle than that which has emerged at the interface of sport and law. Often ostensibly far removed from specific locus and focus of many of the legal actions in question, sport, nonetheless, has been both judged progressively ahead and sent reeling in reaction by forces of law over the last six decades. It was simply inevitable, given sport's status as an integrated institutional component of society, that laws, regulatory edicts, and executive orders, which so profoundly affected American life in general over this period, would have no less profound impact within sport. And nowhere has this impact been more evident than in the sphere of interracial relations.⁹⁸

Thus sport provides an excellent context within which to examine the nature and impact of aversive racism.

The above quote by Dr. Edwards speaks also to the role of sport as reflecting and contributing to the development of values and attitudes in American culture. Sport contributes significantly to reinforcing both negative and positive social values that impact the ways in which members of society perceive each other and interact.⁹⁹ For instance, numerous commentators have

97. See, e.g., D. STANLEY EITZEN & GEORGE H. SAGE, *SOCIOLOGY OF NORTH AMERICAN SPORT* 17 (5th ed. 1993) (commenting on sports utility for examining the complexities of the larger society because it represents a microcosm of society). See also Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. TEX. L. REV. 1115 (1997) (noting the same).

98. Harry Edwards, *The End of the "Golden Age" of Black Sports Participation*, 38 S. TEX. L. REV. 1007 (1997).

99. Timothy Davis & Tonya Parker, *Student-Athlete Violence Against Women: Defining the Limits of Institutional Responsibility*, 55 WASH. & LEEL. REV. 55, 63-64 (1998) (examining

examined sport's contribution in constructing gender identify—in particular, the construction of a male identify that is harmful to women.¹⁰⁰ The same can be said for the role that sports play in constructing racial attitudes that may be harmful to African Americans given that it contributes to the formulation of harmful stereotypes of African Americans. Notes sociologist Jay Coakley:

[T]he social meaning associated with skin color and cultural heritage also influences sport participation decisions among people of color around the world and among ethnic group members in different societies. *At an even deeper level, sports are sites in cultures where people formulate and put into action ideas about skin color and cultural heritage that they then carry over into the rest of society.* They even may use sports to express their ethnicity and what they feel is their cultural destiny.¹⁰¹

Accordingly, addressing the impact of racism in sport may lessen the dissemination via sports of societal values and attitudes that reflect derogatory images and stereotypes of African Americans and other ethnic groups. This is particularly important inasmuch as we learn at very early ages the various stereotypes—which are apt to be highly accessible later in life regardless of a conscious belief in them — of the major social groups within the United States.¹⁰²

Overcoming such stereotypes in sport takes on an added significance when one considers the role of the media in depicting black men in general and black athletes in particular. All too often black men are cast as super-athletes, super-entertainers, and super-criminals, because of their innately athletic, rhythmic, humorous, and violent character.¹⁰³ Notes one scholar:

[U]nless the lens that continually frames black men in negative and stereotypical roles is re-focused to capture a view that is more realistic of our daily experiences and endeavors, America will continue to be deceived and abort its obligation of living up to its potential and motto as being the land of opportunity.¹⁰⁴

the empowering and negative aspects of sport).

100. See, e.g., MICHAEL A. MESSNER, *POWER AT PLAY* 150-51 (1992) (noting the “direct connection between sport as a cult of masculinity and gender relationship built on power, domination, and control . . .”).

101. COAKLEY, *supra* note 46, at 249.

102. See Krieger, *supra* note 23, at 1281.

103. See Billy Hawkins, *The Dominant Images of Black Men in America: The Representation of O.J. Simpson*, in *AFRICAN AMERICANS IN SPORT* 50 (Gary A. Sailles, ed. 1998) (noting that such representations of black men in the media are not intentional but a reflection of the social conditioning process that shapes and focus the lens that produces and reproduces such images).

104. See *id.* at 50.

Consequently, addressing unconscious racism in sport will enhance access to opportunity for minorities within sport, and will contribute toward recasting the negative images that ultimately must be overcome if fairness and diversity are to exist in sports and other segments of American society.