THE MYTH OF THE SUPERSPADE: THE PERSISTENCE OF RACISM IN COLLEGE ATHLETICS

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Introduction

This Article represents my commitment to the lifting of veils. It examines the veils created by the form of racism typical in college athletics—a persistent, unconscious racism nourished by fraudulent stereotypes and myths. As discussed below, the dearth of scholarship concerning the adverse implications of racism for African-Americans involved in college sport underscores the importance of beginning a candid dialogue on racism in sport.

I also posit, however, that the significance of this Article transcends the bounds of sport. An examination of racism in college sport provides an opportunity for a discussion in a discrete context of the larger social significance of unconscious racism. Indeed this Article suggests that such a discourse reveals that racial justice for African-Americans in college athletics, as in society, remains illu-

1. My focus on African-Americans is not intended to suggest that racism in sport does not adversely impact other racial groups. Indeed it does in ways ranging from the stereotyping of Native Americans as mascots and team names to exclusionary practices exercised against Hispanics. See JAY J. COAKLEY, THE SOCIOLOGY OF SPORT 256-62 (1994) (discussing the impact of racism in sport on racial minorities other than African-Americans and noting the need for more detailed study).

   My focus on African-Americans derives from recognition of the substantial importance attached to sport in the African-American community. As discussed below, sport has helped significantly in framing the career aspirations of many African-Americans, particularly males, many of whom perceive it as a vehicle for financial success. Such beliefs have broad implications for the African-American community. These ascribed beliefs also provide evidence of the continued presence of racism in sport. See infra part II.B.
sive, absent recognition of the impact of racism.\textsuperscript{2} Racism in sport thus represents a reflection of the pathology that pervades our society in general.

Since it represents a microcosm of American society,\textsuperscript{3} sport provides a useful paradigm for examining certain themes appearing in critical race literature.\textsuperscript{4} One such theme is challenging stereotypes employed by dominant groups to justify racial subordination.\textsuperscript{5} With respect to college sport, this theme also requires exploration of the pernicious nature of stereotypes. Particular attention will be devoted to the stereotypes that nourish the dominant mindset that perpetuates racism in college sport.

The second theme that emerges in critical race literature which will be examined in this Article is the notion of colorblindness. College sport also provides an appropriate vehicle for examining this theme\textsuperscript{6} and assessing the propriety of race-based remedial al-


\textsuperscript{3} See, e.g., D. STANLEY EITZEN & GEORGE H. SAGE, \textit{Sociology of North American Sport} 17 (5th ed. 1993) (Sport provides a useful institution for examining the complexities of the larger society since it represents a microcosm of the society in which it is embedded); Ben Lombardo, \textit{The Harlem Globetrotters and the Perpetuation of the Black Stereotype}, 35 \textit{Physical Educator} 60 (1978) (Inasmuch as sport represents a microcosm of society, racism is a problem in athletics just as in the rest of American society).

\textsuperscript{4} Critical race scholarship has been defined as challenging the universality of white experience/judgment as the authoritative standard that binds people of color and normatively measures, directs, controls and regulates the terms of proper thought, expression, presentment, and behavior. As represented by legal scholars, critical race theory challenges the dominant discourse on race and racism as they relate to law. John O. Calmore, \textit{Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World}, 65 S. Cal. L. Rev. 2129, 2160-61 (1992).


\textsuperscript{5} Challenging myths and stereotypes is one of the several themes which Professor Delgado has identified as appearing in the writings of critical race scholars. Richard Delgado, \textit{When a Story is Just a Story: Does Voice Really Matter?}, 76 Va. L. Rev. 95, 96 n.4 (1990). \textit{See} Calmore, supra note 4, at 2160-68 (summarizing the central themes of critical race scholarship).

\textsuperscript{6} Calmore, supra note 4, at 2161 n.107 (noting how critical race theory unmasks themes in mainstream legal discourse, including the notion of colorblindness); \textit{see} Delgado, supra note 5, at 95-96 n.4.

In the context of constitutional doctrine, the colorblindness principle disapproves of the use of race-specific criterion of decisionmaking regardless of the "race of the deci-
ternatives. Both of the identified issues—stereotypes and colorblindness—are prevalent in critical race scholarship. In this regard, the Article briefly addresses colorblindness as it relates to the impact of National Collegiate Athletic Association (NCAA) rules and regulations on African-Americans. Moreover, colorblindness becomes relevant to remedial alternatives aimed at ameliorating the adverse consequences of racism in college sport.

Rather than merely focusing on the foregoing themes, this Article more broadly examines the role of race in denying equality of opportunity to black participants involved in college sport. In so doing, I propose that college sport serves as a metaphor for the racism encountered by African-Americans in our society.

Flagg, supra note 2, at 1005. Professor Flagg adds that the principle of colorblindness can often be viewed as representing an expression of the liberal notion of personal autonomy. As such, it disapproves of holding persons responsible for personal characteristics such as race or gender over which they have no control. Id. at 1011.

Professor Bryan Fair argues that the most critical problem in the twenty-first century will be the issue of colorblindness. Bryan K. Fair, Forward: Rethinking the Colorblindness Model, 13 Nat’l Black L.J. 1 (1993). Critically, he adds that colorblindness models ignore the racial subordination which we encounter daily and permit us to ignore the racism which infects us all. Id. at 9-11. Moreover, he concludes that as currently used, colorblindness is “confusing and counterintuitive.” Id. at 64-68. See Richard Delgado, Rodrigo’s Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law, 45 Stan. L. Rev. 1133, 1152 (1993) (discussing the illusions of fairness as well as the harm to minorities ensuing from a race neutral model. Professor Delgado concludes that “facially neutral laws would still fail to redress most racism because of the cultural background against which such laws operate.”).

A delineation of other literature concerning race consciousness is found in Fair, supra at note 3, n.17.

7. The notion of colorblindness is another of the topics examined in critical race literature. Delgado, supra note 5, at 96, n.4.

8. The National Collegiate Athletic Association consists of approximately 950 four-year colleges and universities. Thomas R. Ostdiek, Comment, LB 69: Need Based Financial Aid for College Athletes, 25 Creighton L. Rev. 729, 738 (1992). As articulated in its constitution, the primary purpose of the NCAA “is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.” 1994-95 NCAA Const. art. 1, § 1.3.1, at 1, in National Collegiate Athletic Association NCAA Manual [hereinafter NCAA Manual].

9. Detailed examination of the issue of colorblindness in the context of college sport is reserved for a planned sequel to this Article. Nevertheless the skeleton outline of the analysis which I plan to undertake is set forth infra Part III.

10. See infra Part IV.

Much of the backdrop against which this metaphor is explored is provided by the recent initiatives of the Black Coaches Association (BCA).\textsuperscript{12} Underlying the BCA’s concerns are questions relating to the extent to which alleged inequities are the end product of the continued presence of racism in collegiate athletics.\textsuperscript{13} I conclude that the BCA’s actions are derived in large part from tensions surrounding the enigmatic role of African-Americans in college sport and the crucial supporting role played by unconscious racism.

The notion that racism plays a central role in college sport is not novel. For example, when examining the components of organized American sport, sociologists typically speak of the long-standing and pervasive presence of racism in college athletics.\textsuperscript{14} Notwithstanding what appears to be a presumption, legal scholars have devoted scant discourse to the legal ramifications of such racism. Particularly in this context, given accusations of discrimination against African-American participants, the failure of legal scholars to address the myriad issues related to racism in college athletics is as surprising as it is neglectful.\textsuperscript{15}

\begin{itemize}
  \item[\textsuperscript{12}] The Black Coaches Association is comprised of approximately 3,000 African-American high school and college athletic coaches. Debra E. Blum, \textit{Eyes on the Prize, Chron. Higher Educ.}, July 13, 1994, at A33, A34. Spawned by frustration emanating from being relegated to outsider status, the BCA was initially created to address hiring practices at NCAA institutions. \textit{Id.} at 34; Dana Brooks and Ronald Althouse, \textit{Racial Imbalance in Coaching and Managerial Positions, in RACISM IN COLLEGE ATHLETICS: THE AFRICAN-AMERICAN ATHLETE’S EXPERIENCE} 101, 128 (Dana Brooks & Ronald Althouse eds., 1993)[hereinafter RACISM IN COLLEGE ATHLETICS]. The organization’s expanded agenda encompasses a myriad of issues which affect people of color in intercollegiate athletics. \textit{Id.}; Blum, \textit{supra} at A34.
  \item[\textsuperscript{13}] See Blum, \textit{supra} note 12, at A33 (noting that some members of the BCA view their efforts as directed toward eliminating racism in college sport).
  \item[\textsuperscript{14}] George H. Sage, \textit{Introduction}, in RACISM IN COLLEGE ATHLETICS, \textit{supra} note 12, at 1, 3. See Alison Dewar, \textit{Intergroup Race Relations: Success or Failure?}, in RACISM IN COLLEGE ATHLETICS, \textit{supra} note 12, at 225, 230 (emphasizing a historical pattern of exclusion and oppression in sports); Lombardo, \textit{supra} note 3, at 60 (acknowledging racism is a problem in athletics just as in the rest of American society); Lodis Rhodes & Johnny S. Butler, \textit{Sport and Racism: A Contribution to Theory Building in Race Relations}, 55 SOC. SCI. Q. 919, 922 (1975) (noting the significant extent to which racism has impacted the participation of black athletes throughout the history of organized American sport activity); D. Stanley Eitzen & David C. Sanford, \textit{The Segregation of Blacks by Playing Position in Football: Accident or Design?}, 55 SOC. SCI. Q. 948 (1975) (agreeing with those who conclude that racial discrimination in organized sport, including college sport, limits opportunities for blacks in playing, officiating, coaching and administering).
  \item[\textsuperscript{15}] A few legal scholars have indirectly raised the question of race in the context of the impact of NCAA initial eligibility rules on African-American student-athletes. No one appears, however, to have directly addressed the broader dimensions of the issue of racism in college sport. See, e.g., Chad Baruch & Edward O. Cassidy, Jr., \textit{Technical Foul: The Legality and Wisdom of NCAA Academic Requirements}, 20 LIN-
Upon reflection, however, commentators’ reluctance to engage in dialogue which directly addresses the consequences of racism and the harm it inflicts upon African-Americans involved in organized sport is unremarkable. It is an illustration of America’s aversion to confronting directly the question of race in the context of sport. A noteworthy example of this reticence occurred in 1991. After examining what it purported to be the critical issues confronting intercollegiate athletics, the Knight Foundation’s Commission on Intercollegiate Athletics released a report that concluded that abuses such as the compromise of academic integrity warranted major reforms and structural changes in college sport. Not only was the impact of racism on black student-athletes not...
identified as a major issue, the Commission referred only indirectly to racism's influence in college sport.\textsuperscript{19}

The reluctance of the Knight Commission and others to discuss racism in sport is consistent with a general predilection not to explore the social conditions that influence sport in American society. Indeed, American society seems content to remain in blissful ignorance of the numerous factors, such as social class, race and gender, that influence college athletics.\textsuperscript{20} In a recent article, I concluded that our tendency to romanticize college athletics by relying on myths, such as the principle of amateurism, perpetuates a false model which fails to comport with the present day social, economic and legal realities of intercollegiate athletics.\textsuperscript{21} The comfort apparently arising from ignoring such issues does not, however, negate the reality of sport as a cultural practice that is not separate from the "social, economic, political, and cultural context in which it is situated."\textsuperscript{22}

Reluctance to address directly the role of racism in college athletics also reflects differing perceptions. Unlike blacks, many white Americans refuse to acknowledge race as a factor that influences sport.\textsuperscript{23} The popular belief of athletics as a venue that provides a

\textsuperscript{19} Only four indirect references to the issue of racism in college sport are contained in the Knight Commission Report, supra note 17. The Report notes: Sports have aided in breaking down bigotry and prejudice in American life; the need to expand grants-in-aid to student-athletes from low-income groups; and on two occasions reaffirms the general principle that student-athletes should be treated fairly whether male or female, majority or minority. Knight Commission Report, supra note 17, at x-19. See Audwin Anderson & Donald South, Racial Differences in Collegiate Recruiting, Retention, and Graduation Rates, in RACISM IN COLLEGE ATHLETICS, supra note 12, at 79, 82-83 (identifying critically the Knight Commission's indirect references to racism in college sport).

\textsuperscript{20} Sage, supra note 14, at 2.


\textsuperscript{22} Sage, supra note 14, at 2. Thus a true understanding of college sport is a result of understanding the societal forces of which it is a part. Id. at 2-3.

Anderson & South, supra note 19, at 82-83 (arguing that "if big-time college athletics is going to solve its much publicized problems and dilemmas, it also must face honestly the issues and implications of race relations.").

\textsuperscript{23} A series of surveys conducted in 1991 by USA Today confirmed this conclusion. The survey noted the gap between the beliefs of whites and blacks as to the impact of racism in sport. A majority of the African-Americans surveyed believe that prejudice remains a component of sport. Most whites, on the other hand, concluded it is no longer a factor. Jim Myers, Race Still a Player: Stereotypes Pit Ability vs. Intellect, USA TODAY, Dec. 16, 1991, at 1A. For example, 73 percent of blacks believe that racism limits coaching opportunities for African-Americans, while only 31 percent of whites shared in this view. Race in Sports: A Black-and-White Issue, USA TODAY, Dec. 18, 1992, at 3C.
level playing field where athletic attainment prevails over bigoted, discriminatory attitudes and conduct contributes to this notion.

Given this background, a central purpose of this Article is to initiate and to lay the foundation for what I hope will be a continuing dialogue concerning the innumerable legal issues invoked by the continuing presence of racism in college sport. \(^{24}\) I begin by examining the historical\(^{25}\) and present-day manifestations of racism in college athletics. Part I of this Article gives a detailed examination of the formal and informal rules that excluded and otherwise limited opportunities for blacks in organized college sport. Building upon the notion of interest convergence,\(^{26}\) this Article posits that economic considerations were one of the significant influences leading to the eventual end of segregation in college sport.

Drawing from the work of critical race scholars, I argue that in contrast to the Jim Crow era, the racism currently residing within college sport is subtle. Therefore, it is more difficult to identify. Nevertheless, Part II of this Article demonstrates that today's unconscious racism is premised largely on the same stereotypes and assumptions that effectively excluded African-Americans from sport participation during most of the history of organized college athletics.\(^{27}\) Moreover, the racism persisting\(^{28}\) in the modern intercollegiate athletic enterprise, though more illusive, continues to in-

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\(^{24}\) See Darryl Brown, Note, Racism and Race Relations in the University, 76 Va. L. Rev. 295, 304 (1990) (noting the disparity in perceptions between blacks and whites on issues of race). See also infra text accompanying notes 103-23.

\(^{25}\) As noted above, these issues include the impact of racism on other ethnic minorities.

\(^{26}\) A historical perspective is important inasmuch as racism as it currently exists can only be interpreted in light of the historical experience of the oppressed. Delgado, supra note 6, at 1153-54 (criticizing race neutral rules as deficient in that they ignore the past and focus on the present so as to employ a "freeze frame" sort of approach). See also Anthony E. Cook, Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr., 103 Harv. L. Rev. 985 (1990); Wendy R. Brown, The Convergence of Neutrality and Choice: The Limits of the State's Affirmative Duty to Provide Educational Opportunity, 60 Tenn. L. Rev. 63 (1992) [hereinafter Neutrality and Choice].

\(^{27}\) See discussion infra text accompanying notes 91-94.

\(^{28}\) See discussion infra especially text accompanying notes 149-61.

\(^{28}\) The persistence of racism in college sport mirrors its continued presence in our society. Indeed, Professor Derrick Bell concludes that racism in America is not a temporary phenomenon that the nation desires to cure. He contends that racism is permanent. Professor Bell further states, "racism is an integral, permanent, and indestructible component of this society." Derrick Bell, The Racism is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide, 22 Cap. U. L. Rev. 571, 573 (1993).
flict educational, social, economic and psychological damage on African-American participants.29

Part III identifies the injuries unconscious racism causes to African-American coaches, administrators and student-athletes. In this regard, the concerns voiced by the BCA provide a framework for analyzing the extent to which racism results in injury to African-American participants at the various levels of intercollegiate athletics. This Article also examines, in detail, the adverse impact of unconscious racism to the academic interests of African-American student-athletes. Contending that this impact is significant, Part IV of this Article explores alternatives that may aid in remediating this harm. In particular, it discusses the utility of contract as an antidiscrimination norm to combat unconscious racism.

I. Historical Background
A. Early Years: Exclusion and Overt Discrimination

Critical race theorists recognize the importance of the reinterpretation of history by legal scholars of color.30 The impediments to full participation in intercollegiate sport currently encountered by African-Americans cannot be appreciated apart from the historical and social context from which those impediments spring.31 Indeed, the discrimination encountered by African-Americans in college sport has never been independent of the discrimination encountered by blacks in society in general.32 Accordingly, an historical account of the influence of racism in college sport is an appropriate point of departure.

Since the first intercollegiate competition in 1852,33 black athletes’ involvement in college sport has been marked by racial discrimination and prejudice.34 The attitudes and assumptions that

29. See infra part III.
31. See Neutrality and Choice, supra note 25, at 124. Professor Brown and other race scholars argue that a decontextualized approach to civil rights litigation ignores historical and social influences. Moreover, by focusing on process-oriented reasoning, a decontextualized approach tends, inter alia, to delimit the impact of structural racism in American society. Id. at 69, 124.
33. Howard J. Savage, American College Athletics 17 (1929) (identifying an 1852 crew match between Harvard and Yale as the first intercollegiate competition).
34. Sage, supra note 14, at 3 (noting that racism has been a salient feature from the very beginnings of organized college athletics).
subordinated blacks in society in general fostered exclusionary conduct and blatant discrimination against black athletes during most of the history of college athletics.35

1. Formal Rules of Exclusion

During the late Nineteenth and early Twentieth Centuries, legally countenanced segregation impacted virtually every aspect of social behavior and interaction, including sport.36 In college sport, a series of rules and customs limited black participation to historically black colleges and a few predominantly white colleges located in the northern United States.37

In the South, prohibitions against blacks attending white colleges and universities effectively excluded the black athlete from playing for predominantly white southern institutions.38 Moreover, Jim Crow laws enacted to prohibit whites and blacks from social interaction extended to bar direct sporting competition between them. For example, a Texas Penal Code provision, enacted in 1933, prohibited "boxing, sparring or wrestling contest or exhibition between any person of the Caucasian or 'White' race and one of the

35. The unfair and discriminatory treatment afforded black athletes in both collegiate and professional sport during the latter years of the nineteenth century were the result of "the dominant culture's belief in black inferiority, general deterioration of black rights, and eventual separation of the races in late-nineteenth-century America." David K. Wiggins, Critical Events Affecting Racism in Athletics, in RACISM IN COLLEGE ATHLETICS, supra note 12, at 23, 25.
36. See Alex M. Johnson, Jr., Bid Whist, Tonk, and United States v. Fordice: Why Integration Fails African-Americans Again, 81 CA. L. REV. 1401, 1409 (1993). One writer aptly described the pervasive reach of segregationist laws:

The most conspicuous forms of racial segregation . . . are in residential areas; in educational, recreational, and other public institutions; in quasi-public or privately operated institutions under public control, such as railroads, steamship lines, streetcar and bus systems, and hospitals; in private business establishments, such as hotels and restaurants; and in other private commercial and professional services, such as department stores, mortuary establishments, and doctors' offices. These are the more common visible forms of separation; actually it pervades, in some degree or other, practically the whole range of social behavior.

Id. at 1409 n.25 (quoting Maurice R. Davie, Negroes in American Society 287 (1949)).
African or 'Negro' race...."39 Likewise, a 1932 Atlanta city ordinance prohibited amateur baseball clubs of different races from playing within two blocks of each other.40

More broadly written statutes prohibited any form of athletic competition between whites and African-Americans. Legislative Act 579 is illustrative. Enacted by the Louisiana legislature in 1956, the statute prohibited interracial sports participation.41 Although similar legislation was defeated in Mississippi,42 Mississippi state institutions adopted an "unwritten but ironclad segregation policy."43 That such a policy was adopted with respect to sport may be explained by the fact that Mississippi led former states of the Confederacy in enacting laws and policies to "ensure effective apartheid."44

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39. Tex. Art. 614-11(f), Texas Penal Code (1933). This act was invalidated on grounds that it violated the equal protection of the laws guaranteed by the U.S. Constitution. I.H. 'Sporty' Harvey v. M.B. Morgan, 272 S.W.2d 621, 627-28 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.).

40. C. Van Woodward, The Strange Career of Jim Crow 117 (3d ed. 1974). A Birmingham, Alabama ordinance similarly provided: "It shall be unlawful for a Negro and a white person to play together, or in company with each other, in any games of cards, dice, dominoes, checkers, baseball, softball, football, basketball, or similar games." Thomas E. Foreman, Discrimination Against the Negro in American Athletics 39 (1957). This ordinance was amended in 1954 to permit professional football and baseball exhibitions with mixed teams. Id.

In Boyer v. Garrett, 88 F. Supp. 353 (D. Md. 1949), aff'd, 183 F.2d 582 (4th Cir. 1950), cert. denied, 340 U.S. 912 (1951), Baltimore's informal policies which maintained the racial segregation of athletic competitors was upheld pursuant to the established practice of segregation and the precedent of Plessy v. Ferguson, 163 U.S. 537 (1896), overruled by Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

41. Joan Paul, et al., The Arrival and Ascendence of Black Athletes in the South-eastern Conference, 1966-1980, 45 PhyLon 284 (1984). The stimulus for the enactment of the statute was a controversy involving the 1955 Sugar Bowl which was played in New Orleans. Efforts to prevent the University of Pittsburgh from playing its sole black player in the contest against Georgia Tech set into motion events which led to enactment of the legislation. Foreman, supra note 40, at 33-34.


42. Paul, et al., supra note 42, at 284. This action was taken following a game in which Jones Junior College of Mississippi accepted an invitation to compete in the Junior Rose Bowl Game in Pasadena, California against a Compton College team which had several blacks in its lineup. Foreman, supra note 41, at 34 (also noting the introduction into the Mississippi legislature of an act which barred college teams within the state from competing against teams with black players).

43. Id. at 37. Mississippi legislators indicated they would withdraw funds if the unwritten law was violated. Paul, et al., supra note 41, at 284. This threat was withdrawn when 13 junior colleges in the state agreed informally not to engage in integrated sports competition. Foreman, supra note 40, at 37.

44. Neutrality and Choice, supra note 25, at 74.
One commentator observed, "What was left for blacks generally was participation of black against black and the formation of Negro leagues. At a less organized level, it meant acceptance of the Jim Crow laws which called for separate (but almost never equal) playgrounds, public parks, swimming pools, and other recreational facilities." Under such a regime, the idea of competition in the South between white and black collegians was out of the question.

2. Informal Rules of Discrimination

During the late Nineteenth and early Twentieth Centuries, blacks played sports for a limited number of northern colleges such as Harvard, Amherst and Oberlin. Informal rules reinforced by social strictures, however, were as effective as legislation in limiting the opportunities available to black athletes to compete at predominantly white institutions outside of the South.

These informal limitations appeared in various guises. In some instances, they were manifested as a virtual prohibition of African-Americans from becoming student-athletes. For instance, few black students competed in sports for Catholic universities, because most such institutions excluded African-Americans students during this period. Often informal Jim Crow laws prohibited blacks from playing sports for the schools that did admit black students.

African-American students' experience at the University of Kansas is illustrative. No formal Jim Crow laws were passed in the state of Kansas. Nevertheless, the official policy of the University attempted to minimize the presence of black students in order to remove them from the mainstream of the school's social and extra-

46. Wiggins, supra note 37, at 166.
47. Id. at 166. Similarly, prestigious academic institutions and sports powerhouses throughout the first half of the twentieth century such as Princeton, Yale and Notre Dame did not allow blacks to compete on their sports teams. Notre Dame refused to recruit black athletes until the early 1950's. Even though Yale admitted exceptional black students, it resisted admitting black athletes. Princeton, due to historical ties to southern society, did not admit black students. Consequently, it had no black athletes competing on its athletic teams until 1944. Id.; Ashe, supra note 38, at 56. In 1941, the U.S. Naval Academy, which had no blacks on its sports teams, banned a black player on Harvard's lacrosse team from a game between the schools in Annapolis. William A. Brower, Prejudice in Sports, 19 Opportunity 260-261 (1941) (providing a detailed account of the incident and its ramifications which included student protests at Harvard).
48. Loren Miller, The Unrest Among College Students, 34 Crisis 187 (1927).
curricular activities. One historian notes, “Blacks were denied practically every right except that of attending classes.” The University’s denial of African-American students’ rights to participate in most extracurricular activities included the right to participate on the University’s athletic teams. The head of athletics at Kansas in the 1930s insisted, “[N]o colored man will ever have a chance as long as [he is there].” The situation at University of Kansas illustrates the lack of opportunity for black students to compete for northern universities, which often paralleled those institutions’ attitudes and policies towards black students in general.

The environment encountered by black students and student-athletes at the University of Kansas was not unique. Certain athletic conferences, such as the Missouri Athletic Conference (with the exception of Nebraska) systematically excluded black athletes pursuant to so-called “gentlemen’s agreements” that prohibited blacks from participating in league contests. These “gentlemen’s agreements” constituted a series of written rules or tacit understandings precluding black participation in organized sport.

The reach and impact of “gentlemen’s agreements” extended beyond the walls of the institutions that relied on them to exclude black athletes. These agreements severely impacted the few black athletes who were participating for northern universities. Prior to

49. Numerous prohibitions excluded African-American students from the social life of the university. Black students could not attend university parties, proms and dances; they were barred from using the school’s swimming pools even when it was a part of their physical education curriculum; they were not permitted to live in university housing and they were excluded from literary, drama and glee societies and clubs. Id.


51. Miller, supra note 48, at 187.

52. Wiggins, supra note 37, at 166.

53. In 1914, the University of Nebraska withdrew from the conference after the school refused to capitulate with demands not to allow a black athlete to play in a game against Kansas. Id. at 168. Such progressive attitudes were slower in the making at other institutions. Student protest led to the desegregation of the Big Six Conference (now known as the Big Eight) in the 1940’s. Similarly, following a student resolution protesting discriminatory practices, members of the Missouri Valley Conference (Colorado, Iowa State, Kansas, Kansas State and Nebraska) voted in 1947 to end racial discrimination at their institutions by 1950. The three year delay in implementation was deemed a necessary period of adjustment. Id. at 172.

54. Id. at 168; WOLTERS, supra note 50, at 316 (noting that these schools also “barred Negroes from their campuses” during the 1920’s).

55. FOREMAN, supra note 40, at 1.

56. WOLTERS, supra note 50, at 316. Although gentlemen’s agreements were strictly enforced when southern teams played in the South, occasionally southern teams would suspend the agreements when competing in the North against a school
World War II, most northern teams with blacks on their rosters either did not schedule games against southern teams or would leave their African-American players at home when the team traveled south.\textsuperscript{57} It has also been suggested that a promise to withdraw voluntarily from games against southern schools was an element of the consideration that some northern institutions extracted from their black athletes.\textsuperscript{58}

Illustrations abound of northern schools forcing black players to sit out games against southern teams. For instance, in 1916, Paul Robeson, a member of Rutgers University's football team, was barred from the field of play when Washington and Lee College threatened not to play if he was allowed to participate.\textsuperscript{59} Such ra-


57. FOREMAN, supra note 40, at 31.

58. Brower, supra note 47, at 263. Such promises amounted to precautionary measures intended to obviate the embarrassment northern schools would encounter if their black players protested their exclusion. \textit{Id.}

59. George Fishman, Paul Robeson's Student Days and the Fight Against Racism at Rutgers, 1969 FREEDOMWAYS 221 (providing a detailed account of this incident); Rutgers did redeem itself a few years later when it stood by Robeson in the face of threats by the University of West Virginia that its players would not take the field if Robeson was permitted to compete. WOLTERS, supra note 50, at 316.

Similarly, in 1929, a star black halfback for New York University was withheld from participating in a football game because of the University of Georgia's protest. Wiggins, supra note 37, at 169. The glee with which segregationists applauded this form of racial discrimination is captured in the following remarks: "The Georgians exulted, 'even the most powerful binoculars could not discern the nigger in the grid pile' and congratulated [NYU's] coach Mechan for inventing 'such a terrible injury—a damaged acromioclavicular ligament—to meet such a delicate emergency.'" WOLTERS, supra note 50, at 317. Such incidents of racism provide illustrations of numerous instances during the pre-World War II era during which northern universities would restrict their black players to the sidelines in contests against southern colleges and universities. Wiggins, supra note 37, at 169.

Although this practice was less prevalent during the 1930's and 1940's, even then northern institutions often benched their black players during games against white southern colleges. Wiggins, supra note 37, at 169. In 1934, the University of Michigan kept a black football star, Willis Ward, from competing in a game against Georgia Tech. Likewise in 1941, Harvard succumbed to a request by Navy not to permit a black lacrosse player from competing—a decision which resulted in such an outcry that Harvard thereafetr announced a policy "telling all future athletic opponents it would no longer 'countenance racial discrimination'." Wiggins, supra at 169. See Brower, supra note 48, at 260 (providing additional illustrations).

After World War II in particular, some non-southern universities resisted the segregationists' pressure and permitted their black student-athletes to play. For instance, the University of Southern California permitted two black athletes to compete in the 1924 Rose Bowl despite objections by the University of Missouri. WOLTERS, supra note 50, at 316. Other notable illustrations of the refusal of northern teams to succumb to the segregationist pressures of southern schools are described in FOREMAN, supra note 40, at 31-34.
cially exclusionary practices resulted in black colleges providing the only significant opportunities for the black athlete to compete in college athletics prior to the 1930s.60

Northern institutions adopted other informal rules. These rules carried the weight of law and, thus, restricted the ability of black athletes to compete for white colleges and universities. Informal quotas typically restricted the slots open to black athletes to no more than one or two players on a team.61 In addition to numerical quotas, northern colleges imposed another requirement that limited the number of black student-athletes allowed to compete on their teams. Many of these institutions imposed a "superspade" requirement.62 In other words, the typical African-American stu-

The early years following the war also saw a few instances in which the color barrier, perpetuated by gentlemen's agreements, was crossed. In 1947, two black football players for Penn State played against Southern Methodist University in Dallas. In the same year, a black student-athlete for Harvard was permitted to play in its game against the University of Virginia in Charlottesville. Id. at 32. These illustrations were, however, the exception to the rule.

60. Wiggins, supra note 37, at 29. As an alternative to their lack of access to play sports at white colleges and universities, black colleges and players created all black leagues. Segregation in athletic competition also resulted in the development of all black teams and leagues at the professional level. The black baseball leagues are well known illustrations. Eitzen & Sage, supra note 3, at 324.

61. Wiggins, supra note 37, at 172 (acknowledging the existence of quotas limiting the numbers of African-American student-athletes allowed to compete for a school at one time); Ashe, supra note 38, at 93 (also noting that most white colleges had no black student-athletes on their teams during the early 1900's and the few that did had no more than one or two).

62. Therefore, black student-athletes assumed only token status at the predominantly white institutions willing to admit them. The burdens imposed on "superspades" have been depicted as follows:

That is, they were expected to do more than simply participate in the team's success, they were expected to carry the team to victory. Willis Ward is a shining example of a "superspade;" he scored 13 of the University of Michigan's 18 3/4 points to lead them to victory over Illinois in the 1932 Butler Relays. Three years later Jesse Owens scored 40 of Ohio State's 40 1/5 points in a win over UC, Berkeley. Paul Robeson, the lone African-American on campus at Rutgers, was an All-American in 1917 and 1918. They and other African-Americans were expected to provide super performances to justify their presence on athletic teams at predominantly white colleges and universities.

Othello Harris, African-American Predominance in Collegiate Sport, in RACISM IN COLLEGE ATHLETICS, supra note 12, at 51, 53.
dent-athlete\textsuperscript{63} playing for a predominantly white college prior to the 1930s tended to be an exceptionally talented starter.\textsuperscript{64}

3. **The Black Athlete as an Outsider**

University policies also contributed to the plight of the black student-athlete. These policies operated to ensure that black student-athletes, competing for the few predominantly white colleges willing to admit them, were not spared the indignities of racism at their home institutions. A lack of institutional sensitivity and overt racism relegated the African-American student-athlete to outsider status. Those problems also reflected the schizophrenic attitude of the American public toward the black athlete. As expressed by one commentator,

Black athletes at predominantly white universities [have] been both segregated and despised, yet cheered at game time since William H. Lewis and W.T.S. Jackson played football for Amherst in 1890-1891. This dual existence for black athletes in collegiate sports—simultaneously scorned and loved—was a microcosm of the contradictions of a segregated society. Martin Luther King, Jr. would later speak of the dual nature of an American society “that both loves the Negro but is repelled by him.”\textsuperscript{65}

\begin{footnotesize}
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\item[63.] The profile of the small contingent of African-American student-athletes who played for these schools displays a marked contrast to the African-American student-athlete who would populate college teams once desegregation led to significantly greater access beginning in the 1930's. Black student-athletes who competed during the early years of organized college sport came primarily from middle class families that placed a premium on education and culture. Wiggins, supra note 37, at 165. These values were transferred to the black student-athlete. Although black athletes approached sport seriously, they attached far greater significance to academic achievement. \textit{Id.}

William Henry Lewis, who was an academic and athletic star at Amherst College, is paradigmatic of the early black college athletes. Following graduation from Amherst and Harvard Law School (he played football at both schools), Lewis became a highly successful lawyer and was appointed as assistant attorney general of the United States in 1911. \textit{Id.}

\textit{See} discussion \textit{infra} text accompanying note 81 (providing profile of the modern African-American student-athlete).

\item[64.] Ashe, supra note 38, at 93.

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Such attitudes resulted in the exclusion of the black athlete from the mainstream of campus social, academic and athletic life. Black student-athletes typically were not permitted to reside in campus housing or otherwise engage in campus social life. They encountered demeaning comments from coaches, teammates and other members of the university community, as well as the populace of the local communities in which those colleges were located. This sense of isolation was heightened by an absence of other black students, as well as black faculty, coaches or administrators.

These attitudes also contributed to the academic neglect increasingly suffered by the African-American athlete during the 1920s and 1930s. Black athletes were counseled to take courses that offered little in the way of intellectual value, but which would keep them eligible to play sports.

Black student-athletes faced various forms of discrimination in both locker rooms and on the playing field. During the early 1900s, black athletes who played for white institutions were channeled into sports such as track and field, and to a much lesser extent...
tent, football. These sports were viewed as not involving the type of intimate physical contact required by basketball and swimming. For instance, although the Big Ten Conference permitted blacks to play on its members’ football teams, they were prohibited from playing basketball until after World War II. Moreover, the African-American athlete alone bore the burden of being the “superspade.” They were often blamed when misfortune befall their teams. The use of blacks as scapegoats in college athletics parallels behavior that has occurred in other contexts. Historically, blacks have been deemed responsible for any number of economic or political failures.

In short, black student-athletes were subjected to an atmosphere that isolated them from their university communities and forced them to look outward for nurturing and support. The ramifications of this isolation extended beyond the emotional pain caused by discrimination. It also adversely affected their college careers. Frustrated by patterns of discrimination, some black student-ath-

72. Id. at 166; Harris, supra note 62, at 54 (noting that it was not until after the 1930's that blacks began to compete in appreciable numbers in sport, including football, other than track and field).

73. Id. at 54. See also Wolters, supra note 50, at 316. Such conduct was consistent with the treatment afforded the non-athlete black student at these institutions. During the 1920s, the University of Kansas prohibited black students from all forms of extracurricular activity including glee clubs, literary societies, dramatic associations and dances. Wiggins, supra note 37, at 168. “It also insisted black students live off campus rather than in school dormitories and promoted other segregated practices ranging from seating assignments in the cafeteria to exclusion from local theatres.” Id.

74. Ashe, supra note 38, at 56. Black athletes at northern institutions were subjected to other forms of conduct aimed at separating them from white players. For instance, white teammates of Fritz Pollard, who along with Paul Robeson were perhaps the two most prominent black athletes during this period, refused to share the locker room with him. Pollard was also refused permission to ride on the trolley which carried the rest of his teammates from the campus to the playing field. Wiggins, supra note 37, at 167.

The African-American student-athlete was often slighted in the awarding of athletic honors such as All-American status. Ashe, supra note 38, at 93-94 (providing illustrations of the slights black athletes encountered with respect to awards for athletic achievement).

75. See Wiggins, supra note 37, at 171.

76. See Bell, supra note 28, at 576 (providing examples of the many instances in which American society has used African-Americans as scapegoats).

77. Black college athletes often found nurturing within the local black community. Wiggins, supra note 37, at 166.

78. Spivey & Jones, supra note 68, at 944.
letes ultimately stopped competing. 79 Many of those who continued to compete performed poorly academically. 80

B. The Post World War II Era: From Overt to Covert Racism

During the post-World War II era, 81 the African-American student-athlete emerged as a force to be reckoned with at predominately white colleges and universities. 82 America’s engagement in

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79. See Spivey & Jones, supra note 68, at 944 (many black athletes who encountered a pattern of discrimination at the University of Illinois as at other predominately white northern colleges gave up on competing).

Professor Harris describes the shabby treatment afforded black student-athletes by their schools as follows: “Campus housing was off-limits to most of them; they were refused service in restaurants and not allowed to stay at hotels with their white teammates (even in northern cities like Chicago and Buffalo, New York); and probably most humiliating, they were kept out of home and away games against southern teams.” Harris, supra note 62, at 53-54.

80. Spivey & Jones, supra note 68, at 944 (commenting on how the absence of social outlets for black athletes impeded their academic success).

81. Although the post World War II years are widely recognized as the period during which access opened up for blacks to participate in organized sport, during the 1930's the numbers of highly gifted black athletes competing for predominantly white institutions rose substantially. Wiggins, supra note 37, at 169. This increase occurred simultaneously with the increase in the numbers of black students attending predominately white northern schools as a result of the African-American migration from the South to the North which began in the 1920’s and continued at a reduced rate in the 1930s. Id. Increased access of the African-American student-athletes to white colleges was also attributable to the changing focus of college sport. The increased competitiveness of intercollegiate athletics during the 1930's influenced some predominantly white institutions in the North to disregard skin color in order to acquire the services of the best athletes so as to field successful teams. Id.

The 1930's also marked the beginning of a disturbing trend—a change in the type of black athlete being recruited to attend colleges. As noted above, prior to the 1930's black athletes at white institutions came primarily from middle class families which stressed educational attainment. However, in the 1930's an increasing number of white colleges began to recruit greater numbers of black student-athletes who were "either inadequately prepared or unwilling to do what was necessary to be successful academically." Id. at 170. The focus of the university was to attract the outstanding black athlete who would increase the school's winning percentage regardless of the athlete's ability to survive in the classroom. Id.

82. The segregation of college sport prior to World War II was not quietly condoned. African-American sportswriters for black weekly newspapers campaigned to increase collegiate sport opportunities for black athletes beyond those which existed at traditionally black colleges and universities. Wiggins, supra note 35, at 32. African-American student-athletes and their supporters also protested the discrimination which the former encountered at southern, predominately white university campuses prior to World War II. Spivey, supra note 65, at 117. In 1940, New York University's decision to bench Leonard Bates, a black football star, in a game against the University of Missouri which maintained a staunch line against interracial sporting competition, erupted into mass protest by NYU students against the university administration and its athletic program. Id. at 119. Prior to the 1960s, this form of protest as well as individual acts of defiance were ineffective in changing the discrimination in college
World War II forced many colleges to seek talent from sources that previously had been ignored. One such source of available talent was the African-American student-athlete. As summed up by one author, "the chaotic athletic situation of World War II was a vital factor in the assault on the color-line in sports."

Factors both external and intrinsic to intercollegiate athletics contributed to the increased integration that began in the years following the war. Increased commercialization of college sport was one of the most significant intrinsic factors. It resulted in African-American student-athletes gaining greater access to opportunities to compete. Commercialization enhanced the pressure on colleges to field winning teams. This, in turn, propelled colleges to

83. Id. at 121.
84. Id.
85. Available statistical data reveals the dramatic increase in access to African-American student-athletes in the post World War II era. In 1948, approximately 1% of all players at white universities were black. The percentage increased in 1962 to a figure which was roughly comparable to the distribution of blacks in society at large. In 1975, 34% of all players were black, and by 1985, the percentage of black players competing at predominantly white institutions had increased to 49%. Forest J. Berghorn & Norman R. Yetman, Racial Participation and Integration in Men's and Women's Intercollegiate Basketball: Continuity and Change, 1958-1985, 5 Sociology Sport J. 107, 107-24 (1988).

The predominance of the African-American student-athlete is more clearly seen when placed in the context of the overall enrollment of African-Americans at predominantly white institutions. "[B]lacks comprised only 8.0% of the total undergraduate population in 4-year colleges and universities in 1982, and more than one-quarter of these black students were enrolled at historically black colleges..." Id. at 110.

By the end of World War II, virtually every major collegiate team outside the South had opened its doors to permit at least one black player to compete for it. Spivey, supra note 65, at 121. Southern colleges and universities resisted this fundamental change in college sport and continued after World War II to exclude black student-athletes. The integration of college sport at predominantly white colleges in the South did not occur until the latter part of the 1960's during which time the numbers of black players competing for these institutions mushroomed. Wiggins, supra note 35, at 35.

Thus, although the proportion of blacks living in the South remained constant at 53% throughout the 1970s, the percentage of college basketball players in that region rose nearly 40% between 1970 and 1985. While black players represented 22% of all players in the South in 1970, by 1985 this figure had increased to 61%.

Berghorn & Yetman, supra at 111.
86. Spivey, supra note 65, at 122.
87. Id.
recruit and obtain the services of the most talented student-athletes regardless of their color. 88

While a moral desire to end segregation may have prompted many to seek the integration of organized collegiate sport, the economic interests of others may have been of primary importance. Despite the increased integration of college athletics, the emergence of the black athlete has been restricted primarily to the “revenue producing sports.” 89 This phenomenon was adroitly captured by one commentator who stated:

In those team sports in which “revenue producing” has come to dominate, the contribution of outstanding African-American athletes to winning championships and holding public interest has opened opportunities to African-Americans in college sports. Sports more closely linked to upper-class patronage and with less spectator interest have been slow to attract and integrate blacks. 90

Notwithstanding this “revenue-producing” role, black student-athletes could potentially benefit because their interests often converged with the commercial interests of predominantly white colleges and universities. 91

Although this view may seem unduly harsh, it gains support when one examines the “revenue-producing sports”—sports in which there have been substantial increases in the number of African-American participants. It appears that, in part, colleges set aside discriminatory practices in order to reap benefits. Such benefits came in the form of championship titles and recognition ac-

88. Id. (“Intercollegiate sports was cashing in on black athletes. The post-war era was the coming of age of big time intercollegiate sports and the final victory in collegiate athletics of the win-at-any-cost mentality.”).

I do not intend to suggest that intercollegiate sport was not a commercialized enterprise prior to World War II. Indeed it was. However, the years following the war witnessed the maturation of the commercialization which had begun in the early 1900's. Harry Edwards, Sociology of Sport 41 (1973).

89. Davis, supra note 21, at 276 n.33. The primary revenue-producing sports are Division I-A football and Division I men's basketball. Id.

90. Sage, supra note 14, at 10.

91. The notion of interest convergence was introduced in large part by Professor Derrick Bell in addressing the motivations which underlie the decision in Brown v. Board of Education. Professor Bell's thesis is that whites in policy making capacities recognize that civil rights laws accrue to their political and economic interests at least as much as they benefit blacks. Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980). Thus the principle of interest convergence provides that the “interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.” Id. at 523.
crued from the contributions of African-American student-athletes.\textsuperscript{92} As noted by historian Adolph Grundman,\textsuperscript{93} the professionalization of college sport following World War II enticed colleges to recruit African-American student-athletes. He posits that their recruitment served a dual purpose: it helped these schools strengthen their athletic programs, while at the same time it promoted the advancement of race relations.\textsuperscript{94}

Changes occurring in society at large also contributed to the desegregation of college athletics.\textsuperscript{95} During the period prior to \textit{Brown v. Board of Education},\textsuperscript{96} the laws of the nation were employed to perpetuate the segregation of college sport. Conversely, Supreme Court desegregation decisions,\textsuperscript{97} political decisions,\textsuperscript{98} and events occurring in professional sport\textsuperscript{99} helped to break down bar-

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\item For instance, growing federal concern for nondiscrimination in higher education also favorably impacted the integration of college athletic teams. \textit{See K. C. Green, Government Support for Minority Participation in Higher Education} 9-10 (1982). This is illustrated by President Truman's appointment in 1946 of a commission created to examine the goals, objectives and the social role of America's system of higher education. \textit{Id.} at 9. The six volume report of the President's Commission on Higher Education espoused egalitarian goals including a call for the end of racial and religious discrimination in higher education. \textit{Id.}

\item In addition, Congressional passage of the G.I. Bill which funded post-secondary education for many who otherwise could not afford to attend college resulted in an increased presence of African-Americans, some of whom were athletes interested in competing in sports, on predominantly white campuses. Harris, \textit{supra} note 62, at 54. Consequently, as summed up by Professor Harris, "at a time when Americans were more receptive to African-Americans at least at the level of secondary structural assimilation, there was also a larger pool of potential black athletes available to collegiate athletic teams." \textit{Id.} at 55.

\item 347 U.S. 483 (1954).

\item The Supreme Court's decision in \textit{Brown v. Board of Education} has been described as igniting "an educational reform movement for African-Americans." Kevin Brown, \textit{Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education}, 78 IOWA L. REV. 813, 837 (1993) [hereinafter \textit{Do African Americans Need Immersion Schools?}].

\item See \textit{id.} at 816-17 (commenting on the role that legal and political considerations have played in the aspirations to integrate public schools in America over the past 40 years).

\item A significant external factor was the Brooklyn Dodgers' signing in 1945 of Jackie Robinson. Although signed by the Dodgers in 1945, Robinson spent 1946 in the minor leagues and emerged in 1947 to break the color barrier in major league baseball. \textit{Eitzen & Sage, supra} note 3, at 324; \textit{Jules Tygiel, Baseball's Great Experiment: Jackie Robinson and His Legacy} 343 (1983) (noting the expansion of previously closed opportunities for African-American athletes following the Dodger's signing of Robinson).
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riers for the African-American student-athlete.\textsuperscript{100} As described by Professor Alex Johnson, in the period following \textit{Brown}, "[a] combination of desegregation and other economic and legal events gave African-Americans opportunities which could be, and often were, used to improve their economic and social status."\textsuperscript{101} He adds, however, "[t]he promise of \textit{Brown} and the opportunities for African-Americans that followed it were . . . short-lived."\textsuperscript{102}

Nevertheless, sport, including college sport, is perceived by many as the segment of society where the promise of \textit{Brown} has been truly fulfilled. In that sense, sport would depart from the post-\textit{Brown} paradigm presented by Professor Johnson. Yet, as the following discussion reveals, college sport does not depart from the post-\textit{Brown} paradigm, but represents a microcosm of American society. Thus, it too provides an illustration of the failed promises of \textit{Brown}.

\section{II. Stereotypes And Covert Racism in College Sports}

\subsection{A. Permanence of Racism in Intercollegiate Athletics}

\subsubsection{1. Differing Perceptions}

The end of exclusionary practices and most other overt forms of discrimination in collegiate sport\textsuperscript{103} has increased the opportunities for African-American student-athletes to compete for predominantly white institutions. Increased access\textsuperscript{104} stemming from self-

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Integration of the Brooklyn Dodgers was followed over the next twenty years by the integration of other professional sports organizations. Wiggins, \textit{supra} note 35, at 34; Wiggins, \textit{supra} note 37, at 171. Predominantly white sports teams in the north duplicated the increased integration of professional sports. Harris, \textit{supra} note 62, at 55.

\textsuperscript{100} The lowering of the color barrier for African-American student-athletes at previously off limits, predominantly white colleges resulted in an immediately felt consequence for historically black colleges. Desegregation of college sports placed black colleges at a disadvantage since the black athlete turned to the white institutions to take advantage of the enhanced opportunities provided by increased public exposure. Many black colleges were forced to substantially modify their programs. Sage, \textit{supra} note 14, at 9; \textit{see} Harris, \textit{supra} note 62, at 54-55.

\textsuperscript{101} Johnson, \textit{supra} note 36, at 1410.

\textsuperscript{102} \textit{Id}.

\textsuperscript{103} Although blatant forms of discrimination have subsided considerably in intercollegiate athletics, particularly with respect to access to opportunities to compete, the post-1970 years have not witnessed the complete eradication of overtly discriminatory conduct. The forms of overt discrimination which continue to harm black athletes are described in \textsc{Richard Lapchick}, \textsc{Five Minutes to Midnight Race and Sport in the 1990s} 226-28 (1991).

\textsuperscript{104} Ample evidence exists to demonstrate that those who control some sports have created barriers to black participation in a number of sports, thus reproducing
interest\textsuperscript{105} has not, however, resulted in a transformation of the underlying cultural attitudes and values that helped to produce overt discrimination against the African-American college athlete. As noted by one commentator, the cynical self-interest that contributed to opening doors for black athletes did not result in an overnight transformation of attitudes.\textsuperscript{106} In short, racism persists in college sport.

In fact, distributive equality\textsuperscript{107} has been accompanied by new, more subtle manifestations of racism. Nevertheless, these manifestations derive from the racial stereotyping and insensitivity which has perpetually plagued American collegiate sport.\textsuperscript{108} The overall impact of these new forms of discriminatory conduct is a failure to integrate, in a meaningful way, African-American student-athletes into their university communities.\textsuperscript{109} As described below, these

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\textit{some of the more odious features of racism}. Sage, \textit{supra} note 14, at 9. Professor Sage argues that increased access to opportunities for the African-American student-athlete is not yet universal in college sport. He concludes:

\textit{Many college sports teams still have very few black participants. These sports tend to be linked to upper-class patronage, but class linkage is not the entire explanation for black underrepresentation in these sports. Dominant classes have the wherewithal to insulate themselves against those with whom they do not wish to associate. Laws that prevent African-Americans from being kept out do not assure that they will get in.}

\textit{Id.}

\textit{105. See supra} text accompanying notes 89-94.

\textit{106. Lapchick, supra} note 103, at 226. \textit{As the mood of the country shifted slightly toward giving blacks more educational opportunities, coaches with an eye toward the scoreboard took advantage of} \textit{'open admissions'} policies. White coaches, administrators, boosters, and players had to adjust. \textit{If they had been racist before, they would have to tone it down.} \textit{Id.}

\textit{107. As used here, distributive equality refers to the process of measuring equality based upon opportunity and access}. \textit{See generally} Dewar, \textit{supra} note 14, at 227-29. Under this approach, equality is achieved when the distribution and allocation of opportunities and rewards within a particular sport match the racial distributions in society. \textit{Id.} at 228. Such an approach is short-sighted inasmuch as desegregation is \textit{not} the sole factor which prevents equality in college sport. \textit{As such it ignores the complexities which continue to relegate the African-American in college sport to outsider status}. \textit{See id.}

\textit{In discussing the rationales often used to justify increased minority representation in education, Professor Delgado defines the distributive justice rationale as saying} \textit{“there is a certain amount of wealth available and argues that everyone is entitled to a minimum share of it.”} Delgado, \textit{supra} note 15, at 569. Like Dewar, Delgado perceives shortcomings in a distributive approach to racial justice. \textit{Id.} at 569-71.

\textit{108. Wiggins, supra} note 37, at 172. \textit{As historian Adolph Grundman accurately points out, intercollegiate sport during the decade of the 1950s did not, as some people have been led to believe, ‘mark the triumphs of egalitarian ideals in American society.’} \textit{Id.}

\textit{109. Berghorn & Yetman, supra} note 85, at 107-24. \textit{Increased access alone will not necessarily result in full integration and participation.

new forms of discrimination result in injury that is real and harmful\textsuperscript{110} not only to African-American student-athletes but to other African-Americans not involved in intercollegiate athletics.

\textbf{(a) The Egalitarian Ideal}

Despite its pervasiveness, many would still deny the continued presence of racism in college sport. This denial may be attributed, in large part, to the perception that sport itself transcends race. Sport in America is idealized as an endeavor in which one can be judged solely on the basis of ability and merit.\textsuperscript{111} One scholar expressed this desired, yet elusive, concept as follows:

[In our culture sport is often presented as one area that is free from racism. It is presented as an activity in which hard work and talent are the primary contributors for success because the bottom line in the sporting world is winning and putting the best team or individuals into any competitive situation.\textsuperscript{112}]

The African-American is presumed to have an equal opportunity to share in the rewards that can arise from sports participation.\textsuperscript{113}

For example, the dominant creed of sport is thought to be "individual achievement through competition."\textsuperscript{114} As noted by historian Donald Spivey, the sanctum of sport is premised on doctrines

\textsuperscript{110} Brown, supra note 23, at 296 (noting that despite its increasingly subtle and elusive nature, racism nevertheless inflicts real injuries in need of relief).

\textsuperscript{111} Most white Americans believe that the egalitarian values which supposedly predominate in sport apply equally to the African-American athlete. See Anderson & South, supra note 19, at 85; Spivey, supra note 56, at 283-84 (arguing that sport in American society is premised on unofficial doctrines including equality of opportunity).

\textsuperscript{112} Dewar, supra note 14, at 230. Such romanticized notions, however, fail to comport with the reality of college athletics. This results in large part from a failure to examine the linkage between power and the persistence of oppression in sport. Id.


"Sports have been held up in our society as an activity in which African-Americans, particularly males, could compete and achieve without the bane of discrimination, an activity where merit was rewarded and achievement was unambiguous and evident to all." Anderson & South, supra note 19, at 85.

\textsuperscript{114} Edwards, supra note 88, at 334.
of "equality of opportunity, sportsmanship, and fair play."115 This premise is consistent with a liberal jurisprudential approach that "conceives meritocracy as a system in which benefits and burdens are distributed in accord with one's deeds—presumably the products of rational choice—rather than characteristics over which one has no apparent control."116 The notion of race neutrality then becomes an inherent attribute of athletic competition in general, and of organized sport in particular.117 Yet, as will be discussed shortly, the experiences of black participants in college sport fall short of true egalitarianism.

(b) Illusion of Equality

Differences in the ways in which whites and blacks perceive the same events also influence the former's tendency to discount the impact of race in college sport.118 Many white Americans assume that the removal of barriers to access has eradicated all racial impediments in college sport; African-Americans by and large refuse to adopt this view.119 The perceptions of white Americans are formed against a backdrop of the high visibility of African-American athletes who compete in the three major sports, basketball, football and baseball.120 Such substantial visibility creates an illusion of integration and conveniently obscures the pervasiveness of racism in sport.121 The fallacy of this illusion is demonstrated in non-revenue producing sports (e.g., gymnastics, golf, swimming, tennis, soccer and volleyball), which provide few opportunities for African-Americans to compete.122 Such views also illustrate the

115. Spivey, supra note 65, at 120.
116. Flagg, supra note 2, at 954 n.3.
117. Robert Sellers, Black Student-Athletes: Reaping the Benefits or Recovering from the Exploitation, in RACISM IN COLLEGE ATHLETICS, supra note 12, at 143, 144.

One structural feature of human experience separates people of color from our white friends, accounting in large part for our differing perceptions in matters of race. This structural feature, which dwarfs almost everything else, is simply stated: white people rarely see acts of blatant or subtle racism, while minority people experience them all the time.

Id.

119. LAPCHICK, supra note 103, at 224.
120. ETZEN & SAGE, supra note 3, at 332.
121. Id.
122. COAKLEY, supra note 1, at 264. It is also ironic that revenues generated from revenue-producing sports often help to fund those sports with few African-American student-athletes. Id. The absence of African-Americans in the non-revenue-producing sports may be linked to more than economics. It may also reflect the desires and
superficiality of defining racism in terms of access and opportunities to participate in sport.\textsuperscript{123}

2. The Influence of Race

Considerations more fundamental than the skewed vision resulting from the illusion of black dominance in sport account for these differing perceptions.\textsuperscript{124} The endemic nature of racism masks its reality as well as its harmful consequences.\textsuperscript{125} The explicit ideology of white superiority that prevailed during the Jim Crow era has been "submerged in popular consciousness."\textsuperscript{126} In fact, overt forms of racism are no longer considered acceptable.\textsuperscript{127} It is not so clear, however, whether or not the same moral culpability attaches to unconscious racism.\textsuperscript{128} Professor Bell

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the abilities of those of the upper classes to insulate themselves from those with whom they prefer not to associate. Sage, \textit{supra} note 14, at 9.
\textsuperscript{123} Dewar, \textit{supra} note 14, at 228-30.
\textsuperscript{124} The disparity in perceptions of white and black Americans on the presence of racism results in differing interpretations of the same events and conditions. See Brown, \textit{supra} note 23, at 304.
\textsuperscript{125} Brown, \textit{supra} note 23, at 82-83. "Institutionalized racism pervades all facets of American life, both public and private. Because of its pervasive nature, it is often difficult to identify or place neatly in either the public or private sphere." \textit{Id. See} Brown, \textit{supra} note 97, at 825; Charles R. Lawrence III, \textit{The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism}, 39 STAN. L. REV. 317, 322-23 (1987); Brown, \textit{supra} note 23, at 304.
\textsuperscript{127} Commenting on the social science data which supports this conclusion, Professor Kevin Brown concludes that "[a]lthough individuals (of all races and ethnicities) act upon the negative connotations attached to blacks, open expression of such prejudices by individuals is improper." \textit{Do African Americans Need Immersion Schools?}, \textit{supra} note 97, at 825. Professor Brown goes on to add, however, that this behavioral change has not resulted in more positive attitudes toward African-Americans.

[Social science data], for example, indicates a shift in the expressed norm for racial attitudes of whites—from a sanctioned negative attitude to an obligatory neutral or positive attitude towards blacks. While surveys show that whites overwhelmingly reject blatant forms of discrimination, they fail to show an association with more positive behavior toward African Americans.

\textit{Id.} at 825-26.

Lawrence, \textit{supra} note 125, at 323 (noting that our society has recently adopted a view that racism is immoral); Brown, \textit{supra} note 23, at 307 ("Our society has established a national consensus against blatant, intentional racism . . . "). See Richard Delgado & Jean Stefancic, \textit{Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systematic Social Ills?}, 77 CORNELL L. REV. 1258, 1282 (1992) (asserting that, since overt racism is rare, many whites under appreciate its extent).

\textsuperscript{128} Whites seem not to have reached consensus on the immorality of unconscious racism. Flagg, \textit{supra} note 2, at 987.
states: "the very absence of visible signs of discrimination creates an atmosphere of racial neutrality and encourages whites to believe that racism is a thing of the past."\textsuperscript{129} Moreover, it is in the self-interest of whites to believe that racism can be placed on the shelf as an object of archival history.\textsuperscript{130}

What emerges then is an unconscious norm of white dominance that provides the basis for assessing individual and group conduct.\textsuperscript{131} The manifestations of this norm, however, are difficult to define. Indeed, "[I]lack and much of our social discourse recognize racism only in the form of an overt expression of white racial superiority and deliberate efforts to denigrate, segregate, or deny opportunity on the basis of skin color."\textsuperscript{132}

Despite the muted and elusive nature of its current manifestations, the prevailing ideology of white superiority remains a product of negative stereotypes\textsuperscript{133} and cultural beliefs adverse to people of color. Therefore, it continues to exert a substantial influence on the interests of people of color,\textsuperscript{134} causing them real injury.\textsuperscript{135} Commenting on the harmful consequences of the new ideology of white superiority, Professor Crenshaw concludes that it "legitimates prevailing injustices and constrains the development of new solutions that benefit Black Americans."\textsuperscript{136} This institutionalized, albeit difficult to define, racism pervades college sport just as it does other facets of American society. In summary, just as racism has played a central role in America's "socio-historical experience" and continues to influence our attitudes, perceptions and inter-relationships, it also continues to influence college sport despite disparate perceptions.\textsuperscript{137} The persistence of racism in intercollegiate athletics is assured when there is incorporation (by the dominant

\textsuperscript{129} Bell, supra note 28, at 574. See Brown, supra note 23, at 310 ("White race consciousness informs and helps constitute the existing social conditions that whites are able to reconcile with processes of formal equality and the belief that racism is no longer a significant problem in the United States.")

\textsuperscript{130} See Delgado, supra note 15, at 571; Flagg, supra note 2, at 987.

\textsuperscript{131} Do African Americans Need Immersion Schools?, supra note 97, at 824.

\textsuperscript{132} Brown, supra note 23, at 307-08.

\textsuperscript{133} Crenshaw, supra note 126, at 1369.

\textsuperscript{134} Id. ("The rationalizations once used to legitimate Black subordination based on a belief in racial inferiority have now been reemployed to legitimate the domination of Blacks through reference to an assumed cultural inferiority.")

\textsuperscript{135} Brown, supra note 23, at 310.

\textsuperscript{136} Crenshaw, supra note 126, at 1369.

\textsuperscript{137} Racism has "the power to constrict thought, to channel broad human experience into narrowly referenced and reified stereotypes." Brown, supra note 25, at 81 n.74 (quoting Patricia J. Williams, Alchemical Notes: Reconstructing Ideals From Deconstructed Rights, 22 Harv. C.R.-C.I.L. L. 401, 414 (1987)).
culture) of stereotypes and notions concerning African-American athletes that undergirded the segregation of college sports prior to World War II.138

B. The Influence of Racial Stereotypes

Racism—and the political, economic and social disparities that it spawns—ensue from culturally ascribed beliefs and roles of superiority of whites and inferiority of people of color.139 Indeed, the very history of racism “helps to develop, and in turn is perpetuated by, a shared psychology and culture of which racially affected ideology is a constituent part.”140 This collective consciousness is based, in significant part, on fraudulent stereotypes.141 In turn, these stereotypes aid in the formulation of racial identities that are relied on to define the character and abilities of African-Americans. Thus, untrue images and myths, which are unknowingly transmitted, constitute a crucial ingredient in the process by which unconscious racism is produced.142

Stereotypes143 regarding the African-American athlete are rooted in the same irrationality that impairs one’s ability to perceive the actual qualities and capabilities of any individual or group that is stereotyped.144 Today, fraudulent stereotypes and cultural

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140. Brown, supra note 23, at 304-05.
141. Crenshaw, supra note 126, at 1370. Indeed in the past, the blatant oppression of African-Americans was legitimized in part by stereotypes. Professor Crenshaw states that the series of stereotypes and myths used to rationalize the subordination of blacks “made their conditions appear logical and natural.” Id.
142. Lawrence, supra note 125, at 332, 343, 372 (discussing the importance of stereotypes, particularly in relation to the creation of unconscious racism).
143. “Stereotype” has been defined as “an incorrect or unthinking generalization applied indiscriminately to individuals simply on the basis of group membership.” Aleinikoff, supra note 2, at 1067. Professor Aleinikoff adds that this definition is too limited inasmuch as it suggests that stereotypes can be overcome merely by the supply of additional information concerning a group. Moreover, the definition fails to acknowledge the entrenched structure of race consciousness. Id. See Lawrence, supra note 125, at 372 (“Stereotypes are cultural symbols. They constitute our contemporary interpretation of past and present meaningful behavior.”).
144. Do African Americans Need Immersion Schools?, supra note 97, at 828 (discussing numerous societal stereotypes that foster “rationalized racism”). Professor Brown offers that the undue reliance on stereotypes impairs reason, distorts the cognitive process and ultimately ignores individuality. Id.
myths help to perpetuate the unconscious racism that too often subordinates people of color in college athletics.\textsuperscript{145}

I. The Mythical African-American Athlete

The athletic successes of African-American athletes often has been attributed to physical characteristics of mythical proportions. For instance, one prominent sports commentator advanced the physical superiority myth by erroneously attributing such successes to eighteenth century genetic gerrymandering:

The black is a better athlete to begin with, because he's been bred to be that way. Because of his high thighs and big thighs that go up into his back. And they can jump faster because of their bigger thighs, you see. I'm telling you that the black is the better athlete and he practices to be the better athlete and he's bred to be the better athlete because this goes all the way to the Civil War when, during the slave trading, the owner, the slave owner, would breed this big woman so that he would have a big black kid, see. That's where it all started.\textsuperscript{146}

The unconscious racism that occurs in college sport is, in large part, a result of the internalization of stereotypes concerning black athletes' physical superiority as depicted above.\textsuperscript{147} In the same way that stereotypes are employed to legitimate the subordination of blacks in society in general, specific stereotypes of African-American athletes devalue their accomplishments. They also represent barriers to complete integration of African-Americans into intercollegiate athletics.\textsuperscript{148}

\textsuperscript{145} Crenshaw, \textit{supra} note 126, at 1371.

Similar controversial statements were made by Al Campanis, former vice-president for player personnel for the Los Angeles Dodgers, when he attempted to explain the absence of black managers:

They're outstanding athletes, ... very God-gifted, and they're wonderful people, ... They are gifted with great musculature and various other things. They're fleet of foot. And this is why there are a lot of black major league ballplayers. Now as far as having the background to become club presidents or presidents of a banks [sic]. . . I don't know.


\textsuperscript{147} Lawrence, \textit{supra} note 125, at 343.

\textsuperscript{148} As the following discussion illustrates, stereotypical notions concerning African-American athletes parallel those attached to African-Americans in general. The negative stereotypes historically attached to African-Americans include: "lazy, unintelligent, immoral, ignorant, disabling culture, criminal, shiftless, lascivious." Crenshaw, \textit{supra} note 126, at 1373. In contrast, the cultural myths and stereotypes assigned to whites include: "industrious, intelligent, moral, knowledgeable, enabling
(a) Historical Images

The virtual exclusion of African-Americans from organized collegiate sport during the Jim Crow era was rationalized by beliefs of inferiority and inhumanity. The ideology of race cast black males as possessing unique physical stamina and skills, yet lacking intellectual awareness and feelings. For instance, African-American athletes were "simply too spontaneous and impulsive in nature to participate within the structure of sports rules with the same degree of sophistication as whites."

The image portrayed by the Harlem Globetrotters embodied the stereotypes crucial to the prevailing ideology. A former team member described their typical game behavior, which operated to blind society of the true identity of black athletes:

No pride or self respect . . . gallops about with high stepping strides, loosing shrill jungle sounds, clapping his hands, waving his long arms, grinning to show his teeth, pull sneaky tricks on the white referee, calls his friends by foolish names (i.e., Goose, Meadowlark, etc.) acts devilishly adolescent, shows physical prowess but in need of mature (white) handling. . . . [T]he Globetrotters warm-up to the sounds of "Sweet Georgia Brown," to exhibit their natural rhythm.

The behavior exhibited by the Harlem Globetrotters fed the stereotype of blacks not being serious, but rather "docile, subservient, good-natured, childlike and slightly exotic." These images are remarkably similar to the late eighteenth century theater and literary portrayals where blacks were presented as docile and contented slaves. Such depictions helped to justify the exclusion of blacks from organized collegiate and professional sport.

culture, law-abiding, responsible, and virtuous/pious." Id. See Do African Americans Need Immersion Schools?, supra note 97, at 831 ("African-Americans constantly confront a set of socially constructed meanings regarding their suitability for a particular job, motivation level, intellectual and physical abilities, morality, sexuality, bargaining skills, desirability as neighbors, and financial status.") (citations omitted).

149. See Wiggins, supra note 35, at 25.
150. JEAN A. COAKLEY, SPORT IN SOCIETY: ISSUES AND CONTROVERSY 243 (5th ed. 1994) [hereinafter SPORT IN SOCIETY].
151. EDWARDS, supra note 88, at 38.
152. Lombardo, supra note 3, at 61.
153. Id. See HOOSE, supra note 146, at 6-8.
154. Delgado & Stefancic, supra note 127, at 1262. These authors conclude that the potential of black men as social and economic competitors was diminished by depicting them as objects of laughter. Id. These authors also explain that society's depictions of African-Americans and other minorities over time have been consistent in two ways: their negativity and their evolution so as to serve specific needs.
Just as stereotypes and myths incorporated into the ideology of race were relied on to exclude black athletes, they have also provided a convenient means of explaining the successes and failures of African-American athletes.\textsuperscript{155} Even though athletic success is dependent on multiple psychological, experiential and physical factors,\textsuperscript{156} black athletic accomplishments were defined in terms of "natural" ability and other stereotypes that belittled individual achievement.\textsuperscript{157}

As a consequence, the few blacks afforded the opportunity to compete during the Jim Crow era were characterized according to fraudulent stereotypes. For instance, the athletic feats of the "superspade" were attributed to characteristics supposedly indigenous only to African-Americans.\textsuperscript{158} These innate physiological and psychological skills,\textsuperscript{159} which predisposed black athletes to engage in certain types of physical activities, were used to explain their

\textsuperscript{155} In some periods, society needed to suppress a group, as with blacks during Reconstruction. Society coined an image to suit that purpose—that of primitive, powerful larger than life blacks, terrifying and barely under control. At other times, for example during slavery, society needed reassurance that blacks were docile, cheerful, and content with their lot. Images of sullen, rebellious blacks dissatisfied with their condition would have made white society uneasy. Accordingly, images of simple, happy blacks, content to do the master's work, were disseminated. (citations omitted)

\textsuperscript{156} \textit{Id.} at 1276 (citations omitted).

\textsuperscript{157} The stereotypes used to explain the success of African-American athletes during this period represents a specific application of the ideology of white racial superiority which predominated and justified the oppression of African-Americans. As pointed out by Coakley, the ideology of white superiority and black inferiority "has been revised over the years to fit new circumstances and to continually justify new forms of racial discrimination." \textit{Coakley, supra} note 1, at 243; \textit{Hoosse, supra} note 146, at 4-9 (noting and also describing the various genetic explanations which have been offered with regard to black athletic superiority).

Allowing for journalistic hyperbole, an excerpt from a 1935 newspaper article purporting to describe the reasons for boxer Joe Louis's success demonstrates the dehumanization of the personhood and devaluation of the achievements of African-American athletes. Joe Louis was described as:

\begin{quote}
the magnificent animal. . . . He eats, He sleeps. He fights. . . . Is he all instinct, all animal? Or have a hundred million years left a fold upon his brain? I see in the colored man something so cold, so hard, so cruel that I wonder as to his bravery. Courage in the animal is desperation. Courage in the human is something incalculable and divine.
\end{quote}

\textit{Coakley, supra} note 1, at 244.

\textsuperscript{156} \textit{See Wiggins, supra} note 35, at 38-39.

\textsuperscript{157} \textit{See Coakley, supra} note 1, at 246.

\textsuperscript{158} \textit{See Wiggins, supra} note 35, at 38.

\textsuperscript{159} \textit{Spivey & Jones, supra} note 68, at 945 n.22. The stereotypes used to justify the devaluation of achievement included: "Blacks are superior sprinters because of anatomical peculiarities, excellent football players as a result of natural ability, great basketball players due to the fact they're born with rhythm. 'Sure he is a superb high-
outstanding performances.\textsuperscript{160} As suggested above, the ultimate impact of perceptions based on stereotypes is to deprive individuals of their autonomy inasmuch as they are reduced to predictable objects.\textsuperscript{161}

(b) Modern Images

Today’s African-American student-athlete has witnessed an end to most overt exclusionary practices and has gained access to certain opportunities. However, derogatory images and the “super-spade” myth persist. As is generally true, today’s expressions of race ideology in the sport context are more subtle because they often remain repressed within the white consciousness.\textsuperscript{162} Nevertheless, these expressions ultimately rest on beliefs that the success of black athletes results not from intellect, hard work and determination, but from innate physical skills.\textsuperscript{163} These stereotypes are crucial to the development of a consciousness of white superiority that reverberates within college sport today.

The essence of the modern day image of the African-American athlete was adroitly captured by one commentator:

African-Americans are thought to possess natural athletic ability in speed, quickness, and jumping ability. . . . Whites, on the other hand, are believed to excel at sport because they possess traits that are valued both in and (especially) out of sports: intelligence, industriousness, and other unspecified intangibles. . . .\textsuperscript{164}

\textsuperscript{160} Wiggins, \textit{supra} note 35, at 38 (describing the nature and the proponents of such arguments and the debate which ensued). A brief summarization of theories relying on racial characteristics to explain the dominance of African-Americans in certain sports can be found in \textit{Lapchick, supra} note 103, at 233-38.


\textsuperscript{162} See \textit{Coakley, supra} note 1, at 248.

\textsuperscript{163} Professor Wiggins argues that these notions persist in conjunction with stereotypes that black athletes like other African-Americans are “docile, savage, deceptive, childlike, oversized. . . .” Wiggins, \textit{supra} note 35, at 42.

Unfortunately, the dominant racial ideology has also shaped the beliefs of many African-Americans concerning the source of their athletic successes and abilities. See \textit{Coakley, supra} note 1, at 247; David K. Wiggins, “Great Speed But Little Stamina: The Historical Debate Over Black Athletic Superiority,” \textit{16 J. Sport Hist.} \textit{158, 181-82} (1989).

\textsuperscript{164} Harris, \textit{supra} note 62, at 61-62.
The perceived natural athletic ability of the black athlete detracts from the discipline and work ethic required to excel in competitive sport. Moreover, the attribution of success to innate traits reinforces the false belief that black athletes are slothful and obtuse. Conversely, the characterization of the representative white athlete, which is equally false, perpetuates the myth that whites excel in competitive sport in spite of their physical inferiority. Such success is attributed to the intellectual resourcefulness of the white athlete who, according to this view, is forced to compensate for a lack of innate physical ability.

(c) Media Reinforcement of Stereotypes

The image described above finds frequent reinforcement in the popular media, which describes white and black athletes differently.\textsuperscript{165} References to white athletes will most often refer to their intellectual capabilities while references to blacks most often refer

\textsuperscript{165}. See Aden Addis, "Hell Man, They Did Invent Us:" The Mass Media, Law, and African Americans, 41 Buff. L. Rev. 523, 558-59 (1993) (noting that the perpetuation of these stereotypes is routinely reflected in the media.). See also Armour, supra note 161, at 812-13; Lawrence, supra note 125, at 343.

Professor Othello Harris provides the following illustration of the different characteristics employed in a magazine article to describe four premier point guards in college basketball:

1. Kenny Anderson (Georgia Tech)—'Kenny has superb instincts, unbelievable quickness, and he's also amazingly mature for his age. . . . But . . . he often shoots when he should pass, a serious indictment for a point guard.'

2. Bobby Hurley (Duke)—'So what's the deal here? Hurley's a team genius, the type of kid coaches love to love. . . . From a team point of view—and what other point of view is there for a point guard?—This perceptive penetrator does every bit as much for the Blue Devils as Anderson does for Tech.'

3. Chris Corchiani (North Carolina State)—'If he gets the ball on the move, he's almost impossible to stabilize. Still, many experts question CC Rider's quickness and outside shot. Legitimate queries. But with a guy like Chris, his intangibles will always outweigh his ability.'

4. Lee Mayberry (Arkansas)—'Mayberry's a brilliant athlete and a great passer, but not a true point guard. He just doesn't think like one, says Hamilton. 'More often than not, I disagree with his decision making.' (citations omitted).

Anderson and Mayberry are (of course) African-Americans. The writer gives them credit for their physical ability but has reservations about their mental abilities. The white players—Hurley and Corchiani—lack the physical skill of Anderson and Mayberry, but they make up for it with cognitive abilities and intangibles. Thus, while it appears the writer is honoring Anderson and Mayberry by their inclusion in this exclusive group, he is, in fact, reproducing one of the most pervasive stereotypes of African-Americans: They have the tools, but their intellect is questionable. . . .

Harris, supra note 62, at 62 (citations omitted).

Similar illustrations of the transmission of stereotypes by the media are contained in Hoose, supra note 146, at 9-20.
to their physical abilities.\textsuperscript{166} Given the limited contact between whites and blacks, it is the media, rather than individual contact, that serves as the primary source of information shaping the identities of each group.\textsuperscript{167} Unfortunately, the media's depiction is too infused with stereotypes to bridge the gap in understanding the true identities of whites and blacks.\textsuperscript{168} To the contrary, as Professor Adeno notes, the media assists in institutionalizing the social and information gap between whites and blacks.\textsuperscript{169}

Professor David Wiggins posits that, although the specific explanations for the superior performance of African-Americans has changed over time, a consistent trend emerges: the emphasis on physiological attributes.\textsuperscript{170} This is not surprising given that the dominant culture is both fascinated and troubled by the dominance of blacks in certain sports.\textsuperscript{171} Race neutrality in the constitutional setting serves the interests of the dominant culture by, among other things, creating the illusion of neutrality.\textsuperscript{172} Similarly, the unwarranted focus on physiological attributes ameliorates for white Americans the troubling aspects of African-American sports dominance.

Professor Wiggins further offers a cogent explanation for the emphasis on physiological attributes:

By acknowledging a physiological basis for black athletic superiority, whites . . . could more easily maintain the broad range of black character they found acceptable. . . . Acknowledgement of physical superiority did nothing to disrupt the feeling among a large segment of the white population that blacks were either docile or savage, faithful or tricky, pathetic or comical, childish

\textsuperscript{166} See Lapchick, supra note 103, at 249 (providing illustrations of media perpetuation of racist stereotypes of African-American athletes).

\textsuperscript{167} Addis, supra note 165, at 542.

Given the highly segregated nature of social life and the workplace, the media is often the only means through which blacks and whites have sustained contact with each other. The media, however, often fails to bridge the social space between the two groups, and in many ways it has continued to institutionalize that gap.

\textit{Id.}

\textsuperscript{168} Id. For an articulation of the reasons behind the media's stereotypical portrayal of African-American athletes see id., at 558-59.

\textsuperscript{169} Id. at 542.

\textsuperscript{170} See generally Wiggins, supra note 163. Insightful commentary of the various racial explanations relied on to account for the success of African-American athletes is articulated in Sport in Society, supra note 150, at 243-56 and Edwards, supra note 113, at 44.

\textsuperscript{171} Wiggins, supra note 163, at 182.

\textsuperscript{172} See supra notes 129-30 and accompanying text.
or oversexed. . . . The notions of hard work, dedication, and sacrifice [known as the Protestant work ethic] were rarely used by white commentators to describe the efforts of [notable black athletes]. . . .

2. Recasting the Image—Mylan's Story

The experience of Mylan, a fictional black student-athlete representing a composite of several student and professional athletes, provides a counterstory to the stereotypes that devalue the intellectual capabilities of black athletes. It demonstrates that the athletic achievements of black student-athletes are attributable to factors that extend beyond innate physical abilities.

Mylan grew up in an East Texas town. His father died when he was young. He and his brother were raised by his mother who worked two jobs to support them. Thus, like many black student-athletes, Mylan comes from very modest economic circumstances.

Also like many other African-American student-athletes, Mylan, as well as his family, perceives sports as one of the few vehicles of economic and social mobility available to him. In the words of Mylan, "[I]t's a way to obtain an education, make money and help

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173. Wiggins, supra note 163, at 182.
174. In creating Mylan's story, I draw from secondary materials as well as interviews and conversations with student-athletes.
176. See Edwards, supra note 113, at 44. See also Sport In Society, supra note 150, at 247.

The truth however is that although sport has provided a means of upward mobility for a few black athletes, the perpetuation of this myth has unwelcome consequences for the African-American community. Quite simply, sport is not a viable avenue for escaping the ghetto for the vast majority of black youngsters. As Harry Edwards cogently wrote, "To tie the aspirations of 30 million people to fewer than 2,000 jobs in three professional sports is an inhuman mockery." Stephen K. Figler & Gail Whitaker, Sport and Play in American Life 301 (2d ed. 1991) (quoting Harry Edwards). The injury resulting from the perpetuation of this myth is that it misdirects the time and energy of black youths from endeavors which provide more realistic avenues of development. Id. Professor Edwards explains,

Athletics, then, stifles the pursuit of rational alternatives for black people. For the black masses, struggling for political and social survival, the ideal of individual achievement must appear after 400 years of racist oppression, to be a treadmill and a 'con game.' So while sport may reinforce certain values in white fans, it is unlikely that it has anything more, finally, than a sedative
my mother and brother.” In order to achieve his goal of playing professional sports, he needed to obtain a scholarship to play basketball at a Division I institution. Mylan thus worked hard at developing his athletic skills, and his hard work paid off in the form of the college scholarship.

Mylan developed into a phenomenal basketball player for his college; he was named to the All-American team. Such skills quickly caught the attention of the press. Mylan recalls being described in one press account as follows: “I was described in the newspapers as being ‘so superbly blended and proportioned (and driven by such a fission-fast nervous system) that he achieved the graceful, swift appearance of a large, lithe cat.’”177

Mylan explains that while some would consider such depictions flattering, he finds them insulting. He sees them as dehumanizing him and discounting the hard work that enables him to display such athletic acumen. “I would be the first to acknowledge that I have considerable athletic ability, but my skills are more closely identified with being an engineer than a cat.”178 To illustrate this point, Mylan gave the following account of a competitive situation:

One of [Stanford’s] players stole the ball at half-court for a breakaway lay-up. . . . He was so far ahead of us that nobody bothered to chase him but me. The guy’s lead was so big he wasn’t hurrying. When he reached half-court I took one long stride off to the left to change my angle, then went straight for the bucket. I was flying. . . . [T]he sweetness of the play was the giant step I took to the left as I was building up speed. Without that step the play would have failed, because I’d have fouled the guy by landing on him after the shot. The step to the left gave me just enough angle coming across to miss him and land to the right of him without a foul. [One teammate] was the only guy in the [arena] who noticed that step and knew what it meant.179

In describing the source of his talent and the effort which went into his skills, Mylan explained:

I thought about situations in a game. I dribbled around chairs and worked on my crossover and change-of-pace dribbles. I ran into stationary objects and faked one way and went another

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177. Hooze, supra note 146, at 17 (description once given of Oscar Robertson in a book on the history of college basketball).
178. Id. (paraphrasing former basketball superstar Oscar Robertson).
179. Id. at 16. (quoting former basketball superstar Bill Russell).
way. It was like a baseball player standing in front of a mirror with a bat and watching his swing.\textsuperscript{180}

So you see, more is involved here than raw talent. Since coming to college, I've worked hard to develop the fundamental skills of basketball. Often, I'm so tired after practice (particularly when we have two-a-days) that all I can do is go to the dorm and crash.\textsuperscript{181} In fact, all of the effort and time which goes into practice makes playing basketball seem like going to work.\textsuperscript{182}

Mylan relates the foregoing to emphasize that playing sports is hard work even though it does not always seem to be the case. People refuse to acknowledge that decisions made on the playing field are the result of years of practice, of trial and error and of theory development.\textsuperscript{183} He attributes this to the fact that the display of talent seems automatic and masks the effort necessary to develop them. In his words,

The program in your brain takes over. Subconsciously you've probably seen and imagined every situation.\textsuperscript{184} But remember it is learned. You must learn the offense or you'll never get on the floor.\textsuperscript{185} You could be the greatest player, but if you don't know how to react and go to certain spots you won't be out there.\textsuperscript{186}

Thus, Mylan recognizes that the hard work and intellect required to excel at sport is overlooked. Such is especially true in the case of the black athlete. If society attributes their athletic success to physical characteristics, it couples that with intellectual inferiority.

\begin{enumerate}
\item\textsuperscript{180} \textit{Id.} at 17. (quoting Oscar Robertson)
\item\textsuperscript{181} \textit{See} \textsc{Patricia A. Adler \& Peter Adler, Backboards \& Blackboards: College Athletes and Role Envelopment} 73 (1991).
\item\textsuperscript{182} \textit{See} \textit{id.} at 81 (observing in their study of college basketball players that many equate practicing to going to work).
\item\textsuperscript{183} In criticizing observations concerning basketball star Michael Jordan which focused on his innate ability as being the sole source of his basketball genius, one commentator stated:

To describe Michael Jordan as 'a kid who takes off flying through the sky,' as Dick Vitale does, is to lose sight of the person who decided to spring. The jump, and the direction and timing of the jump, were strategic decisions, made in microseconds, based on years of practice, of trial and error, of theory developed on playgrounds and in gyms.

\textsc{Hoome}, \textit{supra} note 146, at 15.
\item\textsuperscript{184} \textit{Id.} at 17 (quoting former NFL All-Pro running back Calvin Hill who "likens great breakaway runners to jazz improvisers who launch long solo flights from a solid—but unrecognized—foundation of chord theory").
\item\textsuperscript{185} \textsc{Adler \& Adler}, \textit{supra} note 181, at 75 (quoting a college basketball player on the necessity of applying skills learned in practice).
\item\textsuperscript{186} \textit{Id.}
\end{enumerate}
III. The Harm Caused by Racism in College Sport

The continued presence of the above-outlined stereotypical notions of African-American athletes legitimizes the subtle forms of discrimination existing in college athletics. The section below examines how this mindset of discrimination injures African-Americans engaged in college sport.

A. Manifestations of a Mindset of Superiority

The following analysis of the harm occasioned by unconscious racism in collegiate sport is undertaken to a considerable extent by examining the concerns raised by the Black Coaches Association (BCA). The BCA’s grievances represent a useful laundry-list. They identify the two broad categories of harmful consequences caused by the persistence of racism in intercollegiate athletics: (i) denial of unqualified participation in the college sport infrastructure; and (ii) the adverse impact on the academic, social and psychological well-being of the African-American student-athlete.

The veil that masks the unconscious racism in college athletics was partially lifted in October, 1993, when the BCA voted to boycott an “issues forum” sponsored by the National Association of Basketball Coaches (NABC).\textsuperscript{187} The BCA protest was designed to draw attention to concerns regarding limited educational opportunities afforded African-American student-athletes and limited opportunities for African-Americans within the administrative infrastructure of collegiate athletics.\textsuperscript{188}

Following its boycott of the NABC forum, the BCA presented its concerns to members of the Congressional Black Caucus.\textsuperscript{189} Dur-
ing these deliberations, the BCA challenged, *inter alia*, the wisdom and fairness of the newly adopted freshman eligibility requirements and the standardized tests on which the standards are primarily based. 190 These discussion precipitated the creation of a Congressional task force to discuss BCA concerns. 191

A conciliatory response by the NCAA failed to appease the BCA. 192 BCA members threatened to mount a series of protest activities including a possible coaches’ and players’ boycott of basketball games. 193 The threat of a boycott gained momentum when the NCAA voted 191 to 119, at its 1994 Annual Convention, not to increase the number of Division I men’s basketball scholarships allowable. 194 Many college presidents at the convention perceived the efforts to restore the scholarship as the first step toward eroding the changes that were instituted as a part of the NCAA’s reform efforts to contain costs in college athletics programs. 195 Nevertheless, a proposal to review Proposal 16, which contained

190. Steve Wieberg, *Black Coaches, NCAA Open Talks Today*, USA TODAY, Mar. 1, 1994, at 1C.


The attitude of many members of the NCAA was illustrated by its willingness to consider delaying the implementation of tougher academic standards and relaxation of player-contact restrictions. Certain members of the NCAA President’s Commission took a more critical stance toward the BCA. Presidents Hearn of Wake Forest University and O’Brien of the University of New Orleans challenged the BCA to specify their demands for suggested changes. Nevertheless, they too suggested possible compromise on issues of concern to the BCA. Tim Layden, *Coaches Groups Given Challenge*, NEWSDAY, Oct. 21, 1993, at 166.

193. Steve Wieberg, *NCAA Move Doesn’t Deter Black Coaches*, USA TODAY, Oct. 21, 1993, at 7C. The threatened boycott which was characterized as “Black Saturday” would urge players and coaches to boycott college basketball games on a specific Saturday. Id.


195. For some officials, rejecting the proposal symbolized the NCAA’s ability to maintain the principles of the reform movement, such as toughening academic standards and cutting sports’ spending. Blum, supra note 194, at A35.

President Thomas Hearn of Wake Forest emphasized that modifying reformed minded legislation would “open the door, for every other sport to claim the need to restore its own scholarships.” Id. Hearn’s view paralleled that of the Presidents Commission which maintained that repeal of the legislation would impede the mo-
new initial eligibility standards, was overwhelmingly adopted at the convention after it was disclosed that an NCAA committee advisor had ties to a psychologist with racist views on social engineering.196

Despite a high degree of anxiety in the aftermath of the NCAA's scholarship vote,197 the threatened boycott failed to materialize. The boycott was forestalled as a result of behind-the-scenes negotiations. These negotiations culminated in a plan whereby the Community Relations Service,198 a branch of the United States Justice Department, intervened to mediate the BCA's dispute with the NCAA.199 These discussions in turn led to an agreement between the BCA and NCAA that addressed "a number of issues related to expansion of education, employment and governance-participation opportunities for blacks and other ethnic minorities within the NCAA ... ."200 In short, the agreement delineated a set of governing principles that will provide the framework for future discussions between the BCA and NCAA.201


197. Steve Wieberg, Top Officials Try to Blunt Boycott Move, USA TODAY, Jan. 12, 1994, at 1C (also discussing efforts by athletic officials to determine how to respond to an expected boycott).
198. "[T]he Justice Department's Community Relations Service . . . was created by the Civil Rights Act of 1964 and is empowered to offer assistance in resolving any issue related to race, color or national origin discrimination . . . ." Steve Richardson, Black Coaches Association Postpones Boycott of College Basketball Games, DALLAS MORNING NEWS, Jan. 15, 1994, at 1A.
199. BCA Delays Boycott Action, NCAA News, Jan. 19, 1994, at 1; Richardson, supra note 198, at 1A. The first in a series of mediation sessions between the BCA and NCAA was convened on March 1, 1994. Wieberg, supra note 190, at 1C.
200. Method for Addressing Issues Provided by NCAA-BCA Talks, NCAA News, Mar. 30, 1994, at 1. Although it is not clear precisely what issues will be addressed through mediation, NCAA Executive Director, Cedric W. Dempsey, explains that "[w]e all benefit by examining the issues of access, fairness and academic integrity in a considered and cooperative manner." Richardson, supra note 198. Additionally, Congressman Kwesi Mfume says the issues are more complex than a fourteenth scholarship. Id.
201. Moreover, the endorsements set forth in the agreement focus on the need for enhanced communication between the NCAA and the BCA so as to facilitate increased opportunities for African-Americans to participate in all levels of intercollegiate athletics. Debra E. Blum, Black Coaches and NCAA Agree to Discuss Disputed
The BCA's concerns fall into two broad categories: (i) the need for greater inclusion of African-Americans and other ethnic minorities in all levels of college athletics, including the NCAA's governing process; and (ii) the impact of NCAA rules and regulations on African-American student-athletes and their communities.202

With respect to access for African-Americans to the NCAA infrastructure, the BCA demanded an examination of three concerns: the paucity of African-American executives within the NCAA administration,203 the need for more African-American college faculty and coaching staff204 and increased opportunities for female coaches.205 BCA concerns regarding African-American student-athletes include: alleged disparate impact and cultural bias of NCAA initial eligibility standards;206 reductions in scholarships, which allegedly reduce opportunities for prospective African-American student-athletes;207 decreases in the numbers of African-

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202. The BCA's activities represent a continuation of protest efforts by black coaches and administrators.

For years, black coaches and others have complained about academic standards set by the NCAA, which they say discriminate against black athletes.

They have also voiced their discontent with what they see as the shrinking availability of scholarships for black athletes and limited opportunities in college sports for the advancement of black coaches.


203. The BCA cited statistics which revealed that there are no African-Americans among the 14 top-level NCAA administrators. Of the total 129 NCAA administrators, 21 are African-American and two are Hispanic. Blauvelt & Wieberg, supra note 189, at 1C; Raveling, supra note 191, at 5.

204. A BCA-conducted survey revealed that 52 or 4.4% of the 1,218 head-coaching jobs in men's and women's basketball, football, baseball and track and field are held by African-Americans. Richard Lapchick, Finally, a Small Step in the Right Direction, SPORTING NEWS, Jan. 31, 1994, at 8. The same survey found that African-Americans account for fewer than 200, or less than 4%, of the 5,000 assistant coaching positions in the same Division I sports. Id. See G.D. Clay, Black Coaches Take a Stand, NEWSDAY, Oct. 17, 1993, at 30 (noting comments by basketball coach Nolan Richardson decrying the limited numbers of black coaches in college athletics); John Weyer, Baker Among Those Boycotting Conference of Black Coaches, L.A. TIMES, Oct. 19, 1993, at 7C (also describing complaints of black coaches that the NCAA money saving measures which reduce the number of entry-level coaching positions, further limits coaching opportunities for African-Americans).

205. Blauvelt & Wieberg, supra note 189, at 1C. See Raveling, supra note 191, at 5; Lapchick, supra note 204, at 8 (noting a BCA survey revealing that substantially more white men than black women coach women's basketball teams).

206. Raveling, supra note 191, at 5.

207. Id. Recently enacted NCAA legislation reduced the number of athletic scholarships in Division I-A basketball and football to the following: basketball from 15 in 1992 to 13 in 1993 and in football from 92 in 1992 to 85 in 1994. NCAA OPERATING
American student-athletes competing for Division I schools;\textsuperscript{208} legislation limiting the access of coaches to student-athletes and prospective recruits;\textsuperscript{209} restrictions on the amount of athletic activities of student athletes;\textsuperscript{210} and rules that restrict the money student-athletes are permitted to earn.\textsuperscript{211}

The foregoing concerns reflect societal beliefs that, despite the integration of college athletics, African-Americans remain partial participants in the various levels of college sport, such as administration and coaching.\textsuperscript{212} Indeed, the inequality of access for blacks to the administration of college athletics demonstrates the persistent influence of a particular racial stereotype: the black athlete as inferior to the white athlete regarding intellectual and leadership abilities.

A remarkable contrast exists between the substantial numbers of African-American student-athletes playing in college revenue-producing sport and the limited number of African-Americans holding decision-making positions within the collegiate sport enterprise.\textsuperscript{213} Denying African-Americans equal access to managerial, coaching and administrative positions in college sport is consistent with and a consequence of the unconscious racism existing in college sport.

NCAA-generated statistics tend to support this theory. According to a 1994 NCAA Minority Affairs Committee report, blacks comprised approximately 25% of all student-athletes in 1993-94.\textsuperscript{214}

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\textbf{Bylaw, art. 15, §§ 15.5.4, 15.5.5, supra note 8, at 199.} In addition, the legislation reduced the size of coaching staffs—basketball to two full-time, one restricted-earnings assistant and football to nine full-time, two graduate assistants in August, 1992. \textit{NCAA Operating Bylaw}, art. 11, §§ 11.7.2, 11.7.4, \textit{supra} note 8, at 62, 63.

\textsuperscript{208} Raveling, \textit{supra} note 191, at 5.

\textsuperscript{209} \textit{Id.}; Blauvelt & Wieberg, \textit{supra} note 189, at 1C.

\textsuperscript{210} A student-athlete's participation in athletic activities is limited to a maximum of four hours daily and 20 hours per week. \textit{NCAA Operating Bylaw}, art. 17, § 17.1.5.1, \textit{supra} note 8, at 232.

\textsuperscript{211} Raveling, \textit{supra} note 191, at 5 (the BCA proposes that student-athletes be paid a stipend not to exceed $1,500 per semester).

\textsuperscript{212} See \textit{id.} at 4, 5.

\textsuperscript{213} Sage, \textit{supra} note 14, at 11. See Rhodes & Butler \textit{supra} note 14, at 924; Berkowitz, \textit{supra} note 187, at F1.

The BCA protest also drew attention to the need for colleges and universities to hire more black faculty and coaches. Harry Blauvelt, \textit{Black Coaches Take Case to Congressmen}, \textit{USA Today}, Oct. 19, 1993, at 1C. Commenting on the sparse numbers of black professors at predominantly white institutions, Nolan Richardson, coach of the University of Arkansas' men's basketball team, emphasizes the need for black professors who can serve as role models and mentors for black student-athletes. Clay, \textit{supra} note 204, at 30.

\textsuperscript{214} Steve Wieberg, \textit{Study Faults Colleges on Minority Hiring}, \textit{USA Today}, Aug. 18, 1994, at 1C.
yet held considerably fewer athletic director and coaching positions. Black representation at these levels was 10% and 8% respectively.215 These statistics become even more dramatic when the data for historically black institutions are removed.216 African-American representation among both athletic directors and head coaches consequently falls to 4%.217 With respect to non-black institutions, the NCAA report also concluded that the number of African-Americans in such stepping-stone positions as associate athletic director at Division I institutions decreased slightly from 5.5% in 1992-93 to 4.9% in 1993-94.218

One writer noted that, "[w]hile dominant racial ideology has worked to turn black men into entertainment commodities in sports, it has nearly kept them completely out of management positions in sport organizations."219 Sociologist George Sage reaches a similar conclusion by contrasting adult African-Americans' limited management and administrative opportunities with student-athletes' increased opportunities to compete in revenue-producing sports. He opines that this contrast illustrates how the dominant group can employ subtle tools of discrimination in college sport, since it controls access and is better insulated from judicial and public scrutiny.220

B. Racism's Impact on African-American Student-Athletes

Just as unconscious racism limits the opportunities available for African-American coaches and administrators, it also limits opportunities and otherwise harms to African-American student-athletes.221 From the black student-athlete's perspective, stereotypes that nurture unconscious racism cause a myriad of negative effects, including:

215. Id.
216. Id.
217. Id.
218. Id.
219. Coakley, supra note 150, at 255. The basis for this exclusion is the dominant ideology that "[Coaches and] managers have to think, and the conventional wisdom among sports' ruling elite is that . . . blacks don't think as well as whites." Id. Professor Coakley concludes that the sparsity of blacks in administrative positions is consistent with race logic and stacking patterns in team sports. Id.

For a discussion of stacking, see infra notes 223-32.

220. Sage, supra note 14, at 11. Black positions are not considered leadership and thinking positions. A playing career at a non-leadership position is, therefore, assumed to be inadequate training for a career in coaching, providing at least one factor that keeps blacks out of this occupation. Eitzen & Sanford, supra note 14, at 950.

221. Harris, supra note 62, at 63.
subtle racism evidenced in different treatment during recruitment; poor academic advice; harsh discipline; positional segregation on the playing field and social segregation off it; blame for ills for which they are not responsible. Then there are the complaints of overt racism: racial abuse; blacks being benched in games more quickly than whites; marginal whites being kept on the bench while only blacks who play are retained; extra money for the white players; summer jobs for whites and good jobs for their wives.222

In short, the perpetuation of stereotypes, incorporated into a dominant ideology, continues to harm black student-athletes academically, athletically, economically, socially and psychologically.

Although the extent of the practice has decreased in recent years,223 the phenomenon of stacking224 illustrates the relationship between stereotypes and limited athletic opportunities for African-American student-athletes. Stacking involves the assignment of certain individuals to specific athletic positions based on race or ethnicity rather than ability.225 For African-Americans, stacking historically relegated them to positions requiring "speed, quickness, and jumping ability,"226 and other physical abilities, instead of intellect. Thus, the "thinking" and control positions, such as pitcher in baseball and quarterback in football, were reserved for white players.227 How racial stereotyping contributes to stacking has been aptly described: "The notion that blacks are physically superior . . . helps . . . justify the practice of stacking. If blacks are physically superior, then whites can monopolize key positions which ostensibly require greater thinking and organization ability; for example, quarterback, and team captain."228

Although African-American access to positions historically reserved for white athletes has increased, that access continues to be influenced by popular myths and stereotypes. That is, black athletes who play in previously inaccessible positions are required to

222. Lapchick, supra note 103, at 236.
223. See infra note 228. Stacking is less common than was once the case.
224. Lombardo, supra note 3, at 61-62 (noting that stacking resulted in positional discrimination in baseball and football).
225. Harris, supra note 62, at 63.
226. Id.
227. See Harris, supra note 62, at 62-3.
228. Edwards, supra note 113, at 52. The position segregation, known as stacking, results "not because "central" positions require higher levels of social interaction and coordinative tasks, but rather because racial stereotypes suggest that blacks are more ideally suited for those positions which are the least responsible and intellectually demanding." Eitzen & Sanford, supra note 14, at 954.
engage in styles of play that are an outgrowth of stereotypes concerning innate athletic ability. For instance, black college quarterbacks, assuming a position historically reserved for white players, are required to run more often than whites in order to gain significant yardage.\textsuperscript{229} Implicit in this requirement appears to be a continued belief in the stereotype that blacks naturally have better running abilities.\textsuperscript{230} Finally, the consequences of stacking extend beyond the playing field. As explained by one commentator: "If the black man is an effortless, natural athlete, but the white man must work at mastering the sport, then the white athlete would probably know the intricacies and dynamics of the sport better."\textsuperscript{231} This raises the inference that "the white athlete would make a better coach, manager, league commissioner, or even TV or radio sportscaster."\textsuperscript{232}

In addition, the persistence of racial stereotypes harms the academic interests of African-American student-athletes. Indeed, perhaps the most disheartening and significant consequence of unconscious racism in college sport is the failure of institutions to value African-American student-athletes’ academic competence over their athletic ability.\textsuperscript{233} The ultimate result is academic neglect.

1. \textit{The Questionable Neutrality of NCAA Regulations}\textsuperscript{234}

Another consequence of unconscious racism is the disparate impact of NCAA rules and regulations on African-American student-athletes. The NCAA’s uniform rules and regulations are premised on a notion of colorblindness. Despite their assumed neutrality, the NCAA rules appear to impact black student-athletes disproportionately. Indeed, over the past ten years, considerable debate has revolved around the disparate impact of NCAA initial eligibility requirements on African-American student-athletes.\textsuperscript{235} However, eligibility rules provide but a single illustration of NCAA rules and regulations. Many believe that these rules as a whole

\textsuperscript{229} \textit{Id.}
\textsuperscript{230} Harris, \textit{supra} note 62, at 63.
\textsuperscript{231} Edwards, \textit{supra} note 113, at 52.
\textsuperscript{232} \textit{Id.}
\textsuperscript{233} Harris, \textit{supra} note 62, at 63.
\textsuperscript{234} As previously noted, it is my intent to reserve full consideration of this issue for a sequel to this Article. Nevertheless, a brief diversion seems warranted given the relationship between facially neutral rules and regulations and the overall, including academic, well-being of African-American student-athletes.
\textsuperscript{235} See \textit{infra} text accompanying notes 254–68.
operate to produce disproportionate injury to African-American student-athletes and their communities.\textsuperscript{236} Ultimately, the question posed is whether racial realities should be considered in assessing the need for and application of particular rules and regulations, especially those rules that concern limitations on player/coach contact, limitations on earned income, reductions in scholarships, sanctions for rules violations and academic eligibility standards.

Arguably, the rules that should be subjected to a racial realism analysis include those that limit a coach's contact with current student-athletes.\textsuperscript{237} The NCAA imposes limitations on the amount of time that Division I student-athletes can spend off season in other sport programs.\textsuperscript{238} Limiting the degree to which student-athletes can participate in such organized activities has the subsidiary effect of limiting the time that they spend under a coach's guidance.\textsuperscript{239} Black coaches criticize this rule as interfering with the mentoring function that African-American coaches can provide for black student-athletes.\textsuperscript{240}

African-American coaches and administrators have voiced similar criticisms of recruiting rules limiting a coach's access to high school students.\textsuperscript{241} The problem with the rules at the high school level echoes that of the NCAA rules: such restrictions inhibit the mentoring role that coaches can provide for troubled black youths.\textsuperscript{242} The frustration emanating from this rule was dramati-

\textsuperscript{236} Black Caucus Backs Basketball Coaches, DETROIT FREE PRESS, Oct. 20, 1993, at 2C (noting black coaches' criticisms of uniform rules which more severely impact the interests of African-American student-athletes); Black Coaches Seek Help on Capitol Hill, PLAIN DEALER (Cleveland), Oct. 20, 1993, at 1D (discussing how several NCAA policies disparately impact African-Americans).
\textsuperscript{237} Blum, supra note 202, at A48 (noting that the access of coaches to players and prospective players is a concern which seems only to have recently emerged).
\textsuperscript{238} NCAA OPERATING BYLAW, art. 17, § 17.1.5.2, supra note 8, at 232.
\textsuperscript{239} Berkowitz, supra note 187, at F1.
\textsuperscript{240} Id.
\textsuperscript{241} Limits on contacting prospective athletes . . . were meant not only to free athletes from being hounded by coaches interested in their athletic talents, but to curtail the mounting expense of recruiting wars among institutions, and to keep coaches from having advantages over one another simply because of their budgets or locations.
\textsuperscript{242} Certain segments of the athletic community are skeptical of the BCA's true motivation. Some believe the desire for increased access has more to do with obtaining a recruiting advantage than serving in a mentoring role. These reservations were expressed by the commissioner of the Colonial Athletic League as follows:

You have to question how completely altruistic their motives are when you know what the rules are. . . . I'm sure the coaches are concerned with the
cally articulated by John Thompson: "When somebody's shooting somebody down here on First and K Street and I can't jump in a car and go down there because, without a manual, I can't determine whether he's a recruitable athlete or not, that's where we're frustrated."243 In short, many African-American coaches view such rules as being inconsistent with what they perceive as their special obligation to help young people in African-American communities.244

In addition to denouncing NCAA rules pertaining to contacts between coaches and current or prospective players, the BCA addressed other limitations that adversely affect African-American student-athletes. The BCA proposed that student-athletes receive a stipend of up to $1,500 per semester.245 Studies reveal that African-American student-athletes come from households with lower socioeconomic status.246 Thus, the proposal is premised on the belief that student-athletes "from economically disadvantaged backgrounds have little access to spending money."247 In proposing the stipend, the BCA indirectly assaults NCAA regulations limiting the amount of income that student-athletes can earn. The broader issue raised by the BCA's initiative is the extent to which facially neutral income limitations, in ignoring the particular circumstances of black student-athletes, harm African-American student-athletes more than their white counterparts.248

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health and well-being of all the kids who can leap a small building in a single bound, but it's not as clear that they are as concerned with all the other kids.
Blum, supra note 202, at A48. See Raveling, supra note 191, at 5 (acknowledging that critics question the BCA's motives); Kevin B. Blackistone, Black Coaches' Fight with NCAA All about Fairness, DALLAS MORNING NEWS, Dec. 26, 1993, at 4B (noting skeptical views of Texas basketball coach Tom Penders); Ben Brown & Steve Wieberg, BCA Sows Seeds of Revolution/ Coaches and their Critics Clash on Motive for Possible Action, USA TODAY, Jan. 14, 1994, at 10C (discussing the differing perceptions concerning the true motive for black coaches' protest).
244. Blum, supra note 202, at A48.
246. A.I.R. REPORT, supra note 175, at 32.
248. A study of the college experience of African-American student-athletes tends to support the assertion that they have special needs and are harmed by the failure of NCAA rules and regulations to consider these needs:
Black student athletes' reliance on off-campus support may interact with their socioeconomic background to place them at greater risk. Because black student-athletes come from poorer families and because their support systems are more likely to be located away from campus, it is more difficult
Another issue that raises the specter of unconscious racism is the reduction in the number of athletic scholarships allowed by the NCAA. At its 1993 annual convention, the NCAA voted to decrease the number of men’s basketball scholarships that Division I institutions can award from 15 to 14.249 The number of football scholarships was also reduced.250 These rules and resulting reductions were a part of an overall agenda (at what has been characterized as the cost containment convention) aimed at reducing costs associated with college athletics.251

The BCA severely criticized such cost-cutting measures.252 From the perspective of many BCA members, scholarship reductions eliminate opportunities for black student-athletes253 and demonstrate a lack of sensitivity to the African-American community.

The facially neutral rules that have been most severely criticized for their alleged adverse impact on African-American student-athletes are those which relate to the initial eligibility requirements. The BCA vociferously attacked these rules as reflecting bias against African-American student-athletes. Specifically, the BCA protested the upcoming implementation of Proposal 16,254 which modifies current eligibility requirements.255

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250. Id.
252. Raveling, supra note 191, at 5; Berkowitz, supra note 187, at F1.
254. See supra note 196 and accompanying text.

Under currently effective standards, a scholarship athlete is eligible to compete during his first year only if he has a score of 700 on the SAT or 17 on the ACT and at least a 2.0 grade-point average in a core curriculum comprised of eleven courses. NCAA OPERATING BYLAW, art. 14, §§ 14.3.1.1(a), (b), supra note 8, at 141-42. The
Criticisms leveled against Proposal 16 parallel those voiced when eligibility standards, known as Proposition 48 requirements, were initially enacted in 1983,\textsuperscript{256} to take effect in 1986.\textsuperscript{257} Proponents have argued that the enhanced standards would place the "student" back into the term "student-athlete."\textsuperscript{258} To them, it marked the beginning of an effort to restore academic integrity to colleges and universities that had been undermined by scandals arising within intercollegiate sport.\textsuperscript{259} Proponents also argued that heightened standards represented a means of ensuring that student-athletes have a reasonable chance to obtain a meaningful degree.\textsuperscript{260}

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\textsuperscript{257} Id.

\textsuperscript{258} Id. at 220.


\textsuperscript{260} David Davidson, \textit{Administrators Say Prop 48 a Lose-Lose Situation}, \textit{Atlanta Const.} July 28, 1991, at F1 (quoting a college administrator).
Much of the opposition\textsuperscript{261} to Proposition 48 focused on allegations that it was patently racist.\textsuperscript{262} Critics assailed the standards as an effort to undermine the domination of blacks in the revenue-producing sports.\textsuperscript{263} Black educators\textsuperscript{264} and civil rights advocates

\textsuperscript{261} In addition to charges of racism, other less publicized, yet in many cases related criticisms, were leveled against Proposition 48. Some critics lashed out at the universal application of Proposition 48. They argued that it failed to take into account the unique circumstances not only of student-athletes but also of institutions. Marvin Cobb, \textit{Schools Have Responsibility to Underprepared Athletes}, \textit{USA Today}, Jan. 21, 1992, at 8C (noting that Proposition 48 indirectly limited black athletes’ access to historically black institutions as well as predominantly white institutions); Davidson, \textit{supra} note 260, at F1 (arguing that Proposition 48 failed to provide for institutional diversity). An administrator at a historically black institution expressed the following criticism: “An athlete below a 2.5 might have trouble at Notre Dame or Penn State or Southern Cal, but he would be right in line and have a good opportunity for success at Valley, Grambling, Jackson State and a lot of predominantly white institutions.” \textit{Id.}

In a related argument, critics assailed the standards as unfairly placing the burden on student-athletes and their high schools. To these critics, Proposition 48 is a classic example of blaming the victim inasmuch as it placed the responsibility for being academically underprepared for college on the student-athlete. Anderson & South, \textit{supra} note 19, at 88.

Other critics asserted that Proposition 48 had less to do with restoring academic integrity and more to do with protecting the sphere of influence and power of the NCAA. Some perceived it as a measure intended to serve as a shield against governmental legislation which would regulate sports. Rhoden, \textit{supra} note 259, at A27.

Finally, others viewed the new standards as a cynical move by the NCAA to protect the competitive position of predominantly white Division I institutions. \textit{See} Cobb, \textit{supra}.

\textsuperscript{262} Greene, \textit{supra} note 15, at 104. Professor Greene described the criticism of Proposition 48 as focusing on both procedural and substantive concerns. The former related to the exclusion of African-American educators and administrators in the rule promulgation process. The substantive concerns related to the potentially adverse impact of the rules on African-American student-athletes and historically black colleges. \textit{Id.} at 111-12. Several commentators have evaluated equal protection challenges premised on the disproportionate impact of the standards on African-Americans. \textit{See also} Greene, \textit{supra} note 15; Yasser, \textit{supra} note 15; Lufrano, \textit{supra} note 15.

\textsuperscript{263} Greene, \textit{supra} note 15, at 117-18. “The president of Grambling State University predicted that it would lead to a kind of ‘apartheid,’ and he asked whether the NCAA was ‘trying to create a white organization.’” \textit{Sperber}, \textit{supra} note 256, at 220.

\textsuperscript{264} It is important to note that blacks did not express a homogenous view with regard to Proposition 48. The National Alliance of Black School Educators, National Associations for Equality of Opportunity in Higher Education, and notable African-Americans such as Jesse Jackson and Benjamin Hooks criticized the lack of black input in formulating the standards as well as the discriminatory implications of the rules. Anderson & South, \textit{supra} note 19, at 89-90.

An equally sincere group of African-Americans viewed the standards as nondiscriminatory and a step towards emphasizing the educational component of college athletics and stemming the exploitation of African-American student-athletes. \textit{Id.} Lloyd V. Hackley, Chancellor of the University of Arkansas at Pine Bluff, Arthur Ashe and Harry Edwards were among those favoring the new standards as tools for motivating black student-athletes to focus more on education. \textit{Id.}
contended that heightened standards would reduce college access to many black student-athletes who scored below 700 on the SAT in greater numbers than whites.265 Another reason eligibility standards were charged as racist was because they were formulated, in large part, based upon culturally biased standardized tests.266 Thus, Proposition 48 was alleged to be racist because of the disparate impact of initial eligibility standards on African-American student-athletes.267 This impact challenges the neutrality of such rules.268

265. Sperber, supra note 256, at 220.

266. Cobb, supra note 261, at 8C (attacking the SAT as discriminatory in nature); Davidson, supra note 260, at F1 (noting that critics allege that racial and geographic bias is inherent to the SAT and ACT). See also Greene, supra note 15, at 104.

In an effort to further stem academic abuse, the NCAA adopted Proposition 42 at its 1989 convention which prohibits awarding athletic scholarships to partial qualifiers. Alvin P. Sanoff & Gordon Witkin, When is the Playing Field Too Level?, U.S. News & World Rep., Jan. 30, 1989, at 68. Even harsher criticism was voiced against this attempt to toughen the Proposition 48 eligibility standards. As with Proposition 48, many critics noted the disproportionate impact which Proposition 42 would have on African-American student-athletes and its emphasis on standardized tests. For a discussion of these concerns and other criticisms of Proposition 42, see Timothy Davis, Absence of Good Faith: Defining a University’s Educational Obligation to Student-Athletes, 28 Hous. L. Rev. 743, 761 (1991); Wilbon, supra note 189, at C1; Tom Wicker, Slamming the Door, N.Y. Times, Jan. 17, 1989, at A25; Jack Kroll, Race Becomes the Game, Newsweek, Jan. 30, 1989, at 56; John Powers, New Scholarship Rule Causes Rift in College Athletics, Boston Globe, Jan. 20, 1989, Sports, at 1; Sanoff, supra at 68. In light of such criticisms, Proposition 42 was modified at the NCAA’s 1990 convention. The modified version permits partial qualifiers to receive university financial aid from non-athletic sources. Joseph L. Galloway, NCAA Brains Show Brawn, U.S. News & World Rep., Jan. 22, 1990, at 12; NCAA Manual § 14.3.2.1.

267. Rhoden, supra note 259, A27. Those alleging a disparate impact on black student-athletes found support in an NCAA study which concluded “that if athletes entering college in 1977 had been subjected to the [Proposal 48] requirements, a large number of those who have now graduated, particularly black students, would not have been eligible to participate in college athletics as freshmen” and possibly would not have gone to college at all.” Sperber, supra note 256, at 220.

268. Although the NCAA membership rejected the BCA’s demand to modify Proposed Rule 16, it approved a resolution to study the new freshman eligibility requirements. Blum, supra note 194, at A35. The special committee formed to review the standards recommended modifications to Proposal 16 and a one-year delay (until 1996) of implementation of the new standards. New Initial-Eligibility Standards Recommended, NCAA News, June 15, 1994, at 1. The recommendation was premised on concerns that the new standards would disparately impact minorities and had not been adequately communicated to prospective student-athletes, high school coaches and counselors. The suggested modifications would involve changing the sliding scale of initial eligibility as set forth in Proposal 16. The committee’s proposal called for the elimination of a minimum cutoff for standardized test scores. Id.

The NCAA Presidents Commission rejected the recommendations of the special committee. Presidents Stick with Prop 16, Drop Playoff Study, NCAA News, July 6, 1994, at 1. As a compromise, the Presidents Commission offered several alternatives affecting partial qualifier status. Id. at 1, 13.
The meting out of sanctions for rules violations—an issue that was not raised by the BCA—provides an additional illustration of the disparate impact of NCAA rules and regulations on African-American student-athletes. What has emerged in college sport is a pattern of disproportionately high African-American involvement in substantial scandals over the past thirty years. As noted by one commentator:

There are, in my opinion, three contributing factors that account for the disproportionately high percentage of black athletes involved in the various scandals. First, the vast majority of blacks in big-time intercollegiate sports are from lower-class backgrounds and, hence, most desperately in need of financial assistance. Second, the black athletes recruited are blue-chip players and highly sought after. The third contributing factor is racism.

Again, the rules that are violated and incur sanctions are facially neutral. That the rules and their sanctions are disproportionately impacting black student-athletes requires examination.

2. Academic Racism?

Analyzing the conditions and arguments in the foregoing section merely provides a framework for applying a racial realism approach to rules and regulations promulgated by the NCAA. Additionally, the disparate impact of such rules on black student-athletes provides a fertile field for examining the notions of neutrality and colorblindness of rules, and in turn, for educating administrators, coaches and others on the potential implications. Notwithstanding the significance of the alleged disparate impact of

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At the NCAA’s January 1995 convention, NCAA delegates considered conflicting positions regarding Proposal 16 without a recommendation from the NCAA Council. Steve Wieberg, NCAA Council Doesn’t Take Stand on Academic Issue, USA TODAY, Aug. 11, 1994, at 12C. In an unusual move, the 46 member Council declined to make a recommendation. The Council felt that due to the important values at issue, academic standing and educational opportunity, “the full Division I membership should debate and decide.” Id. At the NCAA’s 1995 convention, the NCAA membership voted to delay implementation of Proposal 16 until 1996. Wolff & O’Brien, supra note 245, at 10.

269. See Spivey, supra note 65, at 123. Spivey found that “[o]f the 29 substantial scandals in collegiate sports during the 1950s and 1960s, 19 occurred on teams with one or more black athletes. Of these 19 teams, 74 percent of the black athletes, as compared to 11 percent of the white athletes, were allegedly involved in the rules violations. For example, three of the four athletes charged in the Long Island University basketball fixes were blacks. Of the eight athletes involved in the Illinois scandal, seven were black.” Id.

270. Id.
the NCAA rules, the discussion which follows focuses specifically on institutions' academic neglect of African-American student-athletes. The academic marginalization of African-American student-athletes violates the primary purpose of institutions of higher education—teaching and learning.271 Moreover, academic neglect raises the specter of athletic exploitation of African-American student-athletes who provide valuable services to their institutions but fail to receive access to meaningful educational benefits.272 Finally, specific focus on academic marginalization is warranted since it results in the failure of many institutions to prepare their black student-athletes to effectively deal with post-college life.273 As one author cogently explained: "Just as education may destroy ignorance, open doors, and provide a vision for the future, miseducation can close doors, project the past as a vision of the future and crush the will to win."274

(a) Intellectual Marginalization

Several factors converge to produce neglect of the academic needs of African-American student-athletes.275 Principal among them is a mindset that all but disregards the educational interests of black student-athletes. As noted above, this mindset stems in large part from assumed beliefs nurtured by stereotypes of the intellectually inferior, yet athletically superior, black athlete. The nature and impact of such stereotypes were expressed by one student-athlete as follows:

271. See infra note 290 and accompanying text.
272. See infra text accompanying notes 281, 297-305.
273. See infra text accompanying notes 307, 311-22.
275. Racist stereotypes are not the sole contributors to the academic marginalization of the African-American student-athlete. As noted by sociologist Harry Edwards:

The sociological etiology of their circumstances is far more complex. Many of the social forces determining black student-athletes' extraordinary vulnerability to athletic exploitation have been affecting black society generally and the black family in particular for decades.

I have a lot of upper-level courses and some people are looking for me to miss a class. . . . They're looking to say, "that ol' lazy football player." And because I'm black they're looking for something they can say to lessen my credibility. So when I'm in class on time, when I'm turning in my assignments and I'm doing everything they're saying, "Hey, what's going on? That's not what we're accustomed to, that's not what somebody told me black athletes do or don't do." 276

The foregoing underscores what Professor Harry Edwards characterized as the three strikes that burden African-American student-athletes. 277 First, they must contend with reverberations of the "dumb jock" caricature, which transcend racial boundaries. 278 In addition, the African-American student-athlete must endure the racial implications of the myth of "innate black athletic superiority." 279 Finally, there are the insidiously racist implications of the stereotype of the "dumb Negro' condemned by racial heritage to intellectual inferiority." 280

Each of these "strikes" contribute to institutional tolerance of the devaluation of the academic needs of African-American student-athletes. Beyond their athletic skills, far too little is expected academically of the black student-athlete who becomes a commodity serving the financial interests of the institutions for which they compete. 281 The product of this mindset is the exclusion of African-American student-athletes from the academic and social mainstream in many predominantly white colleges and universities.

(b) Racism and Higher Education

As suggested above, the academic marginalization of black student-athletes results from factors related specifically to their race and to their status as student-athletes. 282 The pervasiveness of these beliefs infests the American educational system to the detri-

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277. Edwards, supra note 275, at 8.
278. Id.
279. Id.
280. Id.
281. See Edwards, supra note 275, at 9 (commenting that by the time black young- sters proceed through the educational process to reach college they have been valued for their athletic but not their intellectual acumen); Rhoden, supra note 276, at A1 (noting that the financial stakes involved in intercollegiate sport transforms black student-athletes into a more valuable commodity than non-athlete black students).
282. See Davis, supra note 266, at 786-88 (discussing the additional pressures confronting student-athletes).
ment of African-Americans. As noted by Professor Kevin Brown, "Our dominant culture says that African-Americans are less intelligent. This knowledge affects blacks in social contexts where intelligence is important." 283

Post-secondary institutions are undoubtedly influenced by the subtle racism nourished by these untrue, yet potent, beliefs. Indeed, colleges and universities are entities that are dominated by people imbued with this regnant ideology. 284 This ideology underlies tolerance for university environments unfriendly to African-American students. 285 Moreover, the dominant ideology perpetuates and institutionalizes policies that ultimately disregard the needs of African-American students. 286 As noted by Professor Alex Johnson, the assimilationist vision of education on which Brown v. Board of Education 287 is premised, harms the interests of African-American students. "[T]hey are forced to compete on a 'level playing field' that ignores their own unique culture and community and forcibly places them in an environment in which the chances of failure are significantly increased." 288 Professor Johnson also describes the detrimental effects of the continued presence of racism at American universities:

The racial dynamic—arising out of occasional blatant racism, recurrent subtle remarks or unconscious behavior, and an ever-present white norm that is the foundation of institutional racism—conspires to create a cognizable injury to black students in predominantly white schools. It alters students' conditions of education just as courts have recognized that racial harassment on the job alters conditions of employment. Racism adds to the stress and anxiety that diminish any person's ability and desire to excel in an academic environment, especially one leading to a professional world known to contain further racial roadblocks to

283. Do African Americans Need Immersion Schools?, supra note 97, at 831.
284. Brown, supra note 23, at 303 ("Major universities are dominated in their administration, faculties, and student bodies by whites—and disproportionately by those born into the comfortable classes.").
285. Id. at 318. See Wendy Brown-Scott, Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?, 43 EMORY L.J. 1, 24 (acknowledging the adverse consequences of racial bias at predominantly white colleges and universities).
288. Johnson, supra note 36, at 1423.
career advancement and hospitable working conditions. The racial dynamic to which black students are subjected at predominantly white colleges contributes to stress that has a detrimental effect on personal well-being as well as academic performance.\textsuperscript{289}

In effect, many predominantly white institutions fall short of fulfilling their educational mission\textsuperscript{290} of producing African-American students who are capable of performing in society on many different levels.\textsuperscript{291} Thus, the existing educational construct, when viewed concomitantly with racial stereotypes of African-American athletes, increases the chances of educational neglect of black student-athletes. Employing the terminology of Professor Edwards, "institutionalized racism" present at white institutions creates another strike that intensifies the educational risk encountered by African-American student-athletes.\textsuperscript{292}

The unconscious racism\textsuperscript{293} within the existing American educational paradigm also contributes to the social isolation of African-

\textsuperscript{289} \textit{Id.} at 1444 (quoting Brown, \textit{supra} note 23, at 315). \textit{See also} Brown-Scott, \textit{supra} note 285, at 60 (stating that a harm which is associated with blacks attending predominantly white colleges is that they encounter the "consequences of the negative social construct of African-Americans perpetrated and perpetuated by the dominant culture").

\textsuperscript{290} Professor Johnson summarizes this educational mission as follows:

From the perspective of both the secondary and post-secondary educator, then, the mission of the educational system must be to produce a student who can perform capably in society on many different levels. Thus, public educational institutions must do more than simply transmit bare facts and statistics. They must also instill and reinforce in students the important customs, values, and principles learned in the family, church, and community.

Johnson, \textit{supra} note 36, at 1433.

\textit{See also} Leroy D. Clark, \textit{New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue}, 36 How. L.J. 259, 269 (1993) (commenting that the primary mission of institutions of higher education is to provide their students, including student-athletes, with a "\textit{bona fide} high-quality education"); H.R. 2620, 99th Cong., 1st Sess. 2 (1985) (declaring the primary purpose of colleges is to provide and encourage higher education).

\textsuperscript{291} Johnson, \textit{supra} note 37, at 1433. \textit{See also} Kevin Brown, \textit{After the Desegregation Era: The Legal Dilemma Posed by Race and Education}, 37 St. Louis U. L. J. 897, 904 (1993). Professor Brown argues that non-traditional educational techniques, such as African-American immersion schools, are necessary to enable African-Americans to overcome obstacles emanating from racial categorization which carries negative connotations. \textit{Id.}

\textit{See also} Brown-Scott, \textit{supra} note 285, at 6 (arguing that the public education system in the United States denies equality of access and opportunity to racial minorities).

\textsuperscript{292} \textit{See} Edwards, \textit{supra} note 113, at 44.

\textsuperscript{293} Johnson, \textit{supra} note 36, at 1445 n.162 ("The phenomenology of black students' experience with racism on white campuses leaves no doubt of the existence and effect of subtle (or unconscious) racism. . . . Despite formal equality and race neutrality in
American student-athletes. This isolation operates as another
detrimental strike, rendering them particularly susceptible to aca-
demic and psychological injury. Additionally, as discussed
above, the black athlete’s isolation derives in part from the
problems that confront all African-American students on predomi-
nantly white campuses.

Social and academic isolation are, how-

institutional policy as well as law, American universities are still infested with myriad,
recurrent reminders of racism”).

294. A 1989 NCAA sponsored study conducted by the American Institutes for Re-
search confirmed the isolation of African-American student-athletes on predomi-
nantly white campuses which makes it difficult for them to cope with their dual roles
of athlete and student. A.I.R. REPORT, supra note 175, at 22. The A.I.R. Report
found that approximately 70% of black football and basketball players at schools with
black enrollment of less than 4% possess feelings of being different and isolated from
the mainstream of campus life. The report concludes that black football and basket-
ball players at predominantly white universities are less likely to become involved in
other extracurricular activities than student-athletes at predominantly black colleges.

Id.

295. Id. In concluding that black student athletes at predominantly white colleges
perceive isolation and discrimination, the A.I.R. study reported the following
findings:

Black football and basketball players on predominantly White campuses, as
compared to those on predominantly Black campuses, are more apt to feel
different from other students, to feel that they lack control over their lives,
to feel isolated from other students, to feel racially isolated, and to feel racial
discrimination. . . . Almost 70% of the Black football and basketball players
at the predominantly White institutions with the fewest numbers of black
undergraduates report a sense of feeling different . . .

Id.

A black student-athlete captured this feeling of isolation as follows:
I was walking across campus a couple of days ago and suddenly I looked
around and I saw that there were no blacks anywhere around, said Bob
Meeks, an offensive tackle at Auburn, where 3.5 percent of the 16,914 stu-
dents are black. Sometimes it’s like you’re the only black person on campus.
I’ve gotten used to it, but still, sometimes it makes you feel a little uncom-
fortable on the inside.

Rhoden, supra note 276, at A1; see Sellers et al., supra note 248, at 32 (concluding that
black student-athletes are more likely to experience racial isolation than white student-
athletes).

296. See Anderson & South, supra note 19, at 91. See also A.I.R. REPORT, supra
note 175, at 13.

In his study of the experiences of African-American student-athletes Professor Sell-
ers described the circumstances which produce need for enhanced institutional sup-
port to aid in their educational attainment as follows:

Although black student-athletes’ support networks may be very effective in
providing emotional support, black student-athletes may have more diffi-
culty receiving the instrumental support which often can only be provided by
a person who has had some college experience. Because black student-ath-
letes on average have parents who have never attended college and because
they are more likely to seek support from parents, they are more limited in
the type of support that their networks are able to provide.

Sellers et al., supra note 248, at 33.
ever, exacerbated in the case of the black student-athlete. The unconscious racism inherent in environments that fail sufficiently to nurture African-American students spawns deliberate actions that often relegate the black student-athlete to the status of a social and academic outsider.

By devoting greater efforts to recruiting African-American students who are athletes rather than those who are non-athletes, some commentators contend, universities contribute to the sense of isolation of black student-athletes.\textsuperscript{297} Statistical data demonstrate the gross disparity in the numbers of African-American student-athletes competing in basketball and football, and non-athlete black students attending Division I institutions.\textsuperscript{298} For instance, during the 1992-93 academic year, African-Americans accounted for only 7.5% of all students at Division I colleges and universities.\textsuperscript{299} In contrast, black male student-athletes made up 30% of all student-athletes who attended Division I institutions in 1992-93.\textsuperscript{300}

This disjunction is more pronounced when the racial composition of athletes participating in the revenue-producing sports is examined. For example, the percentage of black student-athletes playing in Division I basketball and football far exceeds that of

\textsuperscript{297} The report's authors sensed that predominantly white colleges exert greater efforts to recruit black student-athletes than black students who are not athletes. William C. Rhoden, \textit{Many Black College Athletes Express Feelings of Isolation}, \textit{N.Y. Times}, Apr. 6, 1989, at A1.


\textsuperscript{299} 1993 NCAA DIVISION I GRADUATION-RATES REPORT 7 (Martin T. Benson ed., 1994) [hereinafter 1993 GRADUATION-RATES REPORT].

\textsuperscript{300} Id. The disparate recruitment of black athletes in contrast to the black non-athlete student, has marked the history of the relationship between black athletes and predominantly white colleges and universities. Wiggins, \textit{supra} note 37, at 171. Richard Lapchick made similar observations a few years ago:

Unlike other racial groups, African-American student-athletes make up a significant 6.1 percent of African American students on campus. That is 3 times higher than for whites (1.9 percent), 6 times higher than for Hispanics (1.0 percent) and 15 times higher than for Asians (.4 percent). It clearly raises the question of whether colleges use black athletes for their brawn more than their brains.


Professor Harry Edwards argues that given that between 60 to 70 percent of black student-athletes fail to graduate, it is unjustifiable that predominantly white colleges pursue black student-athletes more intensely than other black students. Douglas Ledermann, \textit{Survey Suggests Many Division I Colleges Fail to Graduate Their Black Athletes}, \textit{Chron. Higher Educ.}, July 22, 1994, at A31-32.
white student-athletes. During the 1992-93 academic year, of the male student-athletes who received financial aid and played basketball at Division I institutions, 64.1% were black in comparison to 32.3% who were white.\textsuperscript{301} During this time frame, a smaller yet substantial percentage, 48.9%, of Division I football financial aid recipients were black.\textsuperscript{302} The large proportion of black student-athletes reinforces the stereotype "that blacks are better suited to physical activities than to intellectual pursuits."\textsuperscript{303} It also sends the message to young African-Americans that sports, rather than academics, provides a more readily accessible route to college.\textsuperscript{304} In sum, the disproportionate numbers of African-American student-athletes is a significant factor in the creation of a subculture that is separated both from blacks and whites on university campuses.\textsuperscript{305}

The sense of isolation experienced by many black student-athletes is significant given that the quality of social interactions, including relationships with coaches and other students, contributes to the academic success of student-athletes.\textsuperscript{306} In short, all student-athletes are subjected to pressures that create an ongoing tension between their roles as students and athletes. Yet, the black student-athlete confronts the additional challenge of overcoming insti-

\textsuperscript{301} 1994 Graduation Rates Report, supra note 298, at 617.
\textsuperscript{302} Id.

By not recruiting representative numbers of African-American students, while simultaneously increasing the number of African-American athletes who are almost uniformly less qualified than the black students who are turned down, the impression is created that blacks do better in athletics, because they are disinclined or incompetent to perform academically.

\textsuperscript{304} Id. at A34 (quoting Professor Harry Edwards).
\textsuperscript{305} Id. at A30.

Many college officials disagree with Hacker’s assessment. They perceive sports as having provided educational access to thousands of black youngsters who otherwise would have no such opportunity. \textit{Id.}

\textsuperscript{306} A.I.R. Report, supra note 175, at 25. The existence of a racially insensitive environment contributes to lower academic performance. See Spivey & Jones, supra note 68, at 943 (concluding that racism experienced by black student-athletes at the University of Illinois created an absence of the type of environment which aids in fostering academic success).

Black student-athletes complain that too few of their coaches encouraged them to excel academically. Lapchick, supra note 103, at 230. Moreover, they expressed concern over the few black coaches or faculty members on campus who were available as role models. \textit{Id.}
tutional barriers. For example, when barriers are perpetuated by unconscious racism, the athlete's ability to obtain requisite academic skills is impeded. This loss is damaging to the black student-athlete, as these skills are necessary for effectively addressing the myriad of situations they will encounter throughout life.\textsuperscript{307} Thus, the social marginalization experienced by today's black student-athletes adversely impacts their academic potential, just as exclusionary Jim Crow era practices were detrimental to the academic success of black athletes.\textsuperscript{308} One commentator has noted that:

Young black men from relatively poor socioeconomic backgrounds have entered some of the most prestigious universities in this country largely because they were sought out for their athletic ability. Athletic scholarships have usually provided the financial means for these student-athletes to attend college. Because of this fact there exists the widespread assumption that these grants provided one of the few, if not only, means for black athletes to attend college, obtain a degree, and go on to improve their basic life situation. However, in more cases than not, this assumption masks the realities of being a black student-athlete on most of the nation's college and university campuses. Student-athletes in general, and black student-athletes in particular, often find it difficult to cope with the dual elements of the student-athlete role.\textsuperscript{309}

The fact that black student-athletes are not competing academically as successfully as their white counterparts on the presumed "level playing" field is evidenced by disparate graduation rates be-


\textsuperscript{308} See supra notes 71, 80.

\textsuperscript{309} Spivey & Jones, supra note 68, at 939; see Sellers \textit{et al.}, supra note 248, at 32 (noting that a number of factors converge to result in poorer academic performance of black student-athletes compared to white student-athletes).

A sportswriter described the situation which produces difficulties for the black athlete to cope with the dual role of athlete and student as follows:

Black athletes, because of their celebrity, their size, indeed, their blackness, are often the most visible undergraduates on campus. In the most competitive programs, they frequently make up four of the five starters on the basketball team, and sometimes 7 of the 11 starters on each unit of the football team.

Still despite their visibility, black athletes are a tiny fraction of the undergraduate community on many major college campuses.

They are often revered as campus heroes for their athletic prowess, but many feel shackled to the pedestals on which they have been placed. They move between two conflicting worlds—education and entertainment—without truly belonging to either.

tween white and African-American student-athletes. The most recent studies produced by the NCAA reveal an overall increase in the graduation rates of student-athletes, including African-Americans. This has been the case since the imposition of Proposition 48 standards.\footnote{See generally 1994 Graduation-Rates Report, supra note 298, at 616 (documenting increasing graduation rates for student-athletes who matriculated at colleges during the period 1984 through 1987); see also Debra E. Blum, Are Athletes Graduating?, Chron. Higher Educ. July 6, 1994, at A38 (discussing recent student-athlete graduation rates).} Despite this promising trend, unrestrained optimism is unwarranted. White student-athletes continue to graduate at a considerably higher rate than their African-American counterparts. The 1994 NCAA Graduation Rates Report reveals that, of the student-athletes who matriculated in 1987, 58% of Division I white student-athletes graduated. This contrasts with the 43% graduation rate for black student-athletes.\footnote{These percentages marked a slight increase in graduation rates for student-athletes who entered college in 1986. The comparative rates for this group, were 57 percent for whites and 41 percent for blacks. 1994 Graduation-Rates Report, supra note 298, at 616.}

On at least two accounts, however, these numbers may be misleading. First, graduation rates for black student-athletes in the revenue-producing sports are lower than the overall graduation averages. Of the Division I black male basketball players who entered college in 1987, 39% graduated.\footnote{Id.} This contrasts with the graduation rate for Division I white male basketball players for the same time period, which was 57%.\footnote{Id. A fifteen percentage point difference exists in the graduation rates between white and black women Division I basketball players. White women who matriculated in 1987 graduated at a rate of 67% compared to 52% for black women basketball players. Overall, white women student-athletes graduated at a rate of 69%, while black women graduated at a rate of 53%. The graduation rates for black women actually represent a one percentage point decrease from the 54% graduation rate for those matriculating in 1986. Id.} Similarly, only 44% of Division I-A black football players graduated in comparison to a 63% rate for their white counterparts.\footnote{Id. The 44% graduation rate represents a 1% improvement over that for black student-athletes who entered college in 1986. White student-athletes realized a 4 percentage point improvement from 59% to 63%.} Not only do these numbers evidence the continuing disparity in the graduation rates between white and black student-athletes, but they also represent unacceptably low rates of graduation for student-athletes in general, and for black student athletes in particular.

Graduation rates for student athletes are misleading to the extent that they fail to reflect that, at many institutions, the gradua-
tion rates of African-American male student-athletes are unacceptably low.\textsuperscript{315} Approximately forty Division I institutions that matriculated more than six black student-athletes in 1987 failed to graduate more than 30\% of their black athletes.\textsuperscript{316} This group includes prestigious athletic institutions such as Auburn University,\textsuperscript{317} the University of Washington,\textsuperscript{318} Michigan State University\textsuperscript{319} and Ohio State University.\textsuperscript{320} In addition, the graduation rates of many other academically and athletically prestigious colleges and universities reported graduation rates for their black male student-athletes that hovered around the 30 percent mark.\textsuperscript{321}

In short, despite the modest increases in graduation rates for both white and black student-athletes, the percentages remain sufficiently low that they raise the issue of exploitation. In the case of African-American student-athletes, the data suggests that they continue to suffer from academic neglect. Finally, graduation rates alone cannot sufficiently measure whether African-American student-athletes are being provided with an educational opportunity sufficient to allow them to partake fully of their educational experience and develop the skills necessary to compete in a post-athletic environment. Thus, despite the graduation data presented, the extent to which black student-athletes are provided access to a meaningful educational opportunity is still worth further investigation.\textsuperscript{322}

\textsuperscript{315} See generally Davis, supra note 266, at 755 (commenting that generalized graduation rates fail to consider significant factors which can raise or lower rates, such as the type of institution and the level of competition at which student-athletes compete).


The number of institutions graduating less than 30\% of their black athletes increases when graduation rates for all institutions, including those which matriculated less than 6 black students in 1987-88, are considered. \textit{Id.}

\textsuperscript{317} Auburn graduated only 20\% of its African-American student-athletes. \textit{Id.} at A39.

\textsuperscript{318} Only 28 percent of the black male student-athletes who entered the University of Washington in 1987-88 graduated after six years. \textit{Id.} at A40.

\textsuperscript{319} Only 20\% of Michigan State's black student-athletes graduated after six years. \textit{Id.} at A39.

\textsuperscript{320} Ohio State reported that only 21\% of its black student-athletes graduated after six years. \textit{Id.}

\textsuperscript{321} Examples include the University of Oklahoma, and the University of Nebraska, which reported graduation rates of 30 and 31 percent, respectively. \textit{Id.} at A40.

\textsuperscript{322} See generally Davis, supra note 266, at 754 (discussing how graduation rates may mask the extent to which student-athletes leave college with adequate academic preparation).
Black student-athletes who obtain degrees should be included in any such inquiry.

IV. Redressing The Harm of Unconscious Racism

Thus far, the discussion has focused on identifying the sources of the unconscious racism present in college sport and the harm that it continues to inflict upon black participants. This harm manifests most acutely in the devaluation of the African-American student-athlete’s academic interest. This devaluation raises the question of exploitation of black student-athletes who provide valuable services yet too often leave their institutions of higher learning without having obtained the academic preparation necessary for them to cope successfully with life issues following their college careers.

Consistent with the overall purpose of this Article, the goal of the discussion that follows is to begin a dialogue concerning the mechanisms that may assist in protecting the academic interests of black student-athletes. Since combating the deleterious effects of unconscious racism requires resorting to many different tools,

323. The issue of the potential exploitation which could result when student-athletes are denied an opportunity to access the academic benefits their colleges have to offer has been analyzed by several commentators including: Lesa A. Barkowsky, Note, The Illiteracy Problem and College Athletics: An Argument for Educational Malpractice, 16 COLUM.- VLA J.L. & ARTS 537 (1992); Leroy D. Clark, New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue, 36 HOW. L.J. 259 (1993); Davis, supra note 266; Daniel P. Rafferty, Note, Technical Foul: Ross v. Creighton University Allows Courts to Penalize Universities Which Do Not Perform Specific Promises Made to Student-Athletes, 38 S.D. L. REV. 173 (1993); Edmund J. Sherman, Note, Good Sports, Bad Sports: The District Court Abandons College Athletes in Ross v. Creighton University, 11 LOY. ENT. L.J. 657 (1991); Ron Waicukauski, The Regulation of Academic Standards in Intercollegiate Athletics, 1982 ARIZ. ST. L.J. 79; Michael N. Widener, Note, Suits by Student-Athletes Against Colleges for Obstructing Educational Opportunity, 24 ARIZ. L. REV. 467 (1982).


both traditional and non-traditional analytical approaches are identified.

A. A Race-Conscious Approach

To reiterate, the presumed role of the African-American student-athlete is as a valued sports commodity. This role results in the failure of many colleges and universities to improve support services and take measures necessary to reduce the social isolation of black athletes. In turn, this isolation ultimately negatively impacts the black student-athlete’s academic performance.326

As noted above, institutional environment is critical in determining the black student-athlete’s potential for academic success at predominantly white institutions. As noted by the chief scientist of the Report of the American Institutes for Research, “What the report shows is just bringing [black student-athletes] on campus is not enough.”327 The something more that is required is the development of a supportive environment, one that would work to lessen the academic and social hostility black student-athletes encounter at predominantly white institutions.

The provision of an academically supportive environment may require increased hiring of African-American coaches and administrators who can provide the mentoring and design programs that will improve the academic, social and professional opportunities for black student-athletes.328 Concomitant with increases in the number of black coaches and administrators should be increased admission of non-athlete African-American students. More specifically, courts should require predominantly white colleges that recruit and employ student-athletes “to engage in race-conscious admissions and hiring policies to increase black student enrollment, faculty, and staff.”329

Such efforts alone, however, are likely to prove inadequate. On account of the often deficient educational backgrounds of many black student-athletes, universities must implement academic sup-

326. Lederman, supra note 275, at A32.
328. Sellers et al., supra note 248, at 35.
port systems that "provide skill building opportunities along with tutorial services."\(^{330}\) In this regard, the suggestions of Professor Wendy Brown-Scott provide guidance. In the context of arguing for the preservation of historically black institutions, maintains that predominantly white institutions should take the necessary steps to provide the "maximum opportunity for African-Americans to obtain higher education."\(^{331}\) Professor Brown-Scott adds that these steps may involve the use of race-conscious approaches such as aggressive affirmative action admission and hiring policies.\(^{332}\) The needs of African-American student-athletes are unique, and support programs should be developed specifically to address those needs.\(^{333}\) As one sociologist noted, academic support programs must "shift their focus from the short term goal of eligibility to the long-term development of the black student-athlete."\(^{334}\)

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330. Sellers et al., supra note 248, at 35.

331. Brown-Scott, supra note 285, at 7. The need for aggressive efforts to transform the environment into one more supportive of black students was stated by Professor Brown-Scott as follows:

Even in predominantly white institutions, the issue of trust between the races must be addressed through the creation of cultural institutions within the larger institutions that include content culturally relevant to African-American students and enlightening to whites. This shift recognizes the reality that integrated institutions are not culturally neutral, but reflect the values and norms of the dominant culture. The establishment of African-American cultural centers or institutes on white campuses is an especially good idea as part of a remedial plan premised on sound educational policy.

Id. at 78.

332. Id. at 7. See also Brown, supra note 97 (arguing that the unique needs of black males underscore the need for immersion schools).

333. Responding to the unique needs of the African-American student-athlete does not mean affording them preferential treatment. As noted by one commentator, student-athletes like non-athlete students involved in other subcultures within the university possess unique needs to which institutions are obligated to respond. Doug Single, The Role of Directors of Athletics in Restoring Integrity to Intercollegiate Sport, in The Rules of the Game: Ethics in College Sports 156-57 (Richard E. Lapchick & John B. Slaughter eds. 1989). Accordingly, fashioning support mechanisms to respond to the special needs of African-American student-athletes is equally justifiable.

334. Sellers et al., supra note 248, at 35. Professor Sellers makes the following specific suggestions as to the composition and structure of such an academic support program:

Finally, universities must provide more appropriate and effective academic support systems for student-athletes. This philosophy can best be accomplished through at least two broad policy changes. The first involves providing academic advising services with a measure of autonomy from the eligibility pressures of the athletic departments . . . The second policy change involves mandating the use of trained professionals in teaching programs. It is up to the university to provide a structure that values the long-term devel-
B. Contract-Based Remedies

The student-athlete's relationship with his or her college is widely acknowledged by courts and commentators as premised on an express contract. The express contract and the obligations formed thereby arise from the Letter of Intent, the Statement of Financial Assistance, and various university publications, including bulletins and catalogues. The existence of this contractual relationship brings into question the utility of contract to provide the basis for an antidiscrimination norm. It is relevant, therefore, to explore the extent to which statutory and common law contractually-based principles provide means for redressing the academic neglect of black student-athletes.

1. Civil Rights Approach—Section 1981

Section 1981 of the Civil Rights Act prohibits racial discrimination in the contracting process. In the institution's performance of black student-athletes and provides them with an atmosphere conducive to learning.

Id.


336. A Letter of Intent obligates the student-athlete to participate in sports exclusively for the signatory institution. Cozzillio, supra note 335, at 1290.

337. Id. at 1284 n.20 (discussing the legal significance of the Statement of Financial Assistance).

338. Id. at 1290; Davis, supra note 21, at 315.

339. 42 U.S.C. § 1981 (West Supp. 1994). Prior to 1991, the U.S. Supreme Court rejected decades of contrary precedent in Patterson v. McClean Credit Union, 491 U.S. 164 (1989), by narrowly interpreting the scope of Section 1981 as only applying to the initial formation and the enforcement stages of a contract. The court stated as follows:

Interpreting § 1981 to cover postformation conduct unrelated to an employee's right to enforce his or her contract, such as incidents relating to the conditions of employment, is not only inconsistent with that statute's limitation to the making and enforcement of contracts, but would also undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims.

Id. at 180. Thus, discrimination which involved contractual performance was held to fall outside the strictures of the statute. Id. at 177. The Civil Rights Act of 1991 returned the state of the law to that preceding Patterson by amending section 1981 and thus clarifying its scope. Ronald D. Rotunda, The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation, 68 No.
of its contractually-based educational obligation to its student-athletes, racism harms the latter’s academic interests. \footnote{Thus, racism resulting in harm during the performance stage of the contracting process invites inquiry into the availability of § 1981 as a means of redressing and thereby protecting the academic interests of black student-athletes.} In this regard, despite the contractual relationship, the utility of § 1981 is dubious. Section 1981, like most antidiscrimination statutes, \footnote{proscribes only intentional acts of racial discrimination.} Therefore, to sustain a § 1981 claim, the student-athlete would be required to show that the institution’s conduct was motivated by race. Except in rare instances, however, the academic neglect of black student-athletes appears to result from unconscious rather than deliberately overt forms of racial discrimination. \footnote{As noted, the explicit inclusion of the performance stage of the contracting process within Section 1981’s proscription is particularly important to a potential claim by black student-athletes, since discrimination occurs in the institution’s performance of its academic obligation.} 

\footnote{See infra part III.}{\footnote{See Robert E. Suggs, Racial Discrimination in Business Transactions, 42 Hastings L.J. 1257 (1991) (discussing the barrier to recovery imposed by the intent requirement of one of the grounds for relief under Title VI of the Civil Rights Act of 1964, and the intent requirement of Section 1981). See generally Lawrence, supra note 125 (discussing the limitations of intent based antidiscrimination laws as providing a mechanism for combatting unconscious racism).}}{\footnote{Id.; Suggs, supra note 341 (disparate impact is not sufficient to sustain a section 1981 claim); see, e.g., Edwards v. Jewish Hosp. of St. Louis, 855 F.2d 1345, 1349 (8th Cir. 1987); Watson v. Pathway Financial, 702 F. Supp. 186, 188 (N.D. Ill. 1988).}}{\footnote{See Suggs, supra note 341, at 1275 (noting, in the context of Title VI, that only in cases of extreme discrimination can a plaintiff show the requisite intent to discriminate short of an admission of culpability by the defendant). It should be noted, however, that under Title VII, 42 U.S.C. §§ 2000e-2(a) (1988), which forbids discrimination in employment, liability can be established notwithstanding the absence of invidious intent. Griggs v. Duke Power Co., 401 U.S. 424 (1971); see Rotunda, supra note 339, at 928-38 (summarizing the history of disparate impact theory under Title VII); Timothy D. Loudon, The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact, 71 Neb. L. Rev. 304, 314 (1992) (defining the disparate impact theory of discrimination as involving “neutral employment practices that are not discriminatory on their face, but which result in discrimination in their application or effect on a ‘protected class’ (i.e., race, color, religion, sex, or national origin).”)}}
Consequently, the black student-athlete is situated like many other plaintiffs alleging discrimination in the contracting process. That is, all § 1981 claimants encounter an intent element, which represents an almost insurmountable hurdle to establishing their claim. The slim likelihood of establishing such a claim mandates the search for other means of protecting the black student-athlete’s academic interests.

2. Common Law Contract as an Antidiscrimination Norm

Common law contract principles may provide the theoretical foundation for developing an antidiscrimination norm to address the unconscious racism that confronts African-Americans engaged in collegiate athletics. As specifically described below, such

344. See Williams, supra note 318, at 227 (recognizing that the intent element of a Section 1981 claim represents a fatal obstacle for many plaintiffs even though they suffer real injuries); Suggs, supra note 341, at 1275 (“When subjective evil intent is the critical element necessary for recovery, success on the merits becomes virtually impossible”). Id. at 1302.

345. Recently Professor Richard Epstein attacked the legitimacy of deploying antidiscrimination statutes to end racial discrimination in economic relationships such as that of employee and employer. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992). In urging the repeal of Title VII, Professor Epstein argues that antidiscrimination laws are the antithesis of freedom of contract. Id. at 3. He describes freedom of contract as “a principle that allows all persons to do business with whomever they please for good reason, bad reason, or no reason at all.” Id. One commentator summarizes Epstein’s views on freedom of contract as follows: “Epstein strongly believes that the traditional common law principles of freedom of contract have served us well, and that antidiscrimination laws constitute an unwarranted and inefficient intervention into private contractual matters.” Gregory S. Crespi, Market Magic: Can the Invisible Hand Strangle Bigotry?, 72 Bost. U. L. Rev. 991, 997 (1992). Pursuant to this theory, Professor Epstein would limit state intervention into contractual relations to preventing the use of force and fraudulent behavior in the making of contracts. Epstein, supra at 3-4, 19.

The discussion which follows, while relying on common law contract principles to address discriminatory conduct, diverges considerably from Professor Epstein’s reliance on common law principles. I propose that certain common law contractual principles provide the basis for creating an antidiscrimination norm since they operate to limit the range of permissible contractual conduct. Specifically, the article proposes that the common law good faith doctrine limits personal autonomy in the performance stage of contractual arrangements. Thus the doctrine provides a mechanism for judicial intervention into private contractual matters even in the absence of force or fraud. In addition, it provides a means of attacking the invidious forms of discrimination which can persist even in competitive markets. See Ian Ayres, Alternative Grounds: Epstein’s Discrimination Analysis in Other Market Settings, 31 San Diego L. Rev. 67, 84 (1994) (arguing that invidious discrimination can exist within competitive markets).

It is likely that critics of antidiscrimination laws will also criticize the proposed use of the good faith doctrine notwithstanding the legitimate and limited intrusion which it suggests on the exercise of personal autonomy. See Robert Dugan, Civil Rights and
principles can, in some instances, be employed to constrain discriminatory conduct that harms black student-athletes. In addition, these principles provide a basis for imposing affirmative obligations on universities and colleges to promote the academic interests of African-American student-athletes. The discussion that follows proposes that, of these principles, the duty of good faith and fair dealing holds the most utility for providing the basis for a common law antidiscrimination norm.

Despite the revered position of the notion of freedom of contract in our legal jurisprudence, this freedom has never been absolute. In contrast to the late Nineteenth Century, during which classical contract was dominated by notions of individualism and personal autonomy, the idea of freedom of contract should now be understood as "sensitive both to individual autonomy and to the limitations placed on that autonomy by the social environment in which individuals are situated." In attempting to achieve this balance, common law principles have been employed to limit contractual freedom for reasons ranging from public policy to restraint

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\text{\textit{Freedom of Contract: Employment, Housing and Credit Transactions (Part I-Employment), 26 S. Dak. L. Rev. 259, 298 (1981) (criticizing the socialization of contract law occasioned by antidiscrimination laws and the constraints on freedom on contract mandated by the good faith doctrine and other developments in contract law).}}
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347. \textit{The Antidiscrimination Principle in the Common Law}, supra note 346, at 1993; Kessler et al., supra note 346, at 9 (quoting Pound for the proposition that "there never has been in our law any such freedom [of contract] as they [i.e., the advocates of doctrinaire liberalism] postulate").

348. Williams, supra note 325, at 191, Kessler et al., supra note 346, at 6-7.

349. Burton, supra note 346, at 447 (modern conceptions of freedom of contract limits personal autonomy through the incorporation of values arising from the social environment in which individuals are situated); Williams, supra note 325, at 194 (contract has evolved into a regime which recognizes that social responsibility and morality constrain personal autonomy); Liebergesell v. Evans, 613 P.2d 1170, 1176 (Wash. 1980) (modern contract law interprets freedom of contract as "acknowledging the parties' duty to deal in good faith with one another").
of trade to unconscionability.\textsuperscript{350} Included within these principles is a common law antidiscrimination norm, the "duty to serve."\textsuperscript{351}

Courts historically employed this concept as a means of disallowing private racial discrimination in discrete situations.\textsuperscript{352} Pursuant to the duty-to-serve doctrine, "public service companies"\textsuperscript{353} are required to serve the public without discrimination.\textsuperscript{354} In the context of the duty-to-serve, constraining individual autonomy and freedom of contract grows out of concern for the vulnerability of some individuals to the unreasonable exercise of discretion by private entities.\textsuperscript{355} Thus, the "duty-to-serve limits the contract and property rights of the public service company, and creates a common law basis for disallowing discrimination on racial grounds."\textsuperscript{356}

The significance of the duty-to-serve doctrine is two-fold. As alluded to above, the doctrine illustrates the use of notions of social responsibility to constrain personal autonomy. The doctrine limits

\begin{itemize}
  \item \textsuperscript{350} See \textit{Kessler et al., supra note 346} (identifying the willingness to deny enforcement of contracts contemplating crimes and contracts in restraint of trade as illustrations of common law limitations on the freedom of contract principle); Burton, \textit{supra} note 346, at 451 (identifying the unconscionability and good faith doctrines as two of the more prominent developments in contract law which are antithetical to classical notions of freedom of contract); Williams, \textit{supra} note 325, at 195 (promissory estoppel clearly reflects contract doctrine which has evolved toward greater social responsibility).
  \item \textsuperscript{351} See generally \textit{The Antidiscrimination Principle in the Common Law}, \textit{supra} note 346, (discussing in detail the duty to serve principle as a well established illustration of a common law antidiscrimination norm).
  \item \textsuperscript{352} See, e.g., \textit{Odom v. East Ave. Corp.}, 34 N.Y.S.2d 312, aff'd, 37 N.Y.S.2d 491 (1942).
  \item \textsuperscript{353} Public service companies are persons or business enterprises which engage in a public calling. \textit{The Antidiscrimination Principle in the Common Law}, \textit{supra} note 346, at 1993; Williams, \textit{supra} note 325, at 202.
  \item \textsuperscript{354} \textit{The Antidiscrimination Principle in the Common Law}, \textit{supra} note 346, at 1995 (citing to \textit{De Wolf v. Ford}, 86 N.E. 527, 530 (N.Y. 1908)).
  \item \textsuperscript{355} \textit{The Antidiscrimination Principle in the Common Law}, \textit{supra} note 346, at 2001. Two rationales have been offered for this doctrine which restricts personal autonomy by removing the freedom of certain individuals to select with whom they will enter into a bargain. The duty-to-serve doctrine is thought to have been developed to respond to the monopoly power exercised by those engaged in public callings. \textit{Id.} at 1995. "A situation of virtual monopoly . . . require[s] more protection to ensure that merchants would deal fairly with each individual." \textit{Id.} The second rationale is premised on the view that "by affirmatively electing to hold herself out as serving the general public, a person consents to the imposition of a duty to serve all members of the public without distinction." Williams, \textit{supra} note 325, at 203.
  \item \textsuperscript{356} \textit{The Antidiscrimination Principle in the Common Law}, \textit{supra} note 346, at 2002. One commentator emphasizes the significance of this common law antidiscrimination norm notwithstanding the existence of antidiscrimination laws. "Given the difficulty of proving intent and the subtleties of racial discrimination, plaintiffs often find" the intent to discriminate burden present in Section 1981 and other laws impossible to meet. \textit{Id.} at 2008.
\end{itemize}
the "right of certain parties to choose the persons with whom they contract." Further, the duty-to-serve doctrine is significant to the extent that it constitutes a common law antidiscrimination norm that limited the unreasonable exercise of contractual autonomy. In this regard, the doctrine establishes the predicate for the recognition at common law that parties have a reasonable expectation to be free from discrimination in the contracting process.

3. Good Faith as an Antidiscrimination Norm

In addition to the duty-to-serve doctrine, the good faith doctrine constitutes another common law antidiscrimination norm with utility for precluding overt and covert racial discrimination in the performance stage of the contracting process. Commentators have

357. Williams, supra note 325, at 202.
358. The Antidiscrimination Principle in the Common Law, supra note 346, at 2010-11; Williams, supra note 325, at 208 arguing that the duty-to-serve doctrine demonstrates common law recognition of the propriety of prohibiting discrimination in the formation stage of contracts; but see, Burton, supra note 346, at 458-59 (noting that the common law of contract developed no significant body of law addressing racial discrimination in the contract process).
359. Williams, supra note 325, at 208.

The lawful performance doctrine has also been identified as an emerging common law contract principle which could be used to combat discrimination in contracting. Burton, supra note 346, at 434 (1990). Professor Burton describes the lawful performance doctrine as follows:

The lawful performance doctrine reflects the fact that some statutes create reasonable expectations on the part of contract parties concerning the duties of their contract partners in the course of contract performance. These expectations and legal duties help to form the world of their contract no less than those generated by statutes that only invalidate offending terms of an agreement. The lawful performance doctrine permits the courts to use the judicial power to coordinate common law and statutory law by circumscribing the world of a contract through the construction process. Consequently, statutory duties can become contractual obligations generating legitimate expectations, exposing the party who violates the relevant law to an action for breach of contract.

Id. at 464-65.

Professor Burton proposed the use of the lawful performance doctrine as a means of circumventing the Supreme Court's restrictive interpretation of 42 U.S.C. § 1981 in Patterson v. McLean Credit Union as not covering discrimination in the performance stage of the contracting process. See Williams, supra note 325, at 211-12.

Professor Burton's conceptualization of the lawful performance doctrine remains significant notwithstanding the fact it is no longer necessary to fill the voids created in Patterson. It represents one of few attempts to articulate an antidiscrimination norm in common law contract. In addition, Professor Burton's notion that contractual expectations consist of a world of contract which excludes racial discrimination is relevant to constructing an antidiscrimination norm premised on the good faith doctrine. Burton, supra note 340, at 463.
considered the use of the good faith doctrine as a basis for prohibiting overt discrimination in contractual performance. As will be seen, however, greater utility may reside in use of the doctrine to redress covert forms of discrimination in contractual performance.

In a recent article, Professor Neil Williams proposes use of the good faith doctrine to prohibit overt forms of discrimination in the contracting process. Professor Williams lays the theoretical foundation for his proposed antidiscrimination norm by arguing that employing the good faith doctrine in this manner is consistent with the evolution of contract law. More specifically, he views a common law antidiscrimination norm as an extension of a regime of contract that does not operate independently of social and moral considerations. Professor Williams proceeds to provide illustrations (e.g., promissory estoppel, duty-toerve and unconscionability) of the extent to which modern contract law employs community standards of decency and fairness to impose obligations on contracting parties.

Professor Williams' proposed use of the good faith doctrine as an antidiscrimination norm hinges on his concept of the principle as one that incorporates community standards of decency and fairness. In this regard, he adopts a concept that views good faith as an excluder of bad faith conduct. Proceeding from a bad faith

360. See generally Williams, supra note 325, at 228 (proposing that, of the common law contract theories, the duty of good faith and fair dealing offers the greatest promise as a mechanism for attacking racial discrimination in the contracting process); Burton, supra note 346, at 464 n.116 (questioning the use of the good faith doctrine to prohibit discrimination in contractual performance).
361. See generally Williams, supra note 325.
362. Williams, supra note 325, at 184, 207.
363. Id. at 194, 207.
364. Id. at 184, 193-207.
365. Id. at 214. The excluder formulation of the duty of good faith and fair dealing was originally conceptualized by Professor Robert Summers. See Robert S. Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195 (1968). Professor Summers conceptualized good faith conduct negatively by determining that such conduct is not in bad faith. Id. at 195-96. According to Summers, it is preferable that the good faith obligation not have a specific meaning or meanings. Robert Summers, The General Duty of Good Faith—Its Recognition and Conceptualization, 67 Cornell L. Rev. 810, 829-30 (1982). In his view, any such effort to give the good faith obligation a positive meaning would be unwise because it would provide little useful guidance and might unduly restrict the scope of the doctrine. Id. Summers further explained as follows:

Good faith, then, takes on specific and variant meanings by way of contrast with the specific and variant forms of bad faith which judges decide to prohibit. From the cases it would be possible to compile a list of forms of bad faith, with an opposite for each listed as the corresponding specific meaning of good faith.
concept of the good faith doctrine, Professor Williams concludes that parties possess expectations that they will not be treated in a manner that offends prevailing community norms.\textsuperscript{366} Williams further argues that notions of what constitutes good faith or bad faith behavior are fluid in that they reflect "continually evolving community standards."\textsuperscript{367} He concludes that ideas of good or bad faith behavior are "free to reflect a maturing social conscience that recognizes racial discrimination to be inherently incompatible with modern standards of decency, fairness, and reasonableness. Consequently, practical reasoning mandates that it is time for racial discrimination to be considered bad-faith behavior contrary to the duty of good faith and fair dealing."\textsuperscript{368}

In short, the paradigm of good faith envisioned by Professor Williams for proscribing racial discrimination in the contracting process finds its content in "community standards of decency, fairness, and reasonableness."\textsuperscript{369} Under this construct of good faith, parties have a moral obligation not to discriminate in the contracting process.\textsuperscript{370} Under this model, the good faith doctrine functions as the legal mechanism for enforcing an implied moral obligation not to discriminate.\textsuperscript{371} This moral obligation is derived from society's condemnation of discriminatory conduct.\textsuperscript{372}

\begin{footnotes}

\footnotetext{366} Williams, \textit{supra} note 325, at 214.

\footnotetext{367} \textit{Id.}

\footnotetext{368} \textit{Id.}

\footnotetext{369} Williams, \textit{supra} note 325, at 214.

\footnotetext{370} \textit{Id.} at 209.

\footnotetext{371} \textit{Id.} As noted, above, Professor Williams argues that a moral obligation not to discriminate represents an extension of society's recognition that certain moral obligations, such as those found in sections 82, 83, 85 and 86 of the Restatement (Second) of Contracts, are worthy of enforcement. \textit{Id.} at 209.

\footnotetext{372} \textit{Id.} at 216-7. Professor Williams recognizes that some will criticize his morally based conceptualization as creating too much judicial discretion and lacking of any ascertainable standard which will circumscribe the implementation of "every 'vague' moral requirement imaginable in the mind of a judge." \textit{Id.} at 217. For instance, he notes that Professor Richard Epstein's argument that deploying common law contract principles to prohibit racial discrimination is inappropriate since the state should restrain from efforts aimed at imposing standards of morality on its citizens. \textit{Id.} at 216. He also notes the concern of Professor Burton that a morally based conceptualization of good faith is not sufficiently limited. \textit{Id.} at 217.

Professor Williams responds to these criticisms as follows: [M]oral good faith and legal good faith need not necessarily be the same in every instance. If a reasoned process of judicial inclusion and exclusion is employed, racial discrimination can be recognized as being inimical to modern standards of decency, fairness, and reasonableness without incorporating wholesale the "Sermon on the Mount."
\end{footnotes}
Professor Williams' analysis provides a useful foundation for constructing the good faith doctrine as a contractually-based antidiscrimination norm. Indeed, the morally-based paradigm of good faith envisioned by Professor Williams would seem to provide a useful mechanism for prohibiting overt forms of discrimination that defeat reasonable contractual expectations. This conclusion is explained by the understanding that overt discrimination is deemed by society to constitute morally culpable behavior. 373

It is unlikely, however, that a morally-based paradigm of good faith will proscribe unconscious and subtle forms of racism, which nevertheless manifest to subvert a party's contractual expectations. As noted above, the morally based model of good faith presupposes that racial discrimination constitutes morally culpable and offensive behavior. Therefore, overt acts of racial discrimination would fall within its prohibitive parameters. Yet it remains unclear whether unconscious racism is viewed by society as representative of the sort of morally culpable behavior that offends community standards of fairness and decency. 374 This lack of consensus on the moral culpability of unconscious racism casts doubt on the utility of redress by a morally-based concept of good faith. In short, a morally-based paradigm of good faith may be ineffective in preventing subtle, yet harmful, forms of racial discrimination. Consequently, the viability of this paradigm of good faith to redress the harm to student-athlete's academic interests resulting from unconscious racism may be limited.

An alternative formulation, not premised principally on community standards of decency to give content to the good faith doctrine, provides the foundation for a contractual antidiscrimination norm adequate to prohibit unconscious racism. The linchpins of this formulation are: proscribing conduct that undermines the reasonable expectations of the parties to a contract, and requiring, where necessary, parties to engage in cooperative conduct to promote those

Id. The precise contours of Professor Williams' "reasoned process of judicial inclusion and exclusion" are unclear. He intimates, however, that the process should focus on whether a party to a contract exercises his or her private autonomy in ways which serve no legitimate business purpose and result in harm to others. Id. at 216-17.

373. See supra note 127.

374. See supra note 128 and accompanying text. It might be argued, however, that unconscious racism has been sufficiently identified so as to place society on notice of the adverse consequences flowing therefrom. Thus, at some point, moral culpability can be inferred from the effects of such conduct. This in turn raises the issue of a subjective versus an objective test for determining discriminatory intent. See Martinez, supra note 30, at 602-603 (discussing objective and subjective standards for showing discriminatory intent).
expectations. As discussed below,* this concept of the good faith doctrine would include another essential feature: emphasis on the impact of a party's exercise of discretion, regardless of his motivation or intent, on the other party's reasonable expectations.\textsuperscript{375}

When the express terms of the contract are either unclear or omitted, a party may possess the power to determine or control the actualization of their performance obligation.\textsuperscript{376} Thus, discretion in performance refers to "one party's power after contract formation to set or control the terms of performance."\textsuperscript{377} Accordingly, good faith performance occurs when a party's exercise of discretion is in pursuit of any purpose consistent with the opportunities the parties reasonably contemplated at the time they entered into the contract.\textsuperscript{378} Conversely, bad faith performance occurs when a party uses discretion in a manner inconsistent with the essence of the contractual relationship.\textsuperscript{379}

Several courts have adopted this concept of good faith.\textsuperscript{380} For example, in \textit{Centronics Corp. v. Genicom Corp.},\textsuperscript{381} the New Hampshire Supreme Court addressed whether the defendant's conduct,

\textsuperscript{375} Varying conceptualizations of the good faith doctrine have been articulated. The formulation, in which the doctrine functions to limit the exercise of discretion in contractual performance, represents one such effort. The various attempts to give meaning to the good faith doctrine are discussed in the following: A. Brooke Overby, \textit{Bondage, Domination, and the Art of the Deal: An Assessment of Judicial Strategies in Lender Liability Good Faith Litigation}, 61 \textit{Fordham L. Rev.} 963, 978-992 (1993) (discussing current theoretical conceptualizations aimed at giving content to the duty of good faith); Maureen Armour, \textit{A Nursing Home's Good Faith Duty "to" Care: Redefining a Fragile Relationship Using the Law of Contract}, 34 \textit{St. Louis U. L.J.} 217 (1995) (also discussing the efforts of scholars to define the good faith doctrine); Davis, \textit{supra} note 266. \textit{See also} Market Street Associates Limited Partnership v. Frey, 941 F.2d 588 (7th Cir. 1991) (identifying various conceptualizations of the good faith doctrine); Centronics Corp. v. Genicom, 562 A.2d 187, 191 (1989) (noting the difficulties which have confronted commentators attempting to define the good faith principle); Nolan v. Control Data Corp., 579 A.2d 1252 (N.J. 1990) (discussing differing definitions of the implied duty of good faith); \textit{supra} note 397 and accompanying text.


\textsuperscript{377} \textit{Id}. Professor Burton has observed that discretion in performance arises for varying reasons. "A party has 'discretion' when it 'has a legal power in effect to specify a term of the contract during the performance stage of the contract,' ... 'such as when the contract expressly allows one party to dictate a term,' ... or as a result of 'a lack of clarity and completeness in the express terms, which may become apparent only as events unfold after formation.'" Overby, \textit{supra} note 375, at 981 n.99.

\textsuperscript{378} Burton, \textit{supra} note 376, at 500.

\textsuperscript{379} \textit{Id}.

\textsuperscript{380} \textit{See, e.g.}, Greer Properties, Inc. v. LaSalle National Bank, 874 F.2d 457, 460 (7th Cir. 1989) (good faith requires the party with discretion in performance to exercise it reasonably).

\textsuperscript{381} 562 A.2d 187 (N.H. 1989).
in refusing to release a portion of escrow funds, constituted a breach of the implied covenant of good faith. In finding no breach of the duty, the court attempted to import substantive content into the duty of good faith.  

The court characterized the implied duty of good faith as a series of doctrines that serve different functions. According to the court, the good faith doctrine has been relied on in three categories of cases: "those dealing with standards of conduct in contract formation, with termination of at-will employment contracts, and with limits on discretion in contractual performance..." With respect to the third category, the court concluded that previous case law demonstrated the propriety of good faith serving such a function. The court concluded:

[U]nder an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting.

The Centronics court noted that the limitations imposed by the good faith doctrine on discretion in contractual performance are rooted in protecting reasonable expectations. As expressed by another court, "a party vested with contractual discretion must exercise that discretion reasonably and with proper motive, and may not act arbitrarily, capriciously, or in a manner inconsistent with reasonable expectations of the parties." Therefore, the idea of

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382. Id. at 187.
383. Id. at 190.
384. Id. The court defined good faith in contract formation as "tantamount to the traditional duties of care to refrain from misrepresentation and to correct subsequently discovered error, insofar as any representation is intended to induce, and is material to, another party's decision to enter into a contract in justifiable reliance upon it." Id. The court stated that good faith in the employment at-will context operates to limit the power of an employer to terminate an at-will employee. Id. at 191.
385. Id. at 193.
386. See Dennis Patterson, Good Faith and Lender Liability ix (1990) (noting that protection of reasonable expectation is the essence of the good faith doctrine).
protecting reasonable expectations lies at the heart of attempts to define the duty of good faith.\textsuperscript{388}

Almost all [commentators] view the concept as a mechanism to prevent one party from engaging in conduct which undermines the spirit of the bargain . . . . In sum, the good faith doctrine insulates the parties’ bargain from attempts by one party or the other to evade or undermine it. It imposes upon the parties an obligation to cooperate in achieving the benefits that they expected to flow from their bargain.\textsuperscript{389}

The ultimate impact of the good faith doctrine was recently said to “require parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose on which the contract was made and to refrain from doing anything that would destroy or injure the other party’s right to receive the fruits of the contract.”\textsuperscript{390} Thus, the good faith doctrine has dual elements. It not only proscribes unreasonable exercises of discretion, but also requires affirmative conduct in order to avoid depriving the other party of the benefits of the agreement.\textsuperscript{391} As stated by a California court, the duty of good faith requires that “neither party will do anything which injures the right of the other to receive the benefits of the agreement” and imposes upon parties “an obligation to do everything that the contract presupposes they will do to accomplish its purpose.”\textsuperscript{392}

As suggested above, the question of whether the duty has been breached is intimately tied to determining the essence of the exchange. Consequently, the process whereby reasonable expectations are defined is critical inasmuch as a party’s exercise of

\textsuperscript{388} Armour, \textit{supra} note 375 at 330-31.
\textsuperscript{389} Davis, \textit{supra} note 266, at 775-76.
\textsuperscript{390} USX Corp. v. Prime Leasing, Inc., 988 F.2d 433, 439 (3rd Cir. 1993). This concept of using the doctrine to promote the essence of the transaction was articulated by then Circuit Judge Scalia as follows:

\[\text{T}he\text{ authorities that invoke, with increasing frequency, an all-purpose doctrine of 'good faith' are usually if not invariably performing the same function executed (with more elegance and precision) by Judge Cardozo (citations omitted) . . . when he found that an agreement which did not recite a particular duty was nonetheless 'instinct with [. . .] an obligation,' imperfectly expressed.}\]

\textsuperscript{391} See Weldon v. Montana Bank, 885 P.2d 511, 515 (Mont. 1994) (bad faith occurs when contractual discretion is used to deprive a party of the benefit of the contract).
\textsuperscript{392} Jacobs v. Freeman, 163 Cal.Rptr. 680, 686 (Cal. App. 3d 1980).
discretion is deemed in good faith or in bad faith according to the impact on these expectations.\textsuperscript{393}

Reasonable expectations are determined pursuant to a broad contextual approach.\textsuperscript{394} Such an approach involves consideration of variables ranging from the express terms of the agreement, to the nature of the particular relationship including trade usage,\textsuperscript{395} and to the circumstances surrounding the making of the contract.\textsuperscript{396} Thus, under this view of good faith, any exercise of discretion in contract performance that undermines the other party’s reasonable expectations would constitute bad faith.

Under this formulation, however, a party’s intent or motivation for engaging in such conduct becomes irrelevant. The focus shifts to the impact of the conduct in determining whether the exercise of discretion is in bad faith. Does the exercise of discretion result in conduct that undermines the spirit of the transaction? Does such conduct defeat the gain that the other party reasonably expected to derive from the contract? In short, this approach infers discriminatory intent from the consequences of conduct during performance.

\textsuperscript{393} This model of good faith recognizes the significance of the intent of the parties in determining their reasonable expectations. Yet it extends the boundaries of traditional contract doctrine to focus on the impact of parties’ conduct as it relates to the furtherance of the objectives of their agreement. The focus on conduct underscores the proscriptive and affirmative dimensions of the good faith doctrine. On the one hand, it can be employed as a norm to proscribe conduct which tends to thwart those objectives. On the other, it functions as a norm which may require that one party engage in affirmative conduct to assist the other to achieve the objectives of the contract. See USX Corp. v. Prime Leasing Inc., 988 F.2d 433, 439 (3rd Cir. 1993) (describing the dual functions of the good faith doctrine as prohibiting certain forms of conduct and requiring conduct to promote the essence of the contractual).

Professor Armour describes the dual function of the doctrine as follows: “A contract agreement has two related dimensions; while there is clearly a commitment to the mutually agreed upon goals of that relationship expressed as a consensus, there is also a commitment to the relationship, an understanding of the mutuality of the obligations and the reciprocal nature of the cooperation essential to the successful performance of the contract. Armour, \textit{supra} note 375 (manuscript at 196).

\textsuperscript{394} Armour, \textit{supra} note 375, at 276-77, 318-33.

\textsuperscript{395} \textit{Id.} at 318.

\textsuperscript{396} Professor Dennis Patterson states that expectations derive both from express contractual terms and the circumstances surrounding contracting. Patterson, \textit{supra} note 386, at 35. He adds:

The obligation to act in good faith thus complements the concept of Agreement. The reasonable expectations of the parties best protected by a construction of the relationship between good faith and Agreement that measures the reasonableness of expectations against a pre-existing, yet changing, commercial context of a meaningful relationship.

\textit{Id.} at 34.
which subverts the benefits within the reasonable contemplation of the parties.\textsuperscript{397}

Adopting this impact-based theory of discretion in performance is not intended to suggest that intent becomes irrelevant to the performance stage of contracting. A party’s intent is merely considered during the process of objectively determining the reasonable expectations that shape the permissible range of discretion in performance. In this sense, intent, as it relates to performance, becomes subsumed within the process of determining the purpose of the agreement.\textsuperscript{398}

As intent becomes irrelevant in relation to the reasons that underlie an exercise of discretion, good faith or bad faith behavior would not be dependent on the agreement’s incorporation of moral obligations other than those reflected in the commercial background and the commercial needs of a particular trade or business setting.\textsuperscript{399} As it relates to racial discrimination in the contracting process, this alternative formulation of good faith would not require a determination of whether the discriminatory conduct is a proscribed norm. Rather, it focuses on another norm—whether the essence of the transaction, as reflected in the parties’ respective reasonable expectations, has been impacted adversely as a consequence of racial discrimination. As a result, the impact of unconscious racism, no longer dependent on finding an improper intent,

\begin{quote}
\textsuperscript{397.} The proposed conceptualization of good faith departs from that posited by Professor Burton in that it would preclude courts from considering the reasons why the discretion exercising party engaged in conduct which undermines reasonable contractual expectations. In contrast, Professor Burton’s model of good faith consists of a two step process in determining breach of the duty:

The identity of foregone opportunities is determined by an objective standard, focusing on the expectations of reasonable persons in the position of the dependent parties. Whether a particular discretion-exercising party acted to recapture foregone opportunities is a question of subjective intent. Steven J. Burton, \textit{Breach of Contract and the Common Law Duty to Perform in Good Faith}, 94 Harvard L. Rev. 369, 391 (1980).

\textsuperscript{398.} Such a treatment of intent and a shift to an impact theory of discretion is supported by a broad contextual approach to determining reasonable expectations. As discussed above, a broad range of considerations determine reasonable expectations. Included within these factors is the subjective intent of the parties, as manifested in their words and conduct, at the time they contract.

\textsuperscript{399.} Indeed what is suggested by the notion of moral obligation in this context is intended to include those things which would comprise trade usage or industry custom.

The idea of focusing on the consequences of conduct is far from alien to contract law. Indeed contract liability can be seen as a form of strict liability since a non-breaching party is compensated for the loss of its bargains irrespective of the breaching party’s fault. W. Page Keeton et al., \textit{Prosser and Keeton on Torts}, § 92, at 664 (5th ed. 1984 & Supp. 1988).
\end{quote}
may provide the basis for a breach of contract action. If unconscious racism manifests in such a way that when the party exercising discretion in effect undermines the purpose of the agreement, he or she has acted in bad faith. Similarly, if racial discrimination results in a party refusing to cooperate in order to deprive the other party from recognizing the gains it reasonably sought from the contract, such conduct would constitute bad faith.\textsuperscript{400}

In summary, under an impact-based approach to the duty of good faith, determinations about whether a party has engaged in prohibitive conduct, or has failed to engage in necessary affirmative conduct, would not depend on moral assessments of the discriminatory conduct. The focus shifts to the effects of conduct analyzed in the context of the objectively reasonable expectations of the parties, as viewed in the “contextual and relational dimensions of a contract.”\textsuperscript{401} Such an approach to the good faith doctrine would encompass both overt and unconscious forms of racial discrimination that manifest to defeat expectations under the contract. Accordingly, unconscious as well as overt forms of racial discrimination that undermine the spirit of the contractual relationship would constitute bad faith conduct.

4. Applying the Good Faith Antidiscrimination Norm

A good faith performance doctrine premised on limiting discretion in order to promote reasonable expectations holds promise as a vehicle of redressing the unconscious racism that harms black student-athletes’ academic interests. The propriety of applying the doctrine in this context stems from the discretion that institutions possess in determining the contours of their obligations to provide student-athletes with educational benefits. In addition, the parties’ reasonable expectations justify the requirement that institutions provide their student-athletes a meaningful opportunity to benefit educationally.

The express contract between student-athletes and their institutions fails to define clearly the nature and scope of the latter’s educational obligation to student-athletes.\textsuperscript{402} More precisely, the

\textsuperscript{400} See E. Allan Farnsworth, \textit{Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code}, 30 U. Chi. L. Rev. 666 (1963) (conceptualizing good faith as placing an obligation on parties to cooperate so as not to deprive each other of their reasonable expectation).

\textsuperscript{401} Armour, \textit{supra} note 369, at 319.

\textsuperscript{402} Davis, \textit{supra} note 266, at 772, 777 (noting the contract documents strongly support the imposition of an educational component to the relationship, yet the contours of this aspect of the relationship are unclear).
contract documents do not articulate the nature of institutions' contractual obligations to assist their student-athletes in achieving educational goals. The result of this failure is to imbue colleges and universities with considerable discretion in the performance of their educational obligation.

Under an impact theory of good faith, a broad contextual approach would be used to determine the reasonable expectations of the parties with regard to an institution's educational obligation to its student-athletes. This approach would conclude that a fundamental expectation that goes to the very heart of the student-athlete/university relationship is the expectation that student-athletes be afforded an opportunity to obtain a meaningful educational experience. Consequently, anything short of efforts directed toward integrating African-American student-athletes into the academic and social mainstream of campus life would deny them the full value of the contract into which they enter with the institution. "By diminishing the contract's value, the institution does not merely frustrate, but actually defeats the student-athlete's reasonable expectations." Following such an analysis, consideration would be given to the impact of racism on this and other reasonable expectations inherent in the relationship. To the extent that overt or subtle forms of racism result in conduct that undermines these expectations, institutions would be held accountable pursuant to the good faith performance doctrine.

Under an impact theory, evidence such as the disparity between the graduation rates of African-American student-athletes and their white counterparts would suggest a breach of the good faith performance doctrine. Such a disparity would demonstrate that

403. Id. at 773.
404. Id. at 781.
405. See id. at 780-81, 788-90 (discussing the reasonable expectations which arise from application of such a broad based contextual approach).
406. For discussions of the precise nature of this expectation and the obligations which would be imposed upon institutions, see Davis, supra note 266; Rafferty, supra note 323; Sherman, supra note 309; Widener, supra note 323.
407. Davis, supra note 261, at 778.
409. The grades which African-American student-athletes receive in their courses could also be examined to determine whether or not they are being afforded a reasonable opportunity to develop academically. Other evidence of educational neglect
institutions, as parties to the contract, are exercising their discretion in performance in ways that obstruct the ability of African-American student-athletes to obtain educational benefits. For example, counseling an African-American student-athlete who entered college with low academic predictors to take courses aimed toward eligibility rather than skill-building would constitute an improper exercise of discretion. Such conduct would be "inconsistent with the parties' . . . purposes in contracting." 410

Disparate graduation rates would also provide evidence that institutions exercised their discretion improperly by not doing or performing those things necessary to accomplish the purpose of the contract. 411 Providing the requisite resources to afford African-American student-athletes with an ability to develop educationally may involve constructing academic assistance programs and counseling geared toward the long-term development of the student-athlete. 412 Such programs would attempt to assist these students in developing skills, such as note-taking, writing, time management and reading comprehension. 413 The required affirmative conduct on the part of institutions might also involve hiring black administrators to assist African-American student-athletes in making adjustments necessary to achieve academically.

VI. Conclusion

As noted at the beginning of this Article, the goal has not been to touch on all of the implications of racism in college sport. The more modest aim has been to begin a candid dialogue to address this issue. In this regard, certain key points are worthy of restate-ment if such a dialogue is to be meaningful.

First, as is true of society in general, untrue stereotypes underlie the subtle forms of racism prevalent in college sport. Despite its covert nature, persistent racism in college athletics inflicts real injury on its African-American participants. A particularly vulnerable group are African-American student-athletes. Their academic

could focus on whether student-athletes whose test scores and grade point averages were below the university minimums for incoming students were provided with diagnostic testing to determine skill levels and appropriate levels of tutoring. See Edmund J. Sherman, Casenote, Good Sports, Bad Sports: The District Court Abandons College Athletes in Ross v. Creighton University, 11 Loy. Ent. L.J. 657, 680 (1991).

412. Sellers et al., supra note 248, at 35.
413. Sellers, supra note 117, at 167.
needs suffer as a result of misconceptions propelled by myths concerning their intellectual and athletic abilities.

Secondly, long-term solutions to the harm inflicted upon student-athletes and other African-American participants in college sport will require honest and creative approaches that may transcend traditional doctrinal boundaries. In the short term, this Article has identified potential approaches for providing some modicum of relief for the harm caused by racism. Some of these theories suggest new ways of utilizing traditional doctrines. Whatever the mechanism employed, racial justice for African-American participants in college sport will remain elusive, absent recognition of the role of racism.