Racism in Sports: A Question of Ethics

Paul M. Anderson
Marquette University Law School

RACISM IN SPORTS: A QUESTION OF ETHICS

PAUL M. ANDERSON*

INTRODUCTION

To many people, the sports world is a place in which none of the normal problems of the "real" world could possibly exist. The participants seem to be rich beyond measure, many are educated and well spoken, and though there are disputes, they usually center around money— not trivial problems like poverty and homelessness. Many also believe that the sports world is a model of race relations for the rest of society. Through television and other media coverage, fans see that on the playing field it does not matter whether you are black or white, what matters is your ability. Therefore, sports is often used as a paradigm of how an integrated society should look.

A more sensitive look at the sports world reveals that this idyllic picture is misleading. Although in the major professional sports and college sports today the majority of players are African-American, this does not mean that racism is absent. In college athletics black athletes often deal with racial stereotypes, isolation from the rest of the campus, and the reality that they are in school to play sports, not to get a degree. Furthermore, African-Americans are underrepresented in the coaching and administrative ranks throughout college sports. The professional sports picture shows more integration on the playing field, but few chances for management or other opportunities after a career is over.

This article will analyze the problem of racism in sports. It will propose that sports lawyers can attack the problem from an ethical perspective. The first section will deal with defining racism as a problem in sports. In order to propose any solution to the problem, the analysis

must start with an understanding of what the problem is from a sports perspective. This section will also give an overview of the problem of racism in intercollegiate and professional sports. The second section will provide an overview of ethical theory with examples of particular ways of ethical thinking. This section will not seek to promote one way over another; instead, it will seek to develop a basic understanding in the un- initiated of what goes into ethical thinking and the characterization of problems from an ethical perspective. This will be in an effort to show that racism in sports can also be looked at from this ethical perspective. The third section will provide an overview of ways in which lawyers are regulated both professionally and ethically. This will show that sports lawyers already have a duty to act ethically. And finally, the last section will mention some examples of progress in racial relations and ways in which sports lawyers can put a greater emphasis on ethics in their work.[1]

I. PART ONE: RACISM IN SPORTS

A. *The Problem in General*

Racism can be defined in many ways. For the purposes of this article, the problem of racism can be referred to as "the transformation of race prejudice through the exercise of *power* against a racial group defined as inferior, by individuals and institutions with the intentional or uninten- tional support of the entire culture."[2] This article will focus on racism as directed to African-American athletes (mostly male) only because these athletes are the most prevalent in the professional team sports world and major revenue producing college sports; therefore, scholarship regarding the problem of racism in sports has often focused on these individuals.[3] Moreover, the problems that black athletes face are unique and extensive.

Today the incidence of overt acts of racism has declined, but this does not necessarily mean that racism has evaporated. What has become

---

1. This article will not provide a rehash of the many laws that deal with discrimination in the workplace and other areas, as these areas have been dealt with by many other authors. Instead this piece will focus on how lawyers can be made to act ethically, even if they are already following the legal rules and responsibilities that they must as lawyers.

2. Carole Oglesby, *Issues of Sport and Racism: Where is the White in the Rainbow Coali- tion?, in* RACISM IN COLLEGE ATHLETICS 253 (Dana Brooks & Ronald Althouse eds., 1993).

3. This focus on African-American athletes is also warranted due to the history of racist practices directed at this particular group. "Blacks have not simply been treated unfairly; they have been subjected first to decades of slavery, and then to decades of second-class citizen- ship, widespread legalized discrimination, economic persecution, education deprivation, and cultural stigmatization." Stanley Fish, *Reverse Racism or How the Pot Got to Call the Kettle Black,* ATLANTIC MONTHLY, Nov. 1993, at 130.

prevalent is "unconscious racism." As one author explains, "[r]acism is in large part a product of the unconscious. It is a set of beliefs whereby we irrationally attach significance to something called race."[4] This unconscious racism has become apparent in sports. To most outward perceptions, sports has become a place where racism is no longer a problem, yet as will be explained, the facts do not bear out this conclusion. Today, people who act in ways that result in disparate consequences to racial minorities can claim they did not intend for the negative effects to occur. As unconscious, this racism is not part of cognitive intentional actions. This form of racism is "more insidious because it is for the most part less straightforward, outspoken and 'honest.' "[5]

As will be explained, such actions, even if only expressions of unconscious racism, can be evaluated from an ethical perspective. Such a perspective would look on the action itself, and the consequences of such action on those involved, to help determine the moral significance behind the action.

Any racist actions seem to exact some toll on the actor, as Marge Shott, Jimmy "the Greek" Snider, and Al Campanis found out. Therefore, in the long run racism is "self-defeating."[6] Racism teaches nothing of value and can only breed a hatred or desire to succeed by overcoming the portrayer of the racist action in those it affects. Either way, those who pervade these racist attitudes will be faced with some sort of negative effect.

B.   Racism in Society

It seems obvious that "race . . . should be an irrelevant characteristic in interpersonal relations."[7] The reality is that in society, African-Americans are usually worse off than whites. Today, even though the law now outlaws discrimination, "[h]idden cameras . . . reveal that discrimination exists in housing, lending and even retail."[8] This article will not focus extensively on the legal approaches to combating the discrimination that

---

4. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987).

5. DREW A. HYLAND, PHILOSOPHY OF SPORT 10 (1990). This unconscious racism may also be hard to determine and understand because it is "a persistent and constituent part of our social order, woven into the fabric of society and everyday life." Darryl Brown, *Racism and Race Relations in the University*, 76 VA. L. REV. 295 (1990).

6. FR. CHUCKWUDUM BARNABAS OKOLO, RACISM — A PHILOSOPHIC PROBE (1974).

7. BARRY MCPHERSON ET. AL., THE SOCIAL SIGNIFICANCE OF SPORT 193 (1989).

8. KENNETH L. SHROPSHIRE, IN BLACK AND WHITE: RACE ANDS SPORTS IN AMERICA 18 (forthcoming 1996) (manuscript of August 11, 1995, on file with author).

is faced in parts of society excluding sports. Yet, even though the focus is on the sports world, some statistics can lend validity to this picture of the problem in society as a whole.

African-Americans in the United States face a myriad of problems that can be explained, in part at least, due to past and present racism. These problems or disadvantages include: median incomes that are one-tenth that of white families; at least twice the unemployment rate as white individuals; earning only fifty-nine cents to every dollar earned by whites; thirty percent of African-Americans living in segregated neighborhoods; one-third of African-American children attending public schools where ninety percent of the students are African-American; and one-third of all African-American families earning an income below the poverty line.[9] As a result, whites tend to live an average of ten years longer than blacks, one-fourth of black males between the ages of twenty and twenty-nine are under the jurisdiction of the criminal justice system (either in jail, on parole or on probation), and most black neighborhoods are saturated with crime, drugs, and poor schooling.[10] As a result of the United States long history with racial problems, "successive generations of Blacks and Whites are socialized to accommodate the *status quo*."[11] The statistics presented are evidence of this status quo.

Regardless of the legal remedies, civil rights movement, and lack of overt signs of racism, many African-Americas still do not live in society on an equal footing with whites.[12] Unfortunately, the law and social reform often only recognize the problem of racism in overtly racist acts.[13] As already mentioned, racism today may be more prevalent in its uncon-

---

9. D. Stanley Eitzen, *Racism in College Sports: Prospects for the Year 2000*, in SPORT IN CONTEMPORARY SOCIETY 245-46 (D. Stanley Eitzen ed., 1996).

10. *Id.* at 246.

11. Harry Edwards, *Beyond Symptoms: Unethical Behavior in American Collegiate Sport and the Problem of the Color Line*, 9 J. SPORT & SOC. Iss. 3, 8-9 (1985).

12. Some authors even believe that such an equal footing will never be. Derrick Bell states that "Racial equality is, in fact, not a realistic goal." Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992). Although such feelings cannot be diminished, the only way to attempt to deal with the situation is to try to attack the problem and rid society of it. Equality may be an idyllic goal at this point but to slaves, any sense of freedom may have been just as hard to imagine. Without a commitment to rid society of the problem it is hard to understand how improvement that actually seeks to change perceptions can succeed. Unfortunately, for many blacks the "ultimate irony is that the benefits which did accrue from race-specific strategies went to middle-class blacks who had competitive resources such as steady incomes, education, and special talents." Robert L. Woodson, *Race and Economic Opportunity*, 42 VAND. L. REV. 1003, 1019 (1989). Therefore, those most in need have often not received the help they needed.

13. Brown, *supra* note 5, at 307-08.

scious and hidden form. Professor Harry Edwards put it eloquently when he said:

> The result in both sport and society has been the establishment and perpetuation of what is in effect a *plantation system* of authority arrangements with Whites commanding a virtual monopoly on power and decision-making roles with a negligible proportion of token Blacks in mid-level junior executive positions, and with the masses of Blacks concentrated in lower echelon, relatively powerless production roles.[14]

C. Sport as a Reflection of Society

Most commentators agree that sports is a reflection of society.[15] What this means is that sport often acts as a "microcosm of society" and thus "racial problems in sports have been, and continue to be, brushed away as 'nothing unique.' "[16] It takes outrageous conduct for the reality of racism in sports to come to the forefront.

1. Examples from the Sports World

Three recent and very public examples show how racist beliefs in sports can come to the public forefront, although inadvertently.

In 1987, Al Campanis, then an executive with the Los Angeles Dodgers, was being interviewed on ABC's Nightline regarding the employment of black managers in baseball, among other things. In response to why there were no black managers, Campanis stated that "I truly believe that they may not have some of the necessities to be, let's say, a field manager or perhaps a general manager."[17] Given a chance to correct himself, Campanis instead buried himself (and ended his career with the Dodgers) by saying such things as "why are black men or black people not good swimmers? Because they don't have the buoyancy."[18] Campanis's statements caused an uproar at a time when most Americans thought that society, and especially professional sports, no longer had

---

14. Edwards, *supra* note 11, at 9.

15. *See, e.g.*, RICHARD E. LAPCHICK, FRACTURED FOCUS: SPORT AS A REFLECTION OF SOCIETY (1986); John C. Gaston, *The Destruction of the Young Black Male: The Impact of Popular Culture and Organized Sports*, 16 J. BLACK STUDIES 369, 371 (1986).

16. SHROPSHIRE, *supra* note 8, at 39. For an interesting contrast regarding the issue of racism in sports see Jim Myers, *Racism is a Serious Problem in Sports* (133-37) & George Gilder, *Racism in Sports is Exaggerated* (140-42) both *in* SPORTS IN AMERICA: OPPOSING VIEWPOINTS (William Dudley ed., 1994).

17. SHROPSHIRE, *supra* note 8, at 46.

18. *Id.* at 47.

the problem of pervasive racism. But "Campanis made clear once again that racism cannot be outlawed."[19]

The next public example which made clear that racism was still a problem occurred in 1988. On Martin Luther King day, during an interview Jimmy "The Greek" Snyder, a CBS football commentator at the time, was asked a question regarding the role of blacks in football. Snyder said that "[t]he black is a better athlete to begin with because he's been bred to be that way because of his thigh size and big size."[20] Snyder also said that the reason that there were no blacks in coaching was because "[a]ll the players are black; the only thing that the whites control is the coaching jobs."[21] These comments added to the awareness and uproar caused by Campanis' comments the year before.

A final example that showed the public that racism was still a problem in the sports world was the 1992 fine and suspension of Cincinnati Reds owner Marge Schott for such conduct as calling black players "million-dollar niggers" and saying she would "rather have a trained monkey working for me than a nigger."[22]

These examples showed that racism was still a problem in sports, as many would not admit that it was in society as a whole. Furthermore, beyond these racist comments, statistics show that these comments themselves were merely open commentary on the actual situation in sports.

2. Descriptions

Another public way in which racism is prelevant in society and sports is through the descriptions of the attributes and performance of black athletes. Black athletes are often described in ways that attribute their athletic success to natural ability, whereas white athletes are described as intelligent and hard working. One author notes how in descriptions of two black basketball players (Kenny Anderson and Lee Mayberry) versus that of two white players (Bobby Hurley and Chris Corchiani), the black players were described as "having the tools, but their intellect is questionable. The real praise is reserved for white players because they

---

19. *Id.* at 48.

20. *Id.* at 49.

21. SHROPSHIRE, *supra* note 8, at 50. These comments are reminiscent of Edwards' quotation (*see* text accompanying footnote 14) regarding the perpetuation of a plantation system for blacks.

22. *Id.* at 51.

have managed to prevail despite . . . their modest athletic endowment."[23] One study found that blacks and whites actually agree with these characterizations. In a study that asked respondents to rate blacks and whites in certain categories, black and white respondents ranked white athletes highest for leadership, followed by thinking, instincts, strength and speed; blacks were ranked in the opposite order.[24]

The problem with these descriptions is that this implies that black athletes then are "unthinking, natural performers — born with an advantage;" a characterization that can be "debilitating both to blacks and whites."[25] As Bill Russell explained, black athletes put just as much work into their athletic success as white athletes do. Specifically, Russell stated that "I worked at basketball up to eight hours a day for twenty years — straining, learning, sweating, studying."[26] The perception that black players do not work and that athletics just comes naturally makes black athletes somehow seem less deserving of their success. Implicit in these types of descriptions of black athletes "is that they did not have to exhibit the virtues of hard work and commitment that the white stars did."[27] This also implies that "[w]hites have conceded the physical superiority of blacks because it fits the image: whites still have the brains."[28]

3. Explanations

The descriptions of black athletes just mentioned also lead to another practice that pervades athletics. Since black athletes now make up the majority of the superstars in sports, theorists have attempted to explain why this is so.[29] Explanations for black sport superiority are either soci-

---

23. Othello Harris, *African-American Predominance in Collegiate Sport*, in RACISM IN COLLEGE ATHLETICS 62-63 (Dana Brooks & Ronald Althouse eds., 1993). Another article which analyzes these differences in descriptions of athletic performance in more depth is Audrey J. Murrell & Edward M. Curtis, *Causal Attributions of Performance for Black and White Quarterbacks in the NFL: A Look at the Sports Pages*, 18 J. SPORT & SOC. ISSUES 224 (1994).

24. Jim Myers, *Race Still a Player*, USA TODAY, Dec. 16, 1991. As Myers says, if applied to society, such views would have disturbing implications." *Id.*

25. PHILLIP M. HOOSE, NECESSITIES: RACIAL BARRIERS IN AMERICAN SPORTS 19 (1989).

26. *Id.* at 8.

27. HYLAND, *supra* note 5, at 10-11.

28. RICHARD E. LAPCHICK, FIVE MINUTES TO MIDNIGHT: RACE AND SPORTS IN THE 1990s 235 (1991).

29. Gary A. Sailes, *An Investigation of Campus Stereotypes: The Myth of Black Athletic Superiority and the Dumb Jock Stereotype*, 10 SOCIOLOGY OF SPORT J. 88, 90 (1993). It is interesting to note that these types of theories were never necessary during the 1930s when Jewish players dominated professional basketball. Richard E. Lapchick, *Race on the College Campus*, in THE RULES OF THE GAME: ETHICS IN COLLEGE SPORT 58-59 (Richard E. Lapchick & John Brooks Slaughter eds., 1989). The reason such explanations are looked to in regards to black athletes seems to be racism.

ological — stating that blacks became superior athletes as a way to get out of the ghetto and the poverty and economic distress it may entail, and genetic — as Jimmy "The Greek" explained, that blacks somehow are actually genetically different from whites so that their athletic accomplishments are a reflection of these genetic differences.[30] As to the genetic explanations, years of research (mainly by white researchers) has proven nothing.[31] Still, people "continue to insist on differentiating between human beings based solely on race."[32] In the end, though, "[c]ulture, class, and environment still tell us the most."[33]

Even though such research begins with the admission that black athletes are superior, this superiority "has ironically been turned against them" in implications that they do not possess such virtues as "discipline, commitment, and sustained effort for which white athletes are regularly praised."[34] The real question is why there is the necessity for an explanation in the first place. If it were not for the fact that whites, who dominate almost all other aspects of American life, felt inferior to blacks in certain sports and felt resentment due to this fact, would such questions ever be asked?

4. Culture and Chances

Unfortunately, black culture may add to the problem by promoting athletic success as important for its youth.[35] Black families promote athletic success as a way toward real success in the world without thinking about alternatives if this athletic success fails.[36] Commentators suggest four primary reasons why athletics becomes such a focal point in black culture: 1) racism has kept blacks from the same employment opportunities as whites and so they spend too much time honing their athletic skills; 2) there is a general lack of highly visible black role models in fields other than sports and entertainment; 3) the black family overem-

---

30. HYLAND, *supra* note 5, at 13.

31. LAPCHICK, *supra* note 28, at 236.

32. David K. Wiggins, *Critical Events Affecting Racism in Athletics*, *in* RACISM IN COLLEGE ATHLETICS 42 (Dana Brooks & Ronald Althouse eds., 1993).

33. Richard Lapchick, *Race and College Sports: a Long Way to Go*, *in* SPORTS IN SOCIETY 9 (Richard Lapchick ed., 1995).

34. HYLAND, *supra* note 5, at 15.

35. RICHARD E. LAPCHICK, BROKEN PROMISES: RACISM IN AMERICAN SPORTS 200 (1984); *see also* William Oscar Johnson, *How Far Have We Come*, SPORTS ILLUSTRATED, Aug. 5, 1991, at 40; Douglas Lederman, *Blacks Make Up Large Proportion of Scholarship Athletes, Yet Their Overall Enrollment Lags at Division I Colleges*, 38 CHRON. HIGHER EDUC. A32 (1992); Timothy Davis, *Race and Sports in Intercollegiate Athletics*, 6 FOR THE RECORD 5 (Aug./ Sept. 1995).

36. Gaston, *supra* note 15, at 379.

phasizes athletic success at an early age; and 4) sports is used as a way for black males to prove their manhood.[37] Studies have shown that regardless of social and demographic factors, blacks are in general more involved in sports.[38]

The media adds to the problem. The African-Americans who are portrayed as success stories in the media are predominantly athletes. Since blacks become more involved in sports and follow sports with such passion, a "[b]lack male's dream of becoming a professional athlete seems far more feasible than envisioning himself as a member of a surgical team at a major hospital."[39] Due to their learnings from culture and the media, many black males believe that "sport is his way out of the ghetto."[40] And due to this belief almost forty-three percent of African-American high school athletes believe that they can reach the promised land of professional sports.[41]

The reality is far different. Of high school basketball, baseball, and football players, "fewer than one in 10,000 succeeds at the professional level."[42] In the end, a black athlete "has a much better chance of becoming a doctor or a lawyer" than of becoming a professional athlete.[43]

D. The Problem in Sport

People argue that sport is a model of racial equality, which facilitates the integration of blacks into society, provides an avenue for upward mobility for blacks, and lacks the segregation and discriminatory problems of society as a whole.[44] Unfortunately, as already explained, sport is a reflection of society and "racism is intertwined in the sports

---

37. List provided in both Wilbert Marcellus Leonard, II, *The Sports Experience of the Black College Athlete: Exploitation in the Academy*, 21 INT. REV. FOR SOC. OF SPORT 35, 36 (1986) and Elmer Spreitzer & Eldon E. Snyder, *Sports Within the Black Subculture: A Matter of Social Class or a Distinctive Subculture?, in* SPORT SOCIOLOGY: CONTEMPORARY THEMES 308 (4th ed.) (Andrew Yiannakis, Thomas D. McIntyre, & Merrill J. Melnick eds., 1993).

38. Spreitzer and Snyder, *supra* note 37, at 309.

39. Gaston, *supra* note 15, at 377.

40. LAPCHICK, *supra* note 35, at 200.

41. Richard Lapchick, *There is Gold at the End of this Rainbow*, THE SPORTING NEWS, Mar. 15, 1993, at 8.

42. ALLEN GUTTMAN, A WHOLE NEW BALL GAME: AN INTERPRETATION OF AMERICAN SPORTS 137 (1988).

43. Myles Gordon, *Making the Grade*, 124 SCHOLASTIC UPDATE 20, 21 (1992).

44. MCPHERSON ET. AL., *supra* note 7, at 194. Recognizing that people think this way, Richard Lapchick notes that "there is a great deal of evidence that little has changed since Jackie Robinson took that first courageous step. Although America has made numerous promises to its people, the promise of racial equality has been broken many times over." Richard E. Lapchick, *The Promised Land, in* FRACTURED FOCUS: SPORT AS A REFLECTION OF SOCIETY 76 (Richard E. Lapchick ed., 1986).

culture."[45] As a result, black athletes face a feeling of double conscious-
ness. On the one hand, they bear pride in their race and its fight against
perceptions of black inferiority, while on the other hand, they have had
to follow certain standards which are mandated for success in the domi-
nant white society.[46]

1. Intercollegiate Athletics

Numerous articles have been written documenting the problem of
racism as felt by African-American student athletes in college sports.[47]
Therefore, the many intricacies of the problem will not be repeated here
in depth. Instead, this section will focus on an overview of the problem
and the types of racism and unethical practices that African-American
student-athletes often face in collegiate sports.

a. Statistics

The racism felt by black college athletes often is a "persistent, uncon-
scious racism nourished by fraudulent stereotypes and myths,"[48] but it is
real and debilitating just the same. Since their first inclusion in the col-

---

45. SHROPSHIRE, *supra* note 8, at 64.

46. David K. Wiggins, *The Notion of Double-Consciousness and the Involvement of Black
Athletes in American Sports*, in ETHNICITY AND SPORT IN NORTH AMERICAN HISTORY AND
CULTURE 133 (George Eisen & David K. Wiggins eds., 1994).

47. The following is a listing of some of the more revealing and interesting articles on the
subject of racism, sports, ethics, and African-American participation in intercollegiate athlet-
ics - Adolph H. Grundman, *The Image of Intercollegiate Sports and the Civil Rights Movement:
A Historian's View*, in FRACTURED FOCUS: SPORT AS A REFLECTION OF SOCIETY 77 (Richard
E. Lapchick ed., 1986); Eitzen, *supra* note 9; RACISM IN COLLEGE ATHLETICS; THE AFRICAN-
AMERICAN ATHLETE'S EXPERIENCE (Dana D. Brooks & Ronald C. Althouse, eds., 1993);
Donald Siegel, *Higher Education and the Plight of the Black Male Athlete*, 18 J. SPORT & Soc.
Iss. 207 (1994); Lederman, *supra* note 35, at A32; Earl Smith, Review Essay, *Race, Sport and
the American University*, 17 J. SPORT & Soc. Iss. 206 (1993); Forrest J. Berghorn, et al., *Racial
Participation and Integration in Men's and Women's Intercollegiate Basketball: Continuity and
Change, 1958-1985*, in SPORT SOCIOLOGY: CONTEMPORARY THEMES 314-326 (4th ed.) (An-
drew Yiannakis, Thomas D. McIntyre, & Merrill J. Melnick eds., 1993); Sailes, *supra* note 29;
Gregg A. Jones, et al, *Racial Discrimination in College Football*, 68 Soc. Sci. Q. 70 (1987);
Edwards, *supra* note 11; Murray Sperber, *Myths About College Sports*, in SPORT IN CONTEM-
PORARY SOCIETY 220-228 (D. Stanley Eitzen ed., 1996); Norman R. Yetman & Forrest J.
Berghorn, *Racial Participation and Integration in Intercollegiate Basketball: a Longitudinal
Perspective*, 10 SOCIOLOGY OF SPORT J. 301 (1993); Harris, *supra* note 23; Raymond A.
Winbush, *The Furious Passage of the African-American Intercollegiate Athlete*, 11 J. SPORT &
Soc. Iss. 97 (1987); THE RULES OF THE GAME: ETHICS IN COLLEGE SPORT (Richard E.
Lapchick & Fred Slaughter eds., 1989); LAPCHICK, *supra* note 28; Lapchick, *supra* note 33;
Timothy Davis, *supra* note 34; Timothy Davis, *The Myth of the Superspade: The Persistence of
Racism in College Athletics*, 23 FORDHAM URBAN L. J. 201 (1994); WALTER BYERS, UN-
SPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES (1995); Leonard, *supra* note 37.

48. Davis, *supra* note 47, at 202.

lege sports scheme, African-American athletes have had to be what has been named a "superspade" — or black super athlete.[49] This has meant that blacks usually had to perform at a higher level to become involved in college sports than white student-athletes. Historically, blacks had to be the superstars on their teams in order to get the chance to participate. Although this trend has begun to dissipate in recent years, the myth of the black super athlete has not been eroded completely.[50]

One way this myth is evident is through the existence of stacking in college athletics. Stacking is the "practice of assigning certain racial minorities to some positions and not to others" based on stereotypical perceptions of these individuals.[51] These perceptions are the same type that come out in the descriptions and explanations of the success of black athletes. Research has shown that in basketball, although in the past blacks were restricted to positions based on sheer athletic ability (forward), while whites were put in positions of leadership and intelligence (guard), today blacks dominate all positions except for center.[52] The continued white prominence at center can be explained away merely by the statistical fact that the main requirement for this position is height, not athletic ability or intelligence, and therefore, since there are more whites who are taller (because there are more whites in sheer numbers), the predominance of whites at the center position is not evidence of racism or stacking.[53] In other sports stacking may still be a problem.

The problem is not restricted to the racism that student-athletes are subjected to in a particular sport; the problem extends to the lack of African-American representation in the coaching and administrative ranks throughout college athletics. Several statistics bear out this continuing problem. Of the 5,889 college athletic positions created for athletic programs from 1991 to 1994, only 10.1 percent were filled by African-Americans, giving them a representation of only 8.7 percent of the more than 29,000 positions available in 1994.[54] African-Americans represent only 3.6 percent of college athletic directors and 4.9 percent of associate athletic directors.[55] And, whereas black student-athletes make up sixty-five percent of the athletes in Division I basketball programs, there were

---

49. *Id.* at 215-16.
50. *See* Sailes, *supra* note 29 & the series with Yetman & Berghorn, *supra* note 47.
51. LAWRENCE H. BERLOW, SPORTS ETHICS: A REFERENCE HANDBOOK 38 (1994).
52. Yetman & Berghorn, *supra* note 47, at 305-06.
53. *Id.* at 306.
54. *Blacks Gain in Sports Jobs,* N.Y. TIMES, August 18, 1994, at B18.
55. *Id.*

only forty-one black head coaches in Division I, or fourteen percent.[56] Also, black males make up some 22.2 percent of all scholarship athletes in Division I representing over sixty percent of men's basketball and forty-three percent of football players, while at the same time approximately 6 percent of all students at these same colleges are black.[57] Finally, only eleven percent of the NCAA's powerful Presidents Commission are African-American.[58]

The problem is that even though black student athletes make up such a high percentage of scholarship athletes, primarily in revenue producing sports, this high percentage is not reflected in the administrative ranks or general student populations at these same schools. Black student-athletes are left playing for the revenue producing sports with the knowledge that there are no racial peers for them to turn to on campus besides their fellow athletes, and there will be few African-Americans in the teaching and administrative ranks for guidance.

b. Academic situation

Problems such as these lead to the severe academic problems most black student-athletes face. In many cases, colleges take black students who are superior athletes but have no real chance of making it academically in college.[59] Colleges usually show more interest in a black student-athlete than any black students because they can see the possible improvement in their athletic program. This leads to a situation that will "discourage young blacks who are not athletes by suggesting that it's easier to get to college if you play ball."[60]

---

56. Davis, *supra* note 35, at 5. It bears noting that 1990 census figures put the African-American population in the United States at 12% so that this figure may seem appropriate at higher than the census. With the overwhelming number of players being African-American it bears some consideration as to why so few African-Americans are able to become coaches.

57. Lapchick, *supra* note 33, at 6; Siegel, *supra* note 47, at 207.

58. Richard Lapchick, *Finally, a Small Step in the Right Direction*, THE SPORTING NEWS, Jan. 31, 1994, at 8. Although this is a better percentage then the number of African-American university presidents and athletic directors it still seems small in proportion to the amount of black student-athletes in the major sports which are the money makers for the NCAA and universities.

59. Robert Lipsyte, *Blacks on the Court; Why Not on Campus?*, N.Y. TIMES, Mar. 27, 1992, at B9.

60. Lederman, *supra* note 35, at A32. In essence, "far too little is expected of the black student-athlete who becomes a commodity serving the financial interests of the institutions for which they compete." Davis, *supra* note 35, at 5. Also, those African-American high school students who have a greater academic potential are often "deprived of the chance of entering a university" because only black student-athletes are actively recruited. Sperber, *supra* note 47, at 226.

To many, this acceptance of black athletes who may not be ready for college academically seems to be a positive step. To these individuals, it looks like these athletes are being given a chance to get an education while using their athletic ability to advance in a profession that they may be more able to succeed in. As already mentioned, the chances of this type of success are minuscule, but even black culture promotes athletics as a way to success. This leads to a tremendous amount of pressure being put on student-athletes to succeed athletically because they think that they will be able to "achieve upward social and economic mobility."[61]

This pressure is exacerbated by the fact that these athletes have been admitted with the full knowledge that they probably are not prepared to succeed academically. Through no fault of their own, media coverage glorifies black athletic success, and coaches (predominantly white coaches) overemphasize the importance of success on the playing field at the expense of success in the classroom.[62] The system is a sort of vicious cycle, as black student-athletes are encouraged to focus on athletic success from all sides and are not given proper aid to succeed academically (often being encouraged to take easy courses or having their grades changed, etc.),[63] so that these individuals are unprepared coming in to college to deal with the pressure to succeed in sports and compete academically. They often end up leaving college without attaining a "real" college education to fall back on if athletic success fails.[64]

Part of the problem may be that these black student-athletes allow themselves to be exploited by not taking academics seriously and instead focusing on college as a way to professional athletic success.[65] Unfortunately, these athletes are "throwing away economic and educational opportunities for a dream that is unlikely to be fulfilled."[66]

These athletes also become isolated on campus. As student-athletes, many live in dorms separate from the general student population and are guided in class schedules and course selection by the athletic administra-

---

61. Siegel, *supra* note 47, at 208-209.
62. *Id.*
63. *See, e.g.*, BYERS, *supra* note 47, for an elaborate discussion of this problem.
64. DONALD CHU, THE CHARACTER OF AMERICAN HIGHER EDUCATION & INTERCOLLE-GIATE SPORT 93-99 (1989).
65. Gary A. Sailes, *The Exploitation of the Black Athlete: Some Alternative Solutions*, 55 J. NEGRO EDUC. 439-40 (1985).
66. *Id.* at 440. This is especially problematic because the "current generation of Black males may easily be the most . . . intelligent generation ever born in America." Gaston, *supra* note 15, at 376. At the same time, this generation may be the "least productive" yet due to the problems of racism, poverty, and cultural misguidance that have already been discussed. *Id.*

tion. Their lives become dictated by games and practices. This isolation may insulate them from stronger forms of racism as felt by the general African-American population, but it will also often add to the pressure they feel to succeed because their whole lives are based on athletics.[67]

These athletes also face racist stereotypes throughout their college careers. On the one hand, they are perceived as "dumb jocks" along with athletes of other races.[68] On the other hand, they are perceived as "dumb blacks" who would not have gotten into college except for their athletic ability.[69] And often, they face a third negative perception wherein "fellow students, professors, counselors, and collegiate sports fans assume that the African-American athlete is on campus only for sport participation and not to obtain an education or excel in academics."[70] These perceptions become self-fulfilling as black student-athletes often focus on athletics at the expense of academics, fitting the stereotypes for those who believe in them.

A *USA Today* poll shows the different perceptions blacks and whites have regarding these issues. Approximately sixty percent of blacks and whites agreed that black athletes go to college to play sports, while only around twenty percent thought that black athletes attend college to get an education.[71] Interestingly, seventy-eight percent of blacks felt that black athletes were taken advantage of in college, while only fifty-five percent of whites felt this way.[72] In opposition to this, more blacks and whites thought that white athletes go to college to obtain an education (sixty-eight percent of blacks and forty-six percent of whites), while almost half of blacks and whites agreed (at forty-six percent) that white athletes were also exploited by their universities.[73] This study is at least some evidence that the stereotypical "dumb jock" and "dumb black" perceptions may be more than just academic notions. Although the study proves nothing, it shows that people do perceive the college experience for black and whites differently across racial lines.

In the end, the real problem may be one of a lack of focus regarding the true mission of a university of higher education. As one commentator said, "[i]t should be an embarrassment to predominantly white uni-

---

67. William C. Rhoden, *Athletes on Campus: A New Reality*, N.Y. Times, Jan. 8, 1990, at A1; Davis, *supra* note 47, at 260.

68. Eitzen, *supra* note 9, at 249; Smith, *supra* note 47, at 210.

69. *Id.*

70. Smith, *supra* note 47, at 210.

71. *Race in Sports: A Black-and-White Issue*, USA Today, Dec. 18, 1992, at 3C.

72. *Id.*

73. *Id.*

versities that have a greater proportion of blacks on their intercollegiate football and basketball teams than they have in their general student population."[74] This fact alone makes one wonder if colleges really care about whether black students and student-athletes receive an adequate education at all, or if the colleges' focus is on athletic success and the possible revenue increases that this may entail. Such sacrificing and use of particular individuals for only their athletic prowess while ignoring them as individuals who may need special help to receive an adequate education is unethical and racist, even if unconsciously so. Moreover, the fact that this practice predominantly affects African-American individuals adds to the reality of racism. As no genetic theories have shown that African-Americans are necessarily better athletes, while colleges still focus on them only as such, it seems apparent that at some level many institutions still hold these antiquated beliefs.

2. Professional Sports

Racism in professional sports has not received as much attention,[75] presumably because many of the superstars in the major sports (the National Basketball Association, Major League Baseball and the National Football League) are African-American. However, the Center for the Study of Sport in Society puts out an annual *Racial Report Card* that provides an in depth resource to catalogue the problem within professional sports.[76]

a. Statistics

The *Racial Report Cards* rank the NBA, NFL, and MLB with a letter grade according to their percentage representations of African-Americans in relation to society.[77] The grades are based on the fact that fed-

---

74. Ewald B. Nyquist, *The Immorality of Big-Power Intercollegiate Athletics*, *in* SPORT IN HIGHER EDUCATION 107 (Donald Chu et. al. eds., 1985).

75. Exceptions to this include articles such as: Murrell & Curtis, *supra* note 23; Wiggins, *supra* note 32; Kenneth L. Shropshire, *Race & Sports: Working Towards Solutions*, 6 FOR THE RECORD 1 (Feb./Mar. 1995); SHROPSHIRE, *supra* note 8; HOOSE, *supra* note 25; Reggie Jackson, *We Have a Serious Problem that isn't Going Away*, SPORTS ILLUSTRATED, May 11, 1987, at 40-48; Sharon Richardson Jones, *Race and Baseball: Getting Beyond Business as Usual*, 17 J. OF SPORT AND SOC. Iss. 67, 70 (1993); Johnson, *supra* 35.

76. What will be used primarily are RICHARD E. LAPCHICK & JEFFREY R. BENEDICT, 1994 RACIAL REPORT CARD (1994); & RICHARD E. LAPCHICK, 1995 RACIAL REPORT CARD (1995). The only reason that the National Hockey League is not discussed here is because to date no major studies have been conducted regarding this sport and racial issues. Information beyond the mere observation that there have never been many African-American players is not available.

77. 1995 RACIAL REPORT CARD, *supra* note 76, at 2.

eral law mandates that a workplace should reflect the percentages of the people of certain races as are found in the general population.[78] Therefore, since recent census figures show that twelve percent of the general population is African-American, a sport would receive a B if it reached this level, an A if it doubled this level, and a C if it had half of this level.[79]

In 1995, all three sports reached peak levels of African-American players — the NBA had eighty-two percent (up from seventy-nine percent in 1994), NFL sixty-eight percent (up from sixty-five percent), and MLB had nineteen percent (up from eighteen percent).[80] However, at the same time there was a decline in the overall number of minority head coaches from fourteen to twelve.[81] Specifically, the African-American representation at the head coach level in the NBA stayed at nineteen percent, in the NFL it stayed at only seven percent, and in MLB it fell from fourteen percent to eleven percent.[82] The number of black assistant coaches reached thirty-nine percent in the NBA, while only ten percent in the NFL.[83] At the league level in 1995, professional staff for the NBA league office who were black declined slightly from twenty percent to nineteen percent, while the NFL held steady at fifteen percent.[84] MLB figures were not available for 1995, but the 1994 percentage was nine percent.[85] At the top management level, only the NBA had a significant amount of African-American representation at fifteen percent, while the NFL was at five percent, and MLB was at six percent.[86]

In regards to stacking in professional sports, the *1995 Racial Report Card* concluded that "[p]rofessional sports seems to have finally reached the stage where stacking or positional segregation has become a non-issue."[87] The report found no evidence of stacking at any position in professional basketball, significant progress in the NFL at the quarterback position (where blacks represented nine percent of all quarterbacks, the highest level in the NFL's history) and overall progress in minority representation at the pitcher and catcher positions in base-

---

78. *Id.*
79. *Id.*
80. *Id.* at 3.
81. *Id.*
82. *Id.* at 13.
83. *Id.*
84. *Id.* at 7-8.
85. 1994 RACIAL REPORT CARD, *supra* note 76, at 18.
86. 1995 RACIAL REPORT CARD, *supra* note 76, actual report card (first page of booklet not numbered).
87. *Id.* at 24.

ball (although mainly due to the increase in Latino players at these positions).[88]

The final grades for 1995, after averaging percentages from all positions, came out to an A- for the NBA (falling from an A), a B in the NFL, and a B in MLB, both the same as in 1994.[89] Although these grades sound impressive, what the results actually showed were "record-breaking improvements in the area of player opportunities on the field without corresponding improvements in the front offices and coaching ranks. There were actually declining percentages of minorities in front office administration and coaching ranks."[90] The report concluded that sport, "which is America's most integrated workplace for players, is not much better than society in who it hires in font office and decision-making positions."[91]

b.   What to Make of the Statistics

Although the Report Cards show that these professional sports do receive unprecedented levels of involvement by African-American athletes, the problem is that this does not often translate into coaching, management, or administrative opportunities. The continued success of black coaches disputes any notion that they can not be successful, and the overwhelming number of players who are black shows that there are many candidates. In 1993-94, Nolan Richardson was named coach of the year in college basketball, Lenny Wilkins was coach of the year in the NBA, and Dusty Baker was named coach of the year in the National League.[92] In 1994-95, Felipe Alou was named Major League Baseball and National League Manager of the year, Lenny Wilkens surpassed Red Auerbach as the winningest coach in NBA history, and Ray Rhodes was named NFL coach of the year.[93] With this evidence, what else but racism or ignorance can account for the continued lack of African-American representation in coaching and management?

At the front office and administrative levels, 1994 saw many African-American individuals such as Stu Jackson, Isiah Thomas, and Magic Johnson being given opportunities.[94] 1995 saw slight increases in these levels in the NBA and MLB, but the overall figures still do not compare

---

88. *Id.* at 25.
89. *Id.* actual report card (first page of booklet not numbered).
90. *Id.* at 1.
91. *Id.* at 30.
92. 1994 RACIAL REPORT CARD, *supra* note 76, at 3.
93. 1995 RACIAL REPORT CARD, *supra* note 76, at 11.
94. 1994 RACIAL REPORT CARD, *supra* note 76, at 2.

to the level of participation by African-Americans in these sports (especially on the playing field).[95] Although there has been progress, the numbers are still inadequate. As Shropshire states, "[i]n all respects there are 'qualified' . . . African-Americans available."[96] With all of the former players who could be counted as qualified, the lack of chances being given to African-Americans is noticeable.

The problem with the numbers provided by the report cards is that the standards are too low. Giving a league a grade of B for having the same amount of African-American representation as the general population does not take into account the fact that the number of African-Americans playing in each league is greater than this twelve percent level. For instance, the fact that eighty-two percent of NBA players are African-American, while only nineteen percent of the head coaches are such, means again that those in charge are white. As one commentator has noted, "our sports hierarchy, an overwhelmingly white domain, has, with notable exceptions, kept its doors shut to people of color. Though these exceptions make sports better than society, it is not by much."[97]

People should not be misled into thinking that these report cards show that sports is an exemplary state of racial affairs. Although professional sports may on a percentage basis achieve higher levels of African-American involvement than society, both society and sports are still lacking. Many athletes admit that they do not feel racist attitudes in professional sports; however, at the same time they think that "whites generally received favored treatment in their sport" and "that blacks were far less likely than whites to be allowed into team management after their playing years."[98] African-Americans seem to be in a similar situation in professional sports as they were in in college. They are paid to play and bring success to ownership and management, the same group that usually will not allow them to continue in administration after their playing careers, as student-athletes are often discarded after their playing careers without academic backgrounds to fall back on.

This perception of African-American success in professional sports is also the direct reason that so many young blacks put their effort into success in sports while possibly ignoring academics and why the black culture promotes athletics as a way out of the ghetto. Numbers like those presented in these report cards, along with media attention on Af-

---

95. 1995 RACIAL REPORT CARD, *supra* note 76, at 4.
96. Shropshire, *supra* note 8, at 3.
97. Lapchick, *supra* note 41, at 8.
98. Johnson, *supra* note 35, at 41.

rican-American sports success, "conveys a false impression about opportunities for minorities to achieve wealth through sports."[99] Unfortunately, the report cards show that lasting success in management or front offices has not materialized for African-Americans. And even though the percentage of African-Americans who are players is large, these are those lucky ones out of 10,000 who made it. Many more did not.

Again, opinions on why African-Americas may not attain coaching or managing positions differ across race lines. Seventy-three percent of blacks agree that racism is a factor in blacks not getting coaching positions, and seventy-two percent believe that a white individual has a better chance at a coaching job, even if equally qualified.[100] Only thirty-one percent of whites agreed that racism was a problem in hiring and only forty-six percent thought that equally qualified white applicants would have an edge.[101]

E. A Problem of Ethics

The problem is that the issue of race in sports, especially in professional sports, only seems to come to the forefront when comments like those by Al Campanis or Jimmy "The Greek" are made public. Then the unconscious racism that many may still have comes out into the open. Since it is unconscious, many people do not understand that this racism is there or even feel responsible for adding to the problems. The disparate numbers in intercollegiate and professional sports show that something is going on. For some reason, African-Americans are not being given the same chances or being treated in the same way as whites.

This is clearly an ethical problem because a certain group of people is being treated in a different way with extremely harmful effects. Although there are legal solutions to racist and discriminatory conduct,[102] the often unconscious racism that pervades sports is not so easy to regulate. One way to change these practices is to treat the problem as a problem of ethics and morality. Therefore, conduct in sports that hurts African-Americans should not be changed merely because it is illegal, but moreover because it is unethical. As one author states "[f]or questions concerning what to do, the moral point of view just is the ultimately

---

99. 1994 RACIAL REPORT CARD, *supra* note 76, at 5.

100. *Race in Sports, supra* note 71, at 3C.

101. *Id.*

102. For a thorough overview of the history of the law regarding discriminatory conduct, see DERRICK BELL, RACE, RACISM, AND AMERICAN LAW (1992).

overriding point of view .... Doing what is right is just what one should do and indeed must do or at least try to do."[103]   Seeking a moral and ethical solution through integration into a system of lawyer regulation can attempt to attack the problem of racism in sports in a new and unique way.

II. ETHICAL THEORY

Lawyers often think of ethics as something that is not of utmost concern as long as they are acting properly within whatever legal rules they are governed by. This type of thinking is wrong. Ethical considerations are important because they are not merely restricted to legal considerations; they are concerned with every action we undertake as human beings. Therefore, in order to understand how to focus on ethics as a solution to the problem of racism in sports, a brief overview of ethical theory is necessary.

A. *Overview of Theories*

In the modern world, when people come to think of ethics, they tend to believe that it characterizes doing that which makes them feel as if they are doing the right thing and not hurting anyone. Any discussion of ethical or moral theory as a concept, or living an ethical life in any depth, is left to those in academics, specifically philosophers. Since the philosophy world has not agreed on any one ethical theory that they can show as right or true,[104] people dismiss any talk about ethics as something that does not concern them in everyday life, although most people still try to act in a way that could be characterized as ethical.

Even though people think this way and the academic world has not provided one overriding ethical theory that can be proven, ethical thinking is still valuable. Ethical thinking can be understood as "the effort to develop general criteria for distinguishing correct from incorrect moral judgments, within an overall account of moral life and experience."[105] Ethical theory then is a way to characterize how people act as right or wrong, and through this effort, a way to judge people in their actions.[106]

---

103. Kai Nielsen, *Why Should I Be Moral? Revisited, in* CONTEMPORARY ETHICS: SELECTED READINGS (James P. Sterba ed., 1989).
104. ROBERT L. SIMON, SPORTS AND SOCIAL VALUES 10 (1985).
105. Joseph Boyle, *Natural Law and the Ethics of Traditions, in* NATURAL LAW THEORY 3 (Robert George ed., 1992).
106. As Alasdair MacIntyre states, "every moral philosophy offers explicitly or implicitly at least a partial conceptual analysis of the relationship of an agent to his or her reasons, motives, intentions and actions, and in so doing generally presupposes some claim that these

Ethics then is a way to systematically look into the reasons why people act in certain ways and determine what the proper standards are to guide these actions. Therefore, "being an ethical person means disciplining oneself to live in accordance with those standards."[107]

For a lawyer, ethics will provide a model for action beyond just what the law entails. Being ethical in certain situations may even advocate not following the law but following some standard of conduct beyond what the law prescribes.

The best way to understand this amorphous concept of ethical thinking and theory is to examine several ethical theories that have been proposed to see what is involved in ethical thinking. Each theory provides a different explanation as to what is right and good and what should be done in acting ethically. These theories attempt to provide an approach to understanding human action in a way which judges whether certain actions should be promoted or not.

B.   *Two Ways of Thinking*

In general, all ethical theories can be characterized under two categories — deontology and consequentialism. Deontological (or nonconsequentialist) theories basically believe that the consequences of a particular action do not count in deciding whether the action is morally right.[108] The moral worth of an action depends on the character of the action itself, especially its adherence to moral rules or principles, and does not focus on consequences. Consequentialist (or teleological) theories of ethics predictably hold that what matters in determining whether an action is right or wrong is the consequences of the particular action.[109] Therefore, in judging the moral worth of an action what is important is only the consequences of the action; the action in and of itself has no moral value. These two categories help to at least provide an overriding method for categorizing particular ethical systems. What follows is a description of three of these systems with a critique of each.

As a warning, what follows may lead some readers to believe that all that is being shown is that each theory can be criticized or challenged and so there cannot possibly be any general ethical theory to follow.

---

concepts are embodied or at least can be in the real social world." ALASDAIR MACINTYRE, AFTER VIRTUE 23 (2d ed. 1984).

107.   John Merriman & Jim Hill, *Ethics, Law, and Sport*, 2 J. LEGAL ASPECTS OF SPORT 57 (1992).

108.   ROBERT B. ASHMORE, BUILDING A MORAL SYSTEM 93 (1987).

109.   *Id.* at 47.

Therefore, ethical discussions beyond academic or religious pursuits would seem to have no place in the real world. This conclusion, however, is too simplistic. Although each of the theories proposed can be criticized in some ways, what should be remembered is that they each provides a way to think about actions from a critical ethical perspective. The fact that they can be criticized shows that there are most likely some ethical norms all people follow as a reference to critique these other theories. Therefore, to show that they are wrong, we must have some at least subconscious understandings of what it is to be morally right. And only through discussing ethical ideas such as these can these unconscious moral understandings come to light to better guide our actions.

C. *Ethical Theories*

1. Utilitarianism

Utilitarianism is an ethical theory based on the view that what is morally right can only be judged by the "principle of utility." This principle states that "the moral goal to be aimed at in all we do is the maximization of the greatest amount of good over evil as a whole."[110] Utilitarianism then is a consequentialist theory because the moral rightness of an action is based on the consequences of that particular action. If an action increases the general happiness of all in a particular society, then the action is morally right.

What really becomes important in utilitarianism is to be able to measure the "utility" in an action. "Utility" can be defined as the "tendency which an action appears to have to augment or diminish the happiness of the party whose interest is in question."[111] In deciding whether to undertake a particular action, utilitarianism calls for a "weighing of all consequences, both good and bad."[112] This weighing is done through what is called the "hedonic calculus" or the "calculus of pleasures."[113] Utilitarians then would have to measure certain factors in each action, such as: the intensity of the pleasure, its likelihood of occurring, and the immediacy of the pleasure, and multiplying these factors by the number of people who would experience this pleasure to determine whether an action should be undertaken.[114] For those who abide by this theory, it be-

---

110. Merriman & Hill, *supra* note 107, at 57.
111. CHRISTINA HOFF SOMMERS, RIGHT AND WRONG: BASIC READINGS IN ETHICS 73 (1986).
112. ASHMORE, *supra* note 108, at 74.
113. *Id.*
114. *Id.*

comes a duty to "do the act whose *net* results are a greater good or a lesser evil than that produced by an alternative action."[115]

Utilitarianism seems appealing because it promotes happiness in a moral sense of positively affecting the most people in any action undertaken. Utilitarian theories also promote a sense of equality because each person is treated equally in their pursuit of happiness: no individual pursuit overrides that of the community. And utilitarian theories provide a method for actually measuring particular actions to determine whether they should be undertaken. This undoubtedly would help in situations where the correct course of action is not immediately apparent.

This all too brief explanation of utilitarianism can be criticized in a few important ways. Initially, it becomes apparent that any measuring of what actions promote happiness, and whose happiness is to be promoted, must look to some standard in determining what form of happiness to be promoted. Therefore, someone must determine what standard this is. Not only does utilitarianism avoid providing a definition of what standards to follow, it also fails to explain how it can keep the so called equality among different individuals and their pursuit of happiness without discriminating among particular forms of happiness.[116] If one individual finds happiness in being selfish while one finds happiness in helping others, utilitarianism cannot provide a way to explain why the latter individual's happiness should be promoted at the expense of the former individual.

The next major criticism of utilitarianism is that the overall happiness of the great majority takes precedence over the sacrificing of a small minority. The hedonic calculus would allow innocent individuals to be "sacrificed for the good of the whole."[117] Utilitarian theories promote overall happiness as all important in moral action. The overall happiness, though, is a measure of the value of the combined happiness of all involved. In some situations, then, certain individuals can be left out of the equation if overall happiness is increased, even though for some individuals their happiness is decreased. A classic example is that utilitarianism could allow slavery because its imposition could increase the overall happiness of the majority while sacrificing an innocent minority.

Utilitarianist theories also often avoid taking into account the moral worth of an action itself.[118] Therefore, some actions could be considered

---

115. *Id.*
116. SOMMERS, *supra* note 111, at 100.
117. Merriman & Hill, *supra* note 107, at 58.
118. ASHMORE, *supra* note 108, at 75.

morally appropriate due to their consequences, even if they do not seem to be morally correct in and of themselves. For instance, killing an innocent individual to save three other individuals would be morally appropriate in most circumstances because the happiness of the three would outweigh the unhappiness of the one. Although it can be debated whether this action is morally right, utilitarianism provides no way to morally evaluate the killing of the one individual aside from its affect on the combined happiness of the others involved.

Finally, utilitarianism never deals with the reality that we simply cannot know with any degree of certitude what the consequences of our actions are. In fact, we cannot even control many of these consequences. Therefore, to base the morality of an action on these consequences is to base it on something uncertain.

In the end, utilitarianism has suffered criticism by philosophers for these and other reasons and so is often used as an example of the wrong way to think in ethical discourse. However, even though this simplistic explanation of utilitarianism leaves it open to criticism, the theory itself provides a way of thinking about our actions that seems at first blush to be praiseworthy. As a society, we want to do that which would increase happiness for the most people. However, the criticisms of utilitarianism teach that within this "pursuit of happiness" we must also be aware of those who do not receive the happiness we may be pushing toward.[119]

2. Kantianism

Another major theory is explained by Immanuel Kant. His theory is clearly a deontological theory because it bases the ethical validity of an action on how it follows certain standards of action and not on the consequences of the actions themselves. For Kant, the only proper moral intention behind an action is the intention to do your duty, that is, to do the moral thing simply because it is the moral thing to do. For example, Kant would say that a businessman must not cheat, not because it will help his business or that cheating would lead to negative consequences, but because it is simply not the morally right thing to do.

Kant's ethical theory is based on certain universal laws (or maxims) that he believed all people can and should follow in judging how to act. These laws or maxims "describe some sort of general sort of situation,

---

119. For a more in depth explanation of utilitarianism, see ETHEL M. ALBERT ET. AL, GREAT TRADITIONS IN ETHICS 224-249 (4th ed. 1980); FREDERICK COPLESTON, S.J., A HISTORY OF PHILOSOPHY: Volume VIII 1-93 (1985).

and then propose some form of action for the situation."[120] To act following a maxim "is to commit yourself to acting in the described way whenever the situation arises."[121]

Kant's basic universal law is known as the "categorical imperative," which says that a person should "[a]ct only according to that maxim by which you can at the same time will that it should become a universal law."[122] Although the terminology may seem antiquated, all that this entails is that one should act only in ways that one could accept others acting toward oneself. Therefore, a truly moral person would only undertake actions that follow principles of ethical conduct that they could meaningfully universalize to become standards for everyone to follow in their moral actions.

A good example would be the Christian adage "[d]o unto others as you would have them do unto you."[123] Therefore, if you would not want people to rob you, you should not rob them. And you should be willing to say that nobody should rob anybody. This "universalizability" is key.

The way to judge our actions as moral and immoral is to see whether we could universalize our conduct and accept it from others as the ethically right thing to do. Kant did understand that some maxims that may seem to pass this test still should not be promoted as ethical standards. An example of this would be that "everyone should wake up at six in the morning." Although this could be universalized to all people, the maxim itself has no moral value. This type of failure to be a proper moral maxim could be objective — if the particular conduct could not possibly be universalized as conduct for all people (i.e. everyone should buy whatever they want, though not possible because some people would want the same thing and not be able to get it), or subjective—if, even though the conduct could be universalized, it still would not be desirable to do so (i.e. everyone should not talk to anyone else).[124]

Kant had other ways of expressing the categorical imperative. One formulation was to act in a way that treats others as ends and not merely means.[125] Therefore, Kant recognized a need for respect for persons and not sacrificing them for the goals of an individual or society. Kant

---

120. SOMMERS, *supra* note 111, at 22.
121. *Id.*
122. ASHMORE, *supra* note 108, at 95. This is not the exact wording Kant used but there are many ways he expressed this imperative and many ways scholars have expressed it. This delineation is easily understandable and conveys the same concepts Kant expressed.
123. Merriman & Hill, *supra* note 107, at 59.
124. ASHMORE, *supra* note 108, at 95.
125. *Id.* at 95.

recognized that in all our actions "we must recognize the great intrinsic value of human life."[126] Under Kant's theory we have duties then to ourselves and others to act morally in all we do following the maxims and categorical imperative, and we also must always act following a proper moral motive.[127] This motive would again follow the universalized maxims and avoid any subjective determination based on happiness or feelings. All of this is known and understood by individuals through reason again based on these maxims.[128]

There are several problems with Kant's theory even in the oversimplified explanation just provided. For instance, it is apparent that individuals actually act for many reasons, especially past experience and feelings. Acting merely on reason and attempting to universalize all conduct would not only be cumbersome, but it would also ignore the unique reality each individual finds themselves in. The idea of universalizability also does not seem to allow for any exceptions to the rules.[129] For instance, although normally it seems universal that one should not kill, this would not allow for situations involving self-defense. Also, the mere fact that we might believe an action could be universalized does not seem to give the action any moral validity.[130] Again, just because we could say that all people should brush their teeth before going to bed, that does not in itself give this conduct any moral worth. More must be looked at to understand whether something is moral or not. Finally, even though Kant wants to present a theory that avoids basing moral decision making on the consequences of action, the very universalizability necessary for moral action seems based on the consequences of an action being followed or not.[131] How else could an individual judge whether an action should be universalized except for by attempting to understand the consequences of it as a universal law?[132]

In the end, even with its problems, Kant's theory again helps focus ethical decision making on an important goal — the understanding that consideration as to whether particular action should be promoted or followed by others is necessary as a criteria for making an ethical decision and a focus on the intention or motivation behind our actions, which was

---

126. SOMMERS, *supra* note 111, at 42.
127. ASHMORE, *supra* note 108, at 95-96.
128. *Id.*
129. *Id.* at 97.
130. *Id.*
131. *Id.* at 98.
132. For further reading on Kant, see PETER SINGER, A COMPANION TO ETHICS 175-186 (1993); ALBERT, *supra* note 119, at 224-249.

something utilitarianism ignored. Although Kant may blur the line at times between deontology and consequentialism, he focuses attention on proper respect for others in our own actions.

3. Natural Law Theory

Natural law theory began as an explanation by St. Thomas Aquinas to explain how individuals should act in their lives. Such a theory is usually considered to be deontological because what is important is the way in which we act and not merely the consequences of our actions. Yet there is also a sense in which natural law theory is consequentialist in that the goal of moral action is human fulfillment, the consequence of acting morally. Although the theory has seemed antiquated in the past, recent philosophers have reasserted their interest in it as a basis of ethical action.[133]

Aquinas' natural law theory is embedded in a scheme that recognizes three types of law: eternal, natural, and human. For Aquinas, the eternal law is God's plan, which directs every movement and action in creation.[134] Everything that God creates obeys this eternal law, "and bears the imprint of that law in the form of a natural tendency to pursue whatever behavior and goals are appropriate" to this eternal law. Eternal law is then the beginning of the natural law within us. Aquinas defines the natural law as the way in which "all things partake in the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclination to their proper acts and ends."[135] Natural law is a participation by a human being in the eternal law of God. According to Aquinas, since the natural law is imprinted on man's very nature, men cannot be ignorant of it and its general principles, though people may fail to apply the general principles in a particular case.[136] This is very important because, following from this, the natural law is an inclination to the good within all of us, regardless of whether we choose to follow or understand it. This natural law is promulgated by God in that it is imprinted within all human being's minds so as to be known by men naturally and to lead them to human perfection.[137] The natural law

---

133. For a good overview of contemporary debate over natural law theory please see ROBERT P. GEORGE ED., NATURAL LAW THEORY (1992).

134. BASIC WRITINGS OF SAINT THOMAS AQUINAS, Vol. 2, 250 (Anton C. Pegis ed., 1945).

135. *Id.*

136. COPLESTON, *supra* note 119, Volume II, at 408.

137. LLOYD L. WEINROB, NATURAL LAW AND JUSTICE 58 (1987).

then becomes a habit within people because it is the way we are inclined to act from within.[138]

Aquinas then sets out the first principle of natural law, "good is to be done and pursued, and evil is to be avoided."[139] This first principle is the most common and general precept known to all people and is the most general law that human beings must follow in their actions. The secondary principles of natural law are more particular conclusions on how to act.[140]

Human beings come to know the natural law through reason. For Aquinas, moral reasoning begins with premises known by reflecting on our inclinations, and then willing a course of action comes from this natural tendency we have to perfection.[141] Through these types of reason, human beings act toward the goods which are the proper ends of the natural law, therefore, goods for Aquinas are that which man has an inclination to.[142] Then, by looking at our inclinations, we can see the various goods that we naturally seek, and these are then the goods that we should morally seek. These goods would include such things as life, love, friendship, knowledge, etc. By attaining these goods to which we naturally incline, we fulfill our human nature and that is a consequence of a good moral life.

The inclinations and goods that they point to can be understood differently by different individuals in rare occurrences due to a person's acting in accordance with some passion and avoiding the natural tendencies toward the good as provided by the natural law.[143] They may also change in that reasoning may be from false principles based on the first principles, and so in some instances our options in a particular action can be weighed against the first principle.

Another component necessary to an understanding of Aquinas' theory of natural law is his explanation of human law. For Aquinas, law "is an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[144] Human law helps people order their actions toward the goods that are the proper goals of the natural law. A just law conforms to reason and the natural law so that it is bind-

---

138. BASIC WRITINGS, *supra* note 134, at 773.
139. WEINROB, *supra* note 137, at 58.
140. *Id.*
141. ST. THOMAS AQUINAS: SUMMA THEOLOGIAE A CONCISE TRANSLATION 284 (Timothy Mcdermott ed., 1989).
142. COPLESTON, *supra* note 119, at 406.
143. *Id.*
144. WEINROB, *supra* note 137, at 55-56.

ing to conscience, therefore, a human law which does not follow the natural law is no law at all.[145]

One problem with Aquinas' theory comes from his definition of a good as something that man has an inclination to. The problem is that these inclinations can be clouded by desires within individuals, and it is unclear how a person would know which inclination to follow. It is unclear how one could differentiate between an inclination leading to a good and one that only satisfies a desire. Aquinas' explanation of inclinations is hard to understand and reconcile with complicated choices, because it seems that we should just know how to act from within, without an understanding of why we are acting in a particular way.

One distinct positive note concerning natural law theory is that it is rooted in a notion of human nature that should be available for anyone to investigate. Aquinas postulates, perhaps optimistically, that people can find within themselves, in their own inclinations and tendencies, the goods that they should seek in order to live moral lives. By rooting morality in human nature, natural law makes morality something objective, and not simply something subject to the wishes of an individual or society. Natural law theory provides an objective basis for evaluating any and every individual in society since it is rooted in this human nature common to all individuals in all societies.

In the end, natural law theory provides a way to think about ethical decision making that can be helpful. This type of theory explains that, regardless of whether we understand it or not, we are responsible for our moral actions and the consequences of our actions. Contemporary natural law theories allow for diversity in experiences and understanding of how it is to be moral, because individuals have different contexts and ways of reasoning through ethical decisions.[146]

C.   Ethics

The three theories discussed are examples of the way in which philosophers attempt to understand the world around them through ethical discussions. Each approach has its shortcomings, but each also adds something to an understanding of ethical decision-making that can be valuable. Utilitarianism realizes that people should act in ways that promote the most happiness for all and glaringly shows how a blind approach to this can lead to the sacrificing of innocent minorities; natural law theory presents an explanation of the world following moral norms

---

145. *Id.*
146. Boyle, *supra* note 105, at 23.

within each of us, but it fails to show why some people understand these norms and others do not; and Kantianism shows that ethical understandings must be made in a way in which they could actually be promoted for all with a true respect for all individuals, but at the same time it leaves ethical reasoning so inflexible it is hard to account for the variances among individuals and cultures.

These theories were not presented to promote one or the other. Instead, they show that any thorough ethical understanding of the world around us and attempts at acting ethically must be more detailed and comprehensive than merely doing what one thinks is right. Regardless of the system one follows, it must be understood that "it is plainly and unequivocally in our collective interests that we have a morality and that people generally act in accordance with it."[147] For lawyers, ethical decision-making will entail more than merely doing what the law proscribes. Being a good lawyer is one thing; being an ethical person as well as a good lawyer is something far beyond this.

D. Sports Ethics

Several commentators have focused on ethics as it directly relates to sports.[148] Sports in itself can have three types of relationships with ethics. The relationship can be negative — wherein participants learn that to succeed they have to cheat or act immorally in some other way; neutral — where sports itself has no moral significance at all, or is outside of the moral arena entirely; or positive — where there is a connection between playing sports and the development of moral values.[149] This article advocates that the relationship between sports and morality or ethical development should be positive for all of those involved, i.e., players, coaching, management, and agents. The reason is that anyone

---

147. Nielsen, *supra* note 103, at 100.

148. *See, e.g.*, Barry C. Pelton, *Moral and Ethical Issues in Sport*, 44 PHYS. EDUCATOR 273 (Late Winter 1986); D. Stanley Eitzen, *Ethical Problems in American Sport*, 12 J. SPORT & SOC. ISS. 17 (1988); DONALD G. JONES, SPORTS ETHICS IN AMERICA: A BIBLIOGRAPHY, 1970-1990 (1991); HYLAND, *supra* note 5; Gary Bauslaugh, *Ethics in Professional Sports*, 46 THE HUMANIST 30 (Nov./Dec. 1986); George Cohen, *Ethics and the Representation of Professional Athletes*, 4 MARQ. SPORTS L. J. 149 (1993); Howard Slusher, *Sport: Morality and Ethics*, in SPORT AND RELIGION (Shirl J. Hoffman ed., 1992); Merriman & Hill, *supra* note 107; John Stieber, *The Behavior of the NCAA: A Question of Ethics*, 10 J. BUS. ETHICS 445 (1991); BERLOW, *supra* note 50; Peter J. Arnold, *Sport and Moral Education*, 23 J. MORAL EDUC. 75 (1994); PETER MCINTOSH, FAIR PLAY: ETHICS IN SPORT AND EDUCATION (1980); LAPCHICK & SLAUGHTER, *supra* note 47; *Part IV: Sport, Religion and Ethics*, in SPORT AND RELIGION 213-217 (Shirl J. Hoffman ed., 1992); WARREN P. FRALEIGH, RIGHT ACTIONS IN SPORTS: ETHICS FOR CONTESTANTS (1984).

149. Arnold, *supra* note 148, at 75.

in sports is constantly faced with the situations where their ethical systems are tested, exhibited, and learned.[150]

Since ethics applies to how people ought to behave, in sports this translates to how all participants should act in the most ethically desirable manner, even if this means possibly sacrificing some sports value (like winning) for a truly ethical reason. A person is never just a sports participant; he is also first and foremost a human being. Unfortunately, athletes are often only held to standards of conduct as necessitated by the rules of the particular sport they play. Similarly, sports lawyers may be only held to the standards of conduct that players associations, the American Bar Association, judicial rules, and specific legislation may mandate. Both "enjoy a remarkable range of freedom to act unethically within the framework of the rules."[151]

One overriding concept that is often promoted as a focus of ethical thought in sports is the idea of sportsmanship. Sportsmanship is an idea that encompasses an adherence to the rules of the particular sport, an acceptance that what is really important is effort and not always the end result, and an appreciation for the effort of all those involved, even the opposition.[152] As the NCAA recently expressed, "[w]ithout sportsmanship, true athletics competition and its important educational value for individuals is sorely compromised."[153] According to the NCAA, sportsmanship is demonstrated by "respect, fairness, civility, honesty and responsibility."[154] The NCAA explained that these values are fundamental to an ethical perspective and ethical conduct because such ethical conduct "reflects a higher standard than law."[155]

Sportsmanship then can provide a touchstone between sports and ethics. If lawyers, players, and coaches can learn to act more sportsmanlike in their conduct within the sports world, hopefully the problem of racism in sports would be seen for what it is: a lack of respect and fairness towards those who are affected.

---

150. HYLAND, *supra* note 5, at 33.

151. Hoffman, *supra* note 148, at 216.

152. Pelton, *supra* note 148, at 275. *See also* James W. Keating, *Sportsmanship as a Moral Category, in* PHILOSOPHIC INQUIRY IN SPORT (William J.Morgan, & Klaus Meier eds., 1988); Randolph M. Feezell, *Sportsmanship, in* PHILOSOPHIC INQUIRY IN SPORT (William J.Morgan, & Klaus Meier eds., 1988).

153. *Sportsmanship Report Stresses Importance of Association Action*, NCAA NEWS, Oct. 30, 1995, at 1.

154. *Report of Presidents Commission Committee on Sportsmanship and Ethical Conduct in Intercollegiate Athletics*, NCAA NEWS, Oct. 30, 1995, at 10 [hereinafter *Report of Presidents Commission*].

155. *Id.*

E. Lawyers Ethics

A final area of research that needs to be mentioned is lawyers' ethics. Legal ethics focuses on "what ethical principles and virtues are essential, not to being a good person, but rather to being a good lawyer."[156] Therefore, the study of legal ethics aims to encourage a moral focus within lawyer's responsibility "that is compatible with the social roles and functions that, according to our present legal system, the lawyer is required or expected to fulfill."[157]

Conceptions of legal ethics are embodied in the requirement that all those attempting entry into the legal bar must pass an ethics or moral fitness test. Underlying these tests "is the assumption that to be a good lawyer one must be a morally good person."[158] This conception of legal ethics is also notable in the idea of lawyer professionalism. As ethical considerations deal with the way things ought to be, the notion of professionalism "directs us to what it is that members of the profession believe that we should expect of ourselves."[159] Therefore, within the legal profession, not only is one required to be an ethical entrant into the field, but the very notion of being a professional within the field entails ethical considerations and knowledge that one must have.

As legal ethics should help lawyers realize that ethical considerations must come into legal decision making, they also must realize that "ethics reflects a higher standard than law,"[160] and thus ethical considerations can and should supersede legal considerations in various situations. The law, in itself, cannot provide answers to every situation a lawyer will come into contact with,[161] but still lawyers cannot be expected to be any more knowledgeable about ethical considerations than anyone else. A lawyer can not be expected to know any more about ethical considera-

---

156. Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law, in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed., 1984). *See also* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); and Robert E. Fraley & F. Russell Harwell, *Ethics and the Sports Lawyer: A Comprehensive Approach,* 13 J. THE LEGAL PROFESSION 9 (1988).

157. *Id.*

158. Frederick A. Elliston, *The Ethics of Ethics Tests for Lawyers, in* ETHICS AND THE LEGAL PROFESSION 58 (Michael Davis & Frederick A. Ellisont eds., 1986).

159. Burnele V. Powell, *Lawyer Professionalism as Ordinary Morality,* 35 S. TEX. L. REV. 275, 280 (1994).

160. *Report of Presidents Commission, supra* note 154, at 10.

161. Marvin W. Berkowitz & William C. Starr, *Ethics, in* REDUCE YOUR RISK: RISK MANAGEMENT FOR HIGH SCHOOL ATHLETIC PROGRAMS 138 (published by the National Sports Law Institute).

tions than any reasonable, educated person.[162] This sense of reasonableness should be understandable to lawyers as so much of the law deals with problems from the perspective of the "reasonable" person.

F. Ethics to Responsibility

Taking into account that lawyers do have the responsibility to act ethically and to consider the ethical consequences of their conduct beyond the mere legal answers, it is important now to move to the area of lawyer responsibility and regulation. The focus will be on is the ways in which sports lawyers are regulated, the ways that the leagues and NCAA attempt to also regulate these lawyers, and the specific consideration of sports ethics that lawyers must keep in mind in an effort to deal with racism in sports.

III. LAWYER RESPONSIBILITY

Lawyers in sports are regulated in many ways, including through players associations, the NCAA, state legislation, and the American Bar Association's professional responsibility rules.[163] Guidance for the ethical regulation of lawyers can also be found in codes of conduct, such as the Association of Representatives of Professional Athletes (ARPA) code of ethics, and other specific codes of conduct.[164]

A. Players Associations

The NBA, NFL, and MLB have developed specific regulations that player agents representing their players must follow.

The National Football League Players Association (NFLPA) has a regulatory scheme wherein agents must become certified with the

---

162. ETHICS AND THE LEGAL PROFESSION, *supra* note 158, at 23.

163. Three books which give a good general discussion of the responsibility of being a lawyer and being an athlete-agent are ROBERT O'CONNOR, A COMPLETE GUIDE TO SPORTS AGENTS (1990); KENNETH L. SHROPSHIRE, AGENTS OF OPPORTUNITY: SPORTS AGENTS AND CORRUPTION IN COLLEGIATE SPORTS (1990); and ROBERT RUXIN, AN ATHLETE'S GUIDE TO AGENTS (3d ed.) (1993). Also several articles take different approaches to the review of agent regulation, including: Michael A. Weiss, *The Regulation of Sports Agents: Fact or Fiction*, 1 SPORTS LAW. J. 329 (1994); Curtis D. Rypma, *Sports Agents Representing Athletes: The Need For Comprehensive State Legislation*, 24 VAL. U. L. REV. 481 (1990); Gary P. Konn, *Sports Agents Representing Professional Athletes: Being Certified Means Never Having to Say You're Qualified*, 7 ENT. & SPORTS LAW. 1 (Fall 1988).

164. As to perspectives on the ethical regulation of sports agents, see Paul T. Dee, *Ethical Aspects of Representing Professional Athletes*, 3 MARQ. SPORTS L.J. 111 (1992) & Cohen, *supra* note 148.

NFLPA.[165] To become certified, an agent must provide background information regarding such matters as education and past occupations, and the NFLPA may disqualify an agent for past disciplinary problems.[166] Once certified, the agent is subject to many guidelines. They must use a standard form contract; collect a fee limited on a percentage basis; attend annual NFLPA seminars; comply fully with all applicable state and federal law; and not collect a fee until the player has recieved their compensation.[167] The NFLPA rules attempt to provide an obstacle to agents who are not qualified to represent players and will discipline agents who do not follow these rules with fines or revocation of certification.[168]

These rules have several potential problems, including: 1) these regulations do not regulate agents in their contact with athletes signing their first NFL contracts because these athletes are not yet members of the NFLPA — this can lead to significant abuse as the agents may charge exorbitant fees or give bad advice to these new clients; 2) these rules only regulate contract advisors, whereas agents do more than this in providing advice on endorsements and other deals; 3) the rules do not provide specific criteria for judging an agent's qualifications and so most anyone gets certified; and 4) the rules are not particularly enforceable due to the fact that the NFLPA only has the authority to bargain for its members collectively and not individually; therefore, it cannot force agents to become certified.[169]

The NBA Players Association (NBPA) has instituted a program that regulates its agents in a similar manner, while also trying to avoid some of the problems inherent in the NFLPA plan. Within its Collective Bargaining Agreement, the NBA mandates that only those agents who are certified by the Players Association can represent its players.[170] The regulations themselves cover agents who represent players who have not yet signed their first contract with NBA teams, regulates incentive and fee payments to and from players, and regulates agents in their conduct as

---

165. David Lawrence Dunn, Note, *Regulation of Sports Agents: Since at First it Hasn't Succeeded, Try Federal Legislation*, 39 HASTINGS L.J. 1031, 1043 (1988). A copy of these regulations, entitled *NFLPA Regulations Governing Contract Advisors*, can be obtained from the NFLPA.

166. *Id.*

167. *Id.* at 1044.

168. *Id.*

169. *Id.* at 1045-46.

170. MARTIN J. GREENBERG, SPORTS LAW PRACTICE (Vol. 1) 213 (1993). For a copy of these rules entitled NBPA REGULATIONS GOVERNING PLAYER AGENTS, see GREENBERG (Vol. 2) at 610.

contract advisors.[171] An agent also must demonstrate their competence through a background disclosure before being certified.[172] Agents are also required to use a standard representation agreement and to comply with compensation limitations as imposed by the NBPA.[173] Agents can receive discipline in the form of fines and revocation of their certification if they do not follow these rules.[174]

Problematically, the NBPA regulations do not provide any objective criteria for measuring the competence and qualifications of its agents, and the plan cannot force agents who represent its players to join the program; therefore, the power of these rules is suspect.[175]

The Major League Baseball Players Association (MLBPA) rules regulating player agents begins with the necessity that agents who want to negotiate contracts for baseball players must be certified by the MLBPA.[176] Unlike the other two systems, the agent must receive a commitment from a player that once the agent becomes certified, the player will retain his services.[177] Furthermore, the MLBPA regulations do not restrict the fees chargeable by agents for their services.[178] In other respects, these rules are similar to the other two leagues with the same basic requirements and restrictions.

B. NCAA

Within its manual, the NCAA provides several rules that in effect attempt to regulate athlete agents.[179] The basic NCAA rule that governs athlete agents is Section 12.3.1, which makes clear that an athlete will lose their remaining eligibility to participate in college athletics if they sign an agreement with an agent to represent them in contract negotiations.[180] Therefore, athletes who sign with an agent will lose their ama-

---

171. Dunn, *supra* note 165, at 1047.
172. *Id.*
173. T. Jesse Wilde, *The Regulation of Athlete-Agents*, 2 J. LEGAL ASPECTS OF SPORT 18, 20 (1992).
174. *Id.*
175. Dunn, *supra* note 165, at 1048.
176. GREENBERG, *supra* note 170, Vol. 1, at 380. For a copy of these regulations entitled MLBPA REGULATIONS GOVERNING PLAYER AGENTS see GREENBERG, *supra* note 170, Vol. 2, at 656.
177. GREENBERG, *supra* note 170, Vol. 1, at 380.
178. Wilde, *supra* note 173, at 21.
179. For an overview of this type of regulation see Jan Stiglitz, *NCAA-Based Agent Regulation: Who Are We Protecting?* 67 N.D. L. REV. 215 (1991); Richard J. Evrard, *Common Areas of Agent Liability: "NCAA Rules", in* SPORTS DOLLARS AND SENSE CONFERENCE MANUAL (published by the National Sports Law Institute, Oct. 1993).
180. 1995-96 NCAA MANUAL, Art. 12.3.1.

teur status as seen by the NCAA. Additionally, a college athlete cannot even obtain an agent to be used in future contract negotiations after their eligibility is up,[181] although an athlete can obtain the services of a lawyer if that lawyer does not represent the player in contract negotiations.[182] Also, an agent cannot give any form of benefits to a prospective client who is a student athlete without risking the athlete's college eligibility.[183]

The NCAA has implemented a registration procedure for agents who wish to represent athletes coming out of NCAA schools. Under this system, agents were required to complete the form, agree they would not contact an athlete or coach without first contacting a university's athletic director, and this registration was kept in a listing by the NCAA for athletes and others to view.[184] The aim was that by disclosing the agent's background and qualifications in the registration forms, players and their families would have some resource to evaluate agents they came in contact with.[185] The problem with this registration system is that it is voluntary — the NCAA cannot force agents to participate.[186] And, again, there are no requirements as to general competence that agents must meet to become registered.[187]

A final way the NCAA has attempted to regulate athlete agents is by requiring athletes who will be participating in the Division I basketball tournament or college football bowl games to sign affidavits certifying that they have not signed with an agent.[188] The focus was on these two sports, presumably because they are the two major college revenue producing sports and have been subject to the most frequent agent abuses. A registered agent could be removed from the list if he or she in any way jeopardizes a player's eligibility or fails to contact an athletic director before contacting an athlete or his coach.[189]

The problem with the NCAA's regulations is that all the NCAA can do is regulate its members and student-athletes. And since the agents are not members of the NCAA, the "NCAA has no punitive power over

---

181. *Id.* at Art. 12.3.1.1.
182. *Id.* at Art. 12.3.2. The NCAA also provides athletes with career counseling panels so that they can evaluate their career possibilities without harming their eligibility. GREENBERG, *supra* note 170, Vol. 1, at 871-73.
183. *Id.* at Art. 12.3.3.1.
184. SHROPSHIRE, *supra* note 163, at 37-38.
185. Wilde, *supra* note 175, at 19.
186. *Id.*
187. *Id.*
188. *Id.*
189. Dunn, *supra* note 165, at 1042.

the agent's unscrupulous behavior."[190] Furthermore, the agent registration program is voluntary and many agents just ignore it.[191]

C. State Regulation

Many states have implemented specific statutes that apply to athlete agents.[192] In general, there are two levels of state agent regulation. The first level is under standard criminal and civil laws that may cover misconduct in negotiating and drafting contracts.[193] The second level is actual sports-agent specific statutes which often require agents to register with a state agency.[194] This type of legislation usually attempts to require certification of sports agents, and often the posting of a surety bond or the payment of fees to the state.[195] Early legislation often included provisions for registration, the payment of fees, posting of surety bonds, contract approval by the state, and criminal penalties for agent misconduct.[196] The current trend is legislation that also requires notice to schools and the state before and after the signing of a contract, waiting periods for valid contracts, causes of action by colleges for agent misconduct that damages a school, and less cumbersome registration procedures than the older legislation.[197] In most cases, the states that require registration also provide lists of prohibited activities that can result in punishment.[198] Some states have also begun to incorporate NCAA regulations into their agent regulatory schemes.[199] Therefore, there is a possibility of civil or criminal penalties for agents who violate these rules.

There are many criticisms of these laws. Initially, state laws such as these can lead to confusion resulting from conflicting laws between and among states since there is at present no overriding federal legislation.[200] Therefore, if an agent from Wisconsin signs a player from a school in

---

190. Lori K. Miller et. al., *A Uniform Code to Regulate Athlete Agents*, 16 J. SPORT & SOC. Iss. 93, 95 (1992).

191. Dunn, *supra* note 165, at 1042.

192. For examples of these regulations see Kenneth L. Shropshire, *Common Areas of Agent Liability: "Agent Regulations"*, *in* SPORTS DOLLARS AND SENSE Conference Manual (published by the National Sports Law Institute, Oct. 1993); GREENBERG, *supra* note 163, Vol. 1, at 892-903; GREENBERG, *supra* note 170, at 262-263 (Supp. 1994).

193. SHROPSHIRE, *supra* note 163, at 43.

194. *Id.*

195. *Id.*; *see also* Wilde, *supra* note 175, at 21.

196. Wilde, *supra* note 173, at 22.

197. *Id.* at 22-23.

198. GREENBERG, *supra* note 170, Vol. 1, at 896.

199. SHROPSHIRE, *supra* note 163, at 45.

200. Wilde, *supra*, note 175, at 22.

Illinois who is drafted by a team in Detroit, it is unclear whether the agent must register in all three states. Furthermore, if there is a problem, it is unclear which state law will be controlling.

As a practical matter, for an agent to represent clients in many states, he or she may need to follow extensive registration procedures in each state before having the opportunity to negotiate a contract with a client to recoup money spent on registration.[201] Also, most of the laws do not include any minimum competency requirements that an agent must meet in order to become registered.[202] Therefore, a player cannot be sure if an agent who registers is competent and can represent them properly.

Finally, some commentators suggest that such state regulations may violate the Commerce Clause of the Constitution as improper state regulation of interstate commerce.[203] This is due to the fact that the Commerce Clause bars states from regulating interstate commerce.[204] Commerce involving an agent in one state and a player in another state may be considered as interstate commerce and regulation of this by state law may be suspect.

D. *Federal Regulation*

Although there has been a proposal for a Professional Sports Agency Act[205] and Federal Sports-Agent Legislation,[206] there is no current legislation that regulates sports agents at the federal level. The federal Racketeer Influenced and Corrupt Organizations Act (RICO)[207] was used in the famous lawsuit against Norby Walters and Lloyd Bloom involving charges of mismanagement of funds, fraud, and racketeering.[208] Regardless of this example, at present time no federal legislation has been approved that specifically regulates athlete agents.

---

201. GREENBERG, *supra* note 170, Vol. 1, at 904

202. *Id.* at 905.

203. *Id.* at 904-905; SHROPSHIRE, *supra* note 163, at 92-93.

204. GREENBERG, *supra* note 170, Vol. 1, at 904.

205. This proposal came from the Sports Lawyers Association in 1985. Wilde, *supra* note 173, at 26.

206. See DISCUSSION DRAFT OF FEDERAL SPORTS-AGENT LEGISLATION PREPARED BY CONGRESSMAN JOHN BRYANT OF TEXAS, *in* SHROPSHIRE, *supra* note 163, Appendix III, at 131-144.

207. 18 U.S.C. 1961 et seq. (1988).

208. United States v. Walters, 711 F.Supp. 1435 (N.D. Ill. 1989).

E. American Bar Association

The American Bar Association has specific Model Rules and a Model Code of Professional Responsibility that regulate athlete agents who are lawyers. Unfortunately, many athlete agents are not lawyers, and so they are not governed by these rules. However, since this article is concerned with sports lawyers, these rules are important.

The Model Rules of Professional Responsibility provide regulations that govern how a lawyer must act in numerous situations. Rules concern matters such as Misconduct,[209] Bar Admission and Disciplinary Matters,[210] Reporting Professional Misconduct of others,[211] Competence,[212] Integrity,[213] Fees,[214] etc.[215] These rules intend to encourage lawyers to act more responsibly in all of their legal activities and mandate review and disciplinary proceedings for violations. Most states have incorporated these rules in some form or another, or developed their own rules of professional responsibility that lawyers within that particular state must follow. As already mentioned, professionalism entails the consideration of the ethical impact of a person's actions and making sure that ethical considerations enter into legal decisions. These rules then implicitly carry a sense that for a lawyer to act responsibly, that lawyer must act ethically. The preamble to these rules specifically mentions that lawyers are responsible for the quality of justice that the legal system

---

209. THOMAS D. MORGAN & RONALD D. ROTUNDA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, MODEL RULES OF PROFESSIONAL CONDUCT, AND OTHER SELECTED STANDARDS INCLUDING CALIFORNIA RULES ON PROFESSIONAL RESPONSIBILITY, Model Rules, Rule 8.4 (1993).

210. *Id.* at Rule 8.1.

211. *Id.* at Rule 8.3.

212. *Id.* at Rule 1.1.

213. *Id.* at Rule 4.1.

214. *Id.* at Rule 1.5.

215. For an interesting group of articles regarding these rules and their applicability to sports lawyers see Daniel L. Shneidman, *Applying the American Bar Association Model Rules Regarding Advertising, Solicitation, Marketing, Specialization and Fees to Lawyers Representing Professional Athletes*, SPORTS DOLLARS AND SENSE CONFERENCE, National Sports Law Institute and Arthur Anderson & Co. (Oct. 22-24, 1992); Daniel L. Shneidman, *Law, Ethics and Professional Responsibility of Attorney Representation in Sports and the Arts*, STATE BAR OF WISCONSIN: 1995 ANNUAL CONVENTION: SPORTS, RECREATION AND ENTERTAINMENT LAW SECTION (June 14, 1995); Daniel L. Shneidman, *Selected Issues of Client Representation By "Sports" Lawyers Under the Model Rules of Professional Conduct*, SECOND ANNUAL SPORTS DOLLARS AND SENSE CONFERENCE, National Sports Law Institute and Arthur Anderson & Co. (Oct. 28-30, 1993); Daniel L. Shneidman, *Selected Issues of Client Representation By "Sports" Lawyers Under the Model Rules of Professional Conduct*, 4 MARQ. SPORTS L.J. 129 (1993).

provides, and that they must only act with respect for those involved, and for legitimate purposes within the law.[216]

The Model Code of Professional Responsibility entails a similar regulatory scheme with the addition that for each mandate there is a specific "ethical consideration" mentioned that applies to the particular situation. Moreover, the Preamble to the Model Code makes clear that lawyers must consider the ethical impact of their actions when it says that "[n]ot every situation which [a lawyer] may encounter can be foreseen, but fundamental ethical principles are always present to guide him"[217] and that "in the last analysis it is the desire for the respect and confidence of the members of the profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct."[218] Therefore, as a lawyer serves society within his profession, it is a duty of the profession to act with "the highest possible degree of ethical conduct."

The ABA Model Rules and Model Code provide direct evidence that the American Bar Association, in its regulation of all lawyers, expects these lawyers to act ethically in all that they do. Specifically, "[a]ttorneys are held to an ethical standard for every activity in which they practice."[219] These regulations are over and above normal legal responsibilities as mandated by specific laws; they instead mandate the conduct of lawyers regardless of what legal situation they are acting within. Sports lawyers, by the mere reason that they are lawyers, must be aware of these rules and act in ways that appropriately follow them.[220] Also, these rules avoid the shortcomings of the regulations mentioned so far because there is no necessity for registration, all lawyers are regulated by the nature of being admitted to the bar, and competence is specifically delineated and regulated under these rules.

F. Codes of Conduct

Another way to attempt to regulate sports lawyers or agents is through specific codes of conduct. Ethical codes of conduct are attempts to "institutionalize the expectations of the organizations that adopt

---

216. MORGAN & ROTUNDA, *supra* note 209, at 3.

217. *Id.* at 143.

218. *Id.* at 144.

219. GREENBERG, *supra* note 170, Vol. 1, at 924.

220. *See supra* note 215 for specific examples. *See also* Edward Vincent King Jr., *Practical Advice for Attorneys*, 4 MARQ. SPORTS L.J. 89 (1993), for an interesting perspective from a lawyer who prosecutes other lawyers for violations of these types of rules.

them, establishing efficient, consistent means of control."[221]   Such codes should follow four rules in order to serve their purpose as ethical guidelines. First, they must state expectations concerning how one is to ethically behave.[222] Second, they must clearly indicate the seriousness with which actual ethical considerations should be undertaken within the conduct regulated.[223] Third, they must provide concrete examples of rules of behavior that conform to more abstract ethical principles.[224] Finally, they must be "written, clear, and public."[225] The goal of such a code is to promote ethical conduct in those regulated for the basic reason that "acting ethically is good for its own sake."[226] In other words, acting ethically is just the right thing to do.

With the disparity among different individuals as to what it actually means to act ethically in a particular situation, these codes can serve to help define the range of ethical possibilities. The danger is that "a code of ethics will tend to undermine ethical evaluation"[227] because it takes the individual thought on what is right out of a particular decision, thus making ethical action rigid and formalistic. However, as long as such codes are considered as a possibility for opening up ethical considerations of action in areas where such considerations are not usually explicitly made, they can serve a purpose. Of course, they must be enforced, but their real purpose is to show individuals that whatever conduct they undertake has ethical implications. Therefore, these individuals can hopefully learn to add an ethical perspective to decision making from the beginning.

1.   Association of Representatives of Professional Athletes (ARPA)

One example of an organization that attempted to regulate agents was the ARPA, which regulated agents who represented professional athletes through its Code of Ethics.[228] The ARPA's main goals were to promote honesty by sports lawyers through the adherence to a definite ethical code and promote the competence of sports lawyers through continuing professional education.[229] The Code of Ethics itself focused on

---

221. Steven R. Salbu, *Law, and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics*, 68 IND. L.J. 101, 103 (1992).
222. Berkowitz & Starr, *supra* note 161, at 160.
223. *Id.*
224. *Id.*
225. *Id.* at 161.
226. *Id.* at 159.
227. Salbu, *supra* note 221, at 106.
228. For a copy of this code see SHROPSHIRE, *supra* note 163, at 113-118.
229. GREENBERG, *supra* note 170, Vol. 1, at 891.

five main areas: integrity, competence, dignity, management responsibility, and confidentiality in representation.[230] Through its continuing education seminars, the ARPA tried to teach sports lawyers how to become more competent and ethical in their representations of athletes.[231]

The shortcomings of this Code are obvious in that the ARPA was a voluntary organization and could not compel attorneys to join and follow its laudable commitment to ethical development.[232] Furthermore, even if there were violations of the Code, the ARPA had no ability to or mechanism for enforcement or punishment.[233] Finally, in their attempt to not be burdensome to its members, the rules in the Code were too broad to be useful as guides for specific conduct.[234]

2. The American Lawyer's Code of Conduct

The American Lawyer's Code of Conduct was produced in 1982 by a Commission on Professional Responsibility of the Roscoe Pound-American Trial Lawyers Foundation.[235] This code was provided as an alternative to the ABA's Model Code and Model Rules due to perceived shortcomings in these two documents.[236] This code attempted to recognize the "emptiness of some clichés of lawyers' ethics" (such as many of the Model Rules) as mandates that are meaningless in actual context.[237] The code then focused on presenting rules with more substance than the Model Rules and Code, and attempted to strengthen the legal system as "the embodiment of the constitutional values inherent in the administration of justice in the United States."[238]

Looking at the code, however, it seems to be very similar to the Model Rules and Code provided by the ABA. Chapters such as Chapter 1 — "The Client's Trust and Confidences,"[239] Chapter 2 — "Fidelity to the Client's Interests,"[240] and Chapter 3 — "Zealousness on the Client's Behalf,"[241] address the same issues and situations as the Rules and Code. Although not specifically mentioning ethical consideration, the code at-

---

230. Dunn, *supra* note 165, at 1040.
231. *Id.*
232. *Id.*
233. *Id.* at 1041.
234. *Id.*
235. MORGAN & ROTUNDA, *supra* note 209, at 238-269.
236. *Id.*
237. *Id.* at 245.
238. *Id.*
239. *Id.* at 246.
240. *Id.* at 250.
241. *Id.* at 252.

tempts at least to better delineate all of the considerations that should go into legal decision making and lawyer conduct.

3. Code of Conduct for NFLPA Member Contract Advisors

Another example of a professional code of conduct is the Code of Conduct for NFLPA Member Contract Advisors.[242] This code came about after the NFLPA reformed as a professional association after renouncing its rights to bargain exclusively for the NFL players in 1989.[243] The Code was developed as a necessary step to insure that agents involved with NFL players were actually competent.[244] The Code set out to accomplish this by making sure that agents registered with the NFLPA and provided specific review measures (such as a review period of an initial forty-five days to make sure an applicant met the competency requirements) for which applicants were held.[245] The Code itself specified the types of agreements an advisor could sign, mandates of the type of conduct the advisor must conform to, examples of improper violations of the code, and oversight compliance and arbitration procedures regarding violations of the code.[246]

This code was an effort by the NFLPA to assure that its members received the best representation from their agents that was possible. In providing some explanation of improper conduct and enforcement procedures, this code was a positive step. Unfortunately, although the purpose seemed to be to assure the competence of the agents, there are no specific requirements of background or education mentioned; all that is left is reasons why an applicant would be disqualified.

4. Uniform Code to Regulate Athlete Agents

A final example of a Code is one that was proposed in 1992. Under this proposal, a Uniform Code is needed to regulate all athlete agents and curtail agent abuses. The six basic parts of this proposal included: 1) a broad definition of player and agent to avoid the problems of not regulating agents at all times in their dealings with athletes;[247] 2) a regulatory body for the arbitration of agent-player grievances;[248] 3) qualification and certification requirements developed with the help of leagues and

---

242. *See* GREENBERG, *supra* note 170, Vol. 2, at 634-649.
243. *Id.* at 634.
244. *Id.*
245. *Id.* at 636.
246. *Id.* at 638-644.
247. Miller et al., *supra* note 190, at 99.
248. *Id.*

governing bodies and incorporating written tests to prove competence before certification;[249] 4) a bond requirement to provide some security to injured parties;[250] 5) criminal penalties for violations of the code;[251] and 6) the identification of specific prohibited acts that will result in penalties.[252]

The authors who developed this proposal realized that the initiation of a code of this scope would be problematic and could take a long time.[253] However, the code they provide seems to cover all of the problems with the codes and regulatory schemes that have been addressed already. Presumably, this type of code would also act to heighten ethical awareness and responsibility in sports lawyers who would be regulated by it.

G.   The Ethical Regulation of Lawyers

Lawyers are clearly expected to act ethically. The ABA, legislation, and various codes of conduct provide ways in which lawyers are already held to ethical standards that may come under the heading of "professional responsibility," but also entail the reality that beyond acting as responsible lawyers, lawyers must be ethical lawyers.

The problem of racism in sports is then a problem of which sports lawyers must be aware. Racism is an evil that sports lawyers must seek to change due to their responsibilities for acting ethically, as part of the responsibilities of their profession. Sports lawyers cannot merely avoid the problem; they must make sure that each action, each deal, and each contract they are involved with does not add to the problem of racism in sports. Furthermore, as ethical individuals and as ethically regulated lawyers, they must realize that they have some responsibility for improving the situation faced by African-Americans in sports.

IV.   PROPOSALS FOR THE FUTURE

What does it all mean?

The beginning of this article provided a definition, and evidence, of the continuing problem of racism in sports. The expression of this racism is unethical, even if unconscious, in its lack of respect for others based on nothing else but skin color. A greater focus on ethics can show

---

249. *Id.* at 100.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 101.

both that this conduct is wrong and ways in which conduct can be improved to eradicate racism and its negative effects. Ethics does not have to only be encompassed by the various theories proposed by philosophers. Ethics itself can be a way of thought, where someone considers the consequences of his or her actions and adjusts this conduct to attempt to have the least negative effect on others.

Sports ethics and the ideal of sportsmanship can be applied to all those involved in sports, including lawyers. If lawyers learn to act with a notion of sportsmanship, they will not merely represent their client but take an active role, both individually and collectively, in assuring that all those in their particular sport are treated fairly.

Legal ethics and the idea of professionalism shows that lawyers, in all of their pursuits, must keep in mind their ethical responsibilities to themselves and society. The ABA Model Rules and Code are aware of this notion of professionalism and mandate that lawyers should be aware of the ethical consequences of all that they do. As sports lawyers acting within this concept of professionalism, lawyers must bear some responsibility for conduct within leagues wherein racism still is evident.

A.   Focus

Sports lawyers must focus on the impact they can have on eradicating racism from sports. Ethics can be practical as mentioned here. Ethical considerations do not need to be and should not be mere academic pursuits. They should be practical, constant, day to day considerations.

For most individuals, they already are. The problem is that many individuals who do not face racism or its negative effects do not see that they too have a responsibility to fight racism as ethical human beings.

Sports lawyers in professional sports may be in the best position to help because they often represent the real money makers, those who are the most in the public eye — the players. Lawyers can not avoid responsibility by claiming they are fulfilling their legal rules and should not be further responsible. Lawyers must realize that as part of their ethical responsibility, they bear responsibility to others beyond mere legal considerations. Furthermore, since sports lawyers are in an industry where the workers (players) are overwhelmingly black, while management is overwhelmingly white, lawyers have an increased responsibility to work for change.

B. Athletes

Lawyers can help African-American athletes by possibly working to incorporate provisions into their contracts that make athletes appear in African-American communities as role models, to make children aware of the problems even these "successful" athletes encounter.[254] Lawyers have a unique position here because they advise their clients on many matters that affect their clients' lives. Players often listen to their lawyers when the public and team disagree with their position. Lawyers are often more educated, and able to see the whole sports picture better than the athletes. They can encourage their players to become involved and find ways to help African-American players receive better chances to attain management positions when their careers are over.

Lawyers who represent star players should especially encourage the players to speak out against racism in sports, possibly to the point of helping set up appearances, commercials, and talks during their playing careers. This is especially necessary due to the lack of leadership in the black community and lack of role models beyond sports and entertainment figures.

Lawyers should also abide by what some have called an "Athletes' Bill of Rights." In following the intent of such documents lawyers should help athletes achieve participation in sports that are free from discrimination by race, and should not jeopardize college athletes' careers by offering improper benefits or getting involved with an athlete before their eligibility is exhausted.[255]

Lawyers should promote and follow these specific ethical considerations in all of their actions as representatives of players: respect for persons, treating others as ends in themselves and not means for an end, treating others as you would want them to treat you, and treating others in a fair and equitable way so they receive the same opportunities as anyone else in their position. These ethical considerations are not all inclusive, but lawyers must take responsibility for their work in the sports business, which is an example of equality to so many.

C. Players Associations, Leagues, and Management

Lawyers are also involved in Players Associations, Leagues, and often representatives of management. As representatives who most

---

254. This type of provision would be similar to any appearance agreement which is already incorporated into such contracts.

255. *See, e.g.*, BYERS, *supra* note 47, at 374-384; *Athletes' Bill of Rights*, 6 ARENA REV. 58 (May 1982).

likely must be certified by the Players Associations of a particular league, lawyers should push for the Associations to adopt a Code of Conduct similar to the NFLPA Code already discussed, which specifically mentions that racism in intent or effect is unethical. The Associations can work together to develop a uniform code that incorporates a specific provision admitting the problem of racism and attempting to control such conduct. This code would be based on the six provisions outlined already[256] and would contain specific provisions making it the responsibility of the agents and associations to do their part to end the problem of racism in sports. The Associations should also make it a practice to administer continuing education programs (like the ARPA), which address such figures as those presented by the Racial Report Cards and try to develop ways to further progress.

The leagues can help by incorporating such a code of conduct, as agreed to through the associations, into their Collective Bargaining Agreement. Therefore, any agent would be subject to the code, and the league would have an active role in making sure agent conduct follows this code.

The 1995 Racial Report Card measured the participation in each Association across racial lines. The report found that the NBA and NFL possessed strong African-American representation within their ranks, while MLB was sorely deficient.[257] Many in the administration of these Associations are African-American and lawyers. These individuals must continue to push for change and demand that the leagues recognize and publicize the problem of racism in sports as is attempted through the Racial Report Cards.

At the league level (again where many employees are attorneys), specific awareness and realistic approaches to the problem must be taken. All of these approaches must focus on the fact that it is unethical for these leagues to be made up of high percentages of players who are African-American, while at the same time management is not. The three leagues already have a good number of African-American individuals in high positions.[258] Therefore, these high ranking individuals should take the initiative and act as public role models while heightening awareness of the problem of racism in sports. They should also use their

---

256. *See* text accompanying footnotes 247-52.

257. 1995 RACIAL REPORT CARD, *supra* note 76, at 27-28. Specifically, the NBPA and NFLPA received grades of A while the MLBPA received a grade of C-.

258. Specifically, 23% of those in the NBA league office, 21% of those in the NFL office, and 23% of those in the MLB league office were African-American in 1995. *Id.* at actual report card.

positions to help other qualified African-Americans attain realistic positions within league or team management.

One plan to improve the racial situation within professional sports was the Rainbow Commission on Fairness in Athletics Ten-Point Affirmative Action Plan.[259] Although this plan was presented to MLB, its aim and ideas could apply to all leagues. Particular provisions of this plan pushed for community development programs and youth leagues; purchases of twenty percent of all goods and services from minorities or women; three to five year plans for integration in league posts, marketing, and merchandising; committee formation to seek minority ownership; inclusion of two minority candidates for all executive and managerial positions; diversity and humanities training for owners and executives; and personal development and financial management training for players.[260]

Major League Baseball developed its own plan regarding minority issues, which included similar provisions and also provisions that would seek new minority investors and involvement on their boards of directors; make new efforts to attract minorities as fans; increase community and charitable activities; and mandate sensitivity training for employees.[261] Unfortunately, MLB's plan was less specific in both amount and time frame.

Another proposed plan is the Richardson-Jones plan.[262] This plan suggests the immediate adoption of respect and value of diversity in all employee policies and practices a system-wide planning process "to eliminate racism . . . and other forms of discrimination;" revision of all policies and procedures to reflect multicultural respect; development of team specific Multicultural Advancement plans; development of procedures for recruiting, retaining, and promoting minorities in management positions; the encouragement of managers and players to develop local plans to promote multicultural respect; and the involvement of leaders of minority communities in baseballs financial matters.[263]

These types of plans are examples of what can be done on a league wide basis. Specifically, the Rainbow Commission and Richardson-Jones plans provide comprehensive and specific plans that would move to significant progress. If a plan combining elements from these two and

---

259. *Comparison of Baseball Affirmative-Action Plans*, USA TODAY, Mar. 30, 1993, at 5C.
260. *Id.*
261. SHROPSHIRE, *supra* note 163, at 143.
262. Jones, *supra* note 75, at 70.
263. *Id.*

incorporating a code of conduct for agents could be implemented in all three leagues, progress would be likely.

At the commissioner level, both David Stern and Paul Tagliabue have been lobbying within their respective leagues for greater minority hiring.[264] Jerry Reinsdorf, co-chairman of baseball's Equal Opportunity Committee, has also stated that baseball remains committed to equal opportunity for all those involved.[265]

Management and team owners must also be brought into the picture to help reform sports. Without the input of these groups, many of the actual hirings that take place will remain closed to African-American candidates. These groups control the monetary and employment decisions at the player, coach, and often administrative levels. They must be asked to sign on as committed participants to any plan initiated by the leagues.

There must be collaboration between the leagues, players associations, agents, and management in a continued commitment to eradicating racism in sports. Only with collaboration between all parties can progress be made. It is true that sports provides remarkable opportunities for African-Americans, but the figures are misleading; management and administrative positions are still lacking.

D. NCAA

At the collegiate level, although the NCAA cannot work directly to regulate sports agents, an ethical answer can provide a solution. Sports agents, in a focused commitment to ethical conduct, should understand that improper contact with players before their eligibility is up hurts the players and the schools. Furthermore, the majority of players who are involved in scandals due to improper agent relations are African-American due to the fact that the majority of star players in revenue producing sports are African-American.[266] Agents should become educated as to the realities of college for black athletes, including the stereotypes and pressures they must face. Once players continue in the pros, agents should make the effort to help them continue their educations or help them attain possible employment after their careers are over. Often

---

264. 1995 RACIAL REPORT CARD, *supra* note 76, at 6.

265. *Id.* at 8.

266. This is not meant to imply that these individuals somehow cause more scandals. Because African-Americans make up the majority of stars, they end up being involved in these scandals.

these athletes will not have true college degrees or have the academic background to succeed outside of athletics.

Agents should take it upon him or herself as their moral duty to help the athletes, and not only in their athletic careers. To merely represent them in athletics and do nothing to help them receive an education or not have to bear the problems racism will impose on them is unethical. Again, as lawyers, most agents do have an ethical responsibility in their relations with any client. Even agents who are not lawyers should act ethically as ethical human beings. Any NCAA-wide scheme should take into account these individuals as well.

Agents should also work through the NCAA to develop joint efforts to address the problem of racism in college sports and racism that the athletes may face in professional sports. With greater awareness at this level, athletes may be better able to change things in the future and may have the confidence to take a stand earlier.

E. Code

The overriding code that has been promoted here within professional league sports could also be pushed as federal legislation. This does not mean the literal code itself, but the intent behind it (for example, a federal Sports Agency Code of Conduct). As the code at the league level would create a sense of uniformity among and within the leagues, a federal law would be more effective than the many different state laws that now regulate sports agents. The law could take into account the suggestions of the Uniform Code as already described[267] and the proposals for league reform as already mentioned.[268] The intent here is not to provide the exact wording of such a law, but instead to point out that a federal law of this type would go a long way to mandating a certain type of conduct for those in the sports industry. With the size of the sports industry and amounts of money involved this seems a clear instance of an industry that Congress could regulate through its Commerce Clause powers.

F. Personal Moral Code

Perhaps the most important means by which sports lawyers can attack the problem of racism in sports is through the establishment of their own personal moral code. The ethical theories described earlier all pro-

---

267. *See* text accompanying footnotes 247-52; *infra* section IV.C.
268. *See infra* section IV.C.

vide a way in which individuals can ethically understand their actions and the world around them. Even though each individual will in the end have a different sense of right and wrong, each person has some ethical guidelines that can at least be understood by others. This type of inner ethical code is important because outside regulation through professional or league wide codes of conduct are "meaningless to persons lacking values and courage to do right."[269] A sports lawyer as a moral human being already understands some sense of what it is to be moral. This inner code then can provide the link between the lawyers acting as a moral human being and the realization that within the profession this same ethical realization is important.

G. *Reality*

Racism may be something that cannot be totally eradicated. Any solutions to try and attack the problem in sports "must take into account both this permanence and the need for persistence."[270] People will not change without sacrifice and education is necessary to change the racist perceptions that people still hold unconsciously. To really reach a solution there:

> must be a recognition of the existence of racism, discrimination and limited access networks. Next, there must be a successful transition into a period where racial diversity is the standard . . . .
> As this transition is completed the accomplished goals multi-culturalism—an industry with representation from across American society without racism, discrimination or affirmative action programs.[271]

If progress can be made similar to this, the problem of racism in sports may some day no longer be so prominent. And if sports is still a reflection of society, the problem of racism in society may have also improved.

V. CONCLUSION

Racism does exist in sports — the numbers from such things as the Racial Report Cards bear this out. Still, many people do not admit this fact until comments such as those by Al Campanis come out into the open. Therefore, the type of racism that still exists in sports is predominantly unconscious. The individuals who take actions that negatively harm African-American individuals may not intend the effects or con-

---

269. Dee, *supra* note 165, at 114.
270. SHROPSHIRE, *supra* note 163, at 65.
271. *Id.* at 228.

sciously act in a racist manner. They may merely hire someone they know who also happens to be white. When this type of practice persists, the lack of blacks in management and other positions in sports is not so odd.

However, racism of any kind is unethical. Ethics teaches that as human beings we should never treat others in a way that harms them or devalues them as individuals. The law can fight overt acts of racism and discrimination, but it cannot adequately deal with the unconscious forms of racism. Only through recognition of the problem and commitment to ethical solutions can progress be made.

Sports lawyers have a special role in this because they are involved, for the most part, in sports that are dominated by black players. These lawyers are already mandated to act ethically by the ABA guidelines, Players Associations rules, state laws, and hopefully their own inner ethical consciences. The Uniform Code of Conduct and the Richardson-Jones plan provide laudable guidelines to increase the ethical practice of the law and specifically improve racial policies within sports. In these mandates of ethical conduct, changing systems or practices that add to racist practices is of the utmost ethical concern.

Unfortunately, much of lawyer regulation is self-governance. Therefore, agents can often get away with unethical conduct that may also be illegal. This is not to suggest that agents are intentionally unethical it just suggests that enforcement is lacking. Any effort to change the situation will also be lacking without consistent state or federal legislation because without these guidelines, consistent regulation is not possible.

In the end, the "saddest side of sports is that it serves as a magnet for young African-American males but rejects them when their playing days are over."[272] These are the innocent victims of the problem of racism in sports. The legal bar, specifically sports lawyers, can take an active role in eradicating the problem if they want to. If a lawyer's real role is serving his or her client, then this is what must be done. The only way to ethically serve clients who face the disease of racism is to help them fight to change the situation.

---

272. SHROPSHIRE, *supra* note 163, at 230.