

Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 18 *Volume XVIII*
Number 4 *Volume XVIII Book 4*

Article 2

2008

Should Oscar Run?

Peter Charlish

Sheffield Hallam University, p.charlish@shu.ac.uk

Dr. Stephen Riley

Sheffield Hallam University, S.Riley@shu.ac.uk

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Peter Charlish and Dr. Stephen Riley, *Should Oscar Run?*, 18 Fordham Intell. Prop. Media & Ent. L.J. 929 (2008).

Available at: <https://ir.lawnet.fordham.edu/iplj/vol18/iss4/2>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Should Oscar Run?

Peter Charlish* & Dr. Stephen Riley†

BACKGROUND

Oscar Pistorius is a South African sprinter who was aiming to run at the Beijing Olympic Games in the summer of 2008, either in the 200 meters or the 400 meters. Given his physical condition, this may at first glance have appeared to be a ludicrous proposition. Pistorius was born without fibula bones and consequently had both legs amputated below the knee before his first birthday. He competes using a pair of prosthetic limbs attached to his legs. These J-shaped carbon fiber blades are known as “Cheetahs.”¹ The International Olympic Committee (“IOC”) and the International Association of Athletics Federations (“IAAF”), after conducting a series of tests, concluded on January 14, 2008 that Pistorius was ineligible for entry into the Games.² This Article looks at the circumstances surrounding the decision to ban Pistorius and further examines previous precedent and philosophical argument, which suggest that perhaps Pistorius has

A PDF version of this article is available online at <http://law.fordham.edu/publications/article.ihtml?pubID=200&id=2759>. Visit <http://www.iplj.net> for access to the complete Journal archive.

* Peter Charlish (P.Charlish@shu.ac.uk) is the Acting Head of the Law Department and Subject Leader for Sports Law at Sheffield Hallam University. He received his M.A. Law and M/Phil from the University of Sheffield.

† Dr. Stephen Riley (S.Riley@shu.ac.uk) is a lecturer in law at Sheffield Hallam University. He received his LL.M. in Law from the University of Nottingham and Ph.D. in Law from Lancaster University.

¹ See Matthew Pryor, *Oscar Pistorius Is Put Through His Paces to Justify His Right to Run*, TIMES (London), Nov. 20, 2007, available at http://www.timesonline.co.uk/tol/sport/more_sport/athletics/article2903673.ece (noting that the Icelandic engineered limbs modelled after the shape of the foot of a cheetah).

² *Oscar Pistorius Banned From Olympics*, TIMES ONLINE, Jan. 14, 2008, http://www.timesonline.co.uk/tol/sport/more_sport/athletics/article3184427.ece.

been judged too harshly and that it may be time to re-examine the eligibility rules for Olympic competition.

In March 2007, Pistorius finished second in the South African national championships in the 400 meters, which qualified him for their 4 x 400 meters relay team. Although Pistorius has still not achieved the individual qualifying time for the 400 meters, his achievement in the national championship, coupled with the likelihood of the South African team qualifying as one of the 16 fastest nations in the world, meant that it was highly likely that Pistorius would have been at the Olympic Games, at the very least in his capacity as a member of that relay team. However in March 2007, following the emergence of Pistorius as a realistic candidate for the South African team, the IAAF introduced an amendment to their rules which prohibited the: “use of any technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device.”³ Some have suggested that this rule was introduced specifically to deal with the threat posed by Pistorius,⁴ an allegation vehemently denied by IAAF council member Robert Hersh. Hersh stated that “[w]e did not legislate against his specific device because we haven’t looked at his specific legs.”⁵ Some critics have argued that his carbon fibre prosthetics give Pistorius an advantage over other competitors and that allowing his participation may signal the beginning of a very slippery slope.⁶ Despite the existence of the rule, Pistorius was initially at least

³ IAAF Competition Rule 144.2 (2008), available at <http://www.iaaf.org/news/newsId=42896.printer.html>; see also Steve Goldberg, *Do Disabled Athletes Have an Edge?*, TIME, June 8, 2007, available at <http://www.time.com/time/world/article/0,8599,1631050,00.htm>. Reportedly, athletes in the 2008 Beijing Olympic Games will attempt to use masks to prevent against pollution. It will be interesting to see if this rule is applied so as to prevent distance runners from wearing these masks during competition.

⁴ Jere Longman, *Disabled Runner Makes Case for Competing in Olympics*, INT’L HERALD TRIB., May 14, 2007, available at <http://www.iht.com/bin/print.php?id=5704964> (including rowers Robert Gailey, from University of Miami Medical School, and Angela Schneider, a sports ethicist from University of Western Ontario and a 1984 Olympic silver medalist, as examples).

⁵ Goldberg, *supra* note 3.

⁶ See John Inverdale, *Oscar Pistorius Ruling Should Be Heartless*, DAILY TELEGRAPH, Nov. 21, 2007, <http://www.telegraph.co.uk/sport/main.jhtml?xml=/sport/2007/11/21/soinve121.xml>.

temporarily given permission to compete, subject to the future investigation (the results of which were announced on January 14, 2008) into the nature of his prosthetic limbs, which was eventually used to extinguish his hopes of competing in the Games. Although the decisive ruling went against Pistorius, there does remain the possibility, remote though it may be, that the IOC could yet overrule the IAAF, for the IOC retains the right to set their own eligibility rules and reserves the right to intervene against the decision of a governing body if they feel it is necessary.⁷

Pistorius would not have been the first disabled athlete to compete in the Olympic Games.⁸ In 2000 and again in 2004 Marla Runyon from the United States, who is legally blind due to Stargardt's disease,⁹ ran in the 1500 meters and the 5000 meters. Two archers have also breached the divide between able-bodied and disabled sport: wheelchair bound Paola Fantato represented Italy at the 1996 Athens Olympics and New Zealand's Neroli Fairhall was only denied a place at the Moscow Games by the International boycott, although she reached the Los Angeles Games in 1984. As far back as 1904, at the St. Louis Games, the American gymnast George Eyser actually won six medals, including three gold medals, while competing with a wooden leg.¹⁰ The traffic is not one way between disabled and able-bodied sport. With the backing of the British Wheelchair Racing Association and Dame Tanni Grey-Thompson,¹¹ "able-bodied" Daniel Sadler has been competing in wheelchair events for twelve years.¹² Grey-

⁷ See Longman, *supra* note 4.

⁸ For details of disabled sports participants who have competed with "able-bodied" participants in the United States see Eldon L. Ham, *Disabled Athletes: A Last Vestige of Court Tolerated Discrimination?*, 8 SETON HALL J. SPORT L. 741, 749 (1998).

⁹ Stargardt's disease is an inherited degenerative condition, the most common form of which begins in late childhood and leads to legal blindness. See Richard L. Windsor & Laura K. Windsor, *Understanding Stargardt's Disease*, Vision Worldwide, <http://www.visionww.org/drs-windsor-stargardt.htm> (last visited Feb. 11, 2008).

¹⁰ See Goldberg, *supra* note 3.

¹¹ *Profile of Tanni Grey-Thompson*, BBC.com, http://www.bbc.co.uk/ouch/paralympics/profiles/tanni_grey_thompson.shtml (last visited Feb. 11, 2008) (Thompson is a multiple gold-medal winning paralympic athlete).

¹² Mr. Sadler began competing because of his father, who was a competitor paralyzed from the waist down. See Tom Fordyce, *Sadler's Sit-down Protest*, BBC.com, Apr. 3, 2002, http://www.news.bbc.co.uk/sport1/hi/other_sports/1909192.stm.

Thompson commented: “People assume Dan has an unfair advantage. He hasn’t,” she said. “He may have stomach muscles that work, but he’s carrying more weight, he gets leg cramps, and he makes a less aerodynamic shape.”¹³

He competed in the Great North Run in 2001, although the prize-money he won was withdrawn when the organisers realized that he was “able-bodied.”¹⁴ His story only came to prominence when he attempted and failed to gain admittance to the London Marathon in 2007, despite the fact that the rules for wheelchair athletes competing in the marathon make no mention of the necessity for a competitor to be ordinarily confined to a wheelchair.¹⁵ The rules refer only to the necessity for competitors to be secured into their wheelchair during the marathon and to propel the chair with hands and arms only.¹⁶

The interpretation attached to the rule introduced by the IAAF in March¹⁷ played a crucial part in the decision concerning Pistorius’ eligibility. Elio Locatelli¹⁸ explained the rule by saying: “With all due respect, we cannot accept something that provides advantages. . . . It affects the purity of sport. Next will be another device where people can fly with something on their back.”¹⁹

The kind of sensationalist language used by Locatelli does the IAAF no credit and unfortunately appears to move the debate surrounding these particular prosthetic limbs from the legal and scientific and into the territory more associated with tabloid newspapers. To reiterate, the rule prohibits the: “use of any technical device that incorporates springs, wheels or any other

¹³ *See id.*

¹⁴ *Id.*

¹⁵ Wheelchair Marathon Rules and Regulations, Disability Sport Events, <http://www.disabilitysport.org.uk/sports/dyncat.cfm?catid=1888> (last visited Feb. 11, 2008).

¹⁶ *Id.* Rule 3(a).

¹⁷ *See supra* note 2 and accompanying text.

¹⁸ Elio Locatelli is the director of development for the IAAF. *See* Jere Longman, *An Amputee Sprinter: Is He Disabled or Too-Abled?*, N.Y. TIMES, May 15, 2007, available at <http://www.nytimes.com/2007/05/15/sports/othersports/15runner.html>.

¹⁹ *Id.*

element that provides the user with an advantage over another athlete not using such a device.”²⁰

What is beyond question is that the limbs used by Pistorius are technical devices. Further, Hugh Herr, Associate Professor at Massachusetts Institute of Technology,²¹ argued that they have spring-like qualities: “The prosthetic he’s using is completely passive—it’s just a spring.”²² The implication of this statement may at first glance appear to have been fatal to Pistorius’ chances to compete in the Olympics. Herr’s statement implies that on a crude reading of IAAF rule 144.2²³ the prosthetic limbs appear to violate it. However, Herr then goes on to explain the nature of a spring and these particular limbs, suggesting that a spring will not produce its own energy, but will merely return a percentage of what is put in; this contrasts with the human foot which will generate its own energy on contact with the ground. Herr explains that the generation of force off the ground produced by the human leg, “comes from the muscles, and [Pistorius] has no muscles,”²⁴ which would suggest that Pistorius obtains no advantage over an able-bodied competitor.²⁵

In a 1987 study published in *Archives of Physical Medical Rehabilitation*, researchers evaluated the Flex-Foot, made by Ossur and similar to the Cheetah, against a human foot. Landing on a human foot in a running stride gave a 241% spring efficiency, or energy return, because of the

²⁰ Goldberg, *supra* note 3.

²¹ Hugh Herr is a professor of media, arts and sciences at Massachusetts Institute of Technology (MIT), and Director of the Institute’s Biomechatronics Group. He is also a double amputee. His work on prosthetic limbs won *Popular Mechanics* magazine’s first annual Breakthrough Leadership Award in 2005. See *Hugh Herr Wins Popular Mechanics’ Leadership Award*, Oct. 5, 2005, <http://web.mit.edu/newsoffice/2005/herr-1005.html>.

²² See Posting of Amber Smith to Health & Fitness Blog, http://blog.syracuse.com/healthfitness/2007/08/todays_athletic_prosthetics_ar.html (Aug. 7, 2007, 0:03 EST) (posting an L.A. Times article by Jeannine Stein).

²³ IAAF Competition Rule 144.2, *supra* note 3.

²⁴ See Smith, *supra* note 22.

²⁵ Ossur, the Icelandic manufacturer of the prosthetic limbs used by Pistorius, contends that Pistorius gets only between 60–70% of the return that a natural lower limb produces. See Pryor, *supra* note 1.

contraction of the calf muscles. In comparison, the Flex-Foot had an 82% spring efficiency.²⁶

Robert Gailey, a professor at University of Miami Medical School, comments further:

Are they looking at not having an unfair advantage? Or are they discriminating because of the purity of the Olympics, because they don't want to see a disabled man line up against an able-bodied man for fear that if the person who doesn't have the perfect body wins, what does that say about the image of man? . . . There is no science that he has an advantage, only that he is competing at a disadvantage.²⁷

It is clear, therefore, that, in terms of the crude spring qualities, this device certainly affords Pistorius a performance advantage over and above anything *he* could achieve without such limbs. Nonetheless, the crucial point here is that as regards the definition of the pertinent IAAF rule, this device does not give him an advantage "over another athlete not using such a device."²⁸ The question then arises as to how his eligibility should have been decided: should the performance advantage be measured against that which he would be able to achieve without his prosthetic limbs (ineligible) or should it be measured against the very athletes against whom he would be competing (eligible)? These artificial limbs appear to enable Pistorius to compete, albeit still at a disadvantage, against able-bodied athletes. It may therefore be suggested that it is perverse to deny him the right to compete and earn his living as a professional athlete on the able-bodied circuit if the basis of the decision is taken purely on the spring qualities of the devices.

With the agreement of Pistorius, the IAAF conducted an investigation into the nature of his artificial limbs, with the aim of producing definitive guidelines concerning the use of such prosthetic limbs. The President of IAAF, Lamine Diack, noted

²⁶ Smith, *supra* note 22.

²⁷ Longman, *supra* note 18.

²⁸ IAAF Competition Rule 144.2, *supra* note 3.

that the study, which was conducted in October and November of 2007, would ultimately decide whether Pistorius could use these particular prosthetic limbs.²⁹ The argument, as explained by Diack, did not appear to be about the use of prosthetic limbs *per se*, but rather about the use of what he termed *technical aids*. He commented:

It is important to underline that the IAAF does not have, nor contemplate, a ban on prosthetic limbs, but rather technical aids. The aim of the rule change is not an attempt to prevent disabled athletes from using any artificial limbs or competing against able-bodied athletes if they are good enough to do so.³⁰

Diack then went on to explain the rationale behind the IAAF investigation:

I am a great admirer of the Paralympic movement, and I would like to take this opportunity to congratulate Oscar on all his achievements to date. Yet now that Oscar has improved his times to the extent that he is able to compete in open athletics competitions, the IAAF has a duty to make sure that his prosthetics are analysed carefully. We cannot permit technical aids that give one athlete an unfair advantage over another. Personally, I am very pleased that Oscar has agreed to do this research³¹ with Professor Bruggemann,³² as the results will have very important implications for sports science.³³

²⁹ *IAAF and Oscar Pistorius to Co-operate*, International Sports Press Association, July 26, 2007, <http://www.aipsmedia.com/index.php?page=news&cod=1349&tp=n> [hereinafter *Co-operate*].

³⁰ *Id.*

³¹ In addition to examining the biomechanical properties of his prosthetic limbs, the tests (which were paid for by the IAAF at a cost of €30,000) also measured Pistorius against six other runners of similar quality and attempted to measure the entirety of his performance. See Pryor, *supra* note 1.

³² Bruggemann is one of the world's leading independent experts in athletics biomechanics at Cologne University's Institute of Biomechanics in Germany.

³³ *Co-operate*, *supra* note 29.

While Diack's rationale appears entirely reasonable, there must be some concern about the system of measurement utilized in the tests by the IAAF. While the measurement of the crude mechanics of the limbs themselves should not have proved to be problematic, what may have been more difficult were the intangible advantages and disadvantages that Pistorius gains. How, for example, may the fatiguing effect of lactic acid buildup in the calves of able-bodied athletes in the final stages of a 400 meters race be measured and the commensurate disadvantages suffered by them against Pistorius, who would suffer no such problems?³⁴ Conversely is it possible to quantify the disadvantages that Pistorius has suffered throughout his life and continues to suffer as a direct result of his disability? Just as Pistorius suffers no fatigue in his legs below his knees, similarly he is only able to produce propulsive effects via muscles above his knees. The likely net effect of his particular personal circumstances must be extremely difficult, if not impossible, to accurately quantify. However, it was crucial for Pistorius that the entire package of benefit and detriment was taken into consideration when assessing the impact of these artificial limbs, rather than the investigation looking solely at the limbs in isolation. Even if it was proven that the limbs themselves produced a real and obvious advantage, might such an advantage merely be viewed as redressing the overall performance balance, and therefore may not be viewed as an advantage over other elite athletes at his level of performance? By exploring the global performance of Pistorius rather than merely examining the effects of the prosthetic limbs on him in isolation, it is submitted that we retain objectivity in assessing not just the status of Pistorius, but also any athletes who may be in his position in the future. To properly assess possible performance advantage, one should also examine the overall detriment that personal circumstances may cause a participant. Equity demands that it is the net status of performance, rather than the isolated effects of the prosthetic limbs, that drives eligibility in the circumstances in which Pistorius found himself. The IAAF appears to have attempted an equitable

³⁴ The IAAF instigated the tests after they contested that they had evidence that he was the only 400 metres runner in history to run the second half of the race faster than the first half. *See Pryor, supra* note 1.

testing regime by measuring the performance of Pistorius against six other athletes of similar ability. The BBC reported that: "Pistorius ran alongside six able-bodied athletes who have similar 400 [meter] personal bests to him, in order to establish whether his blades counted as 'technical aids,' which are forbidden in competition."³⁵

In their attempts to ensure that the testing procedure was fair, the IAAF may have unwittingly put in place a testing regime that was flawed and potentially biased against Pistorius. Quite clearly, by measuring him against six other athletes capable of achieving similar times, the IAAF attempted to compare like with like. However, the position of Oscar Pistorius is unlike any other athlete. While he may currently be running times around 46 seconds, he has only been running seriously for just over three years.³⁶ It may well be the case that a more accurate measure would be to assess him against athletes who have run considerably faster, rather than against those who are close to their peak at the times Pistorius is currently capable of running. Pistorius' potential may be far greater than those against whom he is being measured. The physiology of the performance of an elite athlete at the very peak of their performance may be significantly different to the physiology of a good athlete (those against whom Pistorius is currently being measured) at the peak of their particular performance. The question must be asked: into which category should Pistorius fall? The IAAF has clearly placed him in the latter category, when it may have been more appropriate to measure him against the very elite, against whom he aspires to race. The IAAF appeared to conclude following the tests that Pistorius' performance was quantitatively different to those currently running his times. Therefore, it would seem that they concluded that his prosthetics gave him an unfair advantage, which left them no choice but to ban him from competing. It is at least

³⁵ Sam Lyon, *Pistorius Waits on IAAF All-Clear*, BBC SPORT, Nov. 16, 2007, <http://news.bbc.co.uk/sport1/hi/athletics/6917645.stm>.

³⁶ He took up running seriously following an injury received playing rugby. Track work formed part of his rehabilitation program. Phil Stewart, "Fastest Man on No Legs" Put to Rome Test, REUTERS, July 12, 2007, <http://www.reuters.com/article/reutersEdge/idUSL1282940920070712>.

debatable that this is a flawed approach and that the true test of his abilities should be measured against elite athletes, rather than merely good ones.

Immediately prior to the release of the ruling denying Pistorius the right to compete in the Olympics, news unfortunately leaked out making it clear that the IAAF would deny him entry into the Games. Writing in *The UK Times*, Pryor cited a conversation between Professor Brugemann³⁷ and *Die Welt*.³⁸

He [Pistorius] has a considerable advantage compared with athletes without prosthetic limbs who have undergone the same tests. . . . The difference is several percentage points and I did not think the findings would be so clear. . . . [H]is aerobic performance was worse, his anaerobic performance was the same. He could be in better shape. The fact that he still runs the same times as the other runners is due to his prosthetics. The prosthetics return 90 per cent [sic] of the impact energy, compared to the 60 per cent [sic] of the human foot.³⁹

While it is regrettable that this news appeared to have leaked out in this manner, it is clear that the apparent data attained on the prosthetic limbs is broadly consistent with data cited earlier.⁴⁰ However, the data gleaned concerning the biomechanical properties of the human foot appears to differ widely from that cited earlier.⁴¹ The differentiation is so great that concern must be raised as to how accurate it can ever be to assess performance benefit and detriment in this manner.

³⁷ Brugemann is the scientist leading the team responsible for testing Pistorius. *Id.*

³⁸ A German daily newspaper established in 1946. *See Die Welt*, Britannica Online Encyclopedia, <http://www.britannica.com/eb/article-9076527/Die-Welt> (last visited Feb. 11, 2008).

³⁹ Pryor, *supra* note 1.

⁴⁰ *See*, Longman, *supra* note 18 (noting that a prosthetic similar to that used by Pistorius had an 80% efficiency rating, compared to the 90% reported here).

⁴¹ Compare this figure of 80% to the study reported *supra* note 18 where the human foot was reported to be capable of generating its own energy return to the tune of 241% of that put in. *See id.*

Pistorius' feats in attaining this level of performance may be a precursor of things to come for the IAAF and other sports governing bodies. Goldberg has noted the impact of the wars in Afghanistan and Iraq on the number of young Americans returning from these conflicts with disabling injuries. They comment:

And while Pistorius could become the first amputee to qualify for an Olympic track event, he probably won't be the last to give it a try. With more and more soldiers returning from Afghanistan and Iraq with disabling injuries and high-tech fixes, the population of disabled American athletes is growing at a faster rate than anytime since the Vietnam war.⁴²

It therefore seems certain that there are likely to be further challenges to the sporting establishment from disabled athletes wishing to compete against able-bodied participants; we also may see legal challenges to the decisions of sports governing bodies. With the tests conducted on Pistorius costing in the range of €30,000, such challenges may place a high financial burden on sports governing bodies. Conversely, if it is left to the individual athlete to fund such tests, the high costs involved may prove to be prohibitively expensive, meaning few, if any, challenges will get off the ground. In the leading American case on the rights of disabled sports participants,⁴³ the subject of cost and resources was an issue raised as being significant by the dissenting opinion,⁴⁴ examined below.

RELEVANT CASE LAW

Disabled American professional golfer Casey Martin fought all the way to the Supreme Court for the right to use a golf cart when competing on the United States professional tour. Martin suffers from a degenerative circulatory disorder, Klippel-Trenaunay-Weber Syndrome, a progressive disease that obstructs the flow of

⁴² Goldberg, *supra* note 3.

⁴³ See generally *PGA Tour, Inc. v. Martin (Martin III)*, 532 U.S. 661 (2001).

⁴⁴ *Id.* at 696–98 (Scalia, J., dissenting).

blood from his right leg to his heart.⁴⁵ The consequence of this is severe pain, anxiety and an inability to walk 18 holes.⁴⁶ The Supreme Court was first required to answer whether the Americans with Disabilities Act (“ADA”) applied to entry to professional golf tournaments by a qualified disabled individual. In answering affirmatively, the Court ruled that under Title III of the ADA the Professional Golfers’ Association (“PGA”) Tour was prohibited from denying Martin equal access to its tour.⁴⁷ Title III of the ADA states: “[N]o individual shall be discriminated against on the basis of a disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”⁴⁸

Once the first question was answered positively, the Court then focused on three questions pertaining to the request modification: (1) whether the requested modification was a reasonable one, (2) whether it was necessary to help the disabled individual, and (3) whether it would fundamentally alter the nature of the competition.⁴⁹ In describing the Ninth Circuit’s finding that Martin affirmatively answered the first two questions, the Court stated that “permitting Martin to use a golf cart was both a ‘reasonable and a necessary solution to the problem of providing him access to the tournaments.’”⁵⁰

Without the provision of a cart, Martin would be denied equal access to the PGA tour. The provision of a cart, as the Supreme Court acknowledged,⁵¹ was not something that would merely make Martin’s experience more comfortable. It was of fundamental

⁴⁵ *Id.* at 668.

⁴⁶ *Id.* A professional golf tournament comprises four eighteen-hole rounds, played over four days. Typically courses are 6500–7500 yards in length and the average professional will walk an estimate of at least 4 miles each round. *See* PGA Tour Schedule, PGATour.com, <http://www.pgatour.com/t/schedule> (last visited Feb. 12, 2008).

⁴⁷ *Martin III*, 532 U.S. at 677.

⁴⁸ Americans with Disabilities Act of 1990, 42 U.S.C. § 12182(a) (2008).

⁴⁹ *Martin III*, 532 U.S. at 682–83.

⁵⁰ *Id.* at 673 (quoting *Martin v. PGA Tour, Inc. (Martin II)*, 204 F.3d 994, 1001 (9th Cir. 2000)).

⁵¹ *Id.* at 682.

importance, as without it he simply could not fulfill the requirement of walking the golf course. It was therefore both a reasonable and a necessary provision.⁵²

The key issue that the Court therefore needed to address was whether allowing Martin to use a cart would “fundamentally alter” the nature of the event.⁵³ Investigating this question, the Court found that there were actually three different sets of rules governing the playing of golf in the United States.⁵⁴ The pertinent rule was covered in the “Conditions of Competition and Local Rules,” sometimes referred to as the “hard card.”⁵⁵ The Court stated that the “hard card” required professional golfers “to walk the golf course during tournaments, but not during open qualifying rounds.”⁵⁶ Martin had been permitted to use a cart while attending Stanford University and in the PGA Tour’s Qualifying school.⁵⁷ However, at the third stage, the PGA Tour enforced a strict interpretation of the “hard card” rules and refused to allow Martin to use a cart.⁵⁸ The PGA Tour further refused to review medical records submitted by Martin in support of his application,⁵⁹ therefore arguably failing to take Martin’s individual circumstances into account, as required by the ADA.⁶⁰ In assessing the nature of golf, the PGA Tour “asserted that the condition of walking is a substantive rule of competition, and that waiving it as to any individual for any reason would fundamentally alter the nature of the competition.”⁶¹

Expert testimony provided by individuals, such as Jack Nicklaus, Arnold Palmer, and Ken Venturi, explained the importance of the nature of the fatigue in golf engendered in part by walking the course, and further that such fatigue was particularly important on the last day of a tournament when

⁵² *See id.*

⁵³ *Id.*

⁵⁴ *Id.* at 666.

⁵⁵ *Id.*

⁵⁶ *Id.* at 667 (citation omitted).

⁵⁷ *Id.* n.4.

⁵⁸ *Id.* at 669.

⁵⁹ *Id.*

⁶⁰ *Id.* at 668.

⁶¹ *Id.* at 670.

physical and psychological pressure was at its height.⁶² However, while suggesting that the use of a cart may give an individual an advantage over other participants, the expert testimony gave no opinion on any potential advantage that Martin specifically may or may not gain from such use.⁶³ In finding for Martin, the Court assessed the nature of any advantage gained by him in comparison to other competitors, rather than simply assessing the performance benefit accruing from the use of the cart in absolute terms. In fact, the district court judge found that:

[P]laintiff is in significant pain when he walks, and even when he is getting in and out of the cart. With each step, he is at risk of fracturing his tibia and hemorrhaging. The other golfers have to endure the psychological stress of competition as part of their fatigue; Martin has the same stress plus the added stress of pain and risk of serious injury. . . . To perceive that the cart puts him—with his condition—at a competitive advantage is a gross distortion of reality.⁶⁴

It was acknowledged that his use of a cart was a modification of the nature of the event. However, the Supreme Court held that such a modification would not “fundamentally alter” the nature of the event and that it was reasonable and necessary modification.⁶⁵ Therefore, the Court held that the use of a cart was justified under the three ADA requirements.⁶⁶

Casey Martin is not the only golfer in the United States in recent years to resort to the courts in an attempt to be granted permission to use a golf cart in a PGA event.⁶⁷ Although not suffering from the same disorder as Martin,⁶⁸ Ford Olinger’s disability caused similar problems and his case, like Martin’s,

⁶² *Id.* at 671.

⁶³ *Id.*

⁶⁴ *Id.* at 670 (citing *Martin v. PGA Tour, Inc.* (*Martin I*), 994 F. Supp. 1242, 1251 (D. Or. 1998)).

⁶⁵ *Id.* at 690.

⁶⁶ *Id.*

⁶⁷ *See generally* *Olinger v. U.S. Golf Ass’n* (*Olinger I*), 205 F.3d 1001 (7th Cir. 2000).

⁶⁸ Olinger suffers from bilateral avascular necrosis, a degenerative condition that significantly impairs his ability to walk. *Id.* at 1001.

hinged on his request to use a golf cart in the U.S. Open Golf Championship. However, in finding against Olinger,⁶⁹ the Court held that to allow him to use the cart would “fundamentally alter the nature of the competition.”⁷⁰ Essentially, the Court opined that there were two distinct reasons to deny Olinger use of a cart. The first was an argument that had been dismissed in *Martin*:⁷¹ that the fatigue engendered by walking was a critical part of golf and the use of a cart would impact upon this, thus fundamentally altering the nature of the challenge faced by Olinger.⁷² Partially quoting the district court, the Seventh Circuit held:

The point of an athletic competition . . . is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor. The set of tasks assigned to the competitor in the U.S. Open includes not merely striking a golf ball with precision, but doing so under greater than usual mental and physical stress. The accommodation Mr. Olinger seeks, while reasonable in a general sense, would alter the fundamental nature of that competition. . . . physical endurance and stamina and uniform rules are critical factors in determining the winner of a championship-level golf competition. Dr. Theodore Holland also testified that physical endurance and stamina are important criteria in determining the national golf champion. As he put it, “[t]here is a lot more to getting . . . around those 72 holes than just hitting the shots.”⁷³

While acknowledging the importance of fatigue under some circumstances, the suspicion remains that the court took no account

⁶⁹ Petition for a writ of certiorari was granted and the case was remanded to the Seventh Circuit for further review in light of the *Martin* decision. *See Olinger v. U.S. Golf Ass’n (Olinger II)*, 532 U.S. 1064, 1064 (2001).

⁷⁰ *Olinger I*, 205 F.3d at 1006.

⁷¹ *Martin III*, 532 U.S. at 667–78.

⁷² *Olinger I*, 205 F.3d at 1006–07.

⁷³ *Id.* at 1006 (citation omitted).

of the additional strains faced by Olinger due to his disability and merely measured the benefit accrued from cart usage against an able-bodied competitor, rather than measuring the advantage Olinger may obtain relative to the position he held due to his disability. This is an issue of fundamental importance when assessing whether or not an athlete may gain an advantage through the use of an artificial aid. The performance advantage obtained from the aid in isolation should not be the criterion upon which eligibility is measured. Arguably, the only appropriate approach is to weigh the individual circumstances in every situation. While such individual inquiry may prove a difficult standard for a governing body to meet and certainly may have resource implications, perhaps encouraging further litigation,⁷⁴ it is submitted that it is the most appropriate approach. Indeed, when considering the position of Casey Martin, it was specifically noted that the United States Golf Association (“USGA”) paid no heed to *his* individual circumstances. The Court stressed that such refusal was specifically against the purpose of the ADA:

Refusal of non-profit professional golf association to consider disabled golfer’s personal circumstances in deciding whether to accommodate his disability ran counter to the clear language and purpose of the ADA, despite the association’s claim that all the substantive rules for its “highest-level” competitions were sacrosanct and could not be modified under any circumstances.⁷⁵

Under the text of the ADA, there exists an obligation, as acknowledged in *Martin III*,⁷⁶ to take into account the individual circumstances of the claimant golfer in assessing the provision of a

⁷⁴ 42 U.S.C. § 101(10) (1990) specifically addresses undue hardship, which may be forced upon an organization in complying with the act, citing such issues as expense and resource implications for an organization in seeking to accommodate a disabled individual. It was noted earlier, for example, that the tests undertaken by Oscar Pistorius cost about €30,000. *Martin III*, 532 U.S. at 683 (Scalia J., dissenting). This raised concerns about the likelihood of encouraging further litigation if Martin was allowed to use a cart.

⁷⁵ *Martin III*, 532 U.S. at 689.

⁷⁶ *Id.* at 690.

cart.⁷⁷ This principle quite clearly goes hand-in-hand with the notion of a *reasonable accommodation* from the perspective of the competitor. In looking at what may amount to a *reasonable accommodation*, the nature of such inquiry is compelled to be an individual one. Only by investigating the nature of the individual's disability and the nature of the accommodation needed for them to be granted equal access to their chosen activity can the *reasonableness* of that proposed accommodation be assessed. The act rightly focuses on the individual's dealing with discrimination and barriers to equality.⁷⁸ Such an inquiry will have important implications for any individual attempting to rely on such a provision and will also have far-reaching resource implications for any governing body.

The second reason offered for refusing Olinger's request to use a cart was that the modification, the permission to use a cart, was not a reasonable one.⁷⁹ The issue was whether the USGA would have to undergo undue hardship in granting the use of a cart.⁸⁰ In assessing undue hardship, the ADA states:

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in [this chapter]. . . . In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include the nature and cost of the accommodation needed under this chapter; the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its

⁷⁷ *Id.*

⁷⁸ 42 U.S.C. § 12101.

⁷⁹ *Olinger v. U.S. Golf Ass'n (Olinger I)*, 205 F.3d 1001, 1005 (7th Cir. 2000).

⁸⁰ 42 U.S.C. § 102(b)(5)(A).

employees; the number, type, and location of its facilities.⁸¹

In assessing the position of the USGA in relation to the ADA, the court, again citing agreement with the district court, noting:

the administrative burdens of evaluating requests to waive the walking rule and permit the use of a golf cart. As the [district] court explained, the USGA “would need to develop a system and a fund of expertise⁸² to determine whether a given applicant truly needs, or merely wants, or could use but does not need, to ride a cart to compete.” The district court thought that this should be unnecessary. We agree.⁸³

This seems a remarkable reason to cite given the vast wealth of the USGA and the likely infrequency of requests to use a cart. Indeed the Seventh Circuit stated that the USGA had received only a dozen requests from eleven different people to use a cart in fourteen years.⁸⁴

The relevant legislation in England and Wales is similar in many ways to the provisions in existence in the United States. Under the Disability Discrimination Act 1995,⁸⁵ just as in the United States under the ADA 1990,⁸⁶ a duty exists to make *reasonable adjustments* in order to accommodate the disabled individual to whom the relevant act may apply. While there have been no cases involving professional sports participants attempting to gain access to facilities or employment opportunities, the lead case in England and Wales⁸⁷ appears to suggest that the duty to make *reasonable accommodation* may actually extend to positive

⁸¹ *Id.* § 101(10)(A)–(B).

⁸² Pryor, *supra* note 1. The tests undertaken by Oscar Pistorius have cost around €30,000. As technology advances it is not difficult to imagine such tests increasing in complexity and therefore cost. Similarly if Pistorius is successful in his quest, then others are likely to follow. This will push the boundaries further and add to the financial and administrative burden that international sports governing bodies will face.

⁸³ *Olinger I*, 205 F.3d at 1007.

⁸⁴ *Id.* at 1003.

⁸⁵ Disability Discrimination Act, 1995, c. 6. (Eng.).

⁸⁶ 42 U.S.C § 12182 (1990).

⁸⁷ *See generally* Archibald v. Fife Council [2004] UKHL 32 (U.K.).

discrimination discriminating in favor of the disabled person to effectively “level the playing field.”⁸⁸

Mrs. Archibald was employed as a road-sweeper. Following minor surgery she was unable to carry out her normal duties. Her employers, the Fife Council in Scotland, subsequently made commendable efforts to find her alternative work, including retraining,⁸⁹ and wherever possible, short-listing her as a matter of course for jobs that she was qualified to perform. In the next few months, Mrs. Archibald applied unsuccessfully for over 100 jobs with the council.⁹⁰ She was eventually dismissed on the grounds of incapacity almost two years after her original surgery. In hearing her appeal, the court held that *reasonable accommodations* may extend to offering the opportunity for a disabled worker to be re-employed at a higher grade without having to go through a competitive interview, despite the Fife Council’s policy that anyone being re-employed at a higher grade had to go through a competitive interview process.⁹¹ Effectively, the House of Lords held that such positive discrimination might be necessary to eliminate the disadvantage that may be suffered as a result of the disability.⁹²

The possibility of discriminating positively in favor of the disabled person would have important consequences for Oscar Pistorius. If the tests carried out on Pistorius are conclusive that the prosthetic limbs do indeed go further than merely redressing the balance of performance, then *Archibald*⁹³ and *Meikle*⁹⁴ would appear to suggest that under disability discrimination law this alone should not prove fatal to Pistorius’ chances of competing in the Olympics.

⁸⁸ *Id.* at ¶ 57.

⁸⁹ *Id.* at ¶ 53.

⁹⁰ *Id.*

⁹¹ *Id.* at ¶ 54.

⁹² The Court of Appeal in *Nottinghamshire County Council v. Meikle* extended the notion of reasonable accommodation to the provision of sick pay. 2004 WL 1372520, at ¶ 57 (U.K.). The Court held that a reasonable accommodation might involve treating the disabled employee more favorably than an able-bodied employee in assessing eligibility for contractual sick pay. *Id.* at ¶ 54.

⁹³ See generally *Archibald*, [2004] UKHL 32.

⁹⁴ See generally *Meikle*, 2004 WL 1372520.

Ultimately however, the key issue for Pistorius would appear to be one based on pure scientific analysis—do his “blades” give him an advantage over and above other comparable competitors. The IAAF ruled that they did and thus prevented him from running in the Olympic Games. However, it may be suggested that science is not the most not the most important consideration; it is to these other issues that this article now turns.

ANALYSIS

In order to unpack some of the conceptual and jurisprudential questions generated by Pistorius’ situation, we should return to the US Supreme Court’s discussion of the Americans with Disabilities Act in *Martin*.⁹⁵ The three questions the Court faced with respect to Title III of the Act—whether a modification is *reasonable*, *necessary*, and such that it would alter the *nature of a competition*—merit further consideration. However, a terminological divergence from the Supreme Court’s approach is necessary. The questions can be productively translated into alternative analytical categories: commensurability, classification, and sporting ideals. The first, commensurability, refers to whether we are justified in making a comparison between different competitors facing different challenges. The second, classification, refers to how we classify competitors on the basis of those different challenges. The third, sporting ideals, refers to the fundamental assumptions underpinning both comparison and classification in the context of sports.

A. *Commensurability*

Commensurability concerns what can and cannot be compared. If, and only if, two things are capable of being compared, commensurable, can a comparison be legitimate.⁹⁶ The foregoing legal debate concerning Pistorius generated at least two axes of comparison: The physical and psychological challenges faced by

⁹⁵ See *supra* note 43–66 and accompanying text.

⁹⁶ This simple, but crucial point by Aristotle underpins the notion of equity and equality. See ARISTOTLE, *NICOMACHEAN ETHICS*, V.3. § 1131a10-b15 (Roger Crisp trans. 2000).

competitors. Our first question is: Are these commensurable challenges in themselves? And, secondly, are the challenges faced by one competitor commensurable with the challenges faced by another? In response to the first question: The physical and the psychological are very different challenges and should *not* be compared directly. Although all sporting competitors face both mental and physical challenges, these are of a very different order to one another. While the physical challenges faced by Pistorius are very much of the essence here, he, undoubtedly, like any competitor, faces psychological challenges in the form of focus, preparedness, and the psychological “challenge” generated by the presence and competitive spirit of his competitors. And further, Pistorius’ psychological challenges are commensurable to those of his competitors: He may face additional psychological challenges grounded in his physical attributes, but those challenges may well be mirrored in psychological challenges faced by his competitors.⁹⁷ But one should note that these are challenges of an entirely different order to physical challenges. Thus, because they are therefore incommensurable, the mental and physical cannot compensate for one another. When we come to classify the fitness, readiness, skill, or strength of sportspersons we do not allow the physical injury of one to be compensated by the mental make-up or psychological challenges of another. If we were to attempt to compensate for differing levels of psychological preparedness we would begin to undermine fundamental principles, including performance, at work in any sport.

The question of physical fatigue is clearly more complex. While his competitors share similar forms of physiological fatigue, “similarity” being assumed on the basis of their all being elite athletes trained in the same event, Pistorius’ physiological fatigue is different. His fatigue is *different* but is it nonetheless *commensurable*? For his fatigue to be incommensurable it would demand not a quantitatively different but a *qualitatively* different degree of fatigue in comparison to his competitors. An example would be if the fatigue was so negligible, manageable, or

⁹⁷ Cf. Lise Gauvin & John C. Spence, *Psychological Research on Exercise and Fitness: Current Research Trends and Future Challenges*, in *THE SPORT PSYCHOLOGIST* 9, 434–48 (1995) (discussing the meta-research undertaken).

surmountable as to fail to count as fatigue at all. One should note that this is a descriptive question: Would we describe two different kinds of pain in two different people as sufficiently similar? Given the unique nature of pain, this is a difficult question to answer. If we describe pain *behaviors*, then it is simpler to ask: Does Pistorius display the outward signs of fatigue? Again, this is a descriptive, empirical question. In the absence of scientific advice to the contrary⁹⁸ we should assume that it is *not* qualitatively different fatigue; thus, it should not be commensurable. A definitive scientific finding that Pistorius experienced *no fatigue at all in any meaningful sense* would demand a particular classification of Pistorius as a competitor: A competitor who should not be compared to those who do experience fatigue. If on the other hand it remains clear in scientific terms that Pistorius does experience fatigue in some way then we are not permitted to dismiss Pistorius' claim *a priori*.

B. Classification

If Oscar Pistorius and his physiological make-up are, at the very least, commensurable with those of other competitors who similarly experience fatigue, then we have to ask further questions of how we should *classify* him.⁹⁹ The first question of classification is: What kind of competitor is he? He is, by definition, a sportsman, but should he be classed as an *elite* sportsman? Secondly, there is the question of classification in terms of *disability*, a social designation or status, versus *handicap*, a competitive designation or status. These particular classifications—and the gradations within them—are central not only to sound moral and legal decision-making, but are also at the center of discussion of sport. In fact, the questions of sporting-classification and disability-classification overlap. Both are essential for fair competition, because the classifications determine what ability can be realized by individuals and further determines

⁹⁸ Even leaked information on scientific study of Pistorius' performance concedes he experiences some comparable challenges. See *supra* note 41 and accompanying text.

⁹⁹ For a key discussion of the relevance of this, see Leslie Pickering Francis, *Competitive Sports, Disability, and Problems of Justice in Sports*, in *JOURNAL OF THE PHILOSOPHY OF SPORTS* 127–32 (2005).

who is compared to whom. Thus, classifications draw the boundaries between achievement and non-achievement.¹⁰⁰

Classifying an athlete as “disabled” generates significant problems, but these problems are germane. In short, being classified as disabled, like any other classification, involves internal and external comparison. Internal classification is within existing, established boundaries, such as the conventions and standards of a group, sport, or movement. In this sense, although Pistorius may be perceived as disabled, the very fact that he runs means that the designation *disabled* is problematic. External classification allows classification on bases external to those established boundaries. One such example is whether we should gauge his situation not in terms of social disability but rather in terms of relative handicaps within certain activities?¹⁰¹ In this sense, the “handicap” potentially lies with the other competitors and not with Pistorius. This division of external and internal classifications is easiest to discern if we consider whether Pistorius is a “disabled runner.” The question of whether Pistorius should be classified as “a disabled runner” is a classification that can be made on two grounds, depending upon whether we take the “disabled” component or the “runner component” as primary. If *disabled* is the primary component, then an internal classification is based on whatever is stipulated as “the set of all disabled people.” On the other hand, the external classification would be all of the standards external to that set, including the question of whether “disabled” is meaningful at all or whether it presumes a standard of *ability* so inhumanly broad as to be meaningless. If *runner* is the primary component, then classification is determined by whatever professional standards runners adhere to; in effect deferring questions of classification to professional sporting bodies. This becomes less a question of Pistorius-as-disabled and more a question of whether there is a handicap in place. External to that are any other possible comparisons, including whether it is possible to define “runner” at all, given that any definition

¹⁰⁰ See generally Gudrun Doll-Tepper, *Disability Sport*, in THE INTERNATIONAL POLITICS OF SPORT IN THE TWENTIETH CENTURY (Jim Riordan & Arnd Kruger eds., London 1999).

¹⁰¹ See Francis, *supra* note 99, at 130.

stipulated by a professional body is likely to arbitrarily exclude otherwise legitimate forms of running, such as someone running for a bus. In sum, even if classification is possible within a recognized standard, it is always possible to make comparisons outside the set of standards deployed by that body. Consequently, the question of what is ‘necessary,’ in the idiom of the Supreme Court, to include or exclude from a classification is always—to a greater or lesser extent—a partly arbitrary classification. This is because there is also something external to that classification that can be appealed to in order to challenge the classification. Classification is, therefore, something determined in many contexts by “insiders” who, with experience in the field or activity, are able to perceive classification boundaries purely on the basis of their insider experience. Those classifications are not purely arbitrary, however: They will include, in the context of sporting endeavour, the input of crucial sporting ideals.

C. *Sporting Ideals*

Three dimensions of sporting ideals are important: achievement, fair play, and excellence. We will consider these consecutively. First, *achievement* should be distinguished from excellence. Achievement is relative to *any chosen standard*; excellence, on the other hand, appeals to an objective standard of human excellence. Achievement is linked to performance, albeit performance in a double sense. On the one hand, the “maximization of one’s performance” is a dimension of achievement (though not its sufficient condition). However, achievement can be relative to others, to oneself, or to any other gauge. “Performance” also connotes that sport is performed in front of spectators. Certainly no one could dispute Pistorius’ achievement in terms of pure performance, in terms of both maximizing an impressive performance of speed and thereby providing a “performance” for spectators that is incomparable. Moreover, his achievement in the wider possible sense is impressive by any standard: in relation to his own background, to others born with his condition, to other runners who are non-professional runners, and to other runners who are professional runners. In terms of achievement alone, Pistorius’ running is

completely comparable to that of any other sportsperson, albeit on the basis that we are free to define achievement however we wish.

“Fair play” is more problematic insofar as it begs fundamental questions about nuanced, often implicit, expectations and standards.¹⁰² In other words, not only is fair play a negative injunction to adhere to the letter and spirit of the rules and avoid deceptive or perfidious means of achieving advantage, but also, positively, a question of infusing one’s whole approach with high standards of equity and fairness centered not only on achievement but acknowledging the talents and achievement of others.¹⁰³ In this sense there is no unequivocal response to Pistorius’ wish to run, *not* in terms of his own sporting ethos (which is presumably impeccable), but in terms of the perceptions of fellow competitors and indeed of spectators. Would they see Pistorius’ presence as a reflection of fair play? The answer must be both yes and no. In terms of raw perception, his presence, despite any classificatory or comparative justification, may simply *look* like an affront to the principles by which sports undertaken. It simply cannot be said that his whole approach is infused with equity and fairness because he appears to have an advantage. We cannot ignore this extrinsic dimension of the experience of sport; the idea that the perceptions of spectators viewing a performance play an important role in conceptualizing both sport as a whole and fair play more specifically. At the same time, sport and fair play are not reducible to the perception of spectators: Fair play in the first instance is something determined by experienced *insiders* who know and ultimately dictate the legitimate boundaries of a sport. To make the same point in abstract terms, all boundaries are porous boundaries. The “inside” and “outside” of sport are not impermeable; the standards of fair play go beyond sport in the same way that law and ethics generally have to inform sport. In sum, fair play is not something that can be definitely stated and monopolized by sport or sports, rather it evolves as all mores

¹⁰² For a critical discussion of the “bag-of-virtues” account of fair play, see Robert Butcher & Angela Schneider, *Fair Play as Respect for the Game*, 25 J. OF THE PHIL. OF SPORT 1–22 (1998).

¹⁰³ See Sigmund Loland & Mike McNamee, *Fair Play and the Ethos of Sports: An Eclectic Philosophical Framework*, 27 J. OF THE PHIL. OF SPORT 63–80 (2000).

evolve. Consequently, whether or not we (and sport spectators) perceive Pistorius' presence as manifesting or lacking "fair play" is something that cannot be definitively stated. Rather, it can and will change.

As a final point on fundamental sporting principles, compare the foregoing discussion of fundamental sporting principles with the terms within which Pistorius' position has been conceptualised: *purity*. The "purity" of a sport looks like a *prima facie* intelligible claim concerning preservation of certain sporting standards that allow that particular sport to be undertaken in an equitable, and indeed, satisfying way. In fact the notion of purity seems to add little to the principles of fair play and achievement, but has the rather more unpalatable connotation of maintaining a certain class of people ("able-bodied" people) as carrying the "essence" of the sport while others ("non-able bodied" people) can only undertake a variation on the "real" form of the sport. This is not to say that sporting bodies should not apply standards or, absurdly, that they should avoid discrimination on all grounds including *sporting* ability. Rather, purity is far less meaningful than sports' relationship with *excellence*. Translated into more robust terms, sport, particularly elite sport, aims to foster and manifest excellence, by manifesting a standard that "cannot be humanly surpassed." This is not without substantial problems in itself. Being "humanly" is a reification, a treating as real and concrete something that is only abstract. There is no unchanging standard of "human" or "humanly" other than what we abstract from human activity in the past, present, or future. Sporting excellence is similarly a way of stating in abstract terms that the highest standards within a particular form of activity has and will change over time. To parallel, in standard philosophical discussions of "human excellence" (stemming, like discussion of equality, principally from Aristotle¹⁰⁴), this "excellence" is actually a quite modest set of virtues whereby humans *should strive to be the best they can be given the inheritance they receive from life and nature*.¹⁰⁵ Is there a better description of Pistorius' bid for Olympic glory? A manifestation of striving to draw the best he

¹⁰⁴ ARISTOTLE, *supra* note 96, at VII, 1.

¹⁰⁵ *Id.* at II, 6.

can from his natural inheritance, an inheritance that other, less-able individuals would not have been able to profit from. Consequently, if we rely in the final analysis on fundamental sporting principles, and if sporting excellence is to mean anything, Pistorius is an exemplar of excellence. The *classificatory* question of whether he should be striving for excellence within *this* class of elite competitors is a question that simply cannot—legally, morally, or indeed logically—be satisfactorily resolved. We should attend, rather, to his clear, and all-too-human, manifestation of excellence. And although it can be overstated, this, in turn, may well contribute to wider ethical discourse and ethical evolution within and without sport. This point is made forcefully by Loland and McManee: “If practiced according to our norm of fair play, we believe that sporting games can stand out as a paradigmatic practice of the possibility of moral dialogue that is so important in our modern, pluralistic societies.”¹⁰⁶

In other words, all of the principles enunciated by the Supreme Court—reasonable, necessary, and in keeping with sporting ideals—are principles which will evolve. There is potential for them to evolve in a positive way that begins to erode the division between ability and disability. Ultimately, this erosion of division is not simply gesture politics but “a paradigmatic practice of the possibility of moral dialogue” potentially conducted in the most public of arenas, the Olympic Games.

CONCLUSION: PURITY VERSUS EXCELLENCE

This Article has sought to demonstrate that Oscar Pistorius’ participation in the Olympic Games is consistent with the jurisprudence of both the United States Supreme Court and case law from England and Wales. That jurisprudence may be inconsistent, but it offers sufficient grounds for opposing a superficial exclusion of Pistorius. Exclusions are never more superficial than when they invoke the “purity” of a sporting endeavour. This claim merely serves to obscure clearer debates concerning equity, comparability, and sporting ideals. Those

¹⁰⁶ See Loland & McNamee, *supra* note 103, at 76.

debates suggest that Pistorius' participation is both consistent with basic principles at work in sporting justice but also that Pistorius' participation serves an important symbolic function in its demonstration of the importance of excellence.

Pistorius' running is surely symbolic. It is symbolic of the increasing importance of the cybernetic integration of humans and technology; it is also symbolic of the triumph of human determination and spirit. The participation of Pistorius at the Olympic Games would be of crucial symbolic importance given the Olympic ideal:

The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practised without discrimination of any kind. Discrimination, therefore, [is] not acceptable in either spirit or in practice on the basis of disability. Discrimination on the basis of disability [is] no different and [is] as objectionable as discrimination on the basis of race, colour, sex, religion or politics.¹⁰⁷

However, the question of whether Pistorius' participation at the Games would be anything *more* than symbolic, whether he has a *right* to participate, is the crux of the matter. That right is conferred on those who are classified as facing commensurable challenges in pursuing human excellence, and who excel in challenging circumstances. Any elite sporting activity is a meeting of equals to identify the first and best amongst those equals. Accordingly, Pistorius' participation in a shared pursuit of excellence is absolutely in keeping with the ethos of elite sport. It appears to have been determined that Pistorius' prostheses offer him an advantage that is *qualitatively* different from those advantages that can be gained by other competitors. However, this in itself may be highly questionable. It may be decided by Pistorius himself—as an elite athlete committed to sporting ethics—cannot participate in sport. However, until that point, the inclusion of Pistorius would have served to maintain both an ideal of excellence and a distinctive contribution to Olympic ideals.

¹⁰⁷ Doll-Tepper, *supra* note 100, at 182 (quoting Dr. Robert Steadward).

2008]

SHOULD OSCAR RUN?

957

Pistorius should run for both of these reasons, and, most importantly, because he has every right to run.