

# Sports Agents, Role Models and Race-Consciousness

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## ARTICLES

# SPORTS AGENTS, ROLE MODELS AND RACE-CONSCIOUSNESS†

KENNETH L. SHROPSHIRE\*

Sadly, many black players, whether they admit it or not, practice racism against their own people. They are so afraid that a black agent won't be treated with the same respect from pro sport's all-white ownership. Hence, some black players believe they need the Man to talk to the Man in order to get a fair deal. That's why they overlook black agents and hire white ones.<sup>1</sup>

Should we be color-blind to the race of those we hire to provide professional services? This article examines this question by looking at the role of the African-American sports agent in representing African-American athletes. The article specifically explores the role race-consciousness should play in this agent selection process.<sup>2</sup> Many outsiders see the pairing as a natural occurrence for African-American sports agents to represent successful members of their own race in contract negotiations. The reality is that until recently such black-on-black representation was a rare event.<sup>3</sup>

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1. Rob Parker, *Re Agents, Players Not in Black*, *NEWSDAY* (Nassau and Suffolk Edition), July 12, 1995, at A61.

2. For discussions of race-consciousness and its conflict with notions of colorblindness in American law, see, e.g., T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 *COLUM. L. REV.* 1060 (1990) and Gary Peller, *Race Consciousness*, 1990 *DUKE L.J.* 758.

3. See discussion *infra* notes 20 to 34 and accompanying text. Although sports is often called a microcosm of society, the sports agent business is unique. Certainly some issues raised here regarding the hiring of professionals, and the role race should play in that process, may be applicable to society at large.

Part I of this article sets out the general issue of the patronization of African-American businesses and professionals by African-Americans. Part II provides an overview of the sports agent business and the fierce competition for clients. Part III focuses on the lack of the use of African-American sports agents by African-American athletes. Part IV discusses why African-American agents should play a greater role in the business. Among other issues discussed in this section is the African-American athlete's need for role models.<sup>4</sup> This, of course, is counter to the traditional perceived duty for athletes to serve as role models to America's youth.<sup>5</sup> Finally, Part V and the conclusion suggest possible reforms that can be made by African-American athletes as well as the major sports management and marketing firms and the limited role the law may play in this regard.

### I. THE MYTH

The recognition of the lack of patronization by African-Americans of African-American businesses is apocryphal. It is also a topic that has received little attention except in instances where controversy arises. Recent focus on the issue has centered on the success of Korean-American shopowners in African-American communities where African-Americans have failed.<sup>6</sup> At various times, this has been a major issue in

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4. One cannot use this term without trepidation. Richard Delgado has criticized the role model justification for affirmative action, for example, in Richard Delgado, *Affirmative Action as a Majoritarian Device: Or Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222 (1991). See also Anita Allen, *On Being a Role Model*, 6 BERKELEY WOMEN'S L.J. 22 (1991) (questioning role model arguments). My use of the term role model, however, varies somewhat from Delgado's definition of a role model as someone who is "expected to communicate to their communities that opportunities are indeed available and that hard work and perseverance will be rewarded." Delgado, *supra*, at 1222 n.5. My usage here more closely resembles his definition of "mentor" or "one who tells aspiring young persons of color truthfully what it is like to practice your profession in a society dominated by race." See Delgado, *supra*, at 1230 n.49. Here, however, the agent's role is more to tell the athlete of color what it is like in society once his playing days are over. See *infra* Section IV.

5. For a discussion of the traditional role athletes are viewed as playing as role models, see, e.g., Paul Attner, *A Culture of Irresponsibility*, SPORTING NEWS, Mar. 28, 1994, at 12. There the author writes appropriately as to whether or not athletes are role models:

Let's eliminate one misconception immediately. Whether [Charles] Barkley and his peers like it, they are role models. Maybe they think it is unfair; maybe they don't like the burden the title carries. No matter. As soon as people start watching and reading about them, they are potential heroes.

*Id.*

6. See, e.g., Earl Ofari Hutchinson, *Fighting the Wrong Enemy*, THE NATION, Nov. 4, 1994, at 554.

the Los Angeles and New York media, sometimes resulting in civil unrest.<sup>7</sup>

A classic story, most often credited to Malcolm X, provides an insight into the perception by the black community regarding the competence of their own professionals. The story has it that in a small southern town on a hot day, people stood in a long line wrapped around a corner to purchase ice. On the other side of town a black ice vendor sat with plenty of ice doing very little business. When a black patron in the long line was asked why he stood in the long line rather than purchasing the ice in his own neighborhood he responded, "well everybody knows the white man's ice is colder."<sup>8</sup>

Different versions of the same story have been used to explain similar instances where African-Americans do not patronize African-American businesses. It is apparent that some vestiges of this negative race-consciousness have carried over into the African-American athlete's selection of a sports agent.

I grew up in inner-city Los Angeles where my father was a surgeon. More than once I recall him telling a colleague or a friend about the longtime patients who came in for remedies to treat the common cold or to ease aches and pains. At some point they had an ailment that required surgery. They would ask my father whom he could recommend, knowing his training, but presuming that his race precluded him from being the "best." It seemed, "a black doctor is fine unless you've got cancer," my father would remark.

7. *Id.* See also Lucie Cheng & Yen Espiritu, *Korean Businesses in Black and Hispanic Neighborhoods: A Study of Intergroup Relations*, 32 *SOCIOLOGICAL PERSPECTIVES* 521 (1989); Lisa L. Ikemoto, *Traces of the Master Narrative in Story of African-American/Korean-American Conflict: How We Constructed 'Los Angeles'*, 66 *S. CAL. L. REV.* 1581 (1993).

8. See, e.g., Barry Cooper, *Black Sports Agents Beat Odds with Top Clients*, *NEW PITTSBURGH COURIER*, July 13, 1994, at A-10, where the same story is recounted by the national director of the Rainbow Coalition for Fairness in Athletics (RCFA). *Id.* The RCFA held a meeting with black agents on November 17, 1995 in Washington, D.C. exploring this issue. The meeting was billed as "The Colder Ice Syndrome."

While the myth of some sort of intellectual superiority of whites permeates the African-American community, there is also the myth of white athletic inferiority. *WHITE MEN CAN'T JUMP* is not just a movie title but a belief. In other athletic areas, I can recall my high school experience of our all black inner city Dorsey High School in Los Angeles going to play North Hollywood High School in 1973. A banner held by the Dorsey student rooting section set forth the ominous words in white on a black background, "A BLACK DAY FOR NORTH HOLLYWOOD." We would beat them with our superior speed, we all believed. I remember two years later having to run a timed forty-yard dash against a member of that team when we both arrived at Stanford. He beat me handily. The shock injected a needed dose of reality into my own thinking. See also Miki Turner, *White Girls Can't Jump*, 14 *WOMEN'S SPORTS & FITNESS* 62 (1992).

I also recall various times during my childhood when the concept of "buying black" or "recycling black dollars" in the "community" were the watch words of the day. I remember this most vividly following the 1965 Watts riots. The issue of buying black was raised prominently again following the riots in Los Angeles in 1992. Bernard W. Kinsey, who was a co-chairman and chief operating officer of the redevelopment organization Rebuild L.A., said:

To the extent that we spend our money outside of our community, we make someone else more productive than us. Ask yourself: Who is my lawyer? Who is my doctor? Where do I eat? Who does my tax returns? All of these services can be supplied by African-Americans.<sup>9</sup>

The debate regarding black-on-black representation is similar to the debate over whether African-Americans should direct motion pictures focusing on African-American subjects in Hollywood. At a panel discussion at New York University on the subject in 1994, African-American director Spike Lee commented that just as Francis Ford Coppola and Martin Scorsese brought their backgrounds to films on Italian-Americans, African-Americans should be allowed to do the same. The discussion rages on both sides in this realm as well. Bill Duke, another African-American director, said, "We should not be limited by ethnicity, only by our ability." Similarly, Lee added, "There's no guarantee that just because it's black it's going to be great. A lot of the black programs on television are minstrel shows, and they are written by black writers. There's no guarantee."<sup>10</sup>

## II. THE SPORTS AGENT BUSINESS

Like the director in the movie industry, the sports agent is a powerful player in the sports world. The sports agent may be in solo practice or in any size entity ranging up to the large sports marketing and management

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9. See Calvin Sims, *The Nation: 'Buying Black' Approach Paying Off in Los Angeles*, N.Y. TIMES, May 23, 1993, § 4, at 5.

10. See William Grimes, *Should Only Blacks Make Movies About Blacks?* N.Y. TIMES, Mar. 28, 1994, at C11. Filmmaker Spike Lee was selected, over Ken Burns, to produce and direct a motion picture on Jackie Robinson. Rachel Robinson, Robinson's widow, said, "I wanted the very best product I could get. And I really felt, and I still feel, that a black man can understand another black man and all the nuances of his life better than anyone else can. I would feel that way about a woman. Not that white writers cannot write about blacks. There have been white writers who have written about black people and done a good job. I just think you have an edge when you come out of the same experience." See William C. Rhoden, *Looking at the Many Sides of the American War Hero*, N.Y. TIMES, Oct. 30, 1994, at 11.

firm. No matter the type of entity, the sports agent not only negotiates player and marketing contracts for the athlete, but also often guides the athlete in investment and personal life style decisions.<sup>11</sup> The key distinction is that usually in Hollywood, African-American actors are not selecting their directors; in sports, however, African-Americans have the power to do so.

The sports agent business is not one with a multitude of success stories, black or white. Although there are probably a few thousand individuals calling themselves sports agents, other than employees at a few of the major sports management and marketing firms, there are less than two dozen people making a living at that job exclusively.<sup>12</sup> Others combine their sports agent business with careers varying from attorneys, accountants, and insurance sales people to recreation directors.<sup>13</sup> Because sports agents confront no formal educational requirements and only the rare bona fide license requirement, the agent may come from any profession. Although there is no federal law regulating the field, several states do have agent regulatory statutes.<sup>14</sup>

The competition among agents for athlete clients is vigorous. In the last available statistics published by race, there were 200 agents registered with the Major League Baseball Players Association in 1992.<sup>15</sup> Of those 200, 150 had active clients.<sup>16</sup> Only five of those 150 agents, or a little over three percent, were African-Americans.<sup>17</sup> In football the numbers were similar. In 1991 there were 675 agents registered as con-

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11. For a discussion of the role of the sports agent, see generally KENNETH L. SHROPSHIRE, *AGENTS OF OPPORTUNITY: SPORTS AGENTS AND CORRUPTION IN COLLEGIATE SPORTS* (1990); Robert P. Garbarino, *So You Want to Be a Sports Lawyer, or is it a Player Agent, Player Representative, Sports Agent, Contract Advisor, Family Advisor or Contract Representative?*, 1 *VILL. SPORTS & ENT. LAW F.* 11 (1994).

12. See SHROPSHIRE, *supra* note 11, at 6. See also ROBERT H. RUXIN, *AN ATHLETE'S GUIDE TO AGENTS* 31 (1989) (citing an agent who was also a janitor). In terms of total numbers of agents in relation to numbers of players, in 1994 there were 845 agents certified by the National Football League Players Association (NFLPA) and only 222 players selected in that draft. Only half of the registered agents with the NFLPA have clients in the league. Similarly, of 161 agents certified by the National Basketball Players Association, only 94 have at least one client. See J. Mark Rodgers, *The Need for Federal Agent Regulation*, *THE SPORTS LAWYER*, Vol. XIII, Mar./Apr. 1995, at 1.

13. *Id.* Most could not make a living otherwise.

14. See Shropshire, *supra* note 11, at 6 for an overview of the sports agent business. For a summary of the statutory framework see Appendix III therein. See also *States Regulating Professional Sports Agents*, *THE SPORTS LAWYER*, Fall 1995, at 3.

15. See Bobby Clay, *Black Agents Compete For Blue Chip Athletes*, *BLACK ENTERPRISE*, July 1992, at 48.

16. *Id.*

17. *Id.*

tract advisors with the players association, 320 had active clients and forty-five, or fourteen percent were African-Americans.<sup>18</sup>

The reason for the fierce competition is the high income potential of the sports agent. For example, the star running back for the Dallas Cowboys has a player contract for a reported \$13.6 million over four years.<sup>19</sup> Based on salary alone, his agent stands to earn \$544,000, or four percent, over that four-year period. This equals \$136,000 per year for a single client. This does not include any commissions from endorsements where the rate to the agent is more likely to be twenty percent of the value of any contracts. For a superstar client, endorsement fees are likely to exceed the value of the player contract.<sup>20</sup>

It should also be recognized that the selection of an agent is a highly personal matter.<sup>21</sup> It is the type of relationship that involves a great deal of personal interaction. Thus, the sports agent-athlete relationship is the type of area where the law should not, and in fact will not, compel a continuing relationship.<sup>22</sup> Athletes, regardless of their race, should simply select the best agent for his or her particular circumstance. As in many businesses, most often, because of historical barriers, whites tend to have longer track records in the industry.

The African-American sports agent has, however, begun to have some success in the recruitment of clients, and although this progress has been slow, it is measurable. Ten years ago, as one writer phrased it,

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18. *Id.*

19. See Mickey Spagnola, *Dallas Cowboys*, SPORTING NEWS, Sept. 27, 1993, at 43.

20. See, e.g., Randall Lane, *The 40 Top-Earning Athletes*, FORBES, Dec. 19, 1994, at 266. For example, of Michael Jordan's \$30.01 million in earnings in 1993, 30.0 million was from endorsements. For Shaquille O'Neal, of \$16.7 million \$12.5 million came from endorsements. For Jack Nicklaus, of \$14.8 million in earnings \$14.5 million was from endorsement fees. *Id.*

21. See, e.g., ARTHUR ASHE & ARNOLD RAMPERSAD, DAYS OF GRACE 178 (1993), where African-American tennis great Ashe makes this clear in the following exchange:

"You call yourself a role model for young blacks," one friend snapped at me not long ago, "but you have a white man handling your money?"

"I don't call myself a role model," I replied. "And I don't have a white man handling my money. I have Donald Dell, who happens to be white."

"There's no difference, Arthur. None at all."

"Yes, there is!"

"I'm surprised," he went on, "that you don't have a white wife!"

"Well, if I had one, it would be my business and my business alone, wouldn't it? And she would be my wife, first and foremost, who happened to be white."

22. If an athlete desires to get out of a contract with an agent the fees must still be paid, but an order of specific performance, compelling the two to work together, will probably not be granted due to the personal nature of the relationship. See generally JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 666 (3d ed. 1987). See also *Lumley v. Wagner*, 1 De C.M. & G. 604, 42 Eng. Rep. 687 (Lord Chancellor's Court 1852).

“high profile black sports agents were rare as snowballs in Miami.”<sup>23</sup> None of the leagues or players’ associations currently track the race of player agents.<sup>24</sup> Thus, there are no official tabulations of the changing role of African-American agents. With that in mind, looking at the representatives of athletes taken in the first round of the National Basketball Association draft from 1992 through 1994, of twenty-seven players drafted in 1992, five had African-American agents. Of twenty-seven players drafted in 1993, nine had African-American agents, and in 1994, with twenty-seven selections, nine had African-American agents.<sup>25</sup> *USA Today* found that in the 1993 NFL draft twenty of the first fifty-six athletes selected had hired African-American agents.<sup>26</sup> This number represented thirty-six percent of the players in the first two rounds.<sup>27</sup>

It would seem that African-Americans would have success in the sports agent business at a level more significant than the percentages noted above. Seventy-nine percent of the athletes in the National Basketball Association are African-Americans. Sixty-five percent of the athletes in National Football League are African-Americans. In Major League Baseball eighteen percent are African-Americans.<sup>28</sup>

There is not, however, always a great deal of science to the agent selection process by student-athletes.<sup>29</sup> One of the major players in this decision making process is the player’s head coach. In the National Collegiate Athletic Association’s Division IA football programs, this person is probably white. In 1994, of 107 schools with football programs in this division, only three of the head coaches were African-American.<sup>30</sup> Arguably, a white coach is less likely to refer an athlete to an African-American agent. The life experiences and associations of a head coach are likely to be no different from the associations of anyone else, largely limited to one’s own race. Thus, there is probably no negative racial

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23. Barry Cooper, *Black Sports Agents Beat Odds with Top Clients*, NEW PITTSBURGH COURIER, July 13, 1994, at A-10.

24. *Id.*

25. As compiled by the author. Note that in 1992 and 1993, African-American agent Len Elmore represented two athletes in the first round. In 1993, African-American agent Bill Strickland represented three first-round picks, and in 1994, African-American agent Fred Slaughter represented two first-round draft picks.

26. See Carolyn White, *Agents See More Racial Diversity*, USA TODAY, May 7, 1993, at 9C.

27. *Id.*

28. See RICHARD E. LAPCHICK & JEFFREY R. BENEDICT, 1994 RACIAL REPORT CARD 24 (1994).

29. See RUXIN, *supra* note 12, at 30.

30. See Steve Wieberg, *Study Faults Colleges on Minority Hiring*, USA TODAY, Aug. 18, 1994, at 1C.



motivation in a "same race" referral, but just a reflection of American society.<sup>31</sup>

### III. THE RACE CARD

Is it wrong to include the race of the sports agent in the athlete's selection criterion? Is this sort of race-consciousness appropriate in this or any situation? Should the selection of an agent be made on a purely color-blind basis?<sup>32</sup>

#### A. Race as a Positive Factor

The father of NFL running back Barry Sanders accurately expressed part of the reason for the recent increase in the use of African-American agents by African-American athletes to *Black Enterprise*:

I wasn't going to raise my son his whole life and then turn him over to some white people and let them run his life. A lot of them called me and told me how well they knew all the owners, how they played golf with them, but to me that's the worst thing for a player if the agent and owner are that close. I was looking for somebody honest, somebody I could communicate with and go to church with. I just felt more comfortable with blacks. Some people might say that's prejudice, but it's not. Plus, their kids don't sign with black agents; why should ours sign with white agents?<sup>33</sup>

This is arguably a positive expression of race-consciousness.

Similarly, Chris Webber, a premier basketball player for the University of Michigan, announced that he would hire a black agent after he decided to enter professional basketball. When asked if he was being racist, he responded, "It's not being racist, it's about giving your own a chance."<sup>34</sup> Webber's expression of consciousness too is not negative toward a race but positive toward his own.

According to C. Lamont Smith, a prominent African-American sports agent: "The sports and entertainment industry is to African-Americans what technology is to the Japanese and oil is the Arabs. It is

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31. On the related subject of the selection of head coaches, see Claire Smith, *Too Few Changes Since Campanis*, N.Y. TIMES, Aug. 16, 1992, § 8, at 1, where Hall of Fame football coach Bill Walsh stated, "It's a very fraternal thing. You end up calling friends, and the typical coach hasn't been exposed to many black coaches."

32. See discussion *infra* notes 51-66 and accompanying text.

33. See Clay, *supra* note 15, at 7.

34. See Barry Cooper, *Black Sports Agents Beat Odds with Top Clients*, NEW PITTSBURGH COURIER, July 13, 1994, at A-10.

incumbent upon us to work to control our natural resources."<sup>35</sup> But is this reason enough for African-Americans to incorporate race into their decision making process?

### B. *The Prevailing Negative Image*

African-American sports agents are not only confronted with the historic allegiance of African-American athletes to white agents and a lack of positive race-consciousness by these athletes, but also with the negative commentary of the white sports agent. One of the pioneer African-American agents, Fred Slaughter of Los Angeles, told writer Phillip Hoose:

[White agents] just tell the Kid, 'only a white man can make that deal for you.' They have actually said that. And some kids, kids who are sitting in a well-furnished office with computers clicking and listening to a guy with gold teeth say that, they'll think, 'wait a minute. If he's sayin' that, he must be right.' There are a lot of problems. It's been rough.<sup>36</sup>

Fred Slaughter also recalls a black athlete he was trying to sign on as a client in 1975.<sup>37</sup> He was competing against a white agent for this player.<sup>38</sup> The player, who was black, told Slaughter that the white agent said to him:

You know that Slaughter is qualified. He played basketball at UCLA, and he has a law degree. But, what you have to understand is that representing professional athletes is a white man's business. Only white men can sit down with other white men and get you the money you deserve.<sup>39</sup>

In a response to Slaughter's experience, agent George Andrews, who is white, explains that he thinks no reputable sports agent feels that way today.<sup>40</sup> Andrews even touts his own efforts to include blacks on his negotiating team.<sup>41</sup> It is, of course, impossible to know what the feelings of agents are on this issue. But it is apparently true that the use of the white-agent-is-better-than-black rhetoric has continued since Slaughter's cited encounter. And if the argument is not coming directly from the

35. C. Lamont Smith, Address at the Wharton School, University of Pennsylvania (Dec. 9, 1994).

36. See PHILLIP M. HOOSE, *NECESSITIES: RACIAL BARRIERS IN AMERICAN SPORTS* 29 (1989).

37. Cooper, *supra* note 34, at A-10.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

agents, the belief is still ingrained in some African-American athletes. Often the decision of all athletes in selecting an agent is not color-blind but one that gives a preference to white agents.

African-American sports agent Ray Anderson told *Black Enterprise*, "unfortunately, some of the star black players have swallowed the line that you've got to have a white agent and maybe a white, Jewish agent to get the very best deal."<sup>42</sup> Anderson's beliefs are confirmed by African-American Hall of Fame football player and college All-American tight end Kellen Winslow. As a college senior at the University of Missouri destined to be a top first-round draft pick, Winslow reflects:

I needed someone white and preferably of the Jewish faith. My statements concerning the type of agent I wanted reflected the worst. It showed that I went beyond understanding and into the realm of believing that I and those like me, black people, were not only disadvantaged, but unable to handle my affairs with the NFL.<sup>43</sup>

Winslow considered further that a lot of why this white-agent-is-better-than-black-agent mentality works results from the environment in which the African-American athlete's career is developed. More than likely, if the athlete plays at a major college program his coach is white. As was noted, there were only three African-American head coaches in Division IA football in 1994.<sup>44</sup> The coach, by many accounts, understandably becomes one of the most controlling figures in the athlete's life. Outside of the sports culture, the typical media portrayal of the sports agent that a black athlete sees growing up is not likely to be that of a black man or woman as the competent negotiator, but a white male.

The image of the sports agent as white also affects who will enter the business. In 1979, a young production assistant with WATL-TV in Atlanta, who also ushered at Hawks basketball games, was considering sports management as a career. He was told, by then general manager of the Atlanta Hawks Lewis Schaffel, "You're bright and articulate, but there's one problem. You're black."<sup>45</sup> That young man was C. Lamont Smith, who is now the President of one of the largest sports management companies in the country—All Pro Sports and Entertainment. Despite Schaffel's concerns, Smith has successfully fought to establish himself in

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42. See Clay, *supra* note 15, at 7.

43. Interview with Kellen Winslow (Jan. 5, 1995).

44. See *supra* note 30.

45. Smith, *supra* note 35.

the sports industry. He has not, however, been able to escape racism. Smith says that:

Hundreds and hundreds of years of stereotypes are attached to you. This is not unique to the sports industry; if you work for Proctor & Gamble the same thing may happen to a salesperson. You have to convince the potential client that the myths are not the facts.<sup>46</sup>

Noted psychologist Kenneth Clark produced the most famous work on black people's negative view of themselves.<sup>47</sup> In a study of the impact of school desegregation in the American South, he found that to most of black school age children shown both black and white dolls, black dolls were "bad" and "a nigger" while white dolls were described with positive attributes such as "nice" and "better."<sup>48</sup> In 1985, a similar test was conducted and the same results of negative self-esteem and image among black children were found.<sup>49</sup>

In addition to the empirical statistics demonstrating greater patronization of black agents by black athletes, another former NFL All-Pro, African-American quarterback Doug Williams, reconsidered decisions regarding agent selection he made in years past. Following his retirement in 1993, Williams said he would hire an African-American agent "if I was a number one draft pick coming out today."<sup>50</sup>

Williams recognizes a disparity that is present with most African-American agents. "What they don't have access to is the same type of clientele. Most black agents don't have the resources or contacts to fly in players, advance them money or get them a loan for the car of their dreams like a lot of white agents can."<sup>51</sup> Williams further recognized that a top round draft pick "can do more for black agents than the law allows."<sup>52</sup> This is true because in the sports agent business an agent's success lies largely in his or her client pool. "Who else do you represent?" is the first question asked by most prospective athlete-clients.

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46. *Id.*

47. See JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965*, at 20 (1987).

48. *Id.*

49. See Yvonne S. Lamb, *Doll Play and a Child's Self Image*, WASH. POST, Sept. 9, 1991, at 135.

50. See *Williams Today Would Hire a Minority*, USA TODAY, Feb. 9, 1993, at 4C.

51. *Id.*

52. *Id.*

## IV. RACE-CONSCIOUSNESS AND THE SPORTS AGENT SELECTION

Economics is unquestionably one reason a greater role for African-American agents is desirable. The more investment there is in a specific community, the greater the general welfare of that community will be—from increased businesses, leading to greater employment, leading—the long-range logic goes—to less crime.

Beyond direct and indirect economic benefits, there are also role model issues. An African-American agent, with some of the same experiences and background that the athlete may have, may for these reasons be better qualified to render services to the black athlete than the white agent. The African-American agent will probably also be more successful in preparing the African-American athlete for the transition into a world where he is no longer the coddled superstar and must face the same issues of racism impacting all African-American males. Certainly a white agent can help in this transition, and many have done so successfully. Similarly, there are African-American agents who have not aided in this transition. But the African-American agent is certainly better positioned to serve as this transitional role model.

Alan Wertheimer addresses the issue of using race as a qualification in hiring.<sup>53</sup> Wertheimer calls this race element, where there is an arguable justification for including it in a hiring decision, a “reaction” qualification. He provides several examples including the following:

“A shoe store owner must choose *B* (black) or *W* (white) as a salesman. *B* can fit shoes better, but because many customers are hostile to blacks, *W* will sell more shoes.”<sup>54</sup> Arguably, if the shoe store owner hires *W* based on this reaction qualification, he is discriminating against *B* based on race.

Wertheimer distinguishes between reaction qualifications and technical qualifications.<sup>55</sup> He lists “ordinary” qualifications such as “strength, ability to solve problems, and coordination” in his list of technical qualifications.<sup>56</sup> The value of technical qualifications in the employers hiring decision is universally recognized. The reaction qualification, however, is less universally accepted.<sup>57</sup>

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53. See generally Alan Wertheimer, *Jobs, Qualifications, and Preferences*, ETHICS, Oct. 1983, at 99.

54. *Id.* at 100-101.

55. *Id.* at 100.

56. *Id.*

57. *Id.*

Wertheimer discusses whether hiring the best qualified ever means including the party's race, a reaction qualification, as a factor.<sup>58</sup> He observes further that "a preference by a member of a victimized group for members of that group seems more legitimate . . . than a preference by a member of a dominant group for members of that group."<sup>59</sup> Wertheimer points to history as the justification for allowing this preference, noting that, for example, "A black's preference for a black policeman seems comparatively legitimate because there is a history of brutality by white policemen against blacks."<sup>60</sup> The harsh parallel argument would be that white sports agents have more often been named in published litigation as the named defendants that have committed misrepresentation offenses against athletes such as misappropriation of funds<sup>61</sup> or have conflicts of interest.<sup>62</sup>

A more appropriate argument, in support of race-consciousness in the agent selection process, is the closer sociological relationship between two African-Americans.<sup>63</sup> The similar life experiences of two African-American men is a bond that is unique. The potential for an older African-American man to prepare the athlete for the issues he will confront when no longer the revered athlete are difficult for those who have not suffered to understand.

A final argument for the use of African-American agents by African-American athletes is an extension of the traditional role model issue—youngsters striving to be like their athlete role models.<sup>64</sup> The logic, which relates to the broader question raised here, is that if African-American athletes would patronize their own businesses, then young African-Americans and others who look up to them would do the same as well.

In this arena, the race factor should be recognized as the positive that it very well may be. In this regard, however, there are white and black athletes who will benefit in a greater way from the decision to hire a particular white sports agent.<sup>65</sup> It is enough that athletes grow to not

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58. *Id.*

59. *Id.* at 107.

60. *Id.*

61. See *Collins v. NBPA*, 850 F. Supp. 1468 (D.C. Colo. 1991), *aff'd*, 976 F.2d 740 (10th Cir. 1992) (per curiam).

62. See *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542 (E.D. Mich. 1984).

63. See, e.g., Mark H. Anshell, *Perceptions of Black Intercollegiate Football Players: Implications for the Sport Psychology Consultant*, 4 *THE SPORT PSYCHOLOGIST* 235, 242 (1990).

64. ASHE & RAMPERSAD, *supra* note 21.

65. There are agents, however, that have taken the idea of being able to relate to African-American athletes too far. When two African-Americans student athletes encountered one

view the race of African-American sports agent candidates as negative but positive.<sup>66</sup> In other words, in the bundle of qualifications to consider in a prospective sports agent, race should be one of them. No one is capable of making these decisions in a color-blind manner. Race has always been a factor, but one where being white was positive and black negative. Using the presumption that because the agent and athlete, both African-Americans, may have some shared experiences, the otherwise equally qualified white agent may not be the person who should be hired for the job.<sup>67</sup>

This is not always the case. Race should, however, represent a positive factor in the African-American athlete's agent selection process and certainly not a negative, from an African-American's viewpoint, in evaluating the African-American agent.<sup>68</sup>

## V. REFORMS AND THE LAW

### A. Reforms

The ultimate route for an increased role for African-American agents is threefold. The first step of the process, which is already in place, is to have a qualified pool of African-American agents in existence. Second, African-American athletes and also non-African-American athletes must use the services of these agents. Third, there is a moral obligation for the established, large, white-owned sports agencies to provide African-Americans with meaningful roles within their firms. Many African-American athletes are represented by large sports marketing and management concerns.

International Management Group, Advantage International, and ProServ are the three largest firms in the business, all with offices around

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agent, "I thought he was black, having spoken to him on the phone. . . . His actions were black. . . . Like, he walked with a slight limp. You know, how a lot of blacks walk, kind of cool. A strut." See RUXIN, *supra* note 12, at 29.

66. There is a strong argument that if an athlete is accustomed to a white male as an authoritarian figure, and that is the type of role he desires his agent to play, then the agent's whiteness may constitute a positive factor.

67. See Wertheimer, *supra* note 53, at 16. For a discussion of the ability of whites to represent blacks successfully in the United States Congress, see CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN-AMERICANS IN CONGRESS* (1993).

68. In fact, one revealed to me that a different level of success would be achieved when African-American agents commonly represented white athletes as well as black. See Parker, *supra* note 1, quoting African-American agent Eugene Parker, "The fact of the matter is that generally African-Americans don't even get the opportunity for an interview with white players. If it's a problem one way, why shouldn't it be a problem the other way?"

the world. These firms, much like the leagues and teams, have lagged behind in terms of percentages in relation to the race of athletes on the field in hiring and retaining African-Americans at the highest levels.<sup>69</sup> Traditionally, where the major white firms have employed African-Americans it has been in the capacity of "runners" or "birddogs"—the individuals who recruit the African-American clients for firms.<sup>70</sup> The key for these firms is to present opportunities to obtain an equity interest in the business and provide the sensitivity that only an African-American can bring, much like the directors of African-American based motion pictures.<sup>71</sup>

In some instances, the athlete may have a preference to be represented by an African-American agent. The athlete may develop a personal relationship with the African-American employee of the white agent. The role of the African-American "runner" is intentionally kept vague, leading the athlete to believe that the runner is in fact in charge, not the white men back at the home office.

### B. Role of The Law

It is possible that individual African-Americans seeking employment at these firms could bring successful discrimination actions if the facts allowed. But just as in any other business, courts are reluctant to compel business owners to take on new employees and/or promote current employees or associates to partners with an equity interest in the business. If the reason for rejection is not illegal, courts are not likely to intervene.<sup>72</sup>

The introduction of race into the equation does not improve the plaintiff's position much either. Arguably, barring African-Americans from an equity interest in a sports management firm is similar to those cases in which a person is denied partnership in a law firm based on

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69. See, e.g., Paul Farli, *Parting Company at ProServ*, WASH. POST, Apr. 6, 1992, at F-1 (discussing the departure of the few African-Americans and women from ProServ).

70. See, e.g., RUXIN, *supra* note 12, at 27 (citing the Commissioner of the Central Intercollegiate Athletic Association as saying, "A lot of black athletes are misled by black legmen to think that they will be represented by a black firm. . . .") Following a protracted negotiation with one major sports management firm after over a dozen years in the sports law business, I realized that my primary perceived value to them was as a black recruiter. One notable exception to this limited role is William Strickland, the African-American president of International Management Group's basketball division.

71. See Rhoden, *supra* note 10, at 11.

72. Analogous decisions have been made in the sports industry regarding league partners in the ownership scenario. See, e.g., *Levin v. NBA*, 385 F. Supp. 149 (S.D.N.Y. 1974); *Mid-South Grizzlies v. NFL*, 720 F.2d 772 (3d Cir. 1983).



race.<sup>73</sup> The law most applicable in law firm partnership cases is Title VII of the Civil Rights Act of 1964.<sup>74</sup> Title VII is only applicable to employer-employee relationships.<sup>75</sup> That is, only where there is the pre-existing relationship, generally, not where a relationship is being sought. Just like associates at a law firm, the appropriate plaintiff in such a case would be a current "associate" level employee denied "partnership" status.

Another possible legal recourse is the Civil Rights Act of 1870.<sup>76</sup> In its present form, the Civil Rights Act of 1870, as codified at 42 United States Code Section 1981, provides that: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to *make and enforce contracts*, . . . as is enjoyed by white citizens . . ."<sup>77</sup>

Section 1981's scope of coverage is wider than that of Title VII; it applies to the making and enforcing of all contracts, and not just employment contracts.<sup>78</sup> The Supreme Court has also held that the section applies to both public and private discrimination.<sup>79</sup> Consequently, Section 1981 may provide relief whenever an individual is denied admission to employment or a partnership based on his or her race, since both employment and partnerships may be interpreted to be contractual agreements. If an individual is denied the opportunity to become a partner or employee of a sports management firm due to his or her race, he or she

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73. See discussion *infra* notes 77 to 78 and accompanying text.

74. 42 U.S.C. §§ 2000 et. seq.

75. See, e.g., *Hishon v. King & Spaulding*, 104 S.Ct. 2229, 2233 (1984) ("The contractual relationship of employment triggers the provisions of Title VII governing 'terms, conditions, or privileges of employment.'"); Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 MICH. L. REV. 282 (1977) (hereinafter *Discrimination in Law Partner Selection*) ("[T]he courts have interpreted [42 U.S.C. 2000e-e17 (1982)] as prohibiting only those discriminatory practices that occur within the context of an employment."). See *Hishon*, 104 S.Ct. at 2233. In *Hishon*, petitioner alleged that she was denied partnership because of her sex. *Id.* at 2232. The Supreme Court reversed the Court of Appeals for the 11th Circuit, which had held that "Title VII was inapplicable to the selection of partners by a partnership." *Id.* Although the Court did not answer this question, it held that since the underlying employment relationship was a contractual one, advancement to partnership was a benefit or privilege of employment, but only when such advancement is an explicit or implied benefit or privilege. *Id.* Here, petitioner alleged that such advancement had been used to induce her to work for defendant. *Id.* The Court held that petitioner's allegation stated a claim under Title VII since an explicit or implicit benefit or privilege of employment triggers the protection of Title VII inasmuch as it is "terms, conditions or privileges of employment." See *id.* at 2233, 2235.

76. Civil Rights Act, 42 U.S.C. § 1981 (1976).

77. Civil Rights Act, 42 U.S.C. § 1981 (1982).

78. *Id.*

79. See *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968).

is denied the opportunity to make a contract in violation of Section 1981.<sup>80</sup> However, in order to successfully bring this type of action, a plaintiff would have had to establish racial motivation, not just the absence of African-American employment or equity ownership at the firm.<sup>81</sup> Absent the unlikely event of a management firm's owners publicizing that they have denied a party an equity or even an executive or management level position with a sports management firm based on his or her race, the use of Section 1981 will not bring about change.

Under both Title VII and Section 1981 a court of equity can mandate the adoption of an affirmative action program to remedy the effects of discrimination.<sup>82</sup> Courts, however, will probably not mandate a management firm to admit equity owners or other high level employees the firm does not desire.<sup>83</sup> Courts have been hesitant in providing analogous relief, such as reinstatement, under Title VII in upper-level employment discrimination cases, even when actual discrimination has been found.<sup>84</sup> For example, in *EEOC v. Kallin, Phillips, Ross, Inc.*, an upper-level employment case, a federal court denied reinstatement.<sup>85</sup> The court reasoned that reinstatement was not appropriate since "[t]he employee's job required a close working relationship between her and top executives of the employer, and the three-and-a-half years of bitter litigation destroyed the possibility of a relationship with trust and confidence between the employee and employer."<sup>86</sup> Second, upper-level employment

80. *But see* Runyon v. McCray, 427 U.S. 160, 193-94 (1976) (White, J. & Rehnquist, J. dissenting), comparing the following:

Whites had at the time when § 1981 was first enacted and have [now], no right to make contract with an unwilling private person, no matter what that person's motivation for refusing to contract. Indeed it is and always has been central to the very concept of a "contract" that there be "assent by the parties who form the contract to the terms thereof." The right to make contracts, enjoyed by white citizens, was therefore always a right to enter into binding agreements only with willing second parties. Since the statute only gives Negroes the "same rights" to contract as is enjoyed by whites, the language of the statute confers no right on Negroes to enter into a contract with an unwilling person no matter what that person's motivation for refusing to contract.

81. *See* General Bldg. Contractors Assn. v. Pennsylvania, 458 U.S. 375 (1982) (disparate impact not encompassed by Section 1981).

82. *See* Taylor v. Jones, 495 F. Supp. 1285, 1295 (E.D. Ark. 1980). *Accord* Sester v. Novak Inv. Co., 657 F.2d 962, 966-67 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981).

83. *See, e.g.*, Blount v. Xerox Corp., 405 F. Supp. 849, 853 (N.D. Ca. 1975) (footnote omitted) (section 1981 "cannot be construed to place an affirmative obligation on employers to adopt or to maintain affirmative action programs.")

84. *See* Johnny Clyde Parker, Note, *Civil Rights Legislation: Getting Black Executives Off First Base in Professional Team-Sports*, COLUM. BUS. L. REV. 219, 227 (1986).

85. 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

86. *Id.*

hiring criteria tend to be very subjective.<sup>87</sup> And finally, the courts are hesitant to second-guess the validity of such subjective criteria.<sup>88</sup> The "courts in upper level cases often profess a lack of expertise and [thus] refuse to assess an applicant's qualifications."<sup>89</sup> This logic is amplified for the admission of partners in the sports management business.

Finally, compelling admission of partners or equity owners may interfere with the present partners' freedom of association. For example, in *Hishon v. King & Spalding*,<sup>90</sup> the court of appeals affirmed the lower court's conclusion that Title VII did not apply in the selection of partners since a professional partnership was like a marriage and to compel admission of unwanted partners under Title VII "resemble[d] a statute for the enforcement of shotgun weddings."<sup>91</sup> The court of appeals stated that "the essence of a partnership [was] voluntary association."<sup>92</sup> It left untouched the lower two courts' presumption that freedom of association prevented the applicability of Title VII to the selection of partners. This conclusion is supported by Justice Powell's concurring opinion in which he made clear that the Court's decision "should not be read as extending Title VII to the management of a law firm by its partners."<sup>93</sup> Powell reasoned that "[t]he relationship among law partners differs markedly from that between employer and employee—including that between the partnership and its associates [employees]."<sup>94</sup> In short, although freedom of association is not a defense in the employer-employee context,<sup>95</sup> it may be argued in the non-employer-employee context such as the selection of partners from outside of a particular firm.

## VI. CONCLUSION

In the end, apart from competence in contract negotiations and the other services a sports agent provides, what is important regarding sports agents that represent any athlete is aiding in the defeat of what Winslow calls the "meet the bus at 8:00 a.m. syndrome."<sup>96</sup> An athlete pampered

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87. Parker, *supra* note 84, at 225-30.

88. *Id.*

89. *Id.* at 226.

90. 678 F.2d. 1022 (11th Cir. 1982).

91. 25 Empl. Prac. Dec. (CCH) P31,703, at 20,062 (N.D. Ga.) (1980).

92. Although the U.S. Supreme Court reversed, it did so on the ground that plaintiff's promotion was a "term or condition of employment." See *Hishon v. King & Spalding*, 104 S.Ct. 2228, 2234-35 (1984).

93. *Id.* at 2236.

94. *Id.*

95. See *id.* at 2235.

96. Winslow, *supra* note 43.

and taken care of from youth leagues on through the pros may have had no other obligation than to meet the bus, driver, or other escort at an appointed time, when he or she is then whisked through the airport, handed a ticket, picked up at the destination, handed a key at the hotel in the lobby at a specially designated table and receives a wake-up call—to meet the bus at 8:00 a.m.<sup>97</sup> Once his career is over there is no one to do these or the more complex day-to-day financial and other matters which someone else has handled, so long as he was a star.<sup>98</sup> Whoever represents the athlete has to teach them, no matter the difficulty in convincing them of the necessity, for life after the playing days come to an end.<sup>99</sup>

Major changes could be made in this area provided athletes—African-American and otherwise—begin to choose their agents based on the qualifications of the agent alone, with race viewed as a potentially positive factor.<sup>100</sup> The star African-American athlete has the unique power, not only in hiring an individual agent but with one of the major firms, to stress the importance of African-American representation. A first round draft pick has more leverage than he realizes in the hiring practices of a prospective agent. Their stake in improving this business is both personal and societal.

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97. *Id.*

98. *Id.*

99. *Id.*

100. A recent trend has been noted in the number of African-American athletes choosing to attend historically black colleges and universities. *See, e.g.,* Suzanne Alexander, *Black Athletes in Switch, Pick Black Colleges*, WALL ST. J., June 28, 1993, at B1.

