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Grooming Crossovers

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I. INTRODUCTION

Very little attention has been given in scholarly literature and American cultural discourse to the phenomenon of African-American[1] crossover athletes. In popular culture, the term "crossover" is commonly associated with musicians or entertainers. *Encarta World English Dictionary*, for example, defines "crossover" to include "an artist, musician, artistic creation, or piece of music that has become popular outside one original category."[2] In sports, the term is usually associated with a type of basketball dribble.[3] It is rarely used to refer to athletes who cross over the racial divide

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1. I use the terms African-American and Black interchangeably to refer to the larger social and cultural groups that are descendants of Africa.

2. ENCARTA WORLD ENGLISH DICTIONARY 431 (1999).

3. A player who can change his or her direction when switching hands while dribbling is said

in the same manner as musicians. This article wades into the abyss by studying African-American athletes from the 1950s to the present, and explores two distinct crossover models, which I call the Jackie Robinson Model ("Robinson Model") and the Orenthal James (O.J.) Simpson Model ("O.J. Model").[4]

These two distinct models embrace the interrelation between law and sports. Although the models are not categorized neatly by time period, the distinction between the two falls along generational lines. While the Jackie Robinsons fought to establish the right to free agency and the O.J.s have worked to retain and maximize the economic opportunity from it, both groups have had to wrestle with racial exclusion and exploitation by Historically White Institutions (HWIs). Where the Jackie Robinsons faced segregation, the O.J.s confronted enhanced academic standards. Later in this article, the discussion will show the overlap between the two crossover models. Many athletes may possess features of both, but they usually fit neatly into one of the two categories.

The differences between the models can be demonstrated through an examination of both models' use of the legal system to address two issues: free agency and academics. White players began challenging the owners in professional sports before integration and continue to do so,[5] while African-American athletes later joined White players and brought their cultural perspectives and values to these disputes.[6] Most notably, African-Americans brought their culture of struggle against oppression. They valued political and economic freedoms and economic and educational opportunities; but most importantly, they brought the willingness to fight for themselves.[7] These principles have played a role in the litigation over free agency and eligibility for intercollegiate athletics.

In examining the issues of free agency and academics, the following three popular debates have obscured the contribution of both generations to the doctrinal development of American sports law: whether Blacks are superior athletes,[8] whether they deserve to attend HWIs,[9] and whether

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to have a "crossover" dribble. NEIL D. ISAACS & DICK MOTTA, SPORTS ILLUSTRATED, BASKETBALL: THE KEYS TO EXCELLENCE 31 (1998).

4. As many are familiar with, these models refer to Jackie Roosevelt Robinson and Orenthal James Simpson. The former was the first African-American to integrate modern day baseball. KENNETH L. SHROPSHIRE, IN BLACK AND WHITE: RACE AND SPORTS IN AMERICA 22 (1996). The latter was a football player, winner of the Heisman trophy, sportscaster, and actor. ARTHUR R. ASHE, JR., A HARD ROAD TO GLORY: A HISTORY OF THE AFRICAN-AMERICAN ATHLETE SINCE 1946, at 139 (1988); *see also* discussion *infra* Part II.A-B.

5. ASHE, *supra* note 4, at 30-32.

6. *See generally* Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L . REV. 1 (1995) (detailing the historical influence of the African-American community on the development of contract law and the subsequent legal effects).

7. Ed Hinton et al., *Football Helped Griffin Bridge Racial Gap: Run for Respect: A Study of Black Football Players and the South*, ATL. J.-CONST., Sept. 7, 1986, at A1.

8. *See generally* JON ENTINE, TABOO: WHY BLACK ATHLETES DOMINATE SPORTS AND WHY

collegiate athletes should be paid.[10] Whites, who seem fixated by the first question, generally carry on that conversation.[11] The second question, regarding HWIs, is carried on in both Black and White societies and the athletes play major, albeit often silent, roles in it.[12] The third question, concerning the payment of college athletes, is often discussed in a racial vacuum in the general background of the sanctity of amateurism.[13]

Because this article focuses on the roles of African-American athletes, it will not address the first question, but will directly address the second and touch upon the third. In examining the impact that African-American athletes have had on the development of American sports law, the author recognizes that African-American athletes alone did not bring about changes in the world of sports law. Athletes of all colors, working together with lawyers and other professionals, have wrought profound changes in cultural norms and the legal rules applicable to sports.[14] However, the focus of this article is the story of African-American athletes' influence on the world of sports and sports law.

II. ATHLETIC CROSSOVER MODELS

A. Jackie Robinson Model

The first model, the Jackie Robinson Model, appears in the early twentieth century, represented by African-American superstar athletes who

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WE'RE AFRAID TO TALK ABOUT IT (2000) (questioning the reasons behind Black dominance in athletics); JOHN HOBERMAN, DARWIN'S ATHLETES: HOW SPORT HAS DAMAGED BLACK AMERICA AND PRESERVED THE MYTH OF RACE (1997) (arguing that America's obsession with Black athletic achievement has created problems for African-Americans and race relations).

9. *See* Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615 (1995) (discussing how college athletics perpetuates the racism that is deeply rooted in society, and the effects on African American student-athletes).

10. *See* Kenneth L. Shropshire, *The Erosion of the NCAA Amateurism Model*, 14 ANTITRUST 46 (2000) (explaining the changes the NCAA has brought about by denying student-athletes the ability to have any exposure to professional sports prior to entering college).

11. *See* SHROPSHIRE, *supra* note 4, at 21-24.

12. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 50 (1991) (discussing how the achievements of a Black person are measured differently because they are Black and therefore are seen as not the most qualified candidate, but the best qualified Black candidate–the "Best Black"). The influx of Black athletes, many of whom could never be confused with the "Best Black" students, has led to a controversial debate over academic standards. *Id.*

13. *See generally* C. Peter Goplerud III, *Stipends for Collegiate Athletes: A Philosophical Spin on a Controversial Proposal*, 5 KAN. J.L. & PUB. POL'Y 125 (1996) (arguing that Division I college athletes should receive a stipend for competing in revenue-producing sports).

14. *See* discussion *infra* Parts III, IV.

were greeted with acclaim in Black America. Jack Johnson[15] and Joe Louis[16] were "Great Black Hopes"[17] whose athletic skill could not be ignored in White America. Their crossover appeal, however, was limited outside the ring. Their athletic achievements symbolized Black equality and threatened the racial status quo. Moreover, many of these athletes were outspoken champions of racial equality. For example, football player Paul Robeson gained notoriety as an athlete but is far better known as a public intellectual with his outspoken advocacy of Civil Rights and his embrace of communism.[18] White America reacted with ostensible searches for Great White Hopes,[19] but in reality, it conducted more obscure searches for acceptable African-American crossover athletes. The search for African-American crossovers led to the grooming of young African-American athletes to participate in sports in an integrated setting. These athletes needed to be able to navigate acceptably in White society and had to be strong enough to carry the torch for further integration.

The most well-known example of a "groomed" athlete is Jackie Roosevelt Robinson. It is well documented that at the time of his "discovery" by Branch Rickey,[20] Robinson was not the best player in the Negro leagues, yet was selected precisely because he attended the University of California at Los Angeles (UCLA) and served in the military.[21] While Robinson was groomed, his success as a crossover athlete was limited. His

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15. Jack Johnson was the first Black man to hold the world heavyweight championship. *Film Tells Tales of Triumph and Woe*, CHI. SUN-TIMES, May 9, 1986, *available at* 1986 WL 3795316.

16. Joe Louis held the world heavyweight championship for over ten years in the 1930s. ASHE, *supra* note 4, at 82.

17. The public frequently attaches racially symbolic significance to the exploits of athletes. Although Black stars like Jack Johnson are not usually referred to as "Great Black Hopes," I use the term to refer to Black stars in fields once dominated by White athletes. Jackie Robinson and Muhammad Ali, for example, were certainly Great Black Hopes. *See* William Sampson, *Let the Game Begin! Bring on the Great White Hopes*, CHI. SUN-TIMES, Nov. 11, 1986, *available at* 1986 WL 3825293 (referring to the late Mayor Harold Washington as "a Great Black Hope").

18. *See generally* LLOYD L. BROWN, THE YOUNG PAUL ROBESON: "ON MY JOURNEY NOW" (1996) (chronicling Paul Robeson's life from childhood through his professional football career).

19. The term has come to refer to White fighters and more generally to Whites who become stars or achieve success in fields dominated by Blacks. The term was coined after Jack Johnson became the first Black heavyweight champion. He landed a symbolic blow against White supremacy and the White boxing establishment, having defeated a White fighter to reclaim the mantle. *See Film Tells Tales of Triumph and Woe*, *supra* note 15; *see also* Denise C. Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 AKRON L. REV. 529, 536 (1999) (discussing how the Black community has had trouble reconciling the life and success of Johnson and being able to hold him up as a hero); Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 73-74 (1996) (noting the effect Jack Johnson's wins had on the White community).

20. Branch Rickey was a professional baseball executive and the founder of the United States League for African-American players. Encyclopaedia Britannica, *Rickey, Branch (Wesley)*, *at* http://www.britannica.com (last visited Apr. 7, 2001).

21. ARNOLD RAMPERSAD, JACKIE ROBINSON: A BIOGRAPHY 123-24 (1997).

conspicuous advocacy of Civil Rights made him too militant for general acceptance.[22] Today, he is admired more for breaking the color line than for his baseball exploits, but at the time, his outspokenness hurt his crossover appeal. Indeed, few, if any, Black athletes before the 1970s achieved full crossover status.[23] This first model, the Jackie Robinson Model, is the one frequently used by HWIs as they opened their doors wider for African-American athletes in the 1950s and 1960s.[24]

Star Black athletes before the late 1960s generally fit the Robinson Model—admired as athletes but limited in crossover appeal because of their outspokenness. Many of those sports figures, like Jim Brown[25] and Kareem Abdul-Jabbar,[26] gained a following for their athletic prowess. Their acclaim, however, was muted because of the perceptions their outspoken—some would say militant—social activism created.[27] Despite the limited crossover appeal, their impact on American culture and the development of sports law has been great. Black athletes from this era were in the forefront of the fight for free agency in professional athletics.[28] Curt Flood,[29] Oscar Robertson,[30]

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22. *Id.* at 5-6.

23. *See infra* Part III.A.

24. See BRUCE ADELSON, BRUSHING BACK JIM CROW: THE INTEGRATION OF MINOR LEAGUE BASEBALL IN THE AMERICAN SOUTH (1999) and CHARLES K. ROSS, OUTSIDE THE LINES: AFRICAN AMERICANS AND THE INTEGRATION OF THE NATIONAL FOOTBALL LEAGUE (1999), for histories of players who integrated the National Football League and minor league baseball in Southern states.

25. Brown has been an activist on racial issues since retiring from the National Football League. Born in Saint Simons Island, Georgia on February 17, 1936, he attended Manhasset High School in New York, graduated from Syracuse University, and has written an autobiography entitled OFF MY CHEST (1964). He is the subject of at least one biography, entitled JIM BROWN: THE GOLDEN YEARS (1964). He has appeared in nearly forty movies. In his early roles, he integrated the big screen with "Superspade"-like roles in movies like THE DIRTY DOZEN (MGM 1967). He has also appeared in several roles aimed at predominantly Black audiences, including I'M GONNA GIT YOU SUCKA (MGM-United Artists Studios 1988), THREE THE HARD WAY (Xenon Entertainment Group 1974), BLACK GUNN (Columbia Studios 1972), SLAUGHTER (Twentieth Century Fox 1972), and SLAUGHTER'S BIG RIP-OFF (Twentieth Century Fox 1973). Often he was cast as a Black superhero. He has played variations of these roles in recent movies such as MARS ATTACKS! (Warner Studios 1996). His most "neutral" appearance was perhaps as a prison guard in Spike Lee's HE GOT GAME (Touchstone Pictures 1998).

26. A nationally recognized basketball player, Abdul-Jabbar has won numerous championship titles and awards in the National Basketball Association. ASHE, *supra* note 4, at 303.

27. *See* ASHE, *supra* note 4, at 62 (describing Blacks' experiences on some White campuses).

28. *See* discussion *infra* Part III.D.

29. Flood's fight in Major League Baseball is well known, although he rose within the ranks of the baseball farm system and did not attend college. Arguing that the national baseball employment practices violated federal antitrust laws, Flood did not win the case in the U.S. Supreme Court but paved the way for future legislation. ASHE, *supra* note 4, at 30-32.

30. Oscar Robertson was a professional basketball player who played for the Cincinnati Royals and the Milwaukee Bucks. ASHE, *supra* note 4, at 72.

and John Mackey[31] laid down the gauntlet but were not alone. They confronted the economic powers in professional athletics and demanded more participation in control and wealth.[32] They thereby facilitated changes in the crossover landscape forever. Other athletes of the era, such as Kareem Abdul-Jabbar, either participated in, or attempted to organize, a boycott of the 1968 Olympics and one during the 1970s at Brigham Young University (BYU) against its athletic program.[33] This generation also produced two of the greatest public intellectuals in American sports history: Arthur Ashe[34] and Harry Edwards.[35] Undoubtedly, the group laid important cornerstones in the foundation of American sports law.

B. O.J. Simpson Model

The second model, the O.J. Simpson Model, emerges in an identifiable form with the success of the Civil Rights movement. HWIs then had access to Black students in general, although their athletic programs seemed more concerned about revenue than integration.[36] Outstanding athletic skills outweighed character issues as HWIs sought Black athletes who were likely to appeal to White America as entertainers.[37] They were expected to become crossovers, and the grooming of Black athletes for this purpose intensified. Unlike their predecessors, whom the public expected to be assimilationists on the field but tolerated as racial warriors off the field, the O.J. Model crossovers were expected to tone down their militancy on racial matters so as not to offend White audiences. Jim Brown's appearances on the silver

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31. John Mackey played professional football, and later became the president of the National Football League Players Association. ASHE, *supra* note 4, at 144.

32. *See* discussion *infra* Part III.D.

33. ASHE, *supra* note 4, at 53; *see also infra* Part III.B-C.

34. Ashe was a world-ranked tennis player and scholar on African-American athletes. *See* ASHE, *supra* note 4, at ix.

35. Edwards is a Professor of Sociology at the University of California at Berkeley. ASHE, *supra* note 4, at 24.

36. Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269, 276 n.33 (1994).

37. Black athletes have been expected to entertain White audiences since their involvement with athletics in America. During the first half of the twentieth century, Blacks criticized the clowning tactics that some barnstorming Negro baseball teams resorted to, to draw in White audiences. *See* PHIL DIXON & PATRICK J HANNIGAN, THE NEGRO BASEBALL LEAGUES: A PHOTOGRAPHIC HISTORY 18-20 (1992) (accounting the history of the Negro baseball leagues through photographs). Players and fans argued that Blacks were as good athletes as White ballplayers, and that they should be appreciated for their ability to play and compete. *Id.* at 16-18. The HWIs sought Black athletes to entertain their constituents. Similar questions are raised today in the context of rap and hip-hop music. *See* Allison Samuels et al., *Battle for the Soul of Hip-Hop: Is Rap—Increasingly Driven by Sex, Violence and Money—Going Too Far?*, NEWSWEEK, Oct. 9, 2000, *available at* 2000 WL 21083944 (examining the differences between Black and White rappers, and the way in which their lyrics are based on violence and sex).

screen[38] and Bill Russell's acting[39] augured the changes to come, but crossover grooming began in earnest with Orenthal James Simpson.[40] The O.J. model describes many of the African-American superstars who came after him.[41] The accomplishments of the Jackie Robinson Model athletes are evident because they came during the Civil Rights Movement; in contrast, the athletes of the O.J. Simpson Model have focused on their individual accomplishments which have brought forth minimal changes to sport law.[42]

C. Female Athletes' Crossover Model: Jackie or O.J.?

Interestingly, Black female athletes were not groomed to fit into the Jackie Robinson Model. Professional sport opportunities for women were nonexistent until recently,[43] so there was no role for women to play with free agency. There does not appear to have been any expectation in White or Black America that Black females athletes would play a role in integrating HWIs.[44] Until Leatrice Shaw filed suit in *Cureton v. NCAA*,[45] the academic standards debate was pointed largely at African-American males.[46] While Black female athletes have been groomed toward the O.J. Model, it is an imperfect descriptive. The success of Michael Jordan and Magic Johnson[47] overshadowed the emergence of Debi Thomas[48] in figure skating and the dominance of Jackie Joyner-Kersee[49] in track and field. The rise of sisters Venus and Serena Williams[50] in professional tennis has given Black female

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38. *See* discussion *supra* note 25.

39. *NBA History: Bill Russell*, *at* http://global.nba.com/history/russell_bio.html (last visited Apr. 6, 2001). Russell is the winner of two NBA titles with the Boston Celtics and was the NBA's first Black head coach. ASHE, *supra* note 4, at 68-69.

40. *See* ASHE, *supra* note 4, at 139.

41. See *infra* Part IV for a discussion of various O.J.-model athletes and their impact on sports and sports law.

42. *See infra* Parts III, IV.

43. Alfred D. Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239, 247 (1996).

44. *Id.* at 249-51.

45. 37 F. Supp. 2d 687 (E.D. Pa. 1999) (involving Shaw, an African-American athlete, suing under Title VI and challenging the prohibition on freshman year intercollegiate competition by athletes not achieving minimum scores on aptitude tests), *rev'd*, 198 F.3d 107 (3rd Cir. 1999).

46. *See* discussion *infra* Part III.D.4, IV.C.

47. Two of the most successful NBA basketball players of the 1990s.

48. *See* ASHE, *supra* note 4, at 224 (outlining Debi Thomas' figure skating career and accomplishments).

49. *Id.* at 205-06 (describing Jackie Joyner-Kersee's performance in the 1984 Olympics in Los Angeles).

50. Neil Harman, *McEnroe's Words Should Be Heeded: Williams Sisters Would Be Wise to*

athletes far more visibility, but, like Thomas, they perform outside the collegiate setting. Black female athletes in the collegiate setting, like basketball player Chamique Holdsclaw,[51] seem more a part of a dialogue on athletic opportunities for women. This characteristic places them closer to the Jordan/Johnson category as true crossovers based on their growing popularity and most importantly, their ability to decide their own future.[52]

III. THE JACKIE ROBINSON MODEL'S LABORS AND SUCCESSES

A. Notable Jackie Robinsons: Athletes and Social Activism

As the walls of racial segregation came tumbling down after World War II, HWIs began admitting increasing numbers of African-Americans, especially athletes.[53] Many HWIs seem to have followed a Jackie Robinson recruiting strategy. Kareem Abdul-Jabbar, Arthur Ashe, Jim Brown, Wilt Chamberlain,[54] Oscar Robertson, and Bill Russell fit the mold. Their influence on American society was no accident. HWIs had carefully selected them because they possessed qualities that would permit them to succeed in White America.[55] They did not leave those qualities in the playing arena. Sidney Poitier[56] was a better actor, but Jim Brown took his defiant advocacy from the football field to the cinema. Brown thrilled young Blacks on the silver screen with his role as a strong Black man[57] at least seven years before Richard Roundtree brought us the John Shaft fantasy.[58] Wilt Chamberlain preceded Jim Brown as the prototypical "Superspade."[59] Seven-feet-one-

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Take Stock after the Tennis Legend Handed Them Some Free Advice Last Week, SUN. TELEGRAPH, Sept. 24, 2000, at 16.

51. Holdsclaw, a member of the Women's National Basketball Association (WNBA) Washington Mystics, currently ranks third on the NCAA women's basketball all-time career scoring list. In college, she also helped lead Tennessee to three consecutive NCAA titles from 1996-1998. Rick Freemen, *Star on the Rise*, WASH. POST, July 26, 2000, at D1, http://chamiqueholdsclaw.tripod.com.

52. *See* discussion *infra* Part V.

53. *See* ASHE, *supra* note 4, at 58 (noting that by 1950, a societal acceptance of Blacks playing basketball at HWIs began to develop).

54. Chamberlain was a highly successful basketball player and outspoken advocate on Black issues. ASHE, *supra* note 4, at 69-71.

55. One of the qualities these early Black athletes had that made them very attractive to team owners was that "[t]hey were still considered all brawn and no brains." ASHE, *supra* note 4, at 4.

56. Poitier is one of the most well-respected and admired African-American actors, and is one of the only Blacks actor to ever win an Oscar. *Honoring Black History Month: Sydney Poitier, at* http://www.pax.tv/bios/one-bio.cfm/sydneypoiter (last visited Apr. 7, 2001).

57. *See supra* note 25.

58. *See* SHAFT (Warner Studios 1971) (portraying an African-American detective who exuded confidence and strength while in a position of power).

59. I use the term "Superspade" to describe a Black person with superior intellectual or

inch tall and agile, Chamberlain was intimidating on and off the court.[60] Unhappy at the University of Kansas and with intercollegiate athletics, he was one of the first collegians to leave for the professional ranks before graduating from college.[61] Ineligible for the National Basketball Association (NBA) because his college class had not yet graduated, he joined the Harlem Globetrotters for a year.[62] Always a target for criticism, he did not shy away from controversy and was one of the early proponents of free agency.[63]

The era also produced Arthur Ashe, who assumed the persona of the perfect gentleman in order to succeed in tennis.[64] He became an influential figure within the tennis establishment.[65] There was also the dour Kareem Abdul-Jabbar, who converted to Islam, changed his name while a college student, and boycotted the 1968 Olympics.[66] Although HWIs frequently neglected the academic life of these athletes,[67] African-American athletes' participation in the national dialog on equal opportunity and their impact on the development of sports law in the United States is profound.[68]

These athletes shared the common bond of being groomed or selected to integrate into White athletic arenas. More importantly, they were persons of substance whose activities inside and outside sports roiled the politics of race relations in the United States, thereby contributing to the evolution of American culture. There is the indelible image of Jim Brown playing the role of the angry Black man killing White Germans in *The Dirty Dozen*.[69] Arthur Ashe exemplified dignity as he protested apartheid in South Africa.[70]

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physical abilities, or a combination of both. In contrast to Professor Carter's "Best Black," *see supra* note 12, Superspades are measured differently in comparison to the rest of the public, particularly Whites, because they are not seen as the most qualified Black, but as the "token" Black.

60. Larry Schwartz, *Wilt Battled "Loser" Label*, *at* http://espn.go.com/sportscentury/features/00014133.html (last visited Apr. 7, 2001); *see also* WILT CHAMBERLAIN, A VIEW FROM ABOVE, at ix-xiii (1991).

61. Associated Press, *Kansans Have Great Memories of Wilt*, *at* http://espn.go.com/nba/news/1999/1012/110912.html (last visited Apr. 7, 2001).

62. Schwartz, *supra* note 60. The Harlem Globetrotters is a basketball team that performs tricks and uses their skills strictly for entertainment purposes. *See generally* CHUCK MENVILLE, THE HARLEM GLOBETROTTERS: FIFTY YEARS OF FUN AND GAMES (1978).

63. *See* ASHE, *supra* note 4, at 70.

64. *See infra* notes 70-72 and accompanying text.

65. Robin Finn, *On Tennis: Some Absences Make Hearts Grow Fainter*, N.Y. TIMES, Feb. 21, 1993, *available at* LEXIS, Nexis Library, N.Y. Times File.

66. KAREEM ABDUL-JABBAR & MIGNON MCCARTHY, KAREEM (1990).

67. Donald Spivey & Thomas A. Jones, *Intercollegiate Athletic Servitude: A Case Study of the Black Illini Student-Athletes, 1931-1967*, 55 SOC. SCI. Q. 939, 940-41 (1975) (studying the disparate impact of discrimination on Black basketball players, specifically focusing on the University of Illinois-Chicago).

68. *See* discussion *infra* Part III.D.

69. THE DIRTY DOZEN (Warner Studios 1967); *see supra* note 25.

70. Mark Mathabane, *He Was for Me What She Will Be for Them*, WASH. POST, July 16,

He also assumed the role of a public intellectual with a three-volume history of African-American athletes, *A Hard Road to Glory*,[71] and his memoir, *Days of Grace*.[72] Lew Alcindor's[73] renunciation of his Anglicized identity and embrace of Islam, exemplified by the changing his name to Kareem Abdul-Jabbar, was greeted with reprobation.[74] Although Abdul-Jabbar attained mythical status as a basketball player, his public persona has received mixed reviews due to his outspoken nature. He also has dabbled with movies and public intellectualism. His movie roles, like that in *Airplane II*,[75] have been pure entertainment vehicles; yet his intellectual pursuits have been more serious, reflected in *Black Profiles in Courage*.[76]

The most notable athlete of this era, African-American or otherwise,[77] was Muhummad Ali.[78] He confronted White America with the rejection of his Anglicized name, brash poetry, social stances, and his athleticism.[79] He too was groomed. His status as an Olympian selected to represent the United States belies this fact.[80] Ali's impact on American culture and law has been substantial. He set the standard by which all heavyweight champions, past or future, will be measured. Upon the challenge of his conviction for refusing to be inducted into the Army by a federal district court, the Supreme Court acknowledged his conscientious objector status on First Amendment grounds,[81] paving a road of protection for other members of the Nation of Islam. More importantly, his moral stance, in which he was willing to sacrifice his athletic career for his beliefs, set the tone for the Black athletes of the era. Ali was never afraid to speak out on the issues; in defiance of America's racial hypocrisy, he threw his Olympic medals into the Ohio River and was stripped of his boxing titles when he refused to serve in the

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2000, at B1.

71. ASHE, *supra* note 4.

72. ARTHUR ASHE & ARNOLD RAMPERSAD, DAYS OF GRACE: A MEMOIR (1994).

73. Lew Alcindor is Kareem Abdul-Jabbar's birth name. ABDUL-JABBAR & MCCARTHY, *supra* note 66.

74. Pete Axthelm, *The Angry Black Athlete*, NEWSWEEK, July 15, 1965, at 56.

75. AIRPLANE II: THE SEQUEL (Paramount Pictures 1982).

76. KAREEM ABDUL-JABBAR & ALAN STEINBERG, BLACK PROFILES IN COURAGE: A LEGACY OF AFRICAN AMERICAN ACHIEVEMENT (1987) (highlighting the lives of various Black heroes throughout history).

77. *See* ASHE, *supra* note 4, at 100.

78. *Id.* at 95-100 (describing the athletic achievements of Ali leading to his international fame).

79. *See* MIKE MARQUSEE, REDEMPTION SONG: MUHAMMAD ALI AND THE SPIRIT OF THE SIXTIES (1999).

80. ASHE, *supra* note 4, at 96.

81. *See* Clay v. United States, 403 U.S. 698, 703 (1971) (holding that Clay had fulfilled all the requirements needed for exemption from military service).

Vietnam War.[82] Ali, like the other athletes of this time, was a "boat-rocker."

The boat-rockers did not accept the status quo and they repeatedly sacrificed their careers to bring about change. Two boycotts exemplified the boat-rockers. The most famous of these was the African-American boycott of the 1968 Olympics, culminating in the clenched-fist Black Power protests of John Carlos and Tommie Smith in Mexico City.[83] The second was the attempted boycott of Brigham Young University football games in 1969 and 1970.[84] Both boycotts are noteworthy for the participation of African-American athletes who were willing to risk their athletic careers for causes they believed in.

B. 1968 Olympic Boycott

As early as 1964, Civil Rights activist Dick Gregory proposed that Black athletes boycott the 1964 Olympics in Tokyo.[85] Although such a boycott was never established,[86] Harry Edwards[87] formed the Olympic Committee for Human Rights in 1967, which led to the Olympic Project for Human Rights.[88] The proposed 1968 boycott was controversial among Black athletes. Some of the athletes felt strongly about the need to express their discontent with the treatment of Blacks in America, while others felt it would cause more harm than good by placing Blacks in a negative light.[89] Abdul-Jabbar, who declined to participate on the 1968 U.S. basketball team, openly embraced the boycott.[90] He was not alone, but many other athletes refused to boycott the games, although they sympathized with the cause. Jesse Owens[91] openly opposed the boycott,[92] and Spencer Haywood led the basketball team in winning the gold medal.[93]

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82. ASHE, *supra* note 4, at 96-98.

83. *Id.* at 194; *see infra* note 89 and accompanying text.

84. ASHE, *supra* note 4, at 124; *see* discussion *infra* Part III.C.

85. ASHE, *supra* note 4, at 188.

86. Urla Hill, *The Protest of Champions: Looking Back on a Courageous Moment in Olympic History*, DALLAS MORNING NEWS, Sept. 18, 1988, at 1F.

87. *See supra* note 35.

88. ASHE, *supra* note 4, at 190.

89. *See id.* at 191-92 (explaining how the athletes against the boycott viewed those actions as ones that would impair future opportunities for the young Black community).

90. *Id.*

91. Owens was an Olympic track and field star, winning four Olympic medals in the 1976 Olympics. ASHE, *supra* note 4, at 200-01.

92. *See id.* at 192 (noting that Owens was openly opposed to the boycott because of the repercussions it could have for future Black athletes).

93. Interestingly enough, Haywood's subsequent antitrust suit against the NBA enabled

As the Civil Rights movement gained momentum, the organizers of the boycott felt that Black athletes were not excused from participating. The athletes who chose to join the movement boycotted as a general protest against racial discrimination in the United States.[94] Other athletes experienced cognitive dissonance as they represented the United States while Jim Crow was still alive and well.[95] The organizers eventually drafted a list of demands that focused on discrimination in the athletic world.[96] These included the restoration of Muhammad Ali's titles, the exclusion of South Africa from the Olympic Games, and placing Blacks in coaching and policymaking positions on the United States Olympic Commission (USOC).[97] The American protest came on the heels of a threatened boycott of the 1968 Olympic Games by many African countries because of the invitation extended to openly apartheid-run South Africa.[98]

With their actions Black athletes let America know that this exalted sports venue was not immunized from the struggle for political and economic equality. Although 1968 was in the crux of the Civil Rights era, the issue was an unpopular one with both the American public and athletes. The boycott failed to materialize because most Black athletes refused to join it.[99] However, many athletes who declined to boycott found ways with which to express their solidarity. The most notorious of these actions involved the black-gloved fists and socks of John Carlos and Tommie Smith on the medal stand in Mexico City.[100] Although their actions had little impact on the Olympic movement itself, they inspired thousands of young African-Americans to believe that they too could make a difference. Their actions served as a reminder to African-American athletes of the heroism of their ancestors at a time when few were willing to take up the torch. Still today, it remains a noted moment in American history.

African-Americans to enter the professional ranks without obtaining a college degree. *See infra* Part III.B.3.

94. *See supra* notes 83-89 and accompanying text.

95. *See* ASHE, *supra* note 4, at 192 (explaining how athletes viewed the opportunity to boycott the Olympics in Tokyo as a way to further the Civil Rights movement in the United States).

96. *See id.* at 191.

97. *Id.*

98. The invitation was withdrawn in the wake of the proposed African boycott. James A.R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 AM. J. INT'L L. 489, 498 n.40 (1992); *see also* David J. Ettinger, Comment, *The Legal Status of the International Olympic Committee*, 4 PACE Y.B. INT'L LAW 97, 114 (1992) (explaining the importance of having an International Olympic Committee).

99. *See* ASHE, *supra* note 4, at 192 (citing the *Ebony* magazine poll that found that seventy-one percent of Black athletes were against the boycott, and only one percent agreed with it).

100. Smith and Carlos finished first and third, respectively, in the world for the two hundred meter dash. As the *Star Spangled Banner* played and the flag was raised, the two thrust black-gloved fists in the air and bowed their heads. *See* Doug Hartmann, *Race & Sport, at* http://www.johncarlos.com/issue.html (last visited Nov. 11, 2000).

C. Brigham Young University Boycott

The Olympics were the not the only venue in which Black athletes took a stand against discrimination. In the late 1960s, African-American athletes at several colleges were involved in player or school boycotts of athletic contests with Brigham Young University, operated by the Church of Jesus Christ of Latter Day Saints (more commonly known as the Mormon Church), to protest one of its controversial tenets. [101] The Mormon Church had a doctrine that Blacks were inferior beings and therefore ineligible for the clergy.[102] In 1967, Harry Edwards[103] organized a boycott by the track and field team at San Jose State University, a fellow member of the Western Athletic Conference (WAC).[104] The University of Texas at El Paso, another WAC member school, dismissed several athletes, including Bob Beamon,[105] from the track and field team for refusing to participate in a meet with BYU.[106] African-American athletes on these campuses followed in the tradition of Ali by risking their athletic careers to take an unpopular stand.

Protests by Black students at the University of Wyoming led to litigation. In *Williams v. Eaton*,[107] the Black Student Alliance demanded that the university athletic programs boycott BYU.[108] When members of the

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101. *See* HARRY EDWARDS, THE REVOLT OF THE BLACK ATHLETE 85 (1969) (explaining that the Mormon Church saw Black people "as morally, intellectually, and physically inferior . . . .").

102. *Id.*

103. *See supra* note 35 and accompanying text.

104. Greg E. Jones, Sr., *Brooklyn Sports Dad Coaches Son on, off Field: Pop's an Ex-Cub, Baseball Boss at FDR High School*, NEWSDAY (N.Y.), June 16, 1991, at 11 (describing an athlete's participation in the 1967 boycott against Brigham Young University for their racist policies).

105. Beamon set the world's record for the long jump at the 1968 Olympic Games in Mexico, jumping 29.5 feet. ASHE, *supra* note 4, at 196.

106. *Id.* at 192–93.

107. 310 F. Supp. 1342 (D. Wyo. 1970) (holding the athletes were not entitled to wear the armbands in protest, and that had the University of Wyoming allowed their protest, the university would have been in violation of Establishment Clause of the U.S. Constitution), *aff'd in part, vacated in part*, 443 F.2d 422 (10th Cir. 1971), *remanded*, 333 F. Supp. 107 (D. Wyo. 1971), *aff'd*, 468 F.2d 1079 (10th Cir. 1972).

108. The specific demands were:

> (a) University officials at the University of Wyoming, as well as other member institutions in the Western Athletic Conference, not use student monies and university facilities to play host to and thereby in part sanction alleged inhuman racist policies of the Church of Jesus Christ of Latter Day Saints, hereinafter referred to as the Mormon Church;
> (b) That athletic directors in the Western Athletic Conference refuse to schedule and play games with Brigham Young University so long as the Mormon Church continues such alleged policies;
> (c) That black athletes in the Western Athletic Conference protest in some way any contest with Brigham Young University so long as the Mormon Church continues such alleged policies; and
> (d) That all white people of good will, athletes included, protest with their black fellows a policy allegedly clearly inhuman and racist and that the symbol of protest be the black

football team were suspended for taking part in the protest, they challenged the legality of the suspension.[109] The litigation resulted when Coach Lloyd Eaton refused to let members of the football team participate in the protest.[110] When team members met with him wearing black armbands, he determined that they were engaged in a protest or demonstration that was in violation of team rules and dismissed them from the team.[111] The dismissed players, represented by, among others, Jack Greenberg and the late Haywood Burns,[112] brought suit challenging the coach's rule and their dismissal on First Amendment grounds.[113] The court upheld the dismissal on the grounds that the university would have violated the First Amendment if it had permitted the players to protest a religion.[114] Although the legal challenge was unsuccessful, their ultimate goal—to bring about change—was not. In 1978, Elder Spencer Kimball of the Mormon Church had a revelation that persons of Black ancestry could participate in the priesthood and consequently the controversial doctrine was repealed.[115] However, the legal impact of the *Williams* case did not end. Ironically, although the athletes lost their own case, they supplied the leading case on the Establishment Clause's application to colleges and universities.[116] The trial and appellate courts ruled against the athletes on the grounds that permitting student-athletes to protest against the Latter Day Saints would be a violation of the Establishment Clause by a state university.[117] This was only one of many upcoming battles for student-athletes.

D. The Free Agents: Creating Freedom in Athletics

While the political stances of the athletes yielded symbolic victories,

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armband worn throughout any contest involving Brigham Young University.

Williams, 333 F. Supp. at 109.

109. *Id.* at 110.

110. *Id.*

111. *Id.* at 108. The players were Jerome Berry, Anthony Gibson, John M. Griffin, Lionel Earl Grimes, Melvin Hamilton, Ron Hill, William Lark Hysaw, James Isaac, Earl Lee, Anthony E. McGee, Donald K. Meadows, Ivy Moore, Joe Harold Williams, and Theodore T. Williams. *Id.*

112. Burns was an attorney whose primary work focused on constitutional, civil, and human rights. *W. Haywood Burns, at* http://www.tenant.net (last visited Mar. 26, 2001).

113. *Id.*

114. *Williams*, 310 F. Supp. at 1352.

115. The Official Scriptures of the Church of Jesus Christ of Latter-Day Saints, Official Declaration-2 (June 8, 1978), http://scriptures.lds.org/od/2.

116. *See* Gil Fried & Lisa Bradley, *Applying the First Amendment to Prayer in a Public University Locker Room: An Athlete's and Coach's Perspective*, 4 MARQ. SPORTS L.J. 301 (1994) (examining the effect of the Establishment Clause, which the courts have used to limit student-athletes freedom of speech but have not extended to cover coaches).

117. *Williams*, 310 F. Supp. at 1342.

their actions to advance economic freedom and opportunity produced more tangible and lasting results. The struggle for free agency in professional sports was perhaps their most notable accomplishment. The push for free agency reached a fever pitch during the 1960s.

1. The Litigation in Baseball

Since the beginning of organized baseball, players pushed for higher wages.[118] The contract structure known as the reserve system suppressed salaries by precluding a player, after signing his first contract, from selling his services to the highest bidder.[119] In other words, he could not become a free agent.[120] Until *Flood v. Kuhn*, [121] owners brought the major challenges to the contract structure.[122] Owners argued that their ability to compete was adversely affected by the system.[123] After the integration of Major League Baseball (MLB) in the late 1940s, African-Americans moved to the forefront of negotiations.[124] Black ballplayers in the Negro Baseball Leagues essentially enjoyed free agency as they perennially sought to increase the compensation to players.[125] These players brought a strong culture of economic freedom into Major League Baseball.[126] Moreover, the years of

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118. *See* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 358 (1953) (holding that baseball teams, as a business, were not subject to federal antitrust laws); *see also* J. Gordon Hylton, *The Curt Flood Act: Why Baseball's Antitrust Exemption Still Survives*, 9 MARQ. SPORTS L.J. 391, 392-93 (1999) (noting that while the Curt Flood Act has limited baseball's immunity against antitrust laws, allowing labor laws to apply to a minor area of baseball negotiations has ultimately given baseball teams complete immunity from federal antitrust laws).

119. Jeffrey L. Kessler & David G. Feher, *What Justice Breyer Could Not Know at His Mother's Knee: The Adverse Effects of* Brown v. Pro Football *on Labor Relations in Professional Sports*, 14 ANTITRUST 41, 44 (2000) (looking at the impact of *Brown v. Pro Football, Inc.*, which held that antitrust and labor law cannot be reconciled, on professional sports today).

120. *Id.*

121. 407 U.S. 258 (1972) (holding that baseball is exempt from federal antitrust laws).

122. *See* Susan Seabury, *The Development and Role of Free Agency in Major League Baseball*, 15 GA. ST. U. L. REV. 335, 337-39 (1998) (detailing the history of the development of free agency and the effect on the present day relationship between players and owners).

123. *See* Federal Baseball Club of Baltimore, Inc. v. Nat'l League Prof'l Baseball Clubs, 259 U.S. 200 (1922) (holding that the business of baseball is not subject to antitrust laws and upholding the reserve system); *Toolson*, 346 U.S. at 358 (explaining the various reasons why the reserve system was affecting the competition between team owners); Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978) (holding that due to the exemption of baseball from antitrust laws, the commissioner had the authority to disapprove of a baseball team's reassignment of players).

124. *Cf.* Alfred Dennis Mathewson, *Major League Baseball's Monopoly Power and the Negro Leagues*, 35 AM. BUS. L.J. 291, 298 (1998) (noting that although the Negro leagues had unrestricted free agency, the demise of the league was due to other economic factors).

125. *Id.*

126. *See* Chase, *supra* note 6 (outlining the discourse of contract law and the manner in which contract law is influenced by race, which can ultimately empower or disenfranchise the African-American community).

toiling in segregated leagues made them particularly sensitive to contract structures that suppressed their freedom to choose their employer and their ability to maximize wages.[127] Jackie Robinson's testimony in the 1956 Senate hearings on baseball's antitrust exemption raised the economic freedom theme.[128] Robinson's view of shared control has provided the framework for professional team sports under which restrictions on player movement and salary structures derive through today's collective bargaining process. However, Robinson was not the ideological architect of the players' strategy for achieving free agency or its structure.[129] Credit for this structure belongs to Marvin Miller, the executive director of the Major League Baseball Players Association (MLBPA) in the 1970s.[130] Miller was instrumental in getting players the right to free agency—giving players the ability to trade their services to other teams, thereby negotiating for higher salaries.[131]

Curt Flood was an athlete who took Robinson's word to heart.[132] Flood chose to retire from baseball rather than be subject to the whims of owners under the reserve system.[133] Although the contract structure and salary levels gave a clear indication that a player was at the mercy of the team owner's decision-making in *Flood v. Kuhn*,[134] Flood directly challenged the reserve system based upon its infringement of his economic freedom and its

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127. Mathewson, *supra* note 124, at 300-01.

128. *Hearings Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary*, 85th Cong. 295 (1958) (statement of Jackie Robinson).

> I think they should in some way be able to express themselves as to whether or not they do want to play for a certain ball club. I am highly in favor of the reserve clause. I do not want to get this out that I don't believe there should be some control. But on the other hand, I don't think the owners should have all of the control. I think that there should be something that a ballplayer himself could say that would have some effect upon his particular position with a ball club.

Id.

129. Indeed, Robinson spoke of the right of the individual player to share control with the owner over his right to change teams for more money. *Id.*

130. *Marvin Miller*, *at* http://serv1.sportsline.com/u/baseball/bol/ballplayers/M/Miller_Marvin.html (last modified Mar. 19, 2001). Miller was the executive director of the Major League Baseball Players Association in the 1970s and more than any individual, is responsible for the huge salaries of today's athletes. Before Miller, players had few rights; they were stuck with one team until sold, traded, or released. But Miller won his union free agency, and from 1976 to the present, salaries have increased from $19,000 when Miller began to more than $1,400,000 per year today. Ira Berkow, *Sports of the Times: Marvin Miller: Hall of Famer*, N.Y. TIMES, Feb. 15, 1999, at D7.

131. Berkow, *supra* note 130.

132. *See supra* note 29 and accompanying text.

133. *See* Flood v. Kuhn, 407 U.S. 258 (1972); *see also infra* note 134 and accompanying text.

134. 407 U.S. at 258. Flood was able to claim that the restrictions imposed by the reserve system left the players without any options and with economic difficulties. However, the Major League Baseball Players Association had obtained the services of a labor lawyer, Marvin Miller, whose strategy played an essential role in helping baseball teams succeed. *See id.*

suppression of his salary.[135] Flood asserted causes of action on Thirteenth Amendment and antitrust grounds.[136] In all of the opinions produced by the courts in the litigation, only Justice Thurgood Marshall gave any significant attention to the Thirteenth Amendment claim.[137] Like the other justices and judges, he agreed that the reserve system did not constitute slavery because players voluntarily subjected themselves to the system through contracts.[138] He nevertheless dissented from the majority, which relied upon principles of stare decisis in holding that the Sherman Act did not apply to baseball.[139] His dissent was clearly based on his recognition of the principle of economic freedom. He wrote, "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms . . . ."[140] Marshall's statement reflects the importance of economic freedom to African-Americans, specifically noting the history of slavery in the United States.[141] The reserve system was yet another way African-Americans were being held back from economic prosperity, and Flood's challenge proved that the time had come for change.

Although the case did not break any ground in the law of free agency after the Supreme Court ruled that the Sherman Act was not applicable to

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135. *See Curt Flood's Famous Letter, a Signature Document*, ST. LOUIS AM., Jan. 23, 1997 (citing a letter from Curt Flood to Bowie Kuhn, then-commissioner of Major League Baseball, dated December 24, 1969), *available at* http://www.diamondfans.com/profile-flood.html. Flood wrote this letter ignoring the established agency rules in baseball after being advised that the St. Louis Cardinals had traded him to the Philadelphia Phillies without consulting him first.

> After twelve years in the Major Leagues, I do not feel I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the sovereign states.
>
> It is my desire to play baseball in 1970, and I am capable of playing. I have received a contract offer from the Philadelphia Club, but I believe I have the right to consider offers from other clubs before making any decisions. I, therefore, request that you make known to all Major League Clubs my feelings in this matter, and advise them of my availability for the 1970 season.

Id.

136. *Flood*, 407 U.S. at 258.

137. *Id.* at 289.

138. *Id.*

139. *Id.* at 293 (relying on cases dealing with freedom of competition, Justice Marshall states that he would overrule *Toolson* and *Federal Baseball Club of Baltimore, Inc.*).

140. *Id.* at 291 (quoting Justice Marshall's majority opinion in *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)).

141. Flood's argument that a voluntary contract system can constitute slavery, as well as Justice Marshall's characterization of the antitrust laws, hearken back to the post-Civil War era in which Southern states attempted to maintain de facto slavery by regulating the contractual rights of the freed slaves through contracts known as "Black Codes." *Flood*, 407 U.S. at 289. The Black Codes were invalidated by the Civil Rights Act of 1866, now codified at 42 U.S.C. § 1981 (1994).

baseball,[142] the case is still known for its symbolic value. Flood's willingness to risk his career to challenge the system motivated players in all professional sports to continue the fight.[143] In his dissent, Justice Marshall set the stage for further development of the law of free agency in professional team sports.[144] Even if the Court had ruled that the Sherman Act applied, Marshall wondered whether the federal labor laws would, nevertheless, govern the outcome because of the labor law exemption to the antitrust laws.[145] By applying labor law and its principles of collective bargaining, the Supreme Court addressed Robinson's call for shared control between players and owners over free agency.

After *Flood,* athletes in other sports brought cases using antitrust, contract, and labor law. The subsequent cases in basketball and football further developed the analysis of restrictions on free agency under the antitrust laws and the applicability of the labor law exemption.[146] After an arbitration panel construed the collective bargaining agreement's terms and the uniform players' contract, major league baseball players ultimately obtained free agency.[147] The contract structure for free agency in baseball, which was achieved through the collective bargaining process, reflected and addressed Flood's concern for economic freedom and higher salaries.

2. The Litigation in Football

The issues of free agency and higher salaries are ineluctably intertwined. Owners suppressed compensation through restrictions on the player market.[148] The principle of economic freedom appears to have played a significant role in the early challenges to the reserve system in football. In *Radovich v. National Football League,*[149] the Supreme Court held that professional football was subject to the Sherman Act, and that the National Football League (NFL) was liable for blacklisting a player for violating the reserve clause set forth in the uniform players' contract.[150] A White player,

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142. *Flood,* 407 U.S. at 289.

143. *See* ASHE, *supra* note 4, at 31.

144. *Flood,* 407 U.S. at 258.

145. *Id.* at 291-94.

146. *See, e.g.,* Radovich v. Nat'l Football League, 352 U.S. 445 (1957); Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, (9th Cir. 1969).

147. Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 632 (8th Cir. 1976) (holding that the negotiated agreement between the players and the team owners regarding the ability to be traded to another team was enforceable).

148. *See* Seabury, *supra* note 122, at 337-39 (having reserved the rights to star players and binding those players through the reserve clauses, owners were able to control salaries).

149. 352 U.S. 445 (1957).

150. *Id.* at 454.

in an effort to be close to an ill relative, requested to be traded to a specific city and the NFL not only refused to trade him, but blacklisted him after he played for a rival team.[151] After *Radovich*, free agency was theoretically possible, but the NFL went through various machinations to achieve a de facto reserve system.[152]

Enlightened by the litigation in baseball, the players understood the connection between contract structure and salary levels. Accordingly, the players adopted the Jackie Robinson formula; while shared control of free agency gave players greater economic choices, salary levels were of greater concern than economic freedom.[153] The victory in *Radovich*, along with the recognition of the National Football League Players Association (NFLPA) as a labor union under federal labor laws, enabled the professional football players to pursue free agency on two fronts: collective bargaining power and antitrust litigation.[154] The players' desires for higher salaries were thwarted by the de facto reserve system implemented through provisions designed to impede the movement of players from one team to another.[155] The most famous device to limit a player's movement was the Rozelle Rule, which required teams to compensate a club with players or draft picks when they signed a free agent that had previously been under contract to another team.[156] Teams were thus deterred from signing free agents that had been under contract to other teams, and very few players changed teams unless traded. When the collective bargaining process failed to eliminate the Rozelle Rule,[157] the players resorted to antitrust law not only to invalidate the rule, but also to eliminate similar restraints unilaterally imposed by the owners on the free agent market.[158]

African-American athletes were activists in the struggle to obtain free

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151. *Id.* at 448.

152. *See* Mark D. Maco, Note, *Rules Restricting Player Movement Under the Federation Internationale de Football: Do They Violate U.S. Antitrust Law?*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 407, 411 (1999) (examining how the Court decided that placing restrictions on player movement through the Rozelle Rule was an unreasonable restraint on the trading of players).

153. Alan Page, now a Minnesota Supreme Court justice but then a player for the Minnesota Vikings, testified in the *Mackey v. National Football League* trial that the Rozelle Rule was a hindrance to free player movement, but that the principal effect was on players' salaries. Mackey v. Nat'l Football League, 543 F.2d 606, 620 n.28 (8th Cir. 1976), *aff'g in part, rev'g in part* 407 F. Supp. 1000 (D. Minn. 1975).

154. *See, e.g.*, *Radovich*, 352 U.S. at 448.

155. *Mackey*, 543 F.2d at 606.

156. *Mackey*, 407 F. Supp. at 1004 (quoting the Rozelle Rule in the NFL constitution and bylaws).

157. *Mackey*, 543 F.2d at 610 (explaining that the Rozelle Rule dealt with inter-team compensation when a player's contract expires and is signed by another team).

158. *See Radovich*, 352 U.S. at 451-52.

agency and have been leaders of the NFLPA for years.[159] In *Mackey v. National Football League*,[160] the players challenged the Rozelle Rule, which constrained movement by veteran players and restricted rookie players to negotiating with a single team during the college draft.[161] The elimination of the rule would result in a player's market that would produce higher salaries through bidding by competitors.[162] The lead plaintiff was perennial all-star John Mackey of the Baltimore Colts who at the time was also the president of the NFLPA.[163] The Eighth Circuit resolved the question raised by Justice Marshall in *Flood* about the applicability of the labor law exemption.[164] The Supreme Court had already established in *Radovich* that the Sherman Act applied to football.[165] The Eighth Circuit held that the Rozelle Rule was not shielded from antitrust scrutiny by the nonstatutory labor law exemption in antitrust laws.[166] It articulated three criteria that must be satisfied in order for owners to use federal labor law as a weapon against the NFLPA.[167] *Mackey* also reached the merits of the antitrust case, which *Flood* did not, and found that the Rozelle Rule constituted an unreasonable restraint against trade in violation of the Sherman Act.[168] The principle that the regulation of free agency must be a shared enterprise was thus etched in law.

The NFLPA, however, was relatively weak at the time of the *Mackey* litigation and collective bargaining agreements contained provisions that continued the de facto reserve system in football.[169] The NFLPA agreed to compromises on free agency in the collective bargaining process and

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159. *See* ASHE, *supra* note 4, at 144. The players associations in the NFL and the American Football League (AFL) initially retained their independence after the two leagues merged. John Mackey was selected as the president when the two unions formed one players association. *The History of the NFL Players Association, at* http://www.nflpa.org/aboutUs (last visited Sept. 2, 2000). African-Americans have continued to play influential roles in the players association, with Gene Upshaw having served as executive director since 1982. *Id.*

160. 407 F. Supp. 1000 (D. Minn. 1975).

161. *Id.*

162. *Id.* at 1007.

163. *Id.*

164. *Mackey*, 543 F.2d 606, 614 & n.12.

165. Radovich v. Nat'l Football League, 352 U.S. 445, 448 (1957).

166. *Mackey*, 543 F.2d at 616 ("The Union's acceptance of the status quo by the continuance of the Rozelle Rule . . . cannot serve to immunize the Rozelle Rule from the scrutiny of the Sherman Act.").

167. The labor law exemption from the antitrust laws applies "where the restraint on trade primarily affects only the parties to the collective bargaining relationship[,] . . . "concerns a mandatory subject of collective bargaining[,] . . . [and] is the product of bona fide arm's-length bargaining." *Id.* at 614.

168. *Id.* at 622.

169. The union had just emerged from a split between the NFLPA and the American Football League Players Association (AFLPA). The AFLPA had undercut the NFLPA by agreeing to the terms the NFLPA had resisted. *The History of the NFL Players Association, supra* note 159.

challenged them once the agreement expired.[170] Over the ensuing years, this strategy has resulted in substantial changes in the free agency system and higher salaries in professional football. This dual strategy may have ended with the Supreme Court's recent decision in *Brown v. Pro Football, Inc.*[171]

3. The Litigation in Basketball

Professional basketball's struggle for free agency in some way resembles the conflict in the National Football League. The reserve system in the National Basketball Association, however, was never as onerous as the systems in baseball or football. First, basketball uses fewer players so those individual players have had greater leverage, in general, than players in the other sports.[172] In addition, for most of its history, the NBA has faced market competition for professional basketball players in the United States. In the 1950s, some African-American players had the option of playing for the Harlem Globetrotters, who in the early years of the NBA were more popular and more financially successful.[173] In the 1960s, the players benefited from the existence of the rival American Basketball Association (ABA), intensifying the competition between the leagues and leading to higher salaries for players.

Due to the difference in market structures, particularly the existence of rival leagues, basketball players enjoyed the freedom to negotiate with more than one team. Consequently, the players resorted to individual legal challenges to maximize their economic opportunity rather than to pursue a larger economic freedom for all.[174] For example, *Central New York Basketball, Inc. v. Barnett*[175] involved an attempt by an NBA player to obtain a higher salary by signing with a team in the ABA at a higher

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170. See McNeil v. Nat'l Football League, 790 F. Supp. 871 (D. Minn. 1992), for a recent history of this dual strategy.

171. 518 U.S. 231, 250 (1996) (holding that players must choose between using antitrust or labor law to govern relationship with owners). "May have ended" is used because the NFLPA has dealt with the choice between antitrust and labor law before. It decertified itself as a union in 1989 after it lost *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), in which the Eighth Circuit held that the labor law exemption from the antitrust laws extends for unspecified period after the expiration of collective bargaining agreement. *Id.* at 1303.

172. *See* Glen St. Louis, *Keeping the Playing Field Level: The Implications, Effects and Application of the Nonstatutory Labor Exemption on the 1994 National Basketball Association Collective Bargaining Process*, 1993 DET. C.L. REV. 1221, 1248-50 (1993) (stating that professional basketball players are among the highest paid athletes).

173. Mathewson, *supra* note 124, at 302-04.

174. *See* Erving v. Va. Squires Basketball Club, 468 F.2d 1064 (2nd Cir. 1972) (affirming a contract that a player claimed he had been induced into signing); Minn. Muskies, Inc. v. Hudson, 294 F. Supp. 979 (M.D.N.C. 1969) (holding that a basketball team's claim to enjoin a player for breach of contract was dismissed due to the team's own wrongdoing).

175. 181 N.E.2d 506 (Ct. Com. Pl. 1961).

salary.[176] Most of the cases cited involved routine contract law and injunctive relief issues.

In *Denver Rockets, v. All-Pro Management, Inc.*,[177] a player under contract in the ABA sought to jump to an NBA team.[178] The player, Spencer Haywood, had been the Most Valuable Player in the 1968 Olympic basketball tournament and was able to sign with the ABA before he had attended four years of college under the league's hardship rule.[179] When the NBA commissioner refused to approve his contract with the NBA team due to his ineligibility under an NBA rule that prohibited the signing of players before they had been out of high school for four years, Haywood challenged the refusal to sign on antitrust grounds.[180] Where Lou Hudson[181] and Julius "Dr. J" Erving[182] had been unsuccessful, Haywood not only succeeded in changing teams, but he also invalidated a market restraint on the entry of college-age basketball players.[183] It is one of the most significant precedents in sports law history. Haywood's victory still roils with repercussions for all professional sports.

It is fitting that the NBA Players Association resorted to the Robinson formula and first challenged the college draft and free agency limits when the NBA and ABA proposed to eliminate market competition between them in the early 1970s. The suit, *Robertson v. National Basketball Ass'n*,[184] was eventually settled in 1976.[185] The players and owners reached agreements on the college draft and free agency.[186] Since the settlement of the case, these issues have been resolved through the collective bargaining process. The

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176. A standard provision in uniform player contracts provides owners with the right to obtain a negative injunction, which prevents a player from playing for another team during the term of his contract. *See, e.g.*, Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1969).

177. 325 F. Supp. 1049 (C.D. Cal. 1971).

178. *Id.* at 1054.

179. *Id.* at 1060.

180. The litigation was quite protracted. The ABA team, the Denver Rockets, sought to enjoin him from playing for the NBA's Seattle Supersonics because he was under contract with Denver. The player filed suit against the NBA. *Id.* at 1059.

181. Hudson played basketball for the Atlanta Hawks. ASHE, *supra* note 4, at 305.

182. Erving played for the Boston Celtics during the years when the Celtics dominated basketball. He was not permitted to enter the NBA until four years after he left high school. ASHE, *supra* note 4, at 306.

183. *Denver Rockets*, 325 F. Supp. at 1049.

184. 389 F. Supp. 867 (S.D.N.Y. 1975).

185. Robertson v. Nat'l Basketball Ass'n, 72 F.R.D. 64 (1976). With the exception of three members of the class action suit, the players and owners settled the case. The subsequent appeal by the remaining three class members was deemed meritless by the Second Circuit. *See* Robertson v. Nat'l Basketball Ass'n, 556 F.2d 682, 684 (2nd Cir. 1977)

186. *Id.*

Robertson Settlement, as it has become known, laid the foundation for the free agency framework in professional basketball.[187]

African-American athletes, who have been at the forefront of sports issues and important litigation, have often headed the players union. After much legal wrangling, the past two union presidents have been Isaiah Thomas[188] and Patrick Ewing, two of the most prominent basketball players of the late twentieth century.[189] The union's primary focus has been salaries rather than economic freedom.[190] This subtle difference in philosophical motivations, as noted above, has occurred because of the market history of professional basketball.

Issues of political and economic freedom have surfaced in other contexts. Mahmoud Abdul-Rauf, for example, was driven from the NBA because of his refusal to stand for the National Anthem.[191] Most recently, the NBA Players Association strongly defended Latrell Sprewell when the league suspended him for one year and the Golden State Warriors terminated his contract for choking his coach.[192] In negotiating the current collective bargaining agreement, the league strengthened the right to discipline and control players, highlighting again the continued tension between players and management.[193]

4. Intercollegiate Athletics

As they opened the doors to Black athletes in the 1950s and 1960s,[194] many HWIs may have used the Jackie Robinson Model. It was not, however, a perfect model. The professional leagues could use the model to obtain adults who already had substantial grooming, so that academics were far less important. Moreover, the athletes from the 1950s must be distinguished from those in the 1960s and early 1970s. The former group was fewer in

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187. *See* Bridgeman v. Nat'l Basketball Ass'n, 675 F. Supp. 960, 962-64 (D.N.J. 1987) (explaining the impact of the Robertson Settlement on basketball salaries).

188. *See infra* text accompanying notes 306-08.

189. *See* J.A. Adande, *Rolling Sevens*, SPORTING NEWS, June 21, 1999, *available at* LEXIS, Nexis Library, News Group File.

190. Chris Sheridan, *They Got Game: NBA Settlement Barely Beats Buzzer*, BATON ROUGE ADVOC., Jan. 7, 1999, at 1A.

191. Mark J. Spears, *Islamic Faith Caused Ruckus: Abdul-Rauf Disdained Anthem*, DENVER POST, June 22, 2000, at D5.

192. *See* John N. Mitchell, *NBA Star Reinstated after Choking Coach: Arbitrator Finds Penalty Too Severe*, WASH. TIMES, Mar. 5, 1998, at A1 (discussing the reinstatement of Sprewell's contract and modification of his suspension period).

193. *See* Sheridan, *supra* note 190.

194. See generally ADELSON, *supra* note 24, and ROSS, *supra* note 24, for a discussion of the experiences of Black athletes in the 1950s and 1960s.

number[195] and had a transformative social impact on collegiate institutions. The latter groups were larger in number, but frequently had to confront colleges and athletic associations for the right to be there;[196] ironically, the particular university involved usually supported these challenges. The success of the latter groups has been muted because they have been torn between the pursuit of economic and educational opportunities.[197] Notwithstanding the differing impact at the collegiate level, the athletes of the 1960s and 1970s established much of the common law of amateurism in intercollegiate athletics.

The demand of HWIs for African-American athletes did not extend to the Southern states until the late 1960s.[198] This demand came on the heels of the pressure of the Civil Rights movement. The South was undergoing a transformation in its educational systems in the aftermath of *Brown v. Board of Education*.[199] As the Southern states moved with deliberate speed to integrate their public school systems, Civil Rights activists turned their eyes to higher education systems.[200] In 1962, James Meredith made headlines when the University of Mississippi finally admitted him, only to have the National Guard escort him onto the campus.[201] The following year George Wallace stood defiantly in the way to prevent Black students from enrolling at the University of Alabama.[202] Wallace's defiance, however, failed to stem the tide as the National Guard was sent in once again.[203]

As the Civil Rights movement succeeded in opening doors to Blacks, HWIs were presented with a dilemma, the causes of which often are discussed separately. First, HWIs wanted to increase the number of African-American students on campus.[204] Second, their athletic departments wanted

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195. Earl Smith, Ph.D., *Sports Law in the 21st Century: Race Matters in the National Basketball Association*, 9 MARQ. SPORTS L.J. 239, 241-44 (1999).

196. *See* ASHE, *supra* note 4, at 55-64.

197. *See* discussion *infra* Part IV.B.

198. Davis, *supra* note 9, at 624-37.

199. 347 U.S. 483 (1954) (holding that the racial segregation of public schools violates the Equal Protection Clause).

200. *See* Timothy Davis, Ross v. Creighton University*: Seventh Circuit Recognition of Limited Judicial Regulation of Intercollegiate Athletics*, 17 S. ILL. U. L.J. 85, 104-15 (1992) (discussing the reluctance of the courts to intervene in the regulation of athlete-university relations).

201. *Mississippi*, ENCYCLOPAEDIA BRITANNICA (David G. Sansing ed.), http://www.britannica.com./bcom/eb/article/9/0,5716,121289+5,00.html (last visited Oct. 5, 2000).

202. *George C. Wallace*, ENCYCLOPAEDIA BRITANNICA (David G. Sansing ed.), http://www.britannica.com/bcom/eb/article/1/0,5716,77956+1+75962,00.html (last visited Oct. 5, 2000).

203. *Id.*

204. *See generally Expert Report of Thomas J. Sugrue*, 5 MICH. J. RACE & L. 261, 296-97 (1999) (stating that racial and ethnic divisions are still prevalent in the United States); Davis, *supra* note 9 at 698 (discussing the presence of racism in college athletics); Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again*, 81

to increase the number of African-Americans who were athletes.[205] Many of the desirable African-American athletes had academic records that were not only lower than those of the Whites, but also lower than those of the acceptable Black students.[206] Colleges faced a serious dilemma and found themselves with few options. If colleges established academic criteria broadly enough to include academically underachieving African-American athletes, they would have too many African-Americans in general. If colleges established criteria broad enough to snare the "Best Blacks,"[207] they would not be able to admit the athletes they wanted.

The dilemma was particularly troublesome in the South where universities had long resisted the integrationist efforts of colleges and universities outside the region.[208] Alumni and other constituencies were opposed to having Black athletes represent their institutions since athletics are extremely visible to the public and have enormous symbolic value.[209] Segregation died hard and it was easier to tolerate a small number of invisible Black students than to see them on the playing field. For many Southern institutions, the answer to the dilemma was clear and simple: Black athletes had to be excluded.[210] As Southern colleges opened their doors to Blacks in general, they continued to resist on the athletic front. In the 1960s, for example, members of the Atlantic Coast Conference (ACC) adopted its infamous "800 Rule."[211] To be eligible to participate in intercollegiate athletics, an athlete was required to score a minimum of 800 on the Standardized Aptitude Test (SAT).[212] At some schools, the coaches maintained the exclusionary practices. Adolph Rupp,[213] the legendary University of Kentucky basketball coach, was notorious for his refusal to

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CAL. L. REV. 1401, 1412 (1993) (stating that the major race relations issue in the United States today concerns how to promote successful integration while respecting racial differences).

205. *See* Davis, *supra* note 9, at 635-36 (stating that the commercialization of sports helped increase integration in college athletics).

206. Douglas Lederman, *Blacks Make Up Large Proportion of Scholarship Athletes, Yet Their Overall Enrollment Lags at Division I Colleges*, CHRON. HIGHER EDUC., June 17, 1992, at A1.

207. *See supra* note 12 and accompanying text.

208. *See* Davis, *supra* note 9, at 624-37 (discussing the informal, discriminatory rules reinforced in the South).

209. *Id.* at 630.

210. *Id.*

211. Dane Huffman, *Triangle Suffers Major-Bowl Famine*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 31, 1993, at C5 (stating that universities began lacking star athletes to lead teams to championship titles once the ACC passed the 800 minimum SAT requirement).

212. DEAN SMITH, A COACH'S LIFE 98 (1999).

213. Rupp led the Kentucky Wildcats to four national titles. The Hall of Fame coach remains synonymous with not only the university, but college basketball itself. His teams won 82.2% of their games. Kelli Anderson, *True Blue: Kentucky Won Five NCAA Titles Between 1948 and '78, Setting a Standard for Success—Creating Great Expectations*, SPORTS ILLUSTRATED, Apr. 17, 1996, *available at* LEXIS, Nexis Library, Sports Illustrated File.

recruit Black athletes.[214]

At about the same time as the ACC introduced its 800 Rule, the National Collegiate Athletics Association (NCAA) reversed its stand on "home rule" admissions criteria for student-athletes.[215] In 1965, it adopted a uniform minimum standard known as the "1.600 Rule."[216] This requirement was much lower than the 800 Rule. A student-athlete was eligible to participate in intercollegiate athletics if his high school academic performance and standardized test score predicted a 1.600 undergraduate grade point average or C-/D+ average.[217] The NCAA promulgated the rule, at least in part, due to criticism that NCAA members were exploiting Black athletes with its amateurism deal.[218] Black athletes were recruited with the offer of a scholarship but many failed to obtain a degree.[219] The rule was largely window dressing, permitting the NCAA to say that it was serious about academic standards without interfering with the athletic goals of member institutions. Moreover, it permitted colleges and universities to bring in Black athletes in larger numbers.

The 1.600 Rule created huge pressure on the Southern universities to integrate their athletic programs. Considerable historical significance has been given to the 1966 University of Texas at El Paso[220] win in the 1966 NCAA basketball championship. The university used five Black starters to upset Adolph Rupp's favored all-White University of Kentucky Wildcats.[221]

Furthermore, John Wooden's UCLA Bruins, who dominated college basketball for more than a decade with Black players like Lucius Allen, Walt Hazard, Marques Johnson, Michael Warren, Sidney Wickes, Jamal Wilkes, Curtis Rowe, and Kareem Abdul-Jabbar, defined the era. UCLA's success probably led to ACC schools stepping up their recruitment efforts to find Black athletes who passed the 800 Rule and were otherwise acceptable.

Although the success of UCLA on the basketball court cannot be discounted as a factor, its cross-town rival has been credited with greater impact in popular lore. The University of Southern California (USC) Trojans

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214. Michael Wilbon, *Georgetown One Game from 2nd Championship*, WASH. POST, Apr. 1, 1985, at C1.

215. *See* SHROPSHIRE, *supra* note 4, at 104-07. "Home rule" meant each NCAA member established its own academic requirements for participation in intercollegiate athletics. *Id.* at 107.

216. *Id.* at 104.

217. *Id.* at 107. The rule was repealed in 1973 and replaced with a 2.0 minimum grade point average. *Id.*

218. Louis Hakim, *The Student-Athlete vs. the Athlete Student: Has the Time Arrived for an Extended-Term Scholarship Contract?*, 2 VA. J. SPORTS & L. 145, 158-59 (2000).

219. *See* Spivey & Jones, *supra* note 67, at 940.

220. ASHE, *supra* note 4, at 61-62. The university was then known as Texas Western University.

221. Steve Wilson, *Tubby Smith: A Journey to the Top* (March 30, 1998), *at* http://www.finalfour.net.

tried to match UCLA's success on the college football field. In the 1960s, it began a string of Black running backs for its football team: Mike Garrett, O.J. Simpson, Sam Cunningham, Anthony Davis, Charles White, and Marcus Allen.[222] Four of these players won the Heisman Trophy.[223] Yet, the most enduring story of the group's impact on destroying segregation in Southern athletic programs concerned a performance by Sam Cunningham in a 1970 game in Montgomery, Alabama.[224] Cunningham scored three touchdowns in a 41-21 victory over Alabama.[225] Paul "Bear" Bryant, who had left Kentucky in part because of its resistance to Black players, is reputed to have credited Cunningham with having a greater impact on integration in the South than Martin Luther King, Jr.[226] Alabama and other Southern universities would now recruit Black players; they had to if they wanted to be competitive.

As Southern universities rushed to find Black athletes, they began to confront the dilemma other HWIs were facing. Mississippi faced it directly. In 1970, the State of Mississippi established admissions criteria for the University of Mississippi and Mississippi State University based exclusively on standardized test scores.[227] It established an American College Testing Program (ACT) score of fifteen, which most Blacks did not attain and most Whites did.[228] However, it permitted both schools to make fifty exceptions for particularly talented or high-risk students,[229] perhaps a euphemism for athletes. Thus, Mississippi schools would admit Black athletes, but not necessarily other Black students. The 800 Rule functioned in the opposite manner. It allowed ACC members to admit the relatively small number of "Best Black" students while excluding or reducing the numbers of Black athletes.

Black athletes responded by challenging the aforementioned academic standards. Some of those challenges appear to have been directed at the adverse effect on professional opportunity rather than on educational opportunity. The NCAA operated the developmental league for professional

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222. Richard Hoffer, *Most Troubled Team: Where Are the Good Old Days?: Southern Cal, a Team of Glorious Tradition is Struggling to Recover from 3-8 Season*, SPORTS ILLUSTRATED, Aug. 31, 1992, *available at* LEXIS, Nexis Library, Sports Illustrated File.

223. These include Marcus Allen, Michael Garrett, O.J. Simpson, and Charles White. *The Heisman Winners Down Through the Years from Dayne to Berwanger*, *at* http://www.heismanmemorialtrophy.com/winners.html (last visited Oct. 16, 2000).

224. Mark Blaudschun, *Removing the Barrier*, BOSTON GLOBE, Aug. 26, 1994, at 40.

225. *Id.*

226. *Id. Contra generally* HOBERMAN, *supra* note 8 (arguing that Cunningham's impact has been exaggerated).

227. Ayers v. Fordice, 111 F.3d 1183, 1193 (5th Cir. 1997).

228. *Id.*

229. Ayers v. Allain, 914 F.2d 676, 680 (5th Cir. 1990) (holding that the state officials had fulfilled their duty of desegregation).

basketball and football, and athletes who desired the professional opportunity needed to participate at the collegiate level.[230] Unlike the quest of their predecessors, these challenges by student-athletes were not in opposition to professional team owners. Instead, the NCAA brought these challenges against the professional teams in collusion with a college athletic program that wanted to use the player.[231]

This is apparent in challenges brought by the student-athletes to the ACC's 800 Rule. It was a highly controversial rule among member institutions. Paul Dietzl strongly objected to it when he was the head football coach at the University of South Carolina. He complained that South Carolina was losing talented athletes from the state to other NCAA schools.[232] When the conference refused to repeal the rule, Dietzl withdrew South Carolina from the ACC.[233] Other football coaches in the conference complained that the rule hurt ACC football programs because it stunted their program's growth.[234] Where Dietzl failed, two Clemson football players succeeded. The conference repealed the rule after they sued.[235]

Concerns about academic standards in intercollegiate athletics existed long before HWIs discovered the African-American athlete. [236] Scholars in the academy have long accepted the idea that athletic ability and academic dexterity are inversely related and suspected that athletic departments were more interested in winning and financial gains than the academic mission of universities.[237] The mixing of this conventional wisdom with racial stereotypes has generated the modern controversy over initial eligibility standards.

The current debate centers around a class of superior African-American athletes who have not been able to show the proclivity for academic work on standardized tests. The collusion is reflected in the reported opinions. The earliest of these cases is *Parish v. NCAA*.[238] In the late 1960s, small colleges

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230. Gordon S. White, *S. Carolina is Its Own Boss*, N.Y. TIMES, Apr. 10, 1971, *available at* LEXIS, Nexis Library, N.Y. Times File.

231. *See e.g.*, Braxton Lee Banks v. NCAA, 746 F. Supp. 850 (N.D. Ind. 1991) (finding in favor of the NCAA rule that prohibits a player to retain amateur status once he has entered a professional draft); Cureton v. NCAA, 198 F.3d 107 (3rd Cir. 1999) (holding that: disparate-impact regulations promulgated under Title VI are program-specific; the NCAA was not subject to Title VI based on funds received by an affiliated youth enrichment program; and, the NCAA was not subject to a cause of action under Title VI because it did not have controlling authority over its members).

232. White, *supra* note 230.

233. *Id.*

234. Huffman, *supra* note 211.

235. *Id.*; *see also* Schubert v. NCAA, 506 F.2d 1402 (7th Cir. 1974) (discussing the constitutionality of the newly established "2.0 Rule" after the NCAA repealed the 1.600 Rule).

236. SHROPSHIRE, *supra* note 4, at 106.

237. *Id.* at 106.

238. 361 F. Supp. 1220 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975).

and universities tried to play big time basketball by recruiting outstanding Black athletes without regard to their preparation for college. Some universities offered financial inducements in violation of NCAA rules.[239] Centenary University reached the national spotlight after it signed Robert Parish, "The Chief" of Boston Celtic fame.[240] Parish was heralded as the next Lew Alcindor.[241] No one questioned Parish's athletic ability, but the NCAA questioned his academic ability.[242] Under then NCAA initial eligibility rules, a high school athlete was ineligible unless he was predicted to attain at least a 1.600 GPA in college.[243] The prediction was determined by using the athlete's high school grade point average and standardized test score.[244] Because of his standardized test score, Parish failed to meet the initial eligibility requirement.[245] The temptation to view the university as the real plaintiff in the case is great but misplaced. True, the player and the university colluded, but in those days, it was unusual for a football or basketball player to go straight to the professional ranks, even though the legal groundwork permitting an athlete to do so had already been established.[246] Although Parish could have left Centenary for professional basketball, he stayed and graduated.[247]

Parish's lawsuit alleged that the rule violated the Equal Protection and Due Process Clauses.[248] The arguments were difficult because the plaintiffs were Parish and four non-Black athletes.[249] All of the athletes came from rural areas with lesser educational resources, and the essence of the challenge was that the rule denied an educational opportunity to athletes from underprivileged backgrounds.[250] The difficulty for the legal counsel—not the athletes—was to translate the claim into a constitutional violation. The complaint apparently alleged several classes against which the rule

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239. *Id.* at 1030-31.

240. Parish played more minutes and in more games than any other player in NBA history. Frank Hughes, *A Fistful of Things to Watch this Season*, NEWS TRIB., Oct. 31, 2000, at C10 (citing Parish's record).

241. *Parish*, 361 F. Supp. at 1223.

242. *Id.* at 1223-24.

243. *Parish*, 506 F.2d at 1030.

244. *Id.*

245. *See Parish*, 361 F. Supp. at 1223 (discussing how Parish attended college and played basketball while being academically ineligible).

246. *See* Williams v. Eaton, 333 F. Supp. 107, 110 (D. Wyo. 1971).

247. *Parish Announces Retirement After 21 Seasons*, WASH. POST, Aug. 26, 1997, at C5.

248. *Parish*, 506 F.2d at 1033.

249. *Id.* at 1034 n.12.

250. *Id.* at 1226.

discriminated.[251] However, much of the evidence presented at trial related to discrimination against Blacks and its impact on Parish.[252] The district court held that the evidence was insufficient to show that the rule discriminated against Blacks.[253] That left the lawyers without a suspect class in constitutional law terms, and the court applied the rational basis standard.[254] Parish may have lost the case, but his fight for educational opportunity for African-American athletes was temporarily successful. While the litigation was pending, the NCAA repealed the rule.[255]

IV. THE O.J. MODEL'S STRUGGLES AND ACHIEVEMENTS

America is perhaps most familiar with the image of O.J. Simpson leaping over luggage in airports as the pitchman for Hertz Rent-A-Car. O.J., with his charming smile and good looks, was the perfect antidote for the angry Black men of the 1968 Olympics. He personified the nonthreatening Black male who was happy with the American dream. HWIs continued to search for Black super-athletes who preferably could cross over and appeal to largely White audiences. The O.J.s inherited an economic world constructed by the Jackie Robinsons. Two characteristics distinguish them from the Jackie Robinsons. First, knowledge of their endorsement potential made them more image-conscious.[256] Consequently, they discovered that the magnitude of endorsement income directly related to the extent to which they appeared to be nonthreatening to White America. Second, having been silenced in college[257] and being image-conscious, many athletes have shied away from taking public positions on issues of social importance and have been reluctant to take "Floodian" stands.[258] Consequently, these athletes have been frequently criticized for not taking a position on important

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251. *See id.* at 1034 (explaining that the plaintiffs had not clearly distinguished themselves as members of a suspect class for their discrimination claims).

252. *See Parish*, 361 F. Supp. at 1227.

253. *Id.* at 1226-27.

254. *Parish*, 506 F.2d at 1034.

255. *Id.* at 1030 n.1.

256. Product endorsements did not begin with O.J. Simpson. Bill Russell was probably the first Black athlete to do a television commercial. *See* Hirley Riley-Davis, *Bill Russell Had Another First*, N.Y. TIMES, June 25, 2000, at 11. In some instances, the money from endorsements exceeded their compensation from playing. *Sporting Life: For the Love of Money: With McDonald's, Nike and Even Pizza Hut Falling over Themselves to Sponsor Tournaments and Players, is Sport Just Benefiting from the Public's Love of a Good Game or Has It Prostituted Itself to Business?*, OBSERVER, May 23, 1999, *available at* 1999 WL 13403437.

257. *See infra* Part IV.B.

258. *See* discussion *supra* Part III.D.1.

issues.[259]

Michael Jordan, one of the most prominent and famous athletes in history, refused to endorse Harvey Gant, an African-American, in Gant's campaign against Jessie Helms for a North Carolina seat in the U.S. Senate.[260] Jordan refused to endorse him because he wanted to maintain political neutrality.[261] He recognized that Democrats and Republicans both bought Air Jordans and did not want to offend either group.[262] Jordan has also been criticized for not using his influence over Nike to end its use of sweatshops in manufacturing sneakers in Third World countries.[263] Conversely, outspoken athletes have also been criticized for their positions. Reggie White, for example, faced heavy public criticism for his outspoken anti-gay message.[264] Charles Barkley has frequently gotten into trouble for his comments, particularly his views on athletes as role models.[265] Wilt Chamberlain[266] and Bill Russell[267] never hesitated to speak out on controversial issues. They were not afraid to deal with the consequences of their beliefs. Of course, they never engaged in developing a persona for public consumption. They were who they were and if that would sell, fine. If not, so be it. Michael Jordan, Magic Johnson, Charles Barkley, Bo Jackson, Deion Sanders, Shaquille O'Neal, Tiger Woods, and even Dennis Rodman have enormously impacted American culture. While the jury is still out regarding their influence on the shape of the legal institutions governing sports, the quest for the O.J.s undoubtedly has changed the legal landscape in professional and collegiate athletics.

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259. *See, e.g.*, Phil Mushnick, *Cheap Shots at Kathie Lee-Why No Flack For Michael Jordan's Far Fatter Sweatshop Profits?*, N.Y. POST, July 28, 2000, at A29 (criticizing Michael Jordan).

260. Barry Saunders, *Air Jordan Grounded by Foot Trouble? That's UnNikely*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 25, 1997, at A19.

261. *Id.*

262. *Id.*

263. Mushnick, *supra* note 259.

264. *20/20* (ABC television broadcast, Apr. 27, 1998).

265. Larry Guest, *Barkley Drops Guard, Exposing His Soft Side*, ORLANDO SENTINEL TRIB., May 27, 1993, at D1 (reporting that as a basketball player, Barkley does not see himself in a position to be a role model).

266. *See* ASHE, *supra* note 4, at 70.

267. Dennis Tuttle, *Solving an Enigma: HBO Takes on the NBA Legend*, WASH. POST, Apr. 16, 2000, at Y6 (highlighting the life and political motivations of Bill Russell, one of the most decorated basketball players).

A. Professional Sports and the Free Agency Wars

The O.J. generation[268] capitalized on the legal framework shaped by the Jackie Robinson generation.[269] The O.J. generation continued to engage in the free agency wars, but the legal framework has evolved so that the issues are different than they were for the Jackie Robinson generation. African-Americans have played less prominent roles in the Major League Baseball Players Association,[270] while the number of Latin players has increased.[271] Notwithstanding the change in demographics, the MLBPA has remained true to the Floodian principle of economic freedom and continued its fight. As a part of the MLBPA's most recent collective bargaining agreement, it obtained the agreement of owners to seek a congressional reversal of *Flood.*[272] Congress did just that in the Curt Flood Act of 1998.[273]

Prior to the enactment of that legislation, the Supreme Court in *Brown v. Pro Football, Inc.*[274] had rejected the legal strategy utilized by the players associations in basketball and football. This legal strategy has recently been embraced by the MLBPA. The Court, in essence, ruled in *Brown* that players must choose whether to pursue economic goals under either antitrust or labor law.[275] *Brown* backfired and exposed a significant flaw in that approach. Beginning with the *Mackey* litigation, the National Football League Players Association obtained rulings that virtually every form of restraint used to regulate free agency violated the antitrust laws.[276] After each settlement, the NFLPA went back to the bargaining table and conceded to some form of restraint on free agency.[277] The Supreme Court saw the antitrust litigation for what it really was—a tool of the union in the collective bargaining process.[278] Of the players associations in professional sports, the NFLPA has

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268. *See* discussion *supra* Part I.

269. *See* discussion *supra* Part I.

270. *See* Rod Beaton, *Big Majority of Player Reps are White*, USA TODAY, Aug. 23, 1994, at 4C (delineating various statistics in the world of sports).

271. *See* Paul Gains, *Atlantic Crossing*, HERALD (Glasgow, Scot.), Oct. 30, 2000, at 11.

272. *See* 143 CONG. REC. S379 (daily ed. Jan. 21, 1997) (statement from Sen. Hatch).

273. Curt Flood Act of 1998, 15 U.S.C. § 27a (1998) (codifying the extent to which baseball is subject to antitrust laws).

274. 518 U.S. 231 (1996).

275. *Id.* at 248-51.

276. *See, e.g.*, McNeil v. Nat'l Football League, 790 F. Supp. 871, 878 (D. Minn. 1992) (holding that the proposed wage scale would violate antitrust laws); Jackson v. Nat'l Football League, 802 F. Supp. 226, 235 (D. Minn. 1992) (holding that restrictions on a player's negotiations with others teams upon the expiration of his contract violated free agency rules).

277. *See* Kessler & Feher, *supra* note 119, at 42.

278. *See, e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231, 237-38 (1996) (explaining how exempting certain competitive restraints is necessary for a properly functioning collective bargaining

been the only one to use the combined strategy of antitrust and labor law most effectively.[279]

The basketball, baseball, and football players associations, consistent with the Robinson principle of shared control, have all agreed to restraints on the free agent market at the collective bargaining table.[280] However, the MLBPA has conceded the least.[281] In these compromises, the players associations have accepted some restraints in exchange for a viable market. The compromise restraints, while practical, do not fully lift the veil of slavery challenged by *Flood*.[282] Justice Marshall was at odds with *Flood* over this point.[283] For Justice Marshall, Flood had a choice—he could have chosen not to play professional baseball. Had Flood prevailed on the Thirteenth Amendment issue, it would have established a precedent limiting the extent to which a player can relinquish freedom by contract. Antitrust law does provide such precedent. The courts have invalidated restraints on free agency on antitrust law grounds in almost every case in which courts have ruled directly on their validity.[284]

However, Justice Marshall raised the potential application of the labor law exemption from the antitrust laws.[285] Although the reserve system violated the Sherman Act by infringing upon economic freedom, that infringement may nevertheless have been lawful under federal labor laws.[286] The players associations take the position that all such infringements are illegal under the antitrust laws and are saved from invalidation only when the players associations agree to them in the collective bargaining process.[287]

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process).

279. *See, e.g.*, *McNeil*, 790 F. Supp. at 871 (setting the standard of reasonableness when reviewing restraints on trade); *Jackson*, 802 F. Supp. at 226 (D. Minn. 1992) (enjoining the teams from placing restrictions on players, and allowing them to negotiate with other teams).

280. Jonathan C. Tyras, *Players Versus Owners: Collective Bargaining and Antitrust after* Brown v. Pro Football, Inc., 1 U. PA. J. LAB. & EMP. L. 297, 337-40 (1998).

281. *See* Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 521 (arguing that the blanket restraints on players does inhibit the competition among teams and violates the Sherman antitrust laws).

282. Flood v. Kuhn, 407 U.S. 258, 289 (1972). The reserve system was tantamount to slavery only if freedom could not be voluntarily relinquished.

283. *Id.* at 289.

284. See Williams v. Nat'l Basketball Ass'n, 857 F. Supp. 1069, 1079 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2nd Cir. 1995), for an exception. The court in dicta suggested that the NBA salary cap was not an unreasonable restraint under antitrust law. *Id.* at 1079; *see also* Scott R. Rosner, *Must Kobe Come Out and Play? An Analysis of the Legality of Preventing High School Athletes and College Underclassmen from Entering Professional Sportsdrafts*, 8 SETON HALL J. SPORT L. 539 (1998) (examining the effects of the NCAA rules and litigation restraining student-athletes from going from high school straight to the professional arena).

285. *Flood*, 407 U.S. at 294.

286. *Id.*

287. *See* Kessler & Feher, *supra* note 119, at 42 (noting that historically, team owners and players were forced to negotiate through the collective bargaining process due to narrow

Presumably, the participation of a player in the collective bargaining process is the exercise of economic freedom and the players thereby consent to restraints agreed to by the players associations. The requisite voluntariness on the part of players is thus present. Restraints imposed by owners without the players' permission lack voluntary consent and thereby lack notions of economic freedom.[288] The Court does not appear to understand this principle. The players associations may have used antitrust law as a bargaining tool, but they were doing so to preserve Flood's vision of economic freedom. It will be interesting to see how the MLBPA responds to the result in *Brown v. Pro Football, Inc.*, since it has indicated a willingness to follow the approach of the NFLPA in combining collective bargaining with antitrust litigation.[289]

The players associations have an alternative strategy available to them. Their compromises on free agency are inconsistent with the principle of economic freedom Curt Flood asserted. Restraints on free agency infringe on an individual player's economic freedom, whether unilaterally imposed by the owners or derived through the collective bargaining process.[290] The labor law exemption has never shielded all restraints reached in the collective bargaining process.[291] Perhaps it is time to reexamine the substantive limitations of the exemption. Justice Stevens may have started down this road with his dissent in *Brown v. Pro Football, Inc.*[292] He offered a substantive limitation on the restraints that owners may unilaterally impose on free agency as a tool in the collective bargaining process.[293] He argued that the Court should permit restraints that raise salaries to a competitive level, but should not permit restraints that provide for salaries below those

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interpretations of the labor exemption and antitrust laws by the courts).

288. The theoretical limits of this consent argument were exposed in *Powell v. National Football League*, 930 F.2d 1293, 1295 (8th Cir. 1989), in which the players association maintained that its consent, and concomitantly the labor law exemption, ended once the parties reached an impasse. This argument acknowledged that the consent extended beyond the term of the collective bargaining agreement. *Id.*

289. *See generally* Tyras, *supra* note 280 (discussing how the result in *Brown v. Pro Football, Inc.* provides adequate instructions on how to apply collective bargaining strategies).

290. A contractual provision that limits bidding by owners for a player's services suppresses market value regardless of how the limitation came to be. *Id.* at 337-39.

291. Each of the three prongs articulated in *Mackey v. National Football League*, 407 F. Supp. 1000, 1008 (D. Minn. 1975), explicitly contemplates that some types of agreements reached in the collective bargaining process are not protected by the labor law exemption. These primarily include agreements that adversely affect competitors of the employer, but also include restraints unilaterally imposed by employers without bargaining. *Brown v. Pro Football, Inc.* negates the application of the test in the professional sports setting. However, it does not leave the players without a remedy; it merely requires them to use the legal regime to bring challenges. 518 U.S. 231, 238 (1996)

292. 518 U.S. at 252.

293. *Id.*

that players could obtain in a competitive market.[294] If there are substantive limitations on the owners, then perhaps there should be limitations on the agreements that the players association may reach with the owners.[295] Substantive limits on such restraints would recognize that the collective bargaining process permits employers and unions to bring economic power to bear upon each other and compel an agreement. It should not matter whether substantive limitations on restraints on economic freedom achieved through this process are ensconced in antitrust or labor law. An unfair labor practice complaint may do just as well as an antitrust lawsuit.[296]

This is an area of unfinished business for the players associations in professional sports. The structure of free agency and salary restraint provisions in each of the professional sports reflects varying degrees of adherence to the principles of economic freedom and salary maximization. The MLBPA has refused to agree to salary caps so that its free agents may negotiate with the highest bidder without any explicit limits on the amount of compensation or the number of bidders.[297] It did agree to the imposition of a luxury tax upon owners who have high payrolls.[298] In so doing, the MLBPA has fought attempts to control salaries through modifications to the contract structure in baseball.[299] In the most recent collective bargaining agreement in basketball, the National Basketball Players Association (NBPA) agreed to team salary caps, maximum salaries of individual players, and a rookie wage scale.[300] It appears to have preserved economic freedom, but players have to pay for it in the form of explicit limits on salary structure. Players are able to move to other teams but not necessarily at a higher salary than they could obtain with fewer restrictions. In football, the NFLPA has also agreed to team salary caps, rookie salary scale, and franchise player restrictions.[301] Players, especially those below the superstar

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294. *Id.* at 257.

295. There should be some restraints that the players associations simply cannot concede. *See* Dan Messeloff, Note, *The NBA's Deal with the Devil: The Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 521 (2000) (arguing that the salary cap provisions of the collective bargaining agreement infringe upon players' rights to negotiate individual salaries, a right specifically reserved for them in the agreement).

296. Indeed, the MLBPA challenged restraints unilaterally imposed by owners during the last labor stoppage in a complaint for unfair labor practices. Silverman v. Major League Baseball Players Ass'n, 67 F.3d 1054, 1061 (2nd Cir. 1995). However, the legislative history of the Curt Flood Act makes it clear that an antitrust lawsuit by players would face the *Brown* barrier. *See* 144 CONG. REC. S9494 (daily ed. July 30, 1998) (statement of Sen. Hatch).

297. *See generally* Seabury, *supra* note 122, at 363-72 (1998) (describing how historical relations between players and owners have affected negotiations in the 1990s).

298. Messeloff, *supra* note 295, at 560-61.

299. *See generally* Seabury, *supra* note 122.

300. Messeloff, *supra* note 295, at 523-24.

301. *National Football League and the National Football League Players Association*

level, are able to obtain higher salaries in a free agent market.[302] The restraints on rookies in basketball and football—players who are entering those leagues for the first time—constitute the most serious sacrifice of economic freedom. The players associations have agreed to college drafts and rookie wage scales, both of which have been shielded from an antitrust attack by the labor law exemption to the antitrust laws.[303] With an eye on salary levels rather than economic freedom, at least one court has indicated that the restraints on the free agent market in the NBA under the previous collective bargaining agreement would not be illegal under antitrust laws.[304]

The book is not yet closed on the O.J. generation. Its members' voices grow louder as their careers progress, and will grow even louder once they retire from professional sports. Magic Johnson was thrust into retirement and into the role of an AIDS activist.[305] Isaiah Thomas was president of the NBPA while a player.[306] Since his retirement, Thomas has been general manager and part owner of the Toronto Raptors,[307] and had previously owned the now defunct Continental Basketball Association (CBA).[308] In his retirement, Michael Jordan is positioned to influence the affairs of the NBA as general manager of the Washington Wizards,[309] and perhaps as David Stern's successor as Commissioner. Jordan also finally found his political voice with his endorsement of Bill Bradley in the 2000 Democratic primary campaign.[310]

Collective Bargaining Agreement, Article XXIV, Guaranteed League-Wide Salary, Salary Cap, & Minimum Team Salary, 591 P.L.I. 119 (2000).

302. Jackie Robinson suggested in his Senate testimony that it was the good players just below superstardom who were most in need of free agency. *See supra* note 128.

303. The NFL draft as it existed in 1968 has been held to constitute an unreasonable restraint of trade. Smith v. Pro Football, Inc., 593 F.2d 1173, 1175 (D.C. Cir. 1978). The NFL draft at that time was not reached through the collective bargaining process and not protected by the labor law exemption. In a subsequent challenge to the collective bargaining agreement reached after the settlement of *Mackey*, the Eight Circuit held that the agreement was protected by the exemption. Reynolds v. Nat'l Football League, 584 F.2d 280, 289 (8th Cir. 1978); *see also* Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2nd Cir. 1987) (holding that restraints on rookies in NBA collective bargaining agreements are protected by the labor law exemption).

304. *See Wood*, 809 F.2d at 958 (affirming the trial court's holding that the free agency restraints are not invalid under antitrust law because they reflected "bona fide arms-length negotations").

305. EARVIN "MAGIC" JOHNSON & WILLIAM NOVAK, MY LIFE 268 (1992).

306. *Moneyline* (CNN television broadcast, Jan. 6, 1999).

307. Dean Bonham, *There's Sports Magic in Boardrooms*, DENVER ROCKY MTN. NEWS, Sept. 19, 1999, at 5G.

308. Don Muret, *Venue Managers Scramble to Fill Void Left By CBA*, AMUSEMENT BUS., Feb. 19, 2001, *available at* LEXIS, Nexis Library, Amusement Business File.

309. Marc Stein, *Cuban Made Bid for Jordan*, DALLAS MORNING NEWS, Jan. 20, 2000, at 5B.

310. Glenn Dickey, *Supervisors Hit Homer: Naming Playground after DiMaggio Right Choice*, S.F. CHRON., Apr. 14, 2000, at E7.

The voice of political and economic freedom has reemerged. NBA player Dennis Rodman's[311] public defiance of authority, notwithstanding its entertainment value, was born of the same cloth as that of the Jackie Robinson's defiance. Rodman belongs to a group of crossovers whose conduct and public pronouncements parody the Jackie Robinson/Curt Flood era. Brash and confrontational while entertaining, these athletes' assertions of freedom are ambiguous. When Latrell Sprewell choked his coach, he reminded some of a slave lashing out at an overbearing overseer; but, to others, he personified a violent and disrespectful generation.[312] Sprewell's New York Knicks teammate Larry Johnson, during an "uncivil" interview with the media during the 1999 playoffs, openly embraced the slave analogy by justifying Sprewell's actions as the work of a rebellious slave.[313] Alan Iverson has taken the rebellious image even further with his ongoing run-ins with his coach and the law, and now his controversial gangster rap recording.[314] Parody of the Robinson era or not, the torch has been passed to them, and they will shape the future of professional sports. The thought scares the establishment, and consequently, the various sports leagues have attempted to obtain more authority in their contracts with the players unions to control the players' behavior.[315]

B. The O.J. Model in Intercollegiate Athletics

During their college sojourns, the O.J.s were expected to smile rather than confront authority. Silence is the lesson of *Williams v. Eaton*,[316] in which the court permitted universities to condition the right of athletes to participate in intercollegiate athletics on their silence.[317] The athletes' silence has become an essential part of the bargain between universities and student-athletes.[318] The right of universities to silence athletes received the

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311. Rodman has gotten into fights with fellow players and argued with referees leading to suspension. *See* Kent McDill, *Bulls Now Can Turn to Rodman: Jackson Feels He's Worth Having*, CHI. DAILY HERALD, Aug. 28, 1997, at 3.

312. John L. Burris, *Pro-Ball Coaches also Part of Respect Problem*, TRI-STATE DEFENDER, Feb. 18, 1998, at 4A.

313. Salim Muwakkil, *Race, Sports and the Big Bucks*, CHI. TRIB., July 5, 1999, *available at* LEXIS, Nexis Library, News Group File; Joseph H. Brown, *Attitude Makes Big Difference*, TAMPA TRIB., July 4, 1999, at 6.

314. Ashley McGeachy & Dan DeLuca, *Iverson Offers His "Profound Apology" for Gangsta Rap CD*, PHILA. ENQUIRER, Oct. 6, 2000, at D13; Associated Press, *Stern Says Iverson Will Change Offensive Lyrics* (Oct. 16, 2000), http://espn.go.com/nba/news/2000/1012/ 814532. html.

315. Sheridan, *supra* note 190 (outlining the settlement decisions, which explicitly focus on controlling player behavior).

316. 310 F. Supp. 1342 (D. Wyo. 1970).

317. *See supra* text accompanying note 107.

318. The pressure for silence has caused African-American athletes to acquiesce to racial harassment. In *Dambrot v. Central Michigan University*, 839 F. Supp. 477 (E.D. Mich. 1993),

blessing of the NCAA in a 1973 rule change to the standard contractual relationship with student-athletes.[319] Until 1973, the NCAA rules permitted the colleges and universities to offer four-year scholarships.[320] Under the rule change, however, a university may not offer a scholarship for a term of more than one year.[321] Such scholarships are renewable at the discretion of a university.[322] The one-year term gives universities substantial power to silence the activism of student-athletes. Officially, the NCAA promulgated the rule to eliminate competition for athletes through differences in the terms of scholarships.[323] The need for uniformity in scholarship length "just happened" to coincide with the substantial increases in the number of Black athletes in HWIs in the 1970s.[324] The Internal Revenue Service (IRS) buttressed the NCAA's position when the it ruled that athletic scholarships would be taxable if a grant was subject to cancellation by a university upon the refusal of a recipient to participate in the athletic program.[325] One of the consequences of these structural changes has been that African-American college athletes have not been activists on two of the most controversial issues in college athletics: amateurism and academic standards.

While largely silent on social issues since the 1970s, African-American student-athletes have played pivotal roles in transforming the relationship between African-American athletes and universities into primarily a commercial one in which educational opportunity has been treated as an afterthought. The relationship between athletes and universities was greatly transformed as Black athletes seeking to enter professional sports brought

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African-American basketball players defended their coach, who used the "N-word" on at least two occasions, once with their consent. *Id.* at 479. In some instances, African-American collegians have stepped forward to address their mistreatment. A few years ago in an unusual step, basketball players from the University of California at Los Angeles complained about the harsh treatment of Coach Capanelli and he was fired. The firing was controversial. Michael Bauman, *Swearing Not a Deadly Sin*, MILWAUKEE J.-SENTINEL, Feb. 28, 1993, at 1, *available at* 1993 WL 9376363; Ross Atkin, *Controversy Erupts over Coach's Firing*, CHRISTIAN SCI. MONITOR, Feb. 23, 1993, at 13; C.W. Nevius, *Cal Official Says Players Unhappy Campanelli's Tirades Are Blamed*, L.A. DAILY NEWS, Feb. 16, 1993, at S6, *available at* 1993 WL 3508081. Recently, an African-American female complained about the use of a racial slur by her former coach. Associated Press, *Winters of Discontent: Ex-South Florida Player Sues Coach for Racism* (Aug. 25, 2000), http://foxsports.com/womensbasketball/stories/wcb0825south_florida1.sml.

319. Hakim, *supra* note 218, at 158-59.

320. *Id.*

321. 2000-01 NCAA DIVISION I MANUAL, BYLAWS, art. 15.3.3, at 186 (Vanessa L. Abell ed., 2000) [hereinafter NCAA BYLAWS].

322. *See* Hakim, *supra* note 218, at 159.

323. *Id.*

324. Davis, *supra* note 9.

325. Rev. Rul. 77-263, 1977 C.B. 47 (1977). To comply with the ruling, the NCAA minimized the risk to member universities by limiting the terms of scholarships to one year. Adam Hoeflich, *The Taxation of Athletic Scholarships: A Problem of Consistency*, 1991 U. ILL. L. REV. 581, 596 (1991).

forth litigation that would lead to a complete disqualification from collegiate athletics. *Haywood v. National Basketball Ass'n*[326] is, perhaps, the most significant amateurism case in the history of intercollegiate athletics. The *Haywood* decision enabled young athletes to enter the professional ranks in basketball and football without going to college.[327] The case applied to basketball, but football has been affected as well. Herschel Walker relied on the *Haywood* precedent when he threatened to sue the now defunct United States Football League (USFL) if it refused to permit a team to sign him when he had college eligibility remaining.[328] One result of the professional leagues opening their doors, regardless of collegiate eligibility and initial eligibility rules, is an increase in high school players bypassing college sports altogether. Moses Malone was the first player to do so.[329] Until the 1990s, only two other players had done so. Kevin Garnett, Tracy McGrady, and Kobe Bryant have changed that forever.[330] The NBA is trying to address the influx of young, ungroomed athletes with a developmental league.[331]

Athletes who leave college after a year or two, or who bypass college athletics entirely for professional athletics, demonstrate that the value of the professional opportunity outweighs the value of the educational opportunity of a college sports career. Colleges encouraged this perception on the part of student-athletes by at least two NCAA rule changes in the 1970s. The first was the 1973 rule change on scholarship length.[332] By limiting scholarships to one-year terms, a university did not have to renew even if the student's athletic performance was adequate. This change sent a clear message to student-athletes to maintain or improve athletic skill levels even if it was at

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326. Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1970) (holding a college athlete does not have to wait four years after graduating from high school to be drafted by the NBA). *Haywood* is more important than *Board of Regents of University of Oklahoma v. NCAA*, 468 U.S. 85 (1984), which held that the NCAA television plan violated Section 1 of the Sherman Act because *Haywood* directly affects the fates of thousands of young amateur athletes hoping to enter professional sports.

327. *See Haywood*, 401 U.S. at 1204 (holding that an injunction against the NBA would allow Haywood to play for his NBA team).

328. Marianne Jennings & Lynn Zioiko, *Student-Athletes, Athlete Agents and Five Year Eligibility: An Environment of Contractual Interference, Trade Restraint and High Stake Payments*, 66 U. DET. L. REV. 179, 214 (1989). The USFL's draft eligibility rule was successfully challenged subsequently in *Boris v. United States Football League*, No. CV.83-4980 LEW (Kx), 1984 WL 894, at *1 (C.D. Cal. Feb. 28, 1984).

329. In 1975, Malone was the first basketball player to go straight from high school and begin playing for a professional basketball team, the Utah Stars of the American Basketball Association. ASHE, *supra* note 4, at 59.

330. All three players have gone straight from high school to the NBA. *The Skinny on Crawford: A Weight and See Game*, CHI. SUN-TIMES, Feb. 28, 2001, at 135.

331. *See* Marc Stein, *NBA Finals Update*, DALLAS MORNING NEWS, June 13, 2000, at 5B (discussing the possibility of starting a developmental league).

332. *See supra* note 325 and accompanying text.

the expense of academic pursuits.[333]

The second NCAA change affecting athletes' perceptions of the value of a college sports career was the change in freshman eligibility rules. Before 1972, freshmen were ineligible for varsity athletics in the NCAA.[334] Under that regime, student-athletes played junior varsity sports during their freshman year under circumstances less demanding than varsity participation.[335] The university then obtained three years of university participation from the student-athlete, regardless of whether he graduated. The theory behind freshman ineligibility was that it allowed student-athletes an opportunity to acculturate to college life before being overwhelmed by the demands of intercollegiate athletic competition.[336] The rule had the effect of putting academics before athletics, sending a powerful message to those who groom young athletes and to youth aspiring to be superstar athletes.

Freshmen eligibility was not ushered in until the barriers to early entry into the professional sphere were held to violate the antitrust laws. The rule change helped universities obtain at least two to three years of participation from student-athletes before they exhausted their collegiate eligibility. By the 1980s, it was not uncommon for basketball players to leave after one year of intercollegiate competition. While Michael Jordan did not turn professional until after his junior season, Magic Johnson and Isaiah Thomas turned professional after their sophomore years.[337] More recently, Stephon Marbury left after his freshman year.[338] In football, the trend toward turning professional before exhausting collegiate eligibility also began in the 1980s. This trend was a result of the upstart USFL competing with the NFL for players.[339] The NFL, like the NBA before *Haywood*, had a rule against signing college players who were out of high school for less than four years, while the USFL had no such restriction.[340]

African-American athletes have generated considerable case law challenging their exclusion from intercollegiate athletics under NCAA

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333. *See* Taylor v. Wake Forest Univ., 191 S.E.2d 379 (N.C. Ct. App. 1972) (explaining that universities established the priority of athletic development at the expense of academic development).

334. SMITH, *supra* note 211, at 137-38; SHROPSHIRE, *supra* note 4, at 104.

335. SMITH, *supra* note 211, at 137-38.

336. *Id.*

337. *Short Takes: We Hardly Knew Ye*, ATL. J.-CONST., March 30, 1996, at LEXIS, Nexis Library, News Group File.

338. Marbury is a player for the NBA's New Jersey Nets. *Id.*

339. *See* Rosner, *supra* note 284, at 566 (discussing how the draft eligibility rule will affect the terms and conditions for exiting players, thereby warranting that it fall within the non-statutory labor law exemption); *see generally* Jonathan Rand, *Football is Folly Unless It's in Fall: Promoters Keep Trying, But it Doesn't Work in Warm Months*, KAN. CITY STAR, May 13, 1997, at C1 (describing the many attempts and failures by start-up football leagues to compete against the NFL).

340. Rosner, *supra* note 284, at 540.

amateurism and academic rules. These cases have not amounted to an organized general assault on amateurism, and no one case rises to the significance of *Haywood*. Most of these challenges have been brought by individual athletes who were seeking participation in collegiate sports for the furtherance of economic opportunity rather than educational opportunity.[341]

College athletes were presented with the option to circumvent college to reach the professional ranks, a decision that had not previously been made available to them until after Spencer Haywood brought suit against the NBA.[342] The decision to forego collegiate eligibility and turn professional is a career decision with enormous long-term implications. Athletes of professional caliber need professional advice. However, NCAA rules present a minefield for the young athlete. Due to their concern with the protection of amateurism, the NCAA bylaws permit athletes to hire attorneys to advise them on these decisions but prohibit them from contracting with an agent to market their athletic ability.[343] It is difficult to require young adults, often from disadvantaged socioeconomic backgrounds, to comprehend the distinction between representation for legal advice and representation to market athletic ability. This is especially true because eligibility turns upon the wording of the contract terms, whether written or oral.[344]

More than one African-American athlete lost collegiate eligibility while traversing this minefield. Lonnie Shelton is an example of someone who suffered severe consequences for making a wrong move in this area.[345] Shelton signed a contract with a team in the American Basketball Association (ABA) while he had collegiate eligibility remaining. Consequently, he was permanently ineligible to participate in intercollegiate athletics under NCAA rules.[346] He sued the NCAA, challenging his disqualification on the grounds that the contract was unenforceable because it had been procured through duress and fraud.[347] The court upheld the NCAA's position that the enforceability of the contract was irrelevant.[348] This legal challenge was one of many contract challenges to come.

Another example is Braxton Banks, who lost his collegiate eligibility

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341. *See* discussion *supra* Part IV.B.

342. *See supra* note 327.

343. NCAA BYLAWS, *supra* note 321, art. 12.3.2, at 77.

344. The NCAA compounded this problem when it permitted athletes to be professionals in one sport while amateurs in another. A college athlete who obtains an agent for representation in a professional sport must make sure that the contract terms limit agency representation to that sport. *Id.*, art. 12.3, at 77.

345. *See* Shelton v. NCAA, 539 F.2d 1197 (9th Cir. 1976) (holding that the NCAA's rule that declares college basketball players who have signed professional contracts ineligible to participate in intercollegiate activities, is sufficiently related to the goal of protecting amateurism).

346. *Id.* at 1198.

347. *Id.*

348. *Id.* at 1197.

for signing with an agent and entering the NFL draft. [349] In addition to the prohibition against entering into professional contracts, the NCAA also has "No Agent" and "No Draft" rules in football.[350] Banks challenged both rules under Section 1 of the Sherman Act.[351] The court held that his interest in participation was not a business or property interest protected under the Act.[352]

Other athletes have also come forward and challenged similar aspects of the amateurism rules. Larry Gillard, a Mississippi State University football player, lost his eligibility for accepting a one-third discount on the purchases of suits.[353] Michael Thompson, who played for the University of Minnesota, was threatened with the loss of permanent eligibility for "scalping" his complimentary basketball tickets.[354] Although these athletes lost their court cases, their efforts to fight the NCAA rules were not futile, as the NCAA made modifications to its amateurism standard over the years.[355]

In *Hall v. University of Minnesota*,[356] an athlete argued that the relationship between a scholarship athlete and a university was a commercial one.[357] He had played on the university's basketball team for three years, having remained eligible by taking over ninety hours of non-degree credit.[358] He sued the university, arguing that it had deprived him of a property right without due process.[359] The property right he was concerned about was his interest in playing at the professional level.[360] He argued that the university

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349. Banks v. NCAA, 746 F. Supp. 850 (N.D. Ind. 1991), *aff'd*, 977 F.2d 1081 (7th Cir. 1992).

350. *See Banks*, 746 F. Supp. at 852; *see also* NCAA BYLAWS, *supra* note 321, art. 12.3, at 77 (delineating the "No Agent" Rule); *Id.*, art. 12.2.4.2, at 76 (delineating the "No Draft" Rule). A football player who enters the NFL draft is permanently ineligible. *Id.* The NCAA has modified the No Draft Rule for basketball players. Basketball players may enter the draft and do not lose eligibility as long as they do not sign with an agent or get drafted. *Id.*

351. *Banks*, 746 F. Supp at 852. A White football player has challenged these rules under Section 2. *Id.*

352. *Id.* at 862.

353. NCAA v. Gillard, 352 So.2d 1072 (Miss. 1977).

354. *See* Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352, 356 (8th Cir. 1977) (holding that the NCAA was not violating due process and could impose sanctions on the university for violations of the NCAA bylaws).

355. A prime example was Banks' litigation, which led to the change in the basketball No Draft Rule. Michael Tannenbaum, *A Comprehensive Analysis of Recent Antitrust and Labor Litigation Affecting the NBA and NFL*, 3 SPORTS L.J. 205, 214 (1996) (discussing how the recent litigation, such as the *Banks* case, has pressured the NCAA into modifying its bylaws).

356. 530 F. Supp. 104 (D. Minn. 1982).

357. *Id.*

358. *Id.*

359. *Id.* at 107.

360. *Id.*

had induced him to attend with a promise to develop his skills so he could play professionally, and that academics never entered into the equation.[361] While the success of the claim may have brought Hall the desired outcome, this case also represents how an athlete can unabashedly reject the pursuit of an educational opportunity in search of the larger economic compensation.

Taken as a whole, these cases are consistent with a culture that promotes economic freedom for labor. They show that many African-American athletes have used the legal system to challenge barriers to their pursuit of economic opportunity. As the law now stands, a college may infringe on the economic freedom of its athletes to maximize the college's economic opportunities. Perhaps none of the cases reflects a Jackie Robinson/Curt Flood mentality because, after *Haywood,* the law permitted athletes to pursue economic opportunity in the professional ranks.[362] Yet with the NBA's plans to impose an age limit on participation in its proposed developmental league, the NBA has once again shown its ability to limit the pursuit of economic opportunity, proving that the battle between athletes and management continues.[363]

C. Academics

For most of the last half of the twentieth century, intercollegiate athletics have been criticized as corrupt for the blatant pursuit of revenues and the use of professionally focused athletes rather than true student-athletes.[364] By 1980, the discourse had been transformed into one about the academic quality of African-American student-athletes.[365] The transformation occurred because, although the debate began in the context of White athletes, HWIs insisted on standards that excluded mostly African-Americans.[366] HWIs were embarrassed by the numbers of African-American athletes on its campuses who were not prepared for a college education.[367]

African-American athletes from the Jackie Robinson generation have engaged vigorously in both sides of the public debate regarding the critical

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361. *Hall,* 530 F. Supp. at 106 (finding that both the university and the athlete had athletic, not academic, success in mind when the university extended a scholarship offer to Hall).

362. *See* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1204 (1971).

363. *See* Stein, *supra* note 331 (discussing the reasons for the developmental league).

364. *See* Davis, *supra* note 9, at 635-36 (explaining why colleges have made every effort to remove any traces of discrimination: to entice superior Black student-athletes).

365. *See id.* at 664-67 (reviewing the various arguments for and against changing the academic standards for Black student-athletes).

366. Carl Rowan, *Mixed Emotions on the NCAA Rule Proposal,* ATL. J.-CONST., Jan 28, 1986, at A15.

367. *See* Davis, *supra* note 9, at 667 (explaining that because of the low number of athletes graduating, the NCAA modified the academic eligibility standards).

issue of education. Scholars like Arthur Ashe and Harry Edwards supported uniform minimum standards because otherwise, the HWIs are exploiting the athletic ability of Black athletes for economic gain while producing uneducated athletes.[368] Others like John Thompson[369] and John Chaney[370] oppose uniform standards because they impede African-American athletes from availing themselves of the opportunity for a college education.[371] Having been adversely affected by uniform standards, the O.J. generation was silenced, thereby avoiding public debate. Their participation has been limited to collusive litigation to obtain the right to participate in intercollegiate athletics. The colleges have colluded with them in the litigation[372] because colleges want to win games and gain greater revenues. The motives of the student-athletes are less clear. Are they fighting, like Robert Parish, for educational opportunity, or are they trying to use college athletics as "minor leagues" in basketball and football?

As previously suggested, the athlete's motivation in *Hall v. University of Minnesota*[373] was not ambiguous. The case involved university standards as opposed to NCAA standards. Hall sued when the university denied him admission into its University Without Walls program even though he was otherwise eligible. Hall testified that his only reason for enrolling in the program was to retain his eligibility to participate in the basketball program so he could enhance his chances to become a professional basketball player.[374]

The motives of the athlete in *Jones v. Wichita State University*[375] are more ambiguous. The athlete was declared ineligible by the NCAA to play basketball at Wichita State University for failure to meet the minimum grade point average (GPA) of 2.0 required for initial eligibility.[376] The university had previously determined that Jones had satisfied the requirements based on the grades reported by his high school.[377] The university had resorted to

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368. *See, e.g.*, Arthur Ashe, *Stop Coddling Black Athletes*, DALLAS MORNING NEWS, Feb. 17, 1989, at 15A.

369. In 1984, Thompson, the head coach at Georgetown University, became the first African-American coach to win the NCAA men's basketball championship. ASHE, *supra* note 4, at 64.

370. Chaney is head basketball coach at Temple University.

371. Ashe, *supra* note 368.

372. *See* Davis, *supra* note 9, at 669 (arguing that academic institutions do not expect any academic success from Black athletes, focusing instead on athletic success); *see also supra* notes 238-42 and accompanying text.

373. 530 F. Supp. 104 (D. Minn. 1982).

374. *Id.* at 106.

375. 698 F.2d 1082 (10th Cir. 1983).

376. *Id.* at 1085.

377. *Id.* The court noted that this was a good faith mistake on the part of all involved. *Id.* at

some legerdemain in computing his high school grade point average, by using a different computation method for him than his high school used as a general policy.[378] The high school Jones graduated from did not usually include physical education grades in calculating GPAs for students.[379] The university's use of a different method of computation for Jones violated NCAA rules, and Jones was declared ineligible to play.[380] Jones challenged his ineligibility on equal protection grounds.[381] He claimed that he was discriminated against because of the high school he attended.[382] If Jones had attended a high school that typically included physical education courses in determining grade point average, Jones would then have been eligible. Because Jones attended a high school that did not typically include such grades, he was declared ineligible to play.[383] Students like Jones, who received high marks in physical education yet whose high school did not compute physical education grades into their GPA, were at a disadvantage. Athletes who did well in high school physical education classes and whose high schools included physical education grades into their GPAs had a better chance of obtaining a scholarship and the concomitant educational opportunity. Jones' lawsuit thus sought to broaden the availability of the educational opportunity to student-athletes who attended both types of high schools.[384] Yet his willingness to seek special treatment for athletes implies that he may have been more interested in athletic development than a college education.

An athlete's true search for an educational opportunity can be found in *Phillip v. NCAA*.[385] The athlete in this case scored significantly above the NCAA's required minimum SAT score, but was .17 of a credit short of meeting the NCAA's core curriculum requirement.[386] The discrepancy

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1085 n.5.

378. *Id.* at 1085.

379. *Id.* In calculating Jones' GPA for NCAA eligibility, Wichita State included his physical education grades which raised Jones GPA from a 1.59 to a 2.38. *Jones*, 698 F.2d at 1083.

380. *Id.* at 1083.

381. *Id.* at 1085.

382. *Id.* at 1086.

383. *Id.*

384.

> Jones contend[ed] that because the computation of GPAs is left to the individual high school, . . . students may be ineligible "although they had the same (or even better) academic achievement, class participation, and attendance as their counterparts who are eligible under that [the 2.000] standard." Thus, he argue[d], disparate classes are created.

Id. (citation omitted).

385. 960 F. Supp. 552 (D. Conn. 1997), *remanded sub nom.* Phillip v. Fairfield Univ., 118 F.3d 131 (2nd Cir. 1997).

386. *Id.*

occurred between the credits awarded for high school math courses by the state educational authority and those recognized by the NCAA Initial Eligibility Clearinghouse.[387] The trial court found that the athlete was studious and was seeking a good college education.[388] It held that the determination of ineligibility or the failure to grant a waiver of the initial eligibility rules was a violation of the NCAA's contractual duty of good faith and fair dealing and issued an injunction against the NCAA.[389] Although the athlete appears to have been the type of student-athlete the NCAA and its members sought, the Second Circuit Court of Appeals remanded the case back to the district court because it found that the district court "erred in finding that the NCAA evidenced bad faith simply by acting arbitrarily."[390] The circuit court decided to help the student-athlete and temporarily maintained the injunction upon the condition there would be a trial on the merits within four months.[391] In this instance the court was willing to take the extra step and secure for the student the educational opportunity he sought.

The athlete in *Ross v. Creighton University*[392] was also clearly seeking to enhance the value of his educational opportunity when he sued. He had not been actively pursuing an undergraduate degree while playing basketball for the university for four years.[393] During that time, he maintained his eligibility by taking an array of non-degree courses similar to Mark Hall's.[394] Moreover, the record indicated that Ross did not take advantage of academic support services provided by the university.[395] Upon graduation, he was reading at the seventh-grade level.[396] His subsequent lawsuit against the university reflected Floodian courage. He withstood both criticism of his intellect and public embarrassment in order to challenge his exploitation. Ross sought to hold the university liable for educational malpractice, but the

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387. *Id.*

388. *Id.* at 558.

389. *Id.*

390. Phillip v. Fairfield Univ., 118 F.3d at 135 (2nd Cir. 1997) (stating that the court was remanding the case for the trial court's failure to properly apply the principles of good faith and fair dealing of Connecticut contract law). Bad faith under Connecticut law requires a more dishonest purpose than mere negligence. The district court had made no factual findings of bad intent. *Id.*

391. *Id.*

392. 740 F. Supp. 1319 (N.D. Ill. 1990) (suing for "negligent infliction of emotional distress" and "educational malpractice"), *rev'd*, 957 F.2d 410 (7th Cir. 1992).

393. *Id.*

394. *See* Hall v. Univ. of Minn., 530 F. Supp. 104, 105 (D. Minn. 1982) (describing the non-baccalaureate program Hall took during his eligible status at the university).

395. *Ross*, 740 F. Supp. at 1322.

396. *Id.*

courts rejected his claim.[397] While overturning on appeal, the Seventh Circuit, however, did hold that the university could be liable if it breached specifically identifiable promises.[398] The case broke new ground in articulating reasons for holding universities accountable for exploiting African-American athletes. *Ross* went to the core of the bargain that universities make with athletes. Universities promise athletes an educational opportunity in addition to, and often in exchange for, their participation in the athletic program. When they fail to deliver on these promises, athletes should be able to hold universities accountable.

The exploitation reflected in *Ross* is an ongoing concern. In *Kemp v. Ervin*,[399] a teacher in the University of Georgia's academic support program was fired after she blew the whistle on abuses in that program.[400] She sued after the university fired her, claiming that "she was deprived of her employment and benefits because of the exercise of her freedom of speech rights secured by the First and Fourteenth Amendments of the Constitution of the United States."[401] The academic support program theoretically gave students in the program, including student-athletes, an opportunity to strengthen their educational skills.[402] Students were supposed to remain in the program until they fulfilled the necessary requirements, which included the requirement that they receive a minimum grade of "C" in English in the fourth and final quarter of the program.[403] If they were unable to complete the requirements, they were dismissed from the university.[404] Student-athletes were routinely certified as satisfactorily completing the program even when they were received failing grades in English.[405] Clearly, student-athletes were not honing their educational skills in this program and were missing out on an educational opportunity. Their athletic careers took priority over their education.

The issue of student-athletes getting preferential treatment in the classroom continues today as *Kemp*-like charges are making headlines at the University of Minnesota.[406] At Minnesota, a former tutor caused a

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397. *Id.* at 1323.

398. *Ross*, 957 F.2d at 417; *see* Davis, *supra* note 200, at 104-15 (analyzing the university's contractual obligations to student athletes for an educational opportunity).

399. 651 F. Supp. 495, 500 (N.D. Ga. 1986) (holding that evidence that athletes received favorable treatment as compared to non-athletes was admissible to prove administrator's state of mind in firing the whistle-blowing employee).

400. *Id.*

401. *Id.* at 498.

402. *Id.* at 499.

403. *Id.*

404. *Id.*

405. *Kemp*, 651 F. Supp. at 499.

406. Brian Bakst, *Judge Rejects Gophers' Tutor Plea*, ASSOCIATED PRESS, Sept. 25, 2000,

controversy when she produced copies of papers she wrote for players on the men's basketball team in order to keep them eligible to play.[407] The NCAA has imposed sanctions on the University of Minnesota, requiring the university to relinquish conference titles and vacate records, and barring the former coach from coaching at the collegiate level for seven years.[408] The university has settled the $1.5 million contract it made to the coach when he stepped down in light of the scandal.[409] Similar charges have been raised at the University of Tennessee.[410] As of yet, no players have stepped forward to sue over the exploitation at either institution. *Phillip*, on one the hand, demonstrates the types of educational opportunities that can be foreclosed by initial eligibility standards. *Kemp*, on the other hand, illustrates the exploitation that occurs in the absence of initial eligibility standards. Apart from the individual cases, players still do not participate in the public debate. The most influential reform discourse was led by the Knight Commission, a group largely formed to protect the interests of HWIs.[411] In light of the foregoing events, the commission has recently reconvened.[412]

In 1984, the NCAA attempted to strike a balance with the promulgation of its infamous Proposition 48.[413] Proposition 48 established minimum academic standards for initial eligibility based primarily upon standardized test scores.[414] Students who did not meet the minimum standard were ineligible to participate in intercollegiate athletics during their freshman

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2000 WL 27211207.

407. *Id.*

408. *Minn. Academics*, SPORTS NETWORK, Nov. 21, 2000, LEXIS, Nexis Library, Current News File.

409. Associated Press, *NCAA Upholds Ruling on Haskins* (Apr. 6, 2001), *available at* http://espn.go.com/ncb/news/2001/0406/1168665.html.

410. *See* Welch Suggs, *U. of Tennessee Restructures Tutoring Program for Athletes*, CHRON. HIGHER EDUC., June 23, 2000, at A53 (explaining how both the University of Tennessee and the University of Minnesota have restructured their academic advisement programs for student-athletes in the wake of the controversies); *see also* James Walsh, *"U" Alters Athletic Counseling System*, STAR TRIB. (Minneapolis, Minn.), Sept. 25, 2000, at 1A (explaining the restructuring of the academic program for student-athletes at the University of Minnesota).

411. *See* Gary T. Brown, *NCAA Leaders Testify Before New Edition of Knight Commission*, NCAA NEWS, Sept. 11, 2000, at 1 (stating that the commission was organized to oversee intercollegiate athletics and deal with current issues).

412. *Id.*

413. *See* NCAA BYLAWS, *supra* note 321, art. 14.1, at 131; *see also* ASHE, *supra* note 4, at 63 (summarizing Proposition 48 and its effects); SHROPSHIRE, *supra* note 4, at 108 (delineating the requirements of Proposition 48 and the NCAA's reasons for enacting the rule).

414. "[T]he bylaw will require high school students to score a 2.0 grade point average in a 'core curriculum' of 11 academic courses, and make a 700 on the Scholastic Aptitude Test and a 15 on the American College Test." George Morris, *Proposition 48 Gets Final OK Despite Resistance*, BATON ROUGE ST. TIMES, Jan. 14, 1986, at 1C. The requirements were phased in over a two year period and the NCAA created a scale where a higher GPA than required can make up for a substandard test score and vice versa. *Id.*

year.[415] The promulgation was controversial, in part, because the NCAA had not included a single African-American on the task force that made the recommendation.[416] Proposition 48 was followed by Proposition 42.[417] Under Proposition 42, students who failed to qualify under Proposition 48 became ineligible for athletic-based financial aid during their freshman year.[418] These standards have been subsequently raised and were the subject of *Phillip*.[419]

Until *Cureton v. NCAA*,[420] the most remarkable debate within Black America over Propositions 42 and 48 was waged between the Black Coaches Association, led by John Thompson and John Chaney, which opposed the standards promulgated, and Harry Edwards and the late Arthur Ashe, who supported such standards.[421] Their debate mirrors the distinction between *Phillip*[422] and *Kemp*.[423] Thompson and Chaney favored educational opportunity, viewing the higher academic standards as another barrier to the aspirations of African-American youth.[424] Although the standards applied to all NCAA member schools, the principal effect of the standards was to exclude African-Americans from HWIs in disproportionate numbers.[425] In Thompson's and Chaney's view, the higher standards were nothing more than another example of institutional racism.[426] HWIs, stung by widespread criticism over the academic ineptitude of many African-American athletes,

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415. Non-qualifying athletes are still allowed, under Proposition 48, to receive scholarships their freshmen year but "los[e] that year of playing eligibility." *Id.*

416. SHROPSHIRE, *supra* note 4, at 108.

417. Jay Cherwin, *Not-So-Great Expectations: The NCAA's Initial Eligibility Requirements*, 9 KAN. J.L. & PUB. POL'Y 706, 709 (2000).

418. SHROPSHIRE, *supra* note 4, at 111-13.

419. Phillip v. NCAA, 960 F. Supp. 552 (D. Conn. 1997).

420. 37 F. Supp. 687 (E.D. Pa. 1999), *rev'd*, 198 F.3d 107 (3rd Cir. 1999).

421. *See* Ashe, *supra* note 368. The original opposition to Proposition 48 came from the presidents of Historically Black Colleges and Universities, most notably Joseph B. Johnson, president of Grambling State University. Morris, *supra* note 414 (describing the failed attempts by officials at HBCUs to either eliminate consideration of standardized tests or to use them only for academic placement).

422. *See Phillip*, 960 F. Supp at 558 (holding that the athlete was entitled to an education after having attained the required standardized test scores).

423. *See* Kemp v. Ervin, 651 F. Supp. 495 (N.D. Ga. 1986) The court determined that the university inappropriately fired an instructor who protested against the university's "exiting" of nine student-athletes from its remedial program. The school also permitted them to enter the regular college program so that the athletes would not be dismissed, even though they did not fulfill the "exiting" requirements. *Id.* at 498. Non-athletes who did not meet the requirements had been dismissed from the school. *Id.*

424. Cherwin, *supra* note 417, at 709-10.

425. Spivey & Jones, *supra* note 67, at 940.

426. Morris, *supra* note 414.

resorted to academic admission standards.[427]

Arthur Ashe and Harry Edwards were not impressed with the institutional racism argument.[428] Instead, they witnessed revenue-driven HWIs exploiting African-American youths. Colleges and universities encouraged African-Americans to devote considerable effort to the development of their athletic skills at the expense of the development of intellectual skills.[429] The absence of academic skills, in fact, perpetuated the Superspade stereotype.[430] In their view, African-Americans were fully capable of meeting higher standards; they needed only put the time and effort into studying. Higher academic standards would result in more African-American athletes receiving legitimate college educations to the benefit of all African-Americans. There is much to be said for this argument. Graduation rates for African-American athletes have risen since the promulgation of Proposition 48.[431]

The debate obscures the technical difference between the two views. Neither side objects to individual universities setting high admission standards. John Thompson would agree that Georgetown could use the Proposition 48 standards for admission and athletic participation; indeed, Thompson did so when coaching there. Thus, the dispute is not over academic standards, or even high academic standards; rather, it is about mandatory uniform standards based upon standardized test scores.[432] This is why African-American legal scholars, some of whom were athletes, generally have sided with Thompson and Chaney.[433] While creating a uniform standard would seem to create a basis by which all athletes will be measured no matter what the color of your skin, the inequality continues.

In the case for free agency, uniform restraints on opportunity invariably hurt talented superstar athletes. A remarkable aspect of *Parish* was that a

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427. *See* Cherwin, *supra* note 417, at 708-10 (explaining the history of NCAA eligibility requirements and the reasons for enacting stricter standards).

428. *See* ASHE, *supra* note 4, at 62-63 (articulating Edward's and Ashe's stance on the effectiveness of Proposition 48).

429. *See* Davis, *supra* note 9, at 669 (noting that a Black student-athlete's accomplishments on the field are of greater import to the university than his or her academic successes).

430. *Id.*

431. NCAA, *1999 NCAA Graduation-Rates Report*, http://www.ncaa.org/grad_rates (last visited Nov. 20, 2000); *see also* Davis, *supra* note 9, at 676 (discussing graduation rates after the NCAA enacted the original version of Proposition 48).

432. *See The Row Going on over Scholarships*, BATON ROUGE MORNING ADVOC., Jan. 20, 1989, at 6B (describing the debate over the effectiveness of Proposition 48, and whether universities are getting the academically qualified student-athletes needed to continue their athletic programs).

433. *See, e.g.*, Linda S. Greene, *The New Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U. L.J. 101 (1984) (evaluating the implementation of the NCAA eligibility rules and the disparate impact on Black student-athletes); SHROPSHIRE, *supra* note 4, at 103-27 (explaining Proposition 48 and the arguments for and against the efficacy of stricter eligibility requirements).

superstar athlete brought the legal challenge.[434] The probability that an athlete of Robert Parish's caliber and circumstances could bypass college for the NBA today is quite high. Only an athlete like Parish, who valued education very highly, or an athlete with dim professional prospects could have brought the *Cureton* case. Unlike *Parish*, which involved White and Black athletes, the plaintiffs in *Cureton* directly challenged the heightened NCAA standards because of its adverse impact on African-Americans.

The plaintiffs in *Cureton* alleged that the use of a uniform standard based on test scores violated Title VI of the Civil Rights Act of 1964.[435] Perhaps this case was not brought more quickly after the promulgation of Proposition 48 because the minimum standard was tied to the average score for African-Americans. The lawsuit occurred after the Proposition 48 standards were increased in 1996.[436] Both plaintiffs may have qualified under the original Proposition 48 standards. There are important differences between the plaintiff's case in *Parish* and that in *Cureton*. In *Parish*, the plaintiff's case about adverse impact was largely one of conjecture.[437] In *Cureton*, the plaintiffs were able to use the NCAA's own data to show that standards disproportionately and adversely affected African-Americans, that the NCAA was aware of that impact when it approved the heightened standards, and that the NCAA arbitrarily established the new standard.[438] Despite these differences, however, the result was nearly the same. In both cases, the plaintiffs lost the case on technical grounds, as the NCAA is not subject to the antidiscrimination rules of Title VI.[439]

An industry focused on grooming high school athletes to meet the academic standards of colleges has long existed. Oak Hill Academy in Virginia, for example, attracted such players as Jerry Stackhouse, who played at the University of North Carolina and now plays for the Detroit Pistons, and Tracy McGrady, who bypassed college and recently signed with the Orlando Magic.[440] Schools use college preparatory programs to maintain outstanding high school basketball programs. Such an industry has led to some inauspicious scandals. The NCAA discovered that some athletes have violated NCAA rules because donors have paid some or all of their tuition to

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434. *See* Parish v. NCAA, 361 F. Supp. 1220 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975).

435. Cureton v. NCAA, 37 F. Supp. 2d 687, 698-701 (E.D. Pa. 1999).

436. *See* Lee J. Rosen, Comment, *Proposition 16 and the NCAA Initial-Eligibility Standards: Putting the Student Back in Student-Athlete*, 50 CATH. U. L. REV. 175, 182, 190 (2000) (explaining the modification of Proposition 48 into the imposition of Proposition 16 and the effect on *Cureton v. NCAA*).

437. *Parish*, 506 F.2d at 1033.

438. *Cureton*, 198 F.3d 107.

439. *Id.* at 118.

440. Bill Doyle, *McGrady vs. Kobe: Degrees of Success*, SUN. TELEGRAM (Worcester, Mass.), Feb. 25, 2001, at D3.

private schools.[441] Eric Barkley, a former St. John's University player, had to sit out two games in the fall of 2000 when the NCAA discovered that his church basketball program had paid a portion of his tuition at a private school in Maine.[442] Barkley came to the NCAA's attention when it was investigating payments to high school athletes in the Kansas City area by amateur basketball coach Myron Piggie,[443] who subsequently pleaded guilty to a federal offense.[444] While grooming by these schools, and by high schools in general, may help athletes become stronger academically in order to get into college, it has not stopped the hemorrhaging of athletes who intentionally leave college without a degree, or those who choose to bypass college altogether for professional sports.

One of the major disadvantages of the NCAA initial eligibility standards is that the primary burden is placed on athletes to clean up the image of college athletics. Those standards may require a certain minimum for athletes to get in, yet these initial requirements seem to give colleges a way out when they are accused of exploiting athletes for their abilities and not providing them with proper academic support once they are admitted to school. If an athlete fails academically, colleges can excuse themselves by pointing to the academic standards the athletes had to fulfill to be admitted. Moreover, colleges seem to be saying that they do not want African-American athletes who would struggle with college course work. The colleges are thereby refusing to bargain with the one asset they can offer that professional sports cannot—colleges can groom athletes into successful and enlightened human beings.

V. WOMEN

In contrast to their male counterparts, African-American female athletes have been invisible in American sports culture until recently.[445] Prior to the

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441. *See* Darren Everson, *NCAA Eyes Changing Prep School Aid Rules*, N.Y. DAILY NEWS, Jan. 10, 2001, at 62 (noting the NCAA's considerations to change the pre-college expense rules).

442. Bob Herzog, *NCAA Shoots Back/Says School Has Stalled on Barkley*, NEWSDAY (N.Y.), March 2, 2000, at A82.

443. Piggie, an amateur basketball coach, attempted to defraud universities, their conferences, and the NCAA by making payments to a high school player who played for him in summer league games. Mark Morris, *Prosecutor Begins Return to Private Life*, KANSAS CITY STAR, Jan. 25, 2001, at A1.

444. Dick Weiss, *Summer Squash Rules Bent Out of Shape: NCAA Takes on Offseason Basketball and Seeks Solutions to Foul Play*, N.Y. DAILY NEWS, Aug. 20, 2000, at 92; *see also* Robyn Norwood, *The Ploys of Summer: Recruiting Tactics Push the Limits of NCAA Control at Shoe Company-Sponsored Summer Basketball Events*, L.A. TIMES, Aug. 6, 2000, at D1 (reporting on the debate over amateurism and recruiting that occurs during summer league play in Amateur Athletic Union (AAU) tournaments).

445. *See* Carole A. Oglesby, *Myths and Realities of Black Women in Sport*, *in* BLACK WOMEN IN SPORTS 1 (T. Sloan Green et al. eds., 1981).

1960s, these athletes almost exclusively attended Historically Black Colleges and Universities (HBCUs). Because those institutions were more receptive to female athletic participation than HWIs,[446] any model for African-American females would logically originate there. Althea Gibson and Wilma Rudolph,[447] who graduated from Florida A & M and Tennessee State, respectively, fit the mold. They were outstanding athletes who challenged White supremacy in the athletic arena, but their symbolism was lost in a sea of invisibility. Their groundbreaking achievements were simply not viewed on the same level as that of Jackie Robinson. Even today, few realize that the first African-American to win the U.S. Open Tennis Championship and Wimbledon was not Arthur Ashe, but Gibson.[448]

However, Althea Gibson was blamed for not using her notoriety to further the advancement of African-Americans in general.[449] The absence of commercial opportunities for women vitiated the battles for economic opportunity that were being waged by the males. Likewise, African-American females have brought very few, if any, of the cases challenging amateurism and athletic standards at the collegiate level.[450] Today, they are more likely to be engaged in battles to increase athletic opportunities for females generally. For example, Chamique Holdsclaw was viewed as the poster woman for gender equality, as is true of Cynthia Cooper, who won the Most Valuable Player Award in the Women's National Basketball Association (WNBA) during its first three years, and Jackie Joyner-Kersee, a track star, who has been honored as the top female athlete of the twentieth century.[451] Their place as role models for African-American females has been diminished because of the stereotypes that African-American females are supposed to be basketball and track stars, not spokespersons for race and gender equality.

While African-American females have benefited from the wave of Title IX litigation at the college and high school level, that litigation has primarily

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446. *See* Alfred Dennis Mathewson, *supra* note 43, at 245 (looking at how equal protection jurisprudence has addressed the disparate treatment of Black women athletes, and whether it has been effective).

447. Rudolph was deemed fastest woman in the world at the 1960 Rome Olympics. She also became the first American woman to win three gold medals in one Olympics. ASHE, *supra* note 4, at 187.

448. *Id.* at 168-69.

449. *See generally* ALTHEA GIBSON, I ALWAYS WANTED TO BE SOMEBODY 29 (1958) (describing her personal triumphs and defeats).

450. For an example of one such case, albeit not at the collegiate level, see DeFrantz v. United States Olympic Comm., 492 F. Supp. 1181 (D.D.C. 1980). Anita DeFrantz was the lead plaintiff challenging the decision of the U.S. Olympic Committee not to send a team to the 1980 Olympics in Moscow. *Id.* at 1182. Ms. DeFrantz's activism led to her subsequent election to the International Olympic Committee on which she still serves. Rand Harvey, *Is She the Most Powerful Woman in Sports?*, L.A. TIMES, June 30, 1996, at 10 (tracing the history of DeFrantz's career).

451. Larry Schwartz, *Beauty, Grace & Speed, at* http://www.espn.go.com/sportscentury/features/00016057.html (last visited Apr. 1, 2001) (discussing Joyner-Kersee's accomplishments).

benefited White women and girls.[452] Although an action against an HWI to increase athletic opportunities specifically for African-American females is theoretically possible,[453] any litigation brought to advance the cause of African-American females under Title IX would likely involve HBCUs rather than HWIs.[454] In fact, the Department of Education and the NCAA have found violations at HBCUs.[455] A Black woman was one of the first coaches to win a judgment for discrimination based on disparities in salary between her and the coach of the men's team.[456] The defendant in that case, Howard University, was an HBCU.[457]

The gender equality struggles at the collegiate level have been about the number and quality of participation opportunities. The existence of professional sports opportunities, however, has lead to disputes over free agency and higher salaries. Low salaries have been the bane of WNBA players since the league's inception.[458] The low salaries result from the absence of free agency and the bargaining power of the WNBA. The WNBA employs the players themselves, not the individual teams.[459] The structure is a reserve system every bit as pernicious as the one challenged by Curt Flood in baseball, and perhaps, every bit as impervious to an antitrust challenge. There is only one buyer of player services in the WNBA market: the league. Consequently, there is no bidding among teams, and players have no control over the team for which they play.[460] The legal structure under which the WNBA owns all the teams is designed to take advantage of the "single entity" defense in antitrust law.[461] That defense has been less important since

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452. Tonya M. Evans, Comment, *In the Title IX Race Toward Gender Equity, the Black Female Athlete is Left to Finish Last: The Lack of Access for the "Invisible Woman,"* 42 How. L.J. 105, 107 (1998); *see also* Mathewson, *supra* note 43, at 246, 249-51 (noting how Title IX benefited Black males much more than Black female athletes).

453. *See* Alfred Dennis Mathewson, *Emphasizing Torts in Claims of Discrimination Against Black Female Athletes*, 38 Washburn L.J. 817, 821-25 (1999) (arguing that the intersection of racial and gender discrimination would merit a claim under Titles VI and IX for Black women).

454. *See* Mathewson, *supra* note 43, at 251-52 (discussing how after some litigation with Title IX claims Black women were able to advance their rights, but it was limited to HBCU).

455. Mathewson, *supra* note 453, at 824 n.22.

456. For a summery of the case, see Sanya Tyler v. Howard University, http://bailiwick.lib.uiowa.edu/ge/Lawsuits2.html#362 (last visited on Nov. 26, 2000).

457. *Id.*

458. *See generally* Eric Prisbell, *Players: WNBA Cash Not Flowing*, Star-Ledger (Newark, N.J.), July 18, 2000, at 49, 2000 WL 24346611 (presenting the various arguments for and against an increase in salary for WNBA players).

459. *Id.*

460. *Id.*

461. *See* Fraser v. Major League Soccer, L.L.C., 97 F. Supp. 2d 130, 137 (D. Mass. 2000) (holding that the professional soccer league was a single entity and could not be held liable to players under Section 1 of the Sherman Act for arrangements between team owners which allegedly restrained competition).

the decision in *Brown v. Pro Football, Inc.* because WNBA players have formed a players association and have negotiated their first collective bargaining agreement.[462]

The players, however, seem more concerned about the fairness of the salary level than the restrictions on economic freedom.[463] The base salary of the highest paid player in the WNBA is less than the minimum salary in the NBA.[464] Given the history of struggle in women's athletics, this attitude is understandable. The most outspoken critic of salary levels is Theresa Edwards, the best player in the history of women's basketball.[465] History may come to view her as the Curt Flood of women's professional basketball. Edwards has played in the now defunct American Basketball League (ABL).[466] She has refused to play in the WNBA after it offered her less than half the salary she was making in the ABL.[467]

Many American players play in Europe and Asia for teams that offer better opportunities than the WNBA and pay more.[468] The attempt by dissatisfied players to force the WNBA to bid with European teams for their services has not been successful.[469] For one thing, the leagues have different seasons. The European teams play in the traditional basketball season while the WNBA plays during the summer.[470] Many players, in fact, play in both.[471] The WNBA has stuck rigidly to its salary structure because it fears that salaries will escalate out of control and the league may fail as the ABL did.[472] The players counter this argument by stating that while the WNBA has seen its revenues from sponsors more than double, salaries have not.[473] The collective bargaining agreement is likely to be renegotiated soon and it

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462. *See* Prisbell, *supra* note 458.

463. *Id.*

464. The highest base salary in the WNBA in the 2000 season was $75,798 and the minimum salary in the NBA was $317, 000. *Id.*; *see also* KC Johnson, *Withdrawal Symptoms: The Bulls Had Money to Burn this Off-Season to Land the Free Agent of Their Dreams*, CHI. TRIB., Nov. 24, 2000, 2000 WL 29778982 (explaining that the Bulls' payroll is currently the lowest in the NBA, the product of not landing a major free agent and paying a number of current players the league minimum of $317,000).

465. Prisbell, *supra* note 458.

466. *Id.*

467. Sheila Mulrooney Eldred, *WNBA Makes Stop in N.O.: League Faced with Questions About Future*, TIMES-PICAYUNE (New Orleans, La.), Oct. 29, 2000, at 1, 2000 WL 21290972.

468. Prisbell, *supra* note 458.

469. *Id.*

470. Amy Moritz, *WNBA Finds Groove*, BUFFALO NEWS, June 21, 2000, at 1C.

471. Michelle Smith, *One Step Forward, Two Steps Back?*, *at* http://espn.gocom./wnba/colums/smith_michelle/271045.html (Jan. 9, 2001).

472. Jayda Evans, *Summer Storm Brewing*, SEATTLE TIMES, May 30, 2000, at D1.

473. *See* Prisbell, *supra* note 458.

will be interesting to see who steps forward. It will still be viewed as an issue of gender equality as players of all ethnic groups and nationalities fight over salary fairness.

A model for African-American women athletes is emerging in the guise of the Williams sisters in tennis[474] and Marion Jones in track and field.[475] Already they are being compared with Althea Gibson.[476] They are, perhaps, the best-known female athletes in the world today and more is yet to come. There will be plenty of opportunities for them to influence the rules of law governing sports. Will they be vocal advocates within sports and society? Richard Williams, father of Venus and Serena Williams, has been criticized frequently for his outspokenness on the tennis circuit.[477] The sisters appear to have been groomed to do the same.[478] The troubles of Marion Jones' husband may transform her into an activist, whether she had intended to become one or not.[479] The future of African-American women athletes as of yet is unknown. Whether they follow in the footsteps of Jackie Robinson or O.J. Simpson, the path they pave will effect future generations, proving once again that African-American athletes will continue to be at the forefront of these issues.

VI. CONCLUSION

Individuals shape legal and cultural institutions as well as the values of society. African-American athletes have been influential in changing American sports in the twentieth century and developing American sports law. Those individuals were groomed by the society in which they were reared and by the generations that preceded them. The principles of economic freedom and shared control of free agency, even in the aftermath of *Brown v. Pro Football, Inc.*[480] are the cornerstones of American free agency law. Many questions, however, remain unanswered. Will

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474. *See* Edward Moran, *Williams Sisters Can Be the Tiger Woods of the Tennis Courts*, PHILA. DAILY NEWS, July 13, 2000, LEXIS, Nexis Library, News Group File (chronicling the success of the Williams sisters and their rise to stardom and role model status).

475. Marion Jones won five medals at the 2000 Sydney Olympics, the most ever by a woman in track and field. Bert Rosenthal, *WSF: Hunter's Case Hurts Jones' Image*, ASSOCIATED PRESS, October 11, 2000, *available at* 2000 WL 27905463.

476. *See* Tom Long, *With Williams Sisters: Off-Court Ad Success May be the Hardest Game*, DET. NEWS, July 24, 2000, at 1.

477. *Id.*

478. *See* Harman, *supra* note 50 (reporting that former tennis star John McEnroe has advised the Williams sisters to tone down their outspoken nature, given his personal experience).

479. Jones' husband, shot putter C.J. Hunter, tested positive for an anabolic steroid before the 2000 Sydney Olympics. James Lawton, *Olympic Games: Promising Signs of Renaissance in True Ideals*, INDEPENDENT (London), Oct. 2, 2000, at 8.

480. 518 U.S. 231 (1996).

professional athletes use self-restraint to curb potential owner backlash from rising salaries due to shared control with management? The history of struggle against oppression will continue to play a role, but will Black athletes identify themselves as "rebellious slaves" at end of the next century? Or will there emerge some new principle, some new conceptual identity arising out of a century of integration?

African-American men and women will play major roles in twenty-first century athletics, but who will groom them and where will they be groomed? Colleges and universities have not found the balance between educational opportunity and academic standards. Their attempts to strengthen academic standards have made them less attractive to African-American athletes with professional potential.[481] Consequently, these institutions may be expected to play less important roles in the grooming process. What role will African-American women play in shaping the laws applicable to the sports in which they participate? African-American athletes have been fairly successful in looking out for their own best interests in the athletic world. Each success adds to the strength of the next generation's position. The grooming that must now be done should focus on instilling in Black athletes the importance of improving accessibility to a college education and fighting for greater economic freedom, ultimately giving each athlete a choice. As athletics continue to grow and prosper, the intellect of Black athletes—not their brawn—will continue to loom large.

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481. *See supra* notes 420-39 and accompanying text.