Flagrant Foul: Racism in "The Ron Artest Fight"

by Jeffrey A. Williams*

> "There's a reason. But I don't think anybody ought to be surprised, folks. I really don't think anybody ought to be surprised. This is the hip-hop culture on parade. This is gang behavior on parade minus the guns. That's what the culture of the NBA has become."
>
> - Rush Limbaugh[1]

> "Do you really want to go there? Do I have to?. . . .I think it's fair to say that the NBA was the first sport that was widely viewed as a black sport. And whatever the numbers ultimately are for the other sports, the NBA will always be treated a certain way because of that. Our players are so visible that if they have Afros or cornrows or tattoos—white or black—our consumers pick it up. So, I think there are always some elements of race involved that affect judgments about the NBA."
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> - NBA Commissioner David Stern[2]

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[1] Rush Limbaugh, the Rush Limbaugh Show, Nov. 22, 2004 *available at* http://www.freerepublic.com/focus/f-news/1289370/posts. To view footage of the fight, *see infra* note 42 (collecting clips).

[2] Michael Lee, *NBA Fights to Regain Image; One Year Later, Brawl Leaves a Mark Throughout League*, WASHINGTON POST, November 19, 2005 at E01. This quotation is also useful in clarifying the target of this piece, the suspension policies of prominent professional sports leagues and not the individual actors authorized to make decisions and enforce penalties under these regimes. Though Commissioner Stern is entrusted with discretionary authority, most commentators agree that he has proven generally aware of and sensitive to issues of race. *See* Harvey Araton, *One Year After Pacers-Pistons Fight, Tough Questions of Race and Sports*, N.Y. TIMES, October 30, 2005, § 8, at 1 (lauding Commissioner Sterns efforts and recognizing admiration of others). Araton's exploration is also significant for its encapsulation of the problem. Though noting that Stern was "privately troubled by the belief that the behavioral bar was set higher for a league largely dominated by African-American players," Araton concedes that the Artest fight saw "Stern, the straight-and-narrow C.E.O., typically outmuscle Stern, the progressive thinker." *Id.* Nor is the blame to be at-

I. INTRODUCTION

Imagine a laundry list of felonies, misdemeanors and personal indiscretions. Begin with some obviously significant offenses like murder[3] or large-scale drug distribution,[4] then pepper the list with collateral offenses like individual drug use,[5] obstruction of justice[6] or

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tributed to a single discretionary decision but rather, as Araton also explores, the decision within a context where "mistakes and missteps made by the NBA in particular and the basketball industry at large had helped create the conditions for the chaos to volcanically erupt." *Id.* To extend the problem one step further, league suspensions themselves project and therefore help perpetuate these conditions. It is not the choices that executives feel are compelled within the commercial conditions of their business operations, but rather the cultural causes for those conditions, the consequent content of league suspensions within this commercial culture and, ultimately, the needlessness of these discretionary choices themselves.

[3] Rae Carruth, a Carolina Panthers wide receiver arranged the murder of his pregnant girlfriend and then attempted to escape in the trunk of a car. See Gary L. Wright, *Rae Carruth Prosecutor, Headed for the Bench, Not Satisfied with Verdict,* CHARLOTTE OBSERVER, February 17, 2001, Sports, at 1; Gary L. Wright, Eric Frazier and Tim Whitmire, *Jury Finds Carruth Not Guilty of Murder; Ex-NFL Player Convicted on 3 Other Counts,* DALLAS MORNING NEWS, January 20, 2001, at 1B (noting murder acquittal and convictions for conspiracy and shooting offenses); Barry Saunders, *For a Trial of the Month, Mix Sports, Sex and Slaying,* NEWS AND OBSERVER (Charlotte, N.C.), February 3, 2001, at A15. Saunder's editorial recognizes the incredible attention given the trial on Court TV. ("Carruth's trial averaged 327,000 viewers a day, and increased to 500,000 on Jan. 19, when the verdict was announced.").

[4] Baltimore Ravens running back Jamal Lewis was secretly taped using his cellphone to arrange a drug transaction. A plea agreement cost him four months in jail but suspensions were a drop in the bucket only a few weeks after signing a $35 million contract. *See* Bill Rankin, *NFL Star's Plea Deal; 4 Months; Hearing Set for Thursday,* ATLANTA JOURNAL-CONSTITUTION, Oct. 3, 2004, at 1A.

[5] Two of the NFL's biggest stars, Randy Moss and Ricky Williams, have both made waves for their public positions on marijuana use. *See* Jay Mariotti, *Moss' comments sprout another weed; Marijuana is still illegal. No one should have shooed away his acknowledgment like so much smoke,* CHICAGO SUN-TIMES, August 19, 2005, at 159; *Ricky Reportedly Kicking Habit,* HOUSTON CHRON., June 5, 2005, Sports, at 02. Charles Oakley made headlines when he alleged that the NBA was replete with marijuana use. *See* Frank Zicarelli, *Oakley Gets a Reaction,* TORONTO SUN, Feb. 23, 2001, Sports, at 94; Chris Tomasson, *Is NBA Going to Pot? It's Up In Air; Players Agree There's Marijuana Use But Dispute High Figure,* ROCKY MOUNTAIN NEWS (Denver, CO.), Feb. 17, 2005, at 11N (revisiting Oakley's comments). Long before these remarks, however, the NBA had acquired a reputation for heavy drug use. *See* Boyd, YOUNG, BLACK, RICH AND FAMOUS, *infra* note 42, at 24 (discussing 1980 cocaine use allegations).

[6] Ray Lewis pled guilty to such obstruction for his involvement in a murder trial in which no defendant was ever convicted and Lewis was quickly forgiven. *See* Mark Cannizaro, *Ray Goes From Mayhem to MVP,* N.Y. POST, Jan. 29, 2001, at 008.

> ("If you're a football purist, someone who's still uncomfortable with Lewis' wrong doings in Atlanta a year ago, you're going to have very difficult time embracing Lewis as the MVP, as an athletic hero. If you're in search of a compelling story, however, they don't get more bizarre and twisted and even uncomfortable than this one. Lewis has gone from murder suspect to MVP, all in a year.").

perjury.[7] Throw in theft,[8] assault[9] and the possession of unlicensed firearms.[10] Include some relatively minor offenses like excessive traffic tickets[11]and adultery,[12] but be sure to remember spousal abuse,[13] statutory rape[14] and rape.[15] Add being five minutes late for

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Id. This criminal trial was promptly followed by two civil suits against the athlete. *See* Lateef Mungin, *Ray Lewis Sued Again in Deaths*, ATLANTA JOURNAL-CONSTITUTION, Feb. 15, 2002, at 8D.

[7] Rafael Palmeiro has vehemently denied steroid use, even before a Congressional inquiry. Yet Palmeiro tested positive for steroid use just months later, leaving many to suspect that he had perjured himself. *See* Jeff Barker, *Palmeiro's Case Still Unresolved; In Effort To Be Thorough, House Committee Takes Time In Reaching Decision*, BALTIMORE SUN, Sept. 9, 2005, at 3F.

[8] *See infra* note 155 (recounting offenses of Sam Mack, including theft and forgery).

[9] *Id.* (recounting offenses of Sam Mack, including assaults).

[10] Though Sean Taylor, a safety for the Washington Redskins, was recently charged for two counts of aggravated assault with a firearm as well as a count of simple battery, the Redskins management has chosen not to suspend him until resolution of those charges. *See* Jody Foldesy, *Taylor Likely OK to Play in 2005*, WASHINGTON TIMES, June 8, 2005 at C01

> ("Washington Redskins safety Sean Taylor appears likely to play the 2005 season without suspension unless coach Joe Gibbs changes his mind and benches Taylor before his criminal charges are adjudicated.").

[11] New York Giants wide receiver Plaxico Burress recently faced several warrants requiring his appearance regarding unpaid taxes and speeding tickets. *See* Richard Lezin Jones, *Burress Faces Arrest*, N.Y. TIMES, June 18, 2005, § D, at D8.

[12] Kobe Bryant openly acknowledged an adulterous affair while vehemently denying allegations of rape, despite a civil settlement. *See* Steve Henson, *Bryant and His Accuser Settle Civil Assault Case*, LOS ANGELES TIMES, March 3, 2005, § A (Sports Desk), at A1.

[13] Sports suspensions following domestic violence incidents are reserved for only the most egregious instances. *See, e.g.*, Brent Jones, *Ravens' Rolle Receives Probation for Domestic Dispute in February; Tennessee Judge's Ruling is for 11 months, 29 days; NFL Suspension Unlikely*, BALTIMORE SUN, April 7, 2005, §C, at 9C:

> It is unlikely the NFL will further discipline Rolle with a suspension because his prior record is clean, but Rolle could face a fine. Tampa Bay Buccaneers running back Michael Pittman was suspended three games and fined two more game checks after a domestic dispute last year, but Pittman spent 14 days in jail for intentionally ramming his sport-utility vehicle into a car carrying his wife, 2-year-old son and the couple's babysitter, and it was his second domestic dispute offense. The Ravens will not discipline Rolle and do not expect the league will either.

Id.

[14] Mark Chmura, one time Green Bay Packers tight end, attended a post-prom drinking party on the invitation of his babysitter where he was allegedly involved in a sexual assault. Chmura was acquitted of these assault charges, alarming some women's advocates. *See* Charles Osgood & Dave Browde, *Mark Chmura Found Not Guilty in Assault Trial* (CBS Evening News broadcast, February 4, 2001); Karen Rauen, *Chmura Verdict May Silence Some Victims,* GREEN BAY PRESS-GAZETTE, Feb. 6, 2001, § B, at 2B.

[15] Mike Tyson, perhaps the most violent athlete in recent sports history, was welcomed back to boxing after his conviction and prison term for raping Desiree Washington. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1273-74 (1991) (analyzing interaction of race and gender in community support for Tyson); Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males about the Rape of Desiree Washington*, 1992 U. ILL. L. REV. 997.

work.[16] Finally, make a second column and punish all offenders.[17]

Sports teams and leagues rack up figurative lists like this each year, with both collegiate and professional athletes committing increasingly public crimes and indiscretions. With this publicity come the need for punishment and a system of sanctions and fines for athletes decided by team and league authorities. These authorities listen to fans like Limbaugh in determining what penalties to impose for the latest scandals. So if the lists interest us, we should listen to Limbaugh too.

Echoes of Limbaugh's tirade were heard loud, if not clear, when a brawl between players and fans erupted at the end of a basketball game in the Palace at Auburn Hills. Limbaugh was only one voice in the chorus but his characteristic tenacity lent precision to these sentiments. When lambasting the cultural problems of the NBA, Limbaugh cogently forewarned that his remarks would "be tagged as racist."[18] I will; they are.

The brawl at the Palace, the media reaction to it and the consequent suspensions issued by the NBA cannot be understood as "color-

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[16] In one of many coaching eccentricities, New York Giants coach Tom Coughlin asks his players to arrive five minutes early and was willing to fine several players $1,000 for arriving only three minutes before a meeting. *See* Jeff Duncan, *Coughlin Won't Back Down,* TIMES-PICAYUNE (New Orleans), Sept. 26, 2004, Sports, at 4.

[17] See Part III. A for a discussion of criminological explanations for league suspensions. Examples of athletes involved in serious criminal and non-criminal incidents abound, as Jeff Benedict's lively work makes clear. *See* Jeff Benedict, OUT OF BOUNDS: INSIDE THE NBA'S CULTURE OF RAPE, VIOLENCE & CRIME (2004) (hereinafter "OUT OF BOUNDS"); *See also* Jeff Benedict, PUBLIC HEROES, PRIVATE FELONS: ATHLETES AND CRIMES AGAINST WOMEN (Northeastern University Press 1999) (hereinafter "PUBLIC HEROES"); Jeff Benedict, PROS AND CONS: THE CRIMINALS WHO PLAY IN THE NFL (Warner Books 1999).

[18] *See* Limbaugh, *supra* note 1. After explaining league culture, Limbaugh continues,

> "So if anybody will be honest with you about it in the NBA, and a very few will have the courage to, because saying what I just said is going to be tagged as racist, but I, my friends, am fearless when it comes to this because the truth will win out, and that's what's happening here, and part and parcel of this gang culture, this hip-hop culture is: 'I'm not going to tolerate being dissed. I'm not going to be disrespected,' and 'disrespected' is now so broad that it includes somebody looking at you the wrong way."

See also Jason Whitlock, *Message for Black Players*, ALBANY TIMES UNION, Nov. 23, 2004, § C, at C5.

> ("American sports fans, particularly those who consistently shell out the hundreds of dollars it takes to attend a professional game, are fed up with black professional basketball players in particular and black professional athletes to a lesser degree.").

Todd Boyd effectively sensationalizes the media swirl surrounding the fight. *See* Boyd, Basketbrawl, *infra* note 152, at B15

> ("As the intensity of this surreal episode starts to wear off and the inevitable spin cycle begins, people are rushing to find the cause and connect it to something larger. At first they didn't discuss race, but now the conversation is right back where you'd expect it: Super-sized black men beating up helpless white men! Black men gone wild! Let's blame hip-hop culture, the gangsta mentality, the rule of the street.").

blind,"[19] and the limits of existing legal remedies for problems of covert racism in sports warrant an alternative for redress — a shift in league suspension policies from discretionary and reactive regimes to predetermined sets of regular and proportional punishment. Part II explores the legacy of racism in sport, concluding with a description of the modern commercial and cultural climate of the NBA. Part III then details the Artest incident and the legal and league reactions to it before utilizing the limits of alternative explanations for the subsequent suspensions to affirm the influence of racial prejudice. Part IV then explores the limits of available legal remedies and proposes a less discretionary and more proportional model of league sanctions, a change that is warranted because league sanctions that knowingly lend effect to racist reactions are racist, as is a system of law that permits them to do so.

II. RACISM IN SPORTS & "THE RON ARTEST FIGHT"

> Ah, Douglass, we have fall'n on evil days,
> Such days as thou, not even thou didst know,
> When thee, the eyes of that harsh long ago
> Saw, salient, at the cross of devious ways,
> And all the country heard thee with amaze.
> Not ended then, the passionate ebb and flow,
> The awful tide that battled to and fro;
> We ride amid a tempest of dispraise.[20]

Like a microcosm of society, most think the sports world was once rife with racism but has rid itself of these roots. But the reality of both sports and society is far from color-blind and racially contextualizing modern sport will help open eyes to the incident at the Palace.

A. *Historic Racism in Sports*

> It's not easy to know what is true for you or me
> at twenty-two, my age. But I guess I'm what
> I feel and see and hear, Harlem, I hear you:
> hear you, hear me—we two—you, me, talk on this page.
> (I hear New York, too.) Me—who?
> . . . .
> I guess being colored doesn't make me *not* like

[19] *See* David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99; Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (critiquing the purported invisibility or irrelevance of race in modern American society); Charles R. Lawrence III, *Race and Remedy in a Multicultural Society: Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN L. REV. 819 (1995).

[20] Paul Laurence Dunbar, *Douglass*, *in* SELECTED POEMS 159 (Herbert Woodward Martin, ed., 2004) [Penguin Books]

the same things other folks like who are other races.
So will my page be colored that I write?[21]

Major League Baseball ("MLB"), the National Football League ("the NFL"), the National Basketball Association ("the NBA") and the National Collegiate Athletic Association ("the NCAA") were all formerly segregated.[22] Barrier-breakers like Jackie Robinson suggest a wall had been eradicated, yet few would as readily assume that desegregation eliminated the problems of racism in American society. Fueling segregation was a set of strong prejudices and assumptions about the black athlete that lent justification to the separation and persisted after its destruction. Indeed, for much of American history, the issue was whether to accommodate separate black athletic opportunities or none at all.[23]

Behind segregation was a negative conception of the black athlete as physically extraordinary and mentally inferior that rendered them "simply too spontaneous and impulsive in nature to participate within the structure of sports rules with the same degree of sophistication as whites."[24] Black athletic success was not ascribed to strategy but to

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[21] Langston Hughes, *Theme For English B*, *in* THE COLLECTED POEMS OF LANGSTON HUGHES 409 (Arnold Rampersad, ed. 1994) [Vintage Classics, Vintage Books, division of Random House Inc.; David Roessel, Asst. Ed.]

[22] *See* Harry Edwards, *The End of the "Golden Age" of Black Sports Participation?*, 38 S. TEX. L. REV. 1007 (1997)

> ("Largely as a result of "separate but equal" legal rulings and the power of custom, convention, and connivance - e.g., there were never any formal rules or regulations barring Blacks from mainstream professional baseball, basketball, or football - instead there developed a national Black sports institution paralleling that of mainstream White society.");

see Davis, *infra* note 23 at 628

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

Doctor Edwards also notes the role of both money and the media in ending desegregation. *Id.* at 1012-13. The NBA was the last of the major leagues to desegregate, doing so while facing such pressures, including black teams like the Harlem Globetrotters. *Id.*; Davis, *infra* note 23 at 635

> ("It appears that, in part, colleges set aside discriminatory practices in order to reap benefits.").

[23] *See* Timothy Davis, *the Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L. J. 615, 624-26 (1995); John Hoberman, DARWIN'S ATHLETES: HOW SPORT HAS DAMAGED BLACK AMERICA AND PRESERVED THE MYTH OF RACE (1997); Edwards, *infra* note 24 at 35 (noting boxing as exception to racially exclusive sports).

[24] Harry Edwards, SOCIOLOGY OF SPORT 38 (1973); *See also* Robert M. Entman et al., MASS MEDIA AND RECONCILIATION, A REPORT TO THE ADVISORY BOARD AND STAFF, THE PRESIDENT'S RACE INITIATIVE 49 (1998) (citing 1990 University of Chicago social survey in which 52.8% viewed violence as an attribute of blacks).

attributes like height and strength.[25] This "superspade" stereotype simultaneously degraded the accomplishments of black athletes and facilitated their scapegoating.[26]

Such notions may appear antiquated but they remain alive today, as in Jimmy "the Greek" Snyder's infamous 1988 Martin Luther King Day remark:

> The black is a better athlete to begin with, because he's been bred to be that way. Because of his high thighs and big thighs that go up into his back. And they can jump faster because of their bigger thighs, you see . . . . I'm telling you that the black is a better athlete and he practices to be the better athlete and he's bred to be the better athlete because this goes all the way to the Civil War when, during the slave trading, the owner, the slave owner, would breed this big woman so that he would have a big black kid, see. That's where it all started.[27]

Snyder's remarks were echoed by Marge Schott four years later.[28] When Al Campanis, an executive for the Los Angeles Dodgers, was asked about the absence of black managers in 1987, he asserted that blacks lacked some of the mental qualities needed for clubhouse leadership. Worse, he explained his position by querying, "Why are black

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[25] Davis, *supra* note 23, at 646 ("The Myth of the Superspade"); Hoberman, *supra* note 23, at 50 (discussing "The routine association of white athletes with attributes such as mental dexterity, integrity, tenacity, and willpower."). Doctor Edwards also provides a detailed analysis of more complex physical and psychological tests aimed at demonstrating natural biological advantages for black athletes. *See* Edwards, *supra* note 24 at 190-227.

[26] *Id.* at 632. An interesting analogy can be made between the importance of race and sex in sports. *See* Kane, *infra* note 210 at 97

> ("We should not underestimate how much sport reinforces fundamental assumptions underlying patriarchal conceptions of gender. Sport is preoccupied with measurable, physical differences between the sexes in which heights, scores, and distances are obsessively recorded and compared. These differences in turn lay the groundwork for the apparently empirical proof that males are physically, and thus naturally, superior to females. This is precisely why sport is so important.").

The same may be said of the role of sports in reinforcing racial prejudices. Through a comparison of supposed physical advantages and measurable statistics, racists may both maintain the better leadership or intellect of white players and devalue the contradiction-causing success of black athletes.

[27] Leonard Shapiro, *'Jimmy the Greek' Says Blacks Are 'Bred' for Sports; Television Interview Causes Furor*, WASHINGTON POST, January 16, 1988, § A, at A1. *See also* Gotanda, *supra* note 19; Paul M. Anderson, *Racism in' Sports: A Question of Ethics,* 6 MARQ. SPORTS L. J. 357, 364 (1996); Edwards, *supra* note 24, at 197 (quoting similar comments from Dallas Cowboy Calvin Hill and Olympian Lee Evans); NAS, *These Are Our Heroes, on* STREET'S DISCIPLE (Sony Urban Music/Columbia Records 2004) ("Uh, Massa used to breed us to be bigger to go play/ Athletes of today in the NBA . . . .").

[28] *See* Anderson, *supra* note 28, at 364.

men or black people not good swimmers? They don't have the buoyancy."[29]

Thus, the ideology of racism that informed the segregation of sports has simply been quieted, adapted to a desegregated future as a set of (sometimes very) unthinking assumptions about individual qualifications based on race. The contrast of black stars as fast or strong while white stars are intelligent and good leaders echoes the historic perception that blacks were physically gifted but mentally inferior.[30] The egalitarian politics of contemporary America subdue these prejudices, transforming them from expressions of open hatred and rejection into complex feelings of apprehension and fear.[31] Many scholars have noted that this "aversive" face of racism often manifests as hostility towards minorities in positions of high status.[32] "Unconscious"[33] or "aversive" racism is epidemic in America, the sports industry is no exception.

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[29] Davis, *supra* note 23, at 634 ("I truly believe they may not have some of the necessities to be, say, a field manager of perhaps a general manager). *See also* Lawrence III, *infra* note 33, at 339-40 (discussing Howard Cosell's depiction of a black player as a 'monkey'). "Why, for instance, did Cosell use the word 'monkey,' an animal long associated with caricatures and stereotypes of blacks, rather than 'rabbit' or 'deer' or 'jet'?" *Id.* at 340, note 95.

[30] *See* Othello Harris, *African-American Predominance in Collegiate Sport, in* RACISM IN COLLEGE ATHLETICS: THE AFRICAN-AMERICAN ATHLETE'S EXPERIENCE (Dana D. Brooks and Ronald C. Althouse, eds., Fitness Information Technology 1992); Davis, *supra* note 23, at 647.

[31] Timothy Davis, *Racism in Athletics: Subtle Yet Persistent,* 21 U. ARK. LITTLE ROCK L. REV. 881, 883 (1999):

> In contrast to 'old-fashioned' racism, which is expressed directly and openly, aversive racism represents a subtle, often unintentional, form of bias that characterizes many white Americans who possess strong egalitarian values and who believe that they are not prejudiced. Aversive racists also possess negative racial feelings and beliefs of which they are unaware or that they try to dissociate from their non-prejudiced self-images. The negative feelings that aversive racists have for blacks do not reflect open hostility or hate. Instead, their reactions involve discomfort, uneasiness, disgust, and sometimes fear. That is, they find black 'aversive,' while, at the same time, they find any suggestion they might be prejudiced aversive as well.

Id.

[32] Davis, *infra* note 31 at 888-89; Theresa A. Martinez, *Embracing the Outlaws: Deviance at the Intersection of Race, Class, and Gender,* 1994 UTAH L. REV. 193, 194 (1994).

[33] *See* Charles Lawrence III, *The Id, The Ego and Equal Protection: Reckoning With Unconscious Racism,* 39 STAN. L. REV. 317 (1987); *Id.* at 322

> ("To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.");

Id. at 331-39 (discussing psychoanalytical and cognitive approaches to racism); Gary Peller, *Race-Consciousness,* 1990 DUKE L.J. 758, 762

> ("I believe that the failure of the progressive and liberal white community to comprehend the possibility of a liberating rather than repressive meaning of race consciousness

One of the most recognized demonstrations is the scarcity of minority coaches. An annual set of Racial Report cards consistently ranks the major professional sports leagues by percentage representation of blacks.[34] Defenders of a color-blind sports industry might note that the percentages of black athletes in professional sports have consistently risen,[35] but these increases do not always correspond to increases in head coaching and front office positions.[36] Minority franchise owners remain similarly infrequent.[37] While the NBA per-

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has distorted our understanding of the politics of race in the past and obscures the ways that we might contribute to a meaningful transformation of race relations in the future.");

Id. at 845 (discussing focus of race reform on "overcoming bias at the level of consciousness").

[34] *See* Racial Report Cards, *infra* note 35.

[35] Richard E. Lapchick & Jeffrey R. Benedict, 1994 Racial Report Card (1994); Richard E. Lapchick, 1995 Racial Report Card (1995). (hereinafter "Racial Report Cards"); Richard E. Lapchick, 2003 Racial and Gender Report Card (2003); Richard E. Lapchick, 2004 NBA Racial and Gender Report Card (2004). Both the recent report cards and the reports from the mid-90s show the prevalence of black athletes in professional sports. The comprehensive 2004 study of the NBA particularly claims that "the NBA was best for people of color" in several categories, including player representation at 78%. *Id.* at 2.

[36] Though these figures did not increase in the mid-90s, the modern studies reveal that the NBA has achieved its highest percentage ever of representation of people of color in league offices and saw mixed increases and decreases in other categories. *Id.* These conditions are immense improvements over the historical opportunities available to blacks in team and league management, *see* Wayne Embry, THE INSIDE GAME: RACE, POWER, AND POLITICS IN THE NBA 191-94 (2004) (recounting early career as first black general manager), but it is also important to recognize that the variance in increases and decreases in these statistics stem in large part due to their small numbers. So, for example, the "men's leagues" in 2004 were only two shy of a historical record for black CEOs or Presidents but that was with three currently and five as the record. *See* "Racial Report Cards," *supra* note 35.

This article subscribes to the enduring skepticism regarding the translation of statistical representation in sports league athletes or even coaches and managers into political or economic representation in the policies or commercial strategies of the league. *See* Edwards, *supra* note 24, at 190 (questioning the ability of blacks to gain "controlling influence over sport."); *Id.* at 202-03

("Black sports domination, far from being an indicator of Afro-American advancement in the general society, is perhaps one of the surest barometers of a continuing lack of equal opportunity for blacks in America.");

Hoberman, *supra* note 23, at 32-34 (questioning "virtual integration").

Indeed, the *statistical* representation in professional sports can be interpreted quite pessimistically. *See* Hoberman, *supra* note 24, at 71-75 (contrasting black athlete and black aviator or astronaut as potential role models); Boyd, YOUNG, BLACK, RICH AND FAMOUS, *infra* note 43, at 53

("America seemed ready to accept Black celebrities if they conformed to the prevailing standards prescribed for them.").

[37] Richard E. Lapchick & Jeffrey R. Benedict, 1994 Racial Report Card (1994); Richard E. Lapchick, 1995 Racial Report Card (1995). *See also* Michael Corey Dawson, Comment, *A Charge Must Come: All Racial Barriers Precluding Minority Representation in Managerial Positions on Professional Sports Teams Must be Eliminated,* 9 SETON HALL J. SPORTS L. 551 (1999).

formed significantly better than its professional counterparts in all regards, it still carried a wide divergence between players and management.[38]

Minority hiring efforts in professional sports leagues also reflect the currents of political racial discourse surrounding affirmative action programs.[39] The NFL's recently implemented policy on minority interviewing for open coaching positions has drawn heavy criticism. These efforts attract especial hostility because of the competitive nature of sports. When fans are satisfied by the new white coach, they have proven very unreceptive to concerns over how the search was conducted.[40] Another ugly consequence of minority hiring efforts is the criticism of minority coaches as merely "minority hires."[41] Such comments are partly reflections of the heuristic biases of fans—their enthusiasm for a new coach or need to scapegoat a team's poor performance—but these are racial realities as well. Nowhere is this more clearly displayed than in the NBA, with more minority representation than its peer leagues in its coaches, its owners and its fan base. The NBA's players are more representative, too.

B. *The Baddest of Times*[42]*: Michael Jordan & the Air Apparents*

> Yeah, I need my loot by rentday
> But that's not what gives me the heart of Kunte Kinte.
> I'm trying to give us "us free" like Cinque.

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[38] *Id. See also* Boyd, Basketbrawl, *infra* note 152, at B15 ("Today black players so define the NBA that it sounds redundant even to speak of a 'black basketball player'; the blackness of the players is assumed in the occupation of basketball.").

[39] *See e.g.* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding use of race in law school affirmative action plan); Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down use of race in undergraduate affirmative action plan); *See also* John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Edwards, *supra* note 22, at 1023 (comparing sports and broader social debates about race).

[40] The Miami Dolphin's hiring of Nick Saban drew the ire of advocates for "the Rooney rule," which asks teams to interview minority coaching candidates before arriving at a decision. *See* Mike Mulligan, *Saban-to-Dolphins Hits Minority Snag*, CHICAGO SUN-TIMES, Dec. 19, 2004, at 115.

[41] Notre Dame's recent firing of Tyrone Willingham has sparked debate over the impact of race in what was arguably a premature firing. *See* Michael Wilbon, *Notre Dame's True Colors*, The Washington Post, Dec. 11, 2004, § D, at D01; *See also* Allen Wilson, *Coaching Jobs Are Still Not Color-Blind*, Buffalo News (NY), Dec. 5, 2004, § D, at D6 (denying that race was an issue for Willingham but decrying the absence of minority coaches).

[42] Borrowed from Esther Iverem's editorial review of Spike Lee's *Crooklyn* and other contemporary critical movies. *See* Esther Iverem, *Betcha By Golly, Wow; Black Culture Looks Back 20 Years,* NEWSDAY, June 19, 1994, at 18. *See also* Todd Boyd, YOUNG, BLACK, RICH AND FAMOUS: THE RISE OF THE NBA, THE HIP HOP INVASION AND THE TRANSFORMATION OF AMERICAN CULTURE (2003) (hereinafter "YOUNG, BLACK, RICH AND FAMOUS").

I can't stop, that's why I'm hot:
Determination, dedication, motivation,
I'm talking to you, my many inspirations
When I say I can't let you or self down

. . . .

And when these words are found
Let it been known that God's penmanship has been signed with a language called Love.
That's why my breath is felt by the deaf and why my words are heard and confined to the ears of the blind.
I, too, dream in color and in rhyme[43]

The modern era of professional basketball has seen yet another racial revolution, with commercial marketing making the racial composition of the players more than obvious. Increased attention to television broadcast the athletes across the world and the NBA, now more image-conscious than ever, helped mold their stars, their brand and—in effect—their market. It was not simply that so many of the athletes were black; it was that they dressed the part; and sold those shoes, their shorts, those shirts and their voices.

1. The Appearance of Air

"I want to know my hair again, the way I knew it before I knew that my hair is me, before I lost the right to me, before I knew that the burden of beauty—or lack of it—for an entire race of people could be tied up with my hair and me."[44]

Michael Jordan's entrance brought the league unprecedented commercial attention. The ensuing advent of the individual brand would fundamentally alter the business of basketball. Ever since Jordan slam-dunked the sports industry, player after player has been asked to be "just another individual."[45]

a. Sneakers

Michael Jordan was not the first or only NBA star, nor was he the first or only NBA star to endorse a sneaker. He just at times seemed like these things. A promising rookie when he signed with Nike, Jordan would win five "most valued player" awards and six league champion-

[43] Kanye West, *Never Let Me Down, on* COLLEGE DROPOUT (Roc-A-Fella Records 2004) (official lyrics were not available and so the quotation above reflects a consensus of unofficial lyrics and the author's own audio recognition). Spoken word poetry is often not amenable to written recording; listening to the recording is advisable.

[44] *See* Caldwell, *infra* note 179, at 365.

[45] *Supra* note 43; Kellner, *infra* note 116, at 322 (discussing Jordan's role in promoting individualism); Boyd, YOUNG, BLACK, RICH AND FAMOUS, *supra* note 42, at 103.

ships with the Chicago Bulls.[46] His "Air Jordan" line was no less prolific.

Nike was apparently not Jordan's first choice for an endorsement deal[47] and Nike chairman Phil Knight expressed similar reservations about Jordan's marquee[48] but the first Air Jordan shoe proved an instant success. The air cushioning technology and stylish leather-topped look contributed to the original $64.95 price but Jordan's growing fame doubtless did as well.[49] The slam dunk logo would eventually be replaced with the same "Jumpman" image that Nike plastered across the billboards of the targeted launch cities.[50] Shipments routinely sold out within days. "People [were] buying them even if they're in the wrong size, just to have them."[51]

The NBA even contributed to the skyrocketing sneaker, however unexpectedly at first. When Jordan wore his red and black sneakers to a game, the league threatened a $1,000 fine for violating uniform policies requiring shoes show only the major team colors. Nike deftly reminded basketball enthusiasts that "the NBA can't prevent *you* from wearing them"[52] and the NBA quickly saw the same opportunity. Air Jordan dominated the market throughout his storied career but other stars such as Patrick Ewing, Shaquille O'Neal and Allen Iverson would launch sneakers of their own as well.[53] Commissioner Stern opined at length about the "symbiotic relationship" between the NBA and Nike,

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[46] *See generally* Mark Vancil, FOR THE LOVE OF THE GAME: MY STORY, MARK VANCIL (Crown, 1st edition 1998) (recounting Jordan's career); Michael Jordan & Mark Vancil, DRIVEN FROM WITHIN (Atria 2005).

[47] *See* Curry Kirkpatrick, *In An Orbit All His Own*, SPORTS ILLUSTRATED, November 9, 1987 at 82 ("Only Nike went for the deal—hook, line and swoosh.").

[48] Bill Meyers, *Jordan Inc., Star Today Announced He'll Head His Own Nike Division*, USA TODAY, September 9, 1997, at 1A.

[49] *See* Air Jordan Takes Off, NEWSWEEK, June 17, 1985, at 79.

[50] *Id.* ("All of the products will feature a silhouetted Jumpman logo, which features Jordan—his fingers outspread, legs open like a scissors—dunking"); Bill Saporito, *Can Nike Get Unstuck? Once a brash, hard-running firm with soaring numbers, Nike lurched to a stop this year; A new product line and a new attitude are the keys to hitting its stride again*, TIME MAGAZINE, March 30, 1998, at 48 (discussing replacement on Air Jordans of Nike "swoosh" logo with Jumpman).

[51] Saporito, *supra* note 51, at 48; Bill Meyers, *Jordan Inc., Star Today Announced He'll Head His Own Nike Division*, USA TODAY, September 9, 1997, at 1A

> ("That's because nearly 70% of all basketball sneakers are purchased by kids under the age of 17, according to the National Sporting Goods Association . . . The prestige goes up because Nike deliberately holds the supply of Air Jordans down.").

[52] *Id.*

[53] *See* Bill Meyers, *Jordan Inc., Star Today Announced He'll Head His Own Nike Division*, USA TODAY, September 9, 1997, § A, at 1A ("With Adidas signing NBA teen-dreamers like the Lakers' Kobe Bryant and the Toronto Raptors' Tracy McGrady as endorsers, and Reebok promoting Shaquille O'Neal's rap-and-jam message and Allen Iverson's in-your-face image, the Jordan brand will have to work hard for its points in the marketplace.").

associating brands and "sort of borrowing each other's equity."[54] Sneakers, and brands, would become a pivotal element of the basketball player's uniform, on and off the court.

b. Shorts

Jordan might also be credited with the popular rise of baggy shorts, though some reports insist Jordan's shorts were loose to accommodate wearing his college shorts underneath.[55] Others note the entrance of Michigan's "Fabulous Five" into the league as the seminal event of the baggy shorts style.[56] The results should not be understated though: the standard three inch inseam grew in 1990 to "four, then six, then eight," before the 1992 Michigan college basketball squad asked for a ten inch inseam.[57]

Though the careful attention of some journalists noted the cultural overtones of the shorts scandal, the shorts drew the ire of critics of the billowy look.[58] The league would eventually act as well, again regulating the image of the NBA by issuing $5,000 fines to several players in 2001 for wearing shorts too far below their knees.[59] But the style statement had been made; shorts inseams remain longer than the traditional three inch standard and sports apparel outfitters, including Jordan and others, continue to market larger sizes for looser looks.[60]

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[54] *See* Michael Schrage, *The IQ Q&A: David Stern*, INTERACTIVE QUARTERLY, May 26, 1997; Hoberman, *supra* note 23, at 33 (discussing symbiotic relationship between league and sponsors).

[55] *See* Oates, *infra* note 57, at C3. *But see* Jay Mariotti, *NBA Did Right Thing, But for Wrong Reason*, CHICAGO SUN-TIMES, February 14, 1993, at 2 (criticizing Jordan's baggy shorts).

[56] *See* Greg Stoda, *Shortsighted NBA Needs Kick in the Rear*, PALM BEACH POST (Florida), November 23, 1997, at 21B (crediting Fab Five); Boyd, YOUNG, BLACK, RICH AND FAMOUS, *supra* note 42 at 124-144 (discussing Fab Five's introduction to the NBA).

[57] Bob Oates, *The Baggy 90's' Today's Basketball Uniforms Are Two Sizes Too Big; Though High Fashion, They Lack a Sense of Style*, LOS ANGELES TIMES, April 10, 1994, § C, at C3 (considering counterculture angle of style of shorts).

[58] *See Id.* ("You hear it said in front of many television sets: The worst thing about basketball players today is their baggy uniforms.").

[59] *See* John Eligon, *In NBA, Clothes Dress Up The Image*, N.Y. TIMES, October 19, 2005 at D5; Greg Stoda, *Shortsighted NBA Needs Kick in the Rear*, PALM BEACH POST (Florida), November 23, 1997, at 21B

> ("The financial penalty for wearing outlandishly and ever-so-popular oversized basketball trunks could, in some cases, be more severe than the fine assessed for commission of a flagrant foul."). "Why, in a league that sells itself on individuality and star power, force conformity on an issue as silly as the length of a pair of shorts? But it's OK for the NBA to make kajillions of dollars marketing team apparel that changes color and design faster than a runway model changes clothes, right?"

Id.

[60] Jordan's 2005 line features, among other loose apparel, shorts with 8" and 10" inseams. Product details *available at* http://niketown.nike.com.

c. Throwback Jerseys

Shirts followed suit with player jerseys growing looser as well. Jerseys were both more stylized than typical shorts and personalized with the player's number and sometimes name. This variety afforded jerseys distinct commercial advantages over other items of apparel.

As with the inseams of shorts, the design of commercial jerseys changed considerably towards the end of the Nike Jordan era. The mid-90s heralded a sharp spike in sales of "throwback" or "retro" jerseys, custom designed jerseys from players and teams past. These jerseys combined elements of comfort, showmanship and homage into an apparently casual but frequently deliberate style that swept the league.[61] As with sneakers, the league again recognized an opportunity. The league created "Hardwood Classic Nights" where select teams would don their throwback jerseys for a game, further promoting the fad.[62] To this day, throwback jerseys remain visible products in NBA apparel and accessory sales.[63]

d. Tattoos

Dennis Rodman, Michael Jordan's controversial teammate for much of the Bulls' run, was the most notorious of the league's inked athletes. Rodman was not alone, however, illustrating that tattoos were no longer the fashion of only "bikers and carnival workers and sailors."[64] Rodman's outlandish hairstyles, multiple piercings and liai-

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[61] *See* Boyd, YOUNG, BLACK, RICH AND FAMOUS, *supra* note 42, at 167 (noting Kobe's "array of jerseys" including Jackie Robinson, Wayne Gretzky, and Joe Montana).

[62] The NBA itself has offered some history into both the creation of these games and the eras meant to be celebrated. With all respect to those traditions, the commercial character of the venture is unmistakable. *See NBA History: Teams Celebrate Their Past with Hardwood Classic Nights*, NBA.com *available at* http://www.nba.com/history/classics_031120.html (unsigned article).

[63] Individual athletes have also entered these markets with their own product lines. *See, e.g.*, Silva, *infra* note 143 ("Hamilton also has his own clothing line, RIP City, which sells jerseys, sweatshirts and dress shirts.").

[64] Robes Patton, *These Days in The NBA, More and More Players Are Finding That Tattoos Lend to Their Status As Marked Men; In a League Where Players Pride Themselves on Being Trendy, the Latest Rage in the National Basketball Association Sees Players Getting Tattoos*, ORLANDO SENTINEL, February 5, 1995, at C10. "Like shaved heads, baggy shorts and earrings, tattoos have become a rage in the NBA." *Id.* (recognizing that basketball uniforms display more skin than other sports uniforms). *See also* Mark Heisler, *Linking Dress With Success*, LOS ANGELES TIMES, October 19, 2005, at D1

> ("The NBA was the one that always had the advantage of intimacy with TV cameras zooming in on players, who aren't wearing caps, helmets or pads and the league's stars thus are sport's leading models of urban chic.").

sons with Madonna made him easily one of the league's most distinct personalities.[65]

More concerning was the breadth of tattoos among the league's less eccentric personalities. Some hailed the league as "a virtual Louvre-in-motion of skin art," with various tattoos expressing their competitive spirit or personal commitments.[66] Like the throwback, this was a highly individualized trend. Unlike the throwback, however, this was one the league could have done without. When asked in connection with internet content issues whether he would allow an interactive tattoo game featuring Rodman, Commissioner Stern readily replied, "definitely not."[67] Augmenting this position, the NBA's official *Hoop Magazine* airbrushed several of Allen Iverson's tattoos off his body when they put him on the cover of their 1999 holiday edition.[68]

e. Bling-Bling[69]

Completing the look was an array of jewelry. "Bling" came in many forms, including large rings, diamond earrings and heavy medallions dangling on long loose chains. Richard Hamilton offered one player perspective on its popularity, claiming "every young guy who comes through the NBA, that's the first thing they get is a chain."[70] Even if this were to overstate its actual prevalence, it would be hard to overestimate its prevalence in descriptions of league stars.[71] The luxury

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[65] *See* Bill Livingston, *Illustrations Blur Rodman's Talent*, PLAIN DEALER (Cleveland, Ohio), March 10, 1995, at 1D (asking whether "the 'freak' show with its garish designs and its tabloid sensations - Rodman dating the singer to "dye" for, Madonna! - doom his chance for a fair appraisal?"); Todd Jones, *Courting Trouble*, COLUMBUS DISPATCH (Ohio), October 31, 1997, at 5E

("The league takes the game's traits and mixes them with cartoon characters, and the remote-control public is left with the colorful head of Rodman. Entertainer or athlete? There's no clear distinction in the world of the NBA").

[66] Patton, *supra* note 65, at C10.

[67] *See* Schrage, *supra* note 54.

[68] John Eligon, *In NBA, Clothes Dress Up The Image*, N.Y. TIMES, October 19, 2005, at D5; Mark Heisler, *Linking Dress With Success*, LOS ANGELES TIMES, October 19, 2005, § D, at D1; Aschburner, *infra* note 144, at 7C (all recounting airbrushing incident).

[69] The term first entered the vernacular through a rap song from BG, referring to ostentatious expensive jewelry. *See* BG, *Bling-Bling, on* CHOPPER CITY IN THE GHETTO (Cash Money Records 1999) ("Diamonds worn by everybody that's in my clique./ Man, I got the price of a mansion around my neck and wrist."); *See also* William Safire, *Bling-Bling*, N.Y. TIMES, November 23, 2003, § 6, at 28 (noting BG's surprise at popularity of term).

[70] *See* Silva, *infra* note 143.

[71] *See, e.g.*, Irving Scott, *Risky Business; NBA Stars Bring Their Own Bodyguards*, SPORTS ILLUSTRATED, February 16, 2004, at 16

("When the NBA's best descend on L.A. this weekend, most will have pistol-packing bodyguards with them to watch over their friends, their families and their bling.");

Al Iannazzone, *Bank on It; Duncan His Own Man*, THE RECORD (Bergen County, New Jersey), June 3, 2003, at S01

of this jewelry became so equated with success that the NBA Championship rings for the Los Angeles Lakers were once crafted to include the word "bling-bling" written in diamonds.[72]

f. 'Do and 'Fro: League Hairstyles

Of course, the chains and rings of bling came in different shapes and sizes; the throwback jerseys paid tribute to different teams and legends. So too, the hairstyles of the league became a focal point for individual expression, and cultural attachment.

Michael Jordan's dome and Isaiah Thomas' flat top were league standards in their day but Dennis Rodman's hair was just as eccentric as everything else about him, dyed in monochrome and rainbow colors and sometimes even the Bulls logo.[73] The next generation of stars brought hairstyles of their own: braided cornrows became popular in a variety of patterns[74] and the puffed afro returned to the courts.[75] The variety of these fashion statements was apparent—but just as evident was a connection drawn between these various looks and the contrast presented with earlier eras. Even though some of the league's formative stars, Dr. J and World B. Free, wore afros, its return to popularity,

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("Tim Duncan doesn't fit into the hip-hop world of the NBA, where everything is about great dunks, tattoos, trash-talking, gaudy celebrations, colorful headbands, and all the bling-bling one man can wear.");

Juan Carlos Rodriguez, *Zo Good, Get Back in the Groove to Help Others*, MIAMI NEW TIMES, July 15, 2004 (contrasting Alonzo Mourning's charity efforts and the league's "self-centered, money-hungry, bling-headed egoists."). The league even approved a sponsored "King of the Bling" car event at a recent All-Star Weekend. *See* George Spalding, *Big 3 Vie to Be King of the Bling*, POST AND COURIER (Charleston, SC) May 15, 2004, at 1E (discussing automotive industry and rap).

[72] *See* Safire, *supra* note 69.

[73] *See* J. A. Adande, *Rodman's Arrival Sends Chicago Into Radio Daze; Bulls Warming Up To Odd-Ball Forward*, WASHINGTON POST, October 24, 1995, at E01 (noting Rodman's occasional choice of "cherry red hair with a black Bulls logo in the back."); Hoberman, *supra* note 23, at 37 (hailing Rodman as "the defiant self-mutilator of the NBA").

[74] *See* D. Orlando Ledbetter, *Cornrows Are Stylish Issue in NBA's Court*, MILWAUKEE JOURNAL SENTINEL, December 21, 1997, at D3 (discussing growing popularity of cornrows); Sarah Talalay, *Business is Good for the NBA*, SUN-SENTINEL (Fort Lauderdale, Florida), June 26, 2005, at 8C (noting deal between Richard Hamilton and Goodyear for Hamilton to wear cornrows in the shape of a "new tire tread"); Paige, *infra* note 77 (noting variety of Iverson cornrow patterns); Terry Armour, *The Hair Up There; Blank Plates Still Have Their Place in the NBA, But Cornrows are the 'Do These Days'*, CHICAGO TRIB., December 29, 2002, at Q-C-4.

[75] *See* Elana Ashanti Jefferson, *Afros Then & Now: Rappers, Hip-Hop Artists Help Bring Back the "Natural" Look*, DENVER POST, March, 23, 2003, at F-01. (noting afros of several NBA players); Roscoe Nance, *Rocket's Norris Becomes NBA's "Hair" Apparent*, USA TODAY, February 21, 2002, at 6C (interviewing one player regarding his hairstyles and mentioning some coaches concerns over professionalism).

combined with braids and do-rags, made some reminisce about the flat top era.[76]

g. Hip-Hop

What these players wore on and across their bodies, they spoke to as well. Between his music and his movie careers, Shaquille O'Neal is likely the most recognized of the off-the-court entertainers.[77] Kobe Bryant, his former teammate, also ventured into the industry.[78] Allen Iverson caught particular media attention for the sexist and homophobic lyrics of some of his songs.[79] Ron Artest, just days after his suspension, promised to devote himself to the hip-hop album he was producing.[80] Several music artists have also taken minority ownership interests in NBA teams as well.[81]

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[76] *See* Woody Paige, *For Athletes, Hair Raises Expectations*, DENVER POST, March 27, 2005, at B-04.

[77] *See* Richard Justice, *Shaq Inc: It's His World. Welcome to it*, WASHINGTON POST, February 12, 1995, at D01 (discussing Shaquille O'Neal's commercial popularity); *id.* (noting Shaq's musical response to public appearances by a biological father who was never involved in his childhood, a single entitled "Biological Didn't Bother").

> "His lyrics are a passionate description of both his love for his step father, Phil Harrison, and his rage he feels at his biological father."

Id.

[78] *See* Tim Brown, *Lakers Stars See Rap As Free Speech; Pro Basketball: Bryant and O'Neal Support Iverson's Right of Expression Even Though They May Question Lyrics*, LOS ANGELES TIMES, October 16, 2000, § D, at D1. Bryant produced two preview tracks but his album was never actually produced. *See* Boyd, YOUNG, BLACK, RICH AND FAMOUS, *supra* note 42, at 4

[79] *See* Boyd, YOUNG, BLACK, RICH AND FAMOUS, *supra* note 42, at 4; Bob Young, *Third Suns Screw Up, Robinson Arrest Adds to Already Tarnished Image of Team, NBA*, ARIZONA REPUBLIC, February 6, 2001, § C, at 1C. Responding to Iverson's resistance to the NBA's new dress code, one editorial lambasted,

> "Philadelphia's Allen Iverson actually told the Philadelphia Daily News that players wearing coats and ties 'sends a bad message to kids.' No, dog, recording rap songs that promote violence against women and gays sends a bad message to everybody. So get a suit, shut up and play ball . . . ."

See Mike Bianchi, *From the Typewriter: NBA Players Should Shut Up and Suit Up. . .*, ORLANDO SENTINEL, October 16, 2005.

[80] *See Artest Mixes Regret with CD Self-Promotion*, ASSOCIATED PRESS, November 23, 2004

> ("Earlier this month, he was held out of two games by Pacers coach Rick Carlisle after he asked for time off because he was tired from working on the CD.").

But see Glenn Nelson, *The Young & The Restless—Current Generation of NBA Stars Puts Mouth Where Money Is, and What Comes Out is Foul*, SEATTLE TIMES, April 27, 1994, § D, at D12 (discussing Isaiah Rider's excusal from practice to recuperate after a Converse commercial filming).

[81] *See* John Petkovic, *When Hip and Hops Meet; Urban Music, NBA Basketball Are Becoming Inseparable*, PLAINS DEALER (Cleveland), April 24, 2005 at J1 (noting ownership stakes of elite rappers in NBA teams).

The league's liaison with hip-hop culture is an excellent illustration of the complex commercial ventures typical of the league. Consider a recent Nike advertisement on NBA.com featuring Allen Iverson alongside 50 Cent.[82] Advertisements like this show the mutually reinforcing bonds between the sports industry, the sports apparel industry and the hip-hop music industry.

2. Race, the NBA & the Jumpman Generation

Some of these trends grew around Michael Jordan; others in his wake. But the weaning of the NBA off Michael Jordan's celebrity brought these attributes into focus. Even in his absence, Jordan's indelible impression remained. Some would hail the league's next stars as "the dunking generation,"[83] but it was Jordan's moves that engendered those dunks. Some could call it the "Jordan generation,"[84] but it was the league and its sponsors who saturated America with their star. More than anything, the NBA's athletic crop after Jordan was the "Jumpman generation."[85]

Jordan's tenure atop the league taught management two invaluable lessons. The soaring success of the league and its corporate associates during Jordan's rise demonstrated the value of star talent even (if not especially) when appreciably more successful than his peers. Jordan's shorts only added to his shots; both marked him as an individual as well as an athlete. It was Jordan's singularity that made him a star. Practically any fan could recognize the Jumpman silhouette as Jordan.

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[82] *See* Benedict, OUT OF BOUNDS, *supra* note 17, at 194-95. Another detailed description of the commercial connections between basketball and hip-hop is provided by Dr. Boyd. *See* Boyd, YOUNG, BLACK, RICH AND FAMOUS, *supra* note 42, at 14-18 ("The seeds of the connection have always been there.").

[83] Chuck Ashmun, *Dunk Contributes to Lower NBA Scores, Thomas Says*, SEATTLE TIMES, February 3, 1994, at C2

> ("Isiah Thomas calls the NBA's new breed 'the dunking generation.' Thomas, veteran guard and captain of the Detroit Pistons, says this is why team scoring averages are lower this season. 'Defenses haven't gotten better, offenses have gotten worse,' Thomas told Corky Meinecke of the Detroit Free Press. 'Young kids today are learning how to dunk as opposed to learning how to play.'").

[84] *See* Bob Molinaro, *NBA Looking Like Pro Wrassling and MTV*, VIRGINIAN-PILOT, November 4, 1996, at C1 ("This is the generation to which Jordan will be turning over the game.").

[85] *See supra* note 50 (discussing Jumpman logo). An encapsulation of Jordan dunking, the Jumpman was also a symbol of commercial success. Jordan's successors looked to emulate his dunking, but also his dominance off the court. *See also* Jeff Jenson, *NBA Tries Stronger Stuff; Teens Are Target as League Pushes Licensed Merchandise*, ADVERTISING AGE, December 04, 1995, at 36 (discussing "new generation of stars" central to league marketing); Brian Landman, *Even After Mike, League Finds Plenty Worth Marketing*, ST. PETERSBURG TIMES (Florida), February 12, 1994, § C, at 4C (noting multi-billion dollar sports apparel industry).

Jordan's first exit was equally instructive. At the peak of his career, Jordan simply retired to explore a career in professional baseball. Ticket sales and television ratings dropped acutely[86] and the corporate affiliates felt it in their own product lines as well.[87] Jordan's baseball career was not as successful and he returned to the NBA just eighteen months after his retirement. Jordan's brief sojourn gave the league a glimpse of its commercial future, actualizing the fear that Jordan's celebrity might be irreplaceable. Faced with this grim forecast, the NBA took to mining the league for its next marquee player. Sneaker campaigns featured successive league successes, from Ewing to O'Neal to Iverson and beyond. When Jordan retired again to run a Nike subsidiary corporation, the business line was certain to sign several stars to endorsement deals.[88]

The resultant league image was a curious concoction of market-driven individuality. Sports commentators spoke at length about a pattern of aggressively individual athletes.[89] Critics noted the focus of this

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[86] *See* Boyd, YOUNG, BLACK, RICH AND FAMOUS, *supra* note 42, at 146 (noting commercial vulnerability of the league after Jordan's retirement); Michael Wilbon, *Forget Godot, Everyone is Waiting for Jordan*, WASHINGTON POST, March 12, 1995, at D01; Michael Wilbon, *It's How They Play the Game*, WASHINGTON POST, February 1, 1996, § D, at D01

("You can say Michael and Magic are addicted to professional basketball and all that accompanies it, and you would be correct. But as much as they needed the NBA, basketball needed them more.");

Mark Heisler, *Linking Dress With Success*, LOS ANGELES TIMES, October 19, 2005, § D, at D1

("Late in the 1990s and Michael Jordan's career with the Chicago Bulls, the NBA was the alpha and omega of sports marketing, with its Finals beating the World Series' TV ratings three times. Then, with Jordan gone, the league went back to what it had been before, No. 3 on the hit parade, behind the NFL and baseball, as confirmed by the same TV ratings, even if it often seems lower than that.").

[87] *See* Beth Berselli, *Wear Jordan: Clothes Make the Man A New Career; Chicago Bulls Superstar to Become CEO of Footwear and Clothing Line for Nike*, WASHINGTON POST, September 10, 1997, § D, at D09 (noting "dip" in sales during Jordan's baseball career).

[88] *See id.*

("As part of the deal, the brand is being endorsed by the next generation of NBA stars. Five players—including Eddie Jones of the Los Angeles Lakers—already have pledged to pitch the products. Also, basketball teams at three colleges—the University of Cincinnati, St. John's University and North Carolina A&T—will sport Jordan's uniforms this season.");

Bill Meyers, *Jordan Inc., Star Today Announced He'll Head His Own Nike Division*, USA TODAY, September 9, 1997, § A, at 1A

("The Jordan brand, which will include Air Jordan products as well as other new sneakers and clothing items, is expected to generate more than $ 250 million in gross revenues during fiscal year 1998.").

[89] *See, e.g.* Oates, *supra* note 57, at C3 ("The players, as much as they value team membership, also wish to express their individuality."); Terry Boers, *Future NBA Stars Need Help*, CHICAGO DAILY HERALD, August 22, 1997, at 13 (criticizing "Kevin Garnett and his NBA buddies."); Bill Fay, *Men Behaving Badly in NBA*, TAMPA TRIB., February 8, 1997, at 1;

generation on commercial endorsements and celebrity. But they just wanted to be like Mike. No less, the team owners, the league management and the "symbiotic" affiliates all wanted that too.

The desperate search for an "air apparent" continued, seeking star after star to bring to the forefront and market into success. As Commissioner Stern once explained, this was a cooperative venture. Affiliated industries like the sneaker or gaming industries would promote league talent and supply fans with consumer goods. The NBA in turn would generate demand for products through its game and its talents' endorsements.[90]

Commissioner Stern's insights offer one still more candid detail, lauding the "authenticity" of the NBA product.[91] Stern did not elaborate but one thoughtful editorial cogently connected the league's "authenticity" to Allen Iverson's efforts to "keep it real."[92] Competition was in no way more authentic during Jordan's twilight. But the luxurious sneakers, the shorts, the retro jerseys, the tattoo craze, the bling-bling and the record deals were novel. The NBA was offering a cultural authenticity.

Todd Jones, *Courting Trouble*, COLUMBUS DISPATCH (Ohio), October 31, 1997, at 5E (targeting Allen Iverson as representative of generation's selfishness)

> ("But individualism has been promoted by the NBA in the past decade. Players take on personas: The Mailman, Sir Charles, The Admiral, Penny, The Worm, Shaq. Star quality helped the league's popularity to soar, but must a price eventually be paid for applauding Dennis Rodman's hair? Can a league survive as an array of individuals?");

Nelson, *supra* note 80, at D12; Aldoph Reed Jr., *Keeping It Real: The Marketing of the "Authentic" Black Athlete*, VILLAGE VOICE (New York, NY), March 11, 1997, at 32 ("In its haste to fill the anticipated commercial void, the league rushed to promote those it tagged as the next generation of NBA superstars—Shaquille O'Neal, Penny Hardaway, Chris Webber, Grant Hill, Jason Kidd, Stackhouse—even before they had actually accomplished anything."); Michael Wilbon, *It's How They Play the Game*, WASHINGTON POST, February 1, 1996, § D, at D01 (referring to "a spoiled, overrated, egomaniacal generation of brats.").

[90] Nelson, *supra* note 80, at D12 ("Professional basketball, of course, is not a democracy. Its symbols are selected, not elected. Its ambassadors are anointed, not appointed. Today, the NBA, its affiliated networks (NBC and TNT) and its sponsors (mainly, the shoe companies) do the anointing.").

[91] *See* Schrage, *supra* note 54 (discussing interview with David Stern).

[92] *See* Reed Jr., *supra* note 89, at 32

> ("'Allen tries to keep it real.' Thus spoke a sage in an ESPN feature on NBA wunderkind Allen Iverson. As curious as the characterization was the source: a twentysomething, superficially streetwise black guy identified as a Reebok consultant. In other words, an inner-city 'authenticity' expert.");

Hoberman, *supra* note 23, at 37 ('The racial paradox of the NBA and some other sectors of the sports world is that they both exploit and control black violence like a commodity."); *Id.*, at xxix

> (exploring "ghetto authenticity" and recognition of "thoughtful black athlete. . . that he has been cast in two grotesquely incongruous roles, impersonating the traditional sportsman, who honors fair play, while being paid to behave like a predator, a role to which the black athlete brings a special resonance.").

Though its dimensions are complex, the cultural authenticity commercialized by the NBA and industry affiliates represents a racist device because those cultural dimensions are closely associated with race. The hip-hop industry is the most visible example of this affiliation but there are important caveats. Rap may be more popular in urban and economically depressed communities and is also far more popular among younger Americans than the middle-aged or elderly.[93] Most saliently, middle-class whites form a significant chunk of the revenue base behind the hip-hop industry.[94]

Nonetheless, a large majority of hip-hop artists are black and hip-hop contains musical and lyrical connections with black culture.[95] The actual contours of the rap market are lost on consumers disinterested in the music products or personalities. An aversive audience sees only the frightening similarity; differences are lost. Jordan wore baggy shorts, the impetus is irrelevant. The players all want more money, it does not matter how much they earn, how they spend it or even how often they score or contribute. Such is, of course, the elementary power of stereotyping.[96]

The NBA and its sponsors did not create this problem—but they did regard it as a commercial opportunity. This facet of league business is not overt or intentional racism. Yet only the naïve would believe the cultural overtones of the NBA's marketed image were unknown or only understood by league management. This device was in effect the knowing exploitation of subconscious biases shared by a portion of the respective industry markets. Neither overt nor covert, this form of

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[93] *Compare* Bakari Kitwana, THE HIP HOP GENERATIONS: YOUNG BLACKS AND THE CRISIS IN AFRICAN AMERICAN CULTURE (Basic Civitas Books 2003) (describing hip-hop generation) *with* Brown, *infra* note 94, at 60-61 (critiquing breadth of Kitwana's definition of hip-hop generation).

[94] *See* Ronald D. Brown, *The Politics of "Mo' Money, Mo' Money" and the Strange Dialectic of Hip Hop*, 5 VAND. J. ENT. L. & PRAC. 59, 61-62 (2003) (discussing commercial emphasis on suburban white youth); Todd Jones, *Courting Trouble*, COLUMBUS DISPATCH (Ohio), October 31, 1997, § E, at 5E (quoting Jayson Williams on racial compositions of players and audience).

[95] *See* Candace G. Hines, Note, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 486-91 (2005) (chronicling historical forms of black music, including rap); *see also* Crenshaw, *supra* note 15, at 1283-95 (critiquing misogyny of 2 Live Crew lyrics while acknowledging the racial dimensions of their obscenity trial).

[96] *See* Aldoph Reed Jr., *supra* note 89, at 32.

("The problem with that kind of symbol is that once it achieves a certain familiarity, it becomes progressively cliched or twisted.");

Tom Knott, *Good Guys Can Dress Bad*, WASHINGTON TIMES, October 19, 1995, § C, at C01 ("In a way, unfair as it was, Artest, who is a nut job, became the leading ambassador of the NBA. He was the one player who spoke to millions with his crazy actions and stoked the stereotype that the league is filled with thugs. That is just not the way it is").

commercial racism is just as real and, particularly in the case of popular professional sports, just as dangerous.

III. The Crimes and Punishments of Ron Artest

Whatever one thinks of the business necessity or social legitimacy of this device, its use by the league must be remembered when considering the image of the modern professional basketball player and scrutinizing the crimes and punishment of Ron Artest.

A. *The Brawl at the Palace & "The Ron Artest Fight"*

Accurately reconstructing the events that led to the fight is essential for assessing the proportionality of league sanctions against Ron Artest and other players. By the time the NBA announced its decision the following Monday, the facts of the incident, the reaction of the media and the likely legal consequences were relatively transparent.

1. The Brawl at the Palace[97]

With under a minute left in the Indiana Pacers-Detroit Pistons basketball game, Pacer Ron Artest was called for a hard foul on Detroit star Ben Wallace, prompting Wallace to shove Artest forcefully with two hands. Pushing continued as players cleared the benches to separate the two and angry fans threw cups at the court. While others continued to fight, Artest walked away and laid down on the scorer's table in a passive but provocative gesture. He remained there for about ninety seconds, intermittently standing and once putting on headsets while some Pacers and Pistons continued to confront each other and others attempted to separate their teammates.

Artest's passivity ended when a thrown cup struck him and he leaped furiously into the stands. As he approached a segment of fans, he was pushed suggestively by a man in white hat towards a terrified

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[97] This section represents a pastiche of information gleamed from a variety of sources, relying primarily on the video clips available, *see* articles cited *supra* note 42, supplemented by the news sources cited throughout this article, as well as Judge Daniel's detailed explanation of events reviewing the arbitration proceedings, *see* National Basketball Association v. National Basketball Player's Association, 176 L.R.R.M. 2487 (2004) *infra* note 200. Indeed, as Dr. Boyd makes clear, *see* Boyd, Young, Black, Rich and Famous, *supra* note 42, at 108-111, the Pistons were among the first in the league to cultivate the aggressive, defensive style of play which the Pacers and others came to utilize, *id.* at 105-123 (discussing mid-80s Detroit Pistons).

> "The Pistons were an urban menace. There was no finesse, no grace, no attempt at playing to a shallow sense of gentility either. Just good, hard-nosed basketball with a dose of gangsterism thrown in for good measure."

Id. at 123.

fan who Artest then assaulted. The man in white hat and others swarmed Artest. His teammate Stephen Jackson joined him in fighting several fans before others entered the stands to separate them. When Artest returned to the court, he was again engaged by two Pistons fans and another fight ensued. Pacer Jermaine O'Neal struck a defenseless fan during this incident. After several minutes of bedlam, a modicum of order was finally restored. As Pacer players and coaches exited the floor, they were pelted with beer, popcorn and a folding chair. Thus ended one of the most graphically violent incidents in sports history. But it was only after the brawl was over that the legend of the Ron Artest fight really came into being.

2. "The Ron Artest Fight"

> "'They just show it and show it and show it,' he told me, exasperated, acknowledging that the fight had become the Zapruder film of sports."[98]

The reaction in the national media was swift, with most metropolitan newspapers running stories about the incident the next day.[99] Swifter, sports networks and internet sites (significant media sources for actively involved fans) featured the story as "front page" news.[100] Swifter still, video clips were available online almost instantaneously.[101] Whereas the brawl described above lacked a single frame of reference, these sources gave perspective;[102] they captured the roar of the fans

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[98] *See* Araton, *supra* note 2, § 8, at 1.

[99] Liz Robbins, *Smudges Abounding on the League's Image*, N.Y. TIMES, Dec. 12 2004, at B2; *Five Players, Five Pistons Fans to Be Charged with Assault,* WASHINGTON POST, December 8, 2004, at D02; Greg Sandoval, *Suspensions Mobilize NBA Player's Unions*, WASHINGTON POST, November 28, 2004, at E01.

[100] John C. Cotey, *Brawl Coverage is Must-See TV*, ST. PETERSBURG TIMES (Florida), November 26, 2004, § C, at 3C (recounting coverage and noting allegations of anti-player bias); *Timeline of Friday Night's Brawl,* ASSOCIATED PRESS, November 21, 2004.

[101] There are several clips of the fight, *see "The Ron Artest Fight Video," available at* http://www.messedup.net/ron-artest-nba-fight/brawl-ron-artest-fight-video.html; http://establishedboard.com/brawl/brawl.html; http://www.clickondetroit.com/video/3935750/detail.html; http://www.hoopsvibe.com/basketball-article-14881.html. There were other clips as well, including some that have been doctored. For example, the fourth and fifth videos on the Hoopsvibe website, Hoopsvibe.com, depict Artest being directed by Green (his provoker) to attack another fan. Http://www.hoopsvibe.com/basketball-article-14881.html (hereinafter "Hoopsvibe"). Several clips circulated around the internet that altered the footage, creating the illusion that the innocent fan held something that Artest wanted, such as fried chicken or watermelon. These obviously racist renditions are important to note but unnecessary to reproduce.

[102] Sports media and broadcasting were integral to the promulgating of the fight as a seminal event in sports history. Yet the vantage of the media can no longer be mistaken as neutral or objectively representative, especially in matters of race. *See* Kane, *infra* note 210, at 100

punctuating each stage of the drama and the range of emotions from the fear drenched across a young child's face to the menace on Artest's as he lunged into the stands. It was perfect reality TV because it told a story. These videos followed Artest, watching as he sat passively on the bench while other players fought and again when he left the stands as others continued to fight and again as he exited the floor as others continued to fight. These cameras were fuel for the Ron Artest fight, a version of the brawl that everyone was given to watch and listen to, in some forums as often as one would like.

By the time the fight hit the printed press the next day, it was hardly news and very much a story. Opinions and explanations for the catastrophe had formed. Although the stories condemned Ron Artest they were also quick to connect the incident to other incidents in the NBA's recent history and to look beyond the specific conduct of players on November 19th into broader questions of culture and image.[103] As had an antagonist, the themes provided by these questions enriched the brawl into a compelling story. This story was very different than the brawl at the Palace.

("Numerous researchers demonstrate that, although the media may appear to simply 'report what happened,' in reality 'they actively construct news through frames, values and conventions.' Part of this active construction is not only the selection of particular frames over others, but also the use of values and conventions to interpret the event (e.g., the athletic contest) itself. Do media interpretations favor one group, or set of beliefs, over others?")

(citing Susan Birrell & Cheryl L. Cole, *Double Fault: Renee Richards and the Construction and Naturalization of Difference*, 7 SOC. SPORT J. 1 (1990)). *See also* Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293 (2003) (considering permissible FCC responses to minority representation in broadcast networks).

"Because African Americans are a small minority in the United States, many non-blacks are likely to learn about African Americans from television. Therefore, those limited impressions, especially those that reinforce negative stereotypes, are indelibly etched in many viewers' minds."

Baynes, *supra*, at 325. Professor Kwall is clearer about the import of the media in modern American society. *See* Kwall, *infra* note 136, at 27

("The power of the media in our times cannot be overstated. Some observers would go so far as to say that our society, although seeming to idolize the individuals personified in the media, actually idolizes the media itself.").

[103] Frank Deford, *Quo Vadis, NBA?*, SI.COM, Dec. 2, 2004, *available at* http://sportsillustrated.cnn.com/2004/writers/frank_deford/12/02/race.nba/index.html

("And it has been impossible to overlook the videotaped reality that in the dreadful riot that took place in Detroit at the Pistons-Pacers game, it was not just a case of players going into the stands. It was black players going after white fans.").

See also NBA Culture Clash is Generation Gap, BLACK ATHLETE SPORTS NETWORK, Nov. 4 2004, *available at* http://www.blackathlete.com/artman/publish/article_095.shtml.

B. *After the Brawl: The Case and Controversy of Ron Artest*

As the media had anticipated, those involved in the brawl faced a variety of legal and extra-legal consequences. The players faced the risk of civil liability, as they were wealthy and therefore very attractive defendants to plaintiffs injured at the Palace.[104] Additionally, Pistons, Pacers and fans all faced assault charges after the incident.[105] Like many celebrities, professional athletes can often afford very able counsel, a lengthy drawn-out trial and a publicity offensive[106] but these advantages were muted in the Palace incident as the public nature of the debacle had foreclosed any plausible deniability and limited any possible spin. The NBA made clear that they would cooperate fully.[107]

Yet despite the notoriety of the fight, Artest faced only one count each of assault and battery because prosecutors excused almost all of his conduct under a self-defense theory.[108] Months later, Artest and his teammates would be fined, required to perform community service and placed on probation for one year.[109] The fault prosecutors attributed to the players paled in comparison to the blame they ascribed to John

[104] For a general discussion of civil liability in sports injuries *see* Jeffrey A. Citron & Mark Ableman, *Civil Liability in the Arena of Professional Sports*, 36 U.B.C. L. REV. 193 (2003). Tortious conduct between players is governed by a developed doctrine assessing assumed risk. *See infra* note 96. Fans assume less risk of injury at sports events, however, and bystanders in incidents outside the stadium generally face none at all. For these plaintiffs, professional athletes' deep pockets and desire to avoid negative publicity make for attractive defendants. Indeed, one of the fans who charged the court appears to have been a serial opportunist, waiting for a chance to fight NBA players and sue for damages. *See* Peters and Robbins, *infra* note 107, at D4.

[105] *See* Tim Povtak, *12 Face Charges in Basketbrawl; Five Pacers are Hit with Misdemeanor Assault. Seven Fans are Cited, 1 a Felony*, ORLANDO SENTINEL, Dec. 9, 2004, at D1 ("Indiana players Ron Artest, Stephen Jackson, David Harrison and Anthony Johnson were charged with one count each of assault and battery, a misdemeanor that could carry a three-month jail sentence and $500 fine. Teammate Jermaine O'Neal was charged with two counts of assault and battery.").

[106] Black athletes navigate legal channels with the rare combination of disadvantaged race but privileged class and status. *See generally* David Cole, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (The New Press 1999).

[107] *See* Jeremy Peters & Liz Robbins, *5 Pacers and 5 Fans Are Charged in Fight*, N.Y. TIMES, Dec. 9, 2004, § D (Sports Desk), at D4 (quoting deputy commissioner Granik on NBA's promise of full cooperation.).

[108] *See id.* ("While Artest punched other fans during the fight, his altercation, with Ryan, was the only one that was not deemed self-defense, Gorcyca said."). As Rachel Littman makes clear, there are several distinguishable theories for justifying or excusing criminal conduct. *See* Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1159-63 (1997) (comparing adequate provocation and diminished capacity theories to address heat of passion crimes). Though not in strict legal form, the fact that prosecutors deemed Artest's altercations self-defense is noteworthy.

[109] *See* Michael Lee, *Pacers' Trio Sentenced for Brawl: Artest, Jackson, O'Neal Get Probation, Community Service*, WASHINGTON POST, Sept. 24 2005, § E, at E03.

Green, the aforementioned "man in white hat," whom prosecutors viewed as "single-handedly" responsible.[110] It was John Green who threw the beer, the mere possession of which may have violated his parole. Although he has yet to be punished, any sentence Green receives will be affected by his criminal record.[111] But the difference between the culpability assigned by criminal prosecutors to Green and Artest is difficult to ignore.

Just as clear is the difference between the punishments meted on the players by prosecutors and league officials, respectively. Several players would receive appreciable suspensions,[112] but Artest's $5.4 million loss in salary was the most severe.[113] Though Commissioner Stern's public statement acknowledged the role of fans in the incident,[114] the severity of these suspensions speaks to a resolute determination to punish the players. The National Basketball Players Association ("the NBPA") fought the suspensions but prevailed only in reducing the suspension of Jermaine O'Neal by ten games.[115] These

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[110] *See* Peters & Robbins, *supra* note 107, at D1 (attributing to lead prosecutor Gorcyca the statement, "In my mind, he single-handedly incited this whole interaction between fans and players, and he probably is the one that's most culpable."). Some commentators claimed Artest "ran right past the offender and grabbed the wrong kid" but some footage suggests that Green played a role in the mistake. *Compare* Wilbon, *supra* note 86 (criticizing Artest for mistake), *with* Hoopsvibe, *supra* note 101 (showing footage of Green placing his hand on Artest and apparently directing him).

[111] Green's record is available through Michigan's Offender Tracking Information System (OTIS). *Available at* http://www.state.mi.us/mdoc/asp/otis2profile.asp?mdocNumber=182481. Green spent 8 years in prison before being paroled in 1994. *Id.* He previously violated his parole through drinking and driving incidents. *Id.*

[112] The suspensions were as follows: the remaining 73 games of the season for Artest, 30 games for Stephen Jackson, 25 games for O'Neal (reduced by arbitration to 15), 6 games for Ben Wallace, 5 games for Anthony Johnson and 1 game each to four players who left their benches during the altercation, Reggie Miller, Elden Campbell, Derrick Coleman and Chauncey Billups. *See* NBA Press Release, *infra* note 114.

[113] Mark Montieth, Pacers Stand to Save $8 Million, INDIANAPOLIS STAR, November 29, 2004, § D, at 8D.

[114] *See* NBA Press Release, November 21, 2003, *available at* http://www.nba.com/news/pacers_pistons_041121.html:

> The penalties issued today deal only with one aspect of this incident—that of player misconduct. The actions of the players involved wildly exceeded the professionalism and self-control that should fairly be expected from NBA players. . . . There are other issues that the NBA must urgently focus on at this time. First, we must redefine the bounds of acceptable conduct for fans attending our games and resolve to permanently exclude those who overstep those bounds. Participants in and around the court must be assured complete protection from unacceptable fan behavior.

Id.

[115] In response to the NBPA's appeal to an arbitrator of the suspensions, the NBA averred that the collective bargaining agreement did not afford the arbitrator authority to review suspensions for conduct on the court and declined entreaties to attend arbitration proceedings. When the arbitrator reduced the suspension of O'Neal as lacking just cause, the NBPA sought and gained a preliminary injunction preventing suspension for the remain-

suspensions admittedly predated the complete resolution of the legal cases pending against the athletes but that alone is no explanation for the dramatic divergence between assessments of fault.

C. *Outside the Law: Explaining the Extra-Legal Punishment of Ron Artest*

> "Charles Barkley used to throw people through glass windows in bars, but he was colorful. No, he was never a thug"[116]

There are certainly non-racial explanations for the severe suspensions that look to preserving competition, the blameworthiness of Artest's assault or even the bare costs borne by the league consequently. But if these explanations falter, one might suspect that the difference between Artest's punishments stems from the differences developed between the Brawl at the Palace and the Ron Artest Fight, and for the worst of reasons.

1. The Quest for Success: Competitive Explanations

Teams have direct interests in winning and leagues have an indirect interest in seeing competitive players and teams. Some forms of crime and misbehavior pose clear dangers to competition. Performance enhancing drugs are an obvious example,[117] but even the NFL's prohibition on hitting defenseless players and the NBA's flagrant foul exhibit the same concern.[118] Artest's suspension could be similarly motivated.

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ing ten games. Both the NBPA's injunction and the NBA's denial of the arbitrator's authority were resolved in the Southern District of New York, in the NBPA's favor. *See* National Basketball Association v. National Basketball Player's Association, 176 L.R.R.M. 2487 (2004).

[116] Adrian Wojnarowski, Editorial, THE RECORD (Bergen County, NJ), October 20, 2005, at S01. *See also* Douglas Kellner, *The Sports Spectacle, Michael Jordan, and Nike*, *in* SPORT AND THE COLOR LINE: BLACK ATHLETES AND RACE RELATIONS IN TWENTIETH-CENTURY AMERICA, 305 (Patrick B. Miller & David K. Wiggins eds., (Routledge 2004).

[117] See Part IV(B)(2) for a discussion of the steroid debate. *But see* Jack Curry, *Baseball Steps Up to Strike Down Use of Amphetamines*, N.Y. TIMES, November 18, 2005, § D, at D2. The concurrent amphetamines debate took a discernibly different tact, however, in large part because amphetamines were seen by many players as essential to sustaining competitive play throughout a grueling 162 game season. Competition motives also no doubt influence the punishment of recurrent or widespread infractions. *See* Silver & Dohrmann, *infra* note 154 (discussing the "Love Boat" incident involving more than a dozen players, including several starters).

[118] In both instances, a rationale for the penalty is the competitiveness and marketability brought to the sport by making athletes sufficiently secure in their safety to risk making difficult plays. *See, e.g.*, Jeff Legwold, *For Hit, NFL Strikes Back*, ROCKY MOUNTAIN NEWS (Denver, CO) September 16, 2004, § C, at 7C; Allen Wilson, *Player Safety Tops the Agenda at Annual League Meetings*, BUFFALO NEWS (New York), March 20, 2005, § C, at C5 (discussing defenseless player protections in NFL); Anthony Cotton, *NBA Creates an 'Illegal*

Suspensions harm competition as well, however, by removing otherwise talented and valuable contributors from their teams.[119] League suspension policies on the whole indubitably belie this rationale. Anything "detrimental to the league" could warrant action, even though outstanding traffic tickets, tax evasion or even theft or drug distribution have a remote relationship with competition, if any.

Violent crimes like those at the Palace may have a less attenuated connection. Latrell Sprewell's assault of P.J. Carlisimo, his coach, clearly implicated the authority Carlisimo could command over his team.[120] Violent altercations between players also chill the ferocity of the game. Yet it is awfully telling that Vernon Maxwell's 1995 assault of a heckling fan earned him only a 10 game suspension and a relatively minor fine.[121] Fans are not irrelevant to the competitive calculus but they have not become a dramatically pivotal part in the last decade either. Similarly, while the presence of generally volatile athletes might have a negative impact on competition, it would remain a mystery how this could only now have occurred to league executives.[122] Competition explains aspects of the brawl—Artest's hard foul on Wallace, Wal-

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Offense' Call; Packing Top of Key to Set Up 1-on-1 Isolation Could Cost Possession, WASHINGTON POST, September 21, 1987, § C, at C2 (noting increase in fines for flagrant fouls).

[119] Cathy Harasta, *Hot-Headed Maxwell finds NBA is mad, too*, DALLAS MORNING NEWS, February 10, 1995, § B, at 1B ("He also cost his team - which lost to Portland, 120-82, Monday - his availability for at least 10 games."); John Smallwood, *Pro Sports Needs Morality Play*, ORLANDO SENTINEL, December 7, 1997, § C, at C13 (noting under-enforcement of contractual penalties for misbehavior). *See also* Harvey Araton, *One Year After Pacers-Pistons Fight, Tough Questions of Race and Sports*, N.Y. TIMES, October 30, 2005, § 8, at 1 (discussing Rudy Tomjanovich and Kermit Washington fight).

[120] *See* Mark Rosner, *Next Generation Concerns NBA*, AUSTIN AMERICAN-STATESMAN (Texas), December 16, 1997, at C1; John Smallwood, *Pro Sports Needs Morality Play*, ORLANDO SENTINEL, December 7, 1997, at C13 (lauding decision to fire Sprewell for act of "moral turpitude"); Mark Starr, Allison Samuels & T. Trent Gegax, *Hoop Nightmare*, NEWSWEEK, December 15, 1997, at 26. (quoting Sprewell's threat to Carlisimo, "Bitch, you're gonna trade me or I'm gonna kill you."). *But see* Starr, Samuels & Gegax, *supra*, at 26 (noting Carlisimo's reputation for hostility and condescension and quoting Willie Brown's suggestion for an NAACP investigation into the Artest suspension, "[m]aybe his boss needed choking").

[121] *See* Craig Daniels, *League Eyeing Conduct Code?*, TORONTO SUN, February 12, 1995, at SP4; *Whine Fest Making NBA Look Cheesy*, ST. LOUIS POST-DISPATCH, February 11, 1995, at 4C (including Maxwell incident along host of others); Cathy Harasta, *Hot-Headed Maxwell finds NBA is mad, too*, DALLAS MORNING NEWS, February 10, 1995, at 1B (calculating cumulative cost of fine and suspension at $243,536.58). *See also* Art Thiel, *Butcherball: Finals A Chance to See How Ugly NBA Has Become*, SEATTLE POST-INTELLIGENCER, June 8, 1994, at D1. (discussing "two stunning playoff brawls").

[122] *See* Aldoph Reed Jr., *supra* note 89, at 32

> ("Add in the Manichaean Georgetown/Duke relation and such a juxtaposition seems perfect. No doubt Stern could sense the potential of this kind of rivalry. He is, after all, the guy who turned the NBA into a promotional bonanza by imitating the cartoonish morality plays of the World Wrestling Federation.").

lace's reaction, the hostility of the fans to the Pacers—but it does not adequately explain his suspension or suspension policies generally.

2. Criminal Culpability

"No Patriot Act here!"[123]

A more fundamental sense of culpability could also animate league suspension policies, based on criminological theories like incapacitation, deterrence, retribution and rehabilitation.[124] Rehabilitation seems an especially unlikely explanation for suspensions and a multi-million dollar fine, and an incapacitation theory would be hard-pressed to explain the differential treatment afforded various players involved.[125] Deterrence and retribution appear more applicable but both rationales are attended by difficulties of their own. Deterrence is ineffective where suspensions are discretionary and selectively used, and when details of those suspensions are often kept confidential from both the public and individual teams.[126]

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[123] Commissioner Stern, responding to whether Kobe Bryant would face league punishment prior to criminal conviction. *See* Mark Heisler, *Linking Dress With Success*, LOS ANGELES TIMES, October 19, 2005, at D1.

[124] *See e.g.* Lee, *infra* note 128, at 697.

[125] With the possible exception of substance abuse policies that require regular testing, league suspension policies are generally simple sentences with no opportunity to determine whether players have sufficiently rehabilitated during or after their suspension. *See* Jones, *supra* note 13 (recounting suspensions); articles cited *infra* note 138 (noting the Vernon Maxwell incident).

[126] One legal scholar has recently considered the deterrence rationale in light of the actual methods of execution employed. *See* Jonathan S. Abernathy, *The Methodology of Death: Reexamining the Deterrence Rationale*, 27 COLUM. HUMAN RIGHTS L. REV. 379, 381 (1996)

> ("Lest there be any misunderstanding, the purpose of this Article is not to advocate for public or more gruesome forms of execution. Rather, this Article attempts to undermine the deterrence rationale from a different angle than prior, empirical studies have, by arguing that there is an inconsistency between deterrence theory on the one hand and execution methodology on the other.").

Abernathy recognizes the problem of secrecy specifically. *Id.* at 392

> ("The movement from public to private executions seems to be at odds with both cost-benefit deterrence and preconscious fear deterrence");

Id. at 395-407 (discussing attention to humanity of the means of execution, culminating in the dominance of lethal injection).

While the analogy between league suspensions and capital punishment is certainly strained, the problem of privacy is the same. When recently-acquired Tennessee Titans running back Travis Henry was suspended four games for a repeat offense under the NFL substance abuse program, Titans head coach Jeff Fisher explained that the team had inquired with the NFL and were told that Henry was in the program but were not given any information beyond that. *See* Associated Press, *Henry Suspended for Substance Abuse*, AP NEWSWIRE, Sept. 27, 2005, at F3. Regardless of the wisdom of private executions or the confidentiality of suspensions, Abernathy is quite correct to note that effective deterrence "depends on 'the effective communication of threats of punishment and their concrete exemplifications to the public.'" (citing Franklin E. Zimring & Gordon Hawkins, DETER-

Retributive theories are also curious in light of Eighth Amendment jurisprudence stressing a need for proportionality in criminal punishment, a concept which, however difficult, is still useful in digesting league suspension policies.[127] One commentator's thorough analysis of this jurisprudence[128] affirms the principle that "a punishment should not be disproportionate to the crime."[129] This discussion draws important attention to the comparative and non-comparative elements of desert in a theory of punishment.[130]

Practically any account of comparative desert, what one deserves "in reference to what others deserve,"[131] in league suspension policies is fatal to a retributivist explanation. One need look only at what various league miscreants actually receive as punishment to realize as much: violence against women and other serious charges are routinely ignored while isolated incidents like the brawl at the Palace solicit extraordinary attention.[132] An attention to comparative desert could also query differences in league policies over similar offenses. These comparative considerations seriously undercut retribution as an animating principle of league suspension policies.

This approach might also look to assaults on various victims—bystanders at a party, wives at home, coaches during practice or fans at a game—yet this comparison also reveals a difficulty in a non-comparative approach to desert. Lee explains the concept with an example,

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RENCE: THE LEGAL THREAT IN CRIME CONTROL 141-42 (University of Chicago Press 1973)).

[127] *See, e.g.*, Weems v. United States, 217 U.S. 349, 367 (1910) ("it is a precept of justice that punishment for crime should be graduated and proportioned to offense"); Furman v. Georgia, 408 U.S. 238 (1972) (revisiting Weems). *See also* United States v. Bajakajian, 524 U.S. 321 (1998) (extending proportionality logic to the Excessive Fines Clause).

[128] *See* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005). Lee digests the constitutional forms a proportionality standard has taken, *id.* at 687-698, as well as the philosophical developments of a theory of just deserts, *id.* at 699-704. *See also* Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties,* 144 U. PA. L. REV. 101 (1995) (advocating theory of cumulative excessiveness where multiple penalties and offenses for the same conduct may be utilized but cannot excessively punish in total); *id.* at 149-50 (discussing various approaches to punishment in the federal system).

[129] Lee, *supra* note 128, at 698.

[130] *Id.* at 685 ("The noncomparative element focuses on whether one is treated in an appropriate way without regard to how others are treated. Comparative desert, by contrast, involves how one is being treated in comparison to others of varying deservingness."); See *id. at* 708-14 for an in-depth discussion of the distinction.

[131] *Id.* at 712.

[132] *See supra* notes 3-17 and accompanying text. *See also* Tom Knott, *Good Guys Can Dress Bad*, WASHINGTON TIMES, October 19, 1995, § C, at C01

> ("If there is a problem with the NBA, it is the inability of players to keep their pants on as often as they should around groupies, which has led to an unacceptable number of out-of-wedlock offspring.").

"when we say that it would be clearly disproportionate to punish parking violations with one year in prison, that statement would be true even if every parking violation were treated the same way and more serious crimes were treated more harshly."[133] Critics of Artest maintain, however, that an assault on fans during a game is dissimilar to other assaults. A non-comparative theory of desert cannot avoid confronting this question though I will, for now, because the answer seems transparently non-criminological: the law affords no special protection for fans.

3. Cost-Shifting Rationales: Courting King Courtside

> "People like confrontation. The media responds to confrontation and people take their cues from the media."[134]

One could also envision commercial explanations for the suspensions, perhaps in tandem with deterrence rationales (i.e., deterring loss of profit.) The violence that erupted at the Palace damaged the NBA and Indiana Pacers products, most specifically ticket sales, a staple of the professional sports revenue stream. Teams and leagues still thrive off of actual attendance.[135] Suspending Ron Artest and others helped shift any costs of the incident onto players by saving the teams eight million dollars in salary.

Like deterrence, cost-shifting alone seems an insufficient explanation. The players will already incur some costs[136] and importantly avoid others, specifically consistent devaluation in the free agency mar-

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[133] *See* Lee, *supra* note 128, at 711.

[134] Craig Daniels, *League Eyeing Conduct Code?*, TORONTO SUN, February 12, 1995, at SP4.

[135] Andrew H. Goodman's discussion of public financing for professional stadiums provides an excellent glimpse into the importance of stadium-based revenue to the professional sports team, including ticket sales, licensed and luxury seats, concessions, merchandise, parking, and advertising. *See* Andrew H. Goodman, *The Public Financing of Professional Sports Stadiums: Policy and Practice*, 9 SPORTS LAW. J. 173 at 188-192 (2002).

[136] Besides legal fees, there are other potential costs like missed commercial opportunities and potential civil settlements. *See* Mark Montieth, *Prosecutor IDs the Fan Accused of Throwing Cup, Pacers Hope for Break on Suspensions,* INDIANAPOLIS STAR, Nov. 23, 2004, § A, at 1A

> ("Also Monday, police said they had received nine complaints from fans who said they were assaulted by Pacers players, and team officials slipped into a defensive stance.").

For a detailed historical and social account of the importance of advertisement in celebrity *see* Roberta Rosenthall Kwall, *Fame*, 73 IND. L.J. 1, 25 (1997) (discussing right to publicity):

> The visibility of celebrities and the public's need to know about products lead consumers to listen closely to celebrity endorsements. In a sense, then, celebrity endorsements function in much the same way as trademarks do to communicate information about the product. Celebrity in America, thus, is proof of the American Dream of money and power, and our capitalist culture ensures that the benefits of this American Dream ac-

ket. Struggling teams desperate for talent often prove willing to pay for gifted players despite their indiscretions.[137] In other words, costs do not shift because teams are inconsistent enforcers. There are incentives to punish, but there are also incentives to win.

Nor are suspensions costless to the league; they diminish the level of competition by removing talented players and antagonizing the player's union into expensive litigation. The Ron Artest fight saw the NBA recouping far more in salary than they had for previous violent altercations,[138] yet when the suspensions were issued just days after the incident, the actual revenue consequences were still unclear. The cost-shifting rationale hangs on the extraordinary loss apparently anticipated after the fight but it lacks a theory to explain that magnitude. Even supposing commercial media partly designed the story for its appeal, what gave it such appeal?

4. The Persistent Problems: Bias in Sports Enthusiasm

> "I'm going to continue playing hard and out of control, like a wild animal that needs to be caged in."[139]

The pull of the story rests in the racial imaginary. The fight was a good story because it was a racial story that the NBA had been telling

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crue not only to the celebrities themselves, but also to the businesses and causes the celebrities endorse.

Id.

[137] *See e.g.* Benedict, OUT OF BOUNDS, *supra* note 17, at 70 ("The NBA is one place where a registered sex offender can get a $33-million increase in salary the day he gets out of jail, and then be introduced to the public as a 'great guy' without any questions being asked.").

[138] In addition to a few smaller suspensions, Artest is a notorious flagrant fouler. *See* Mark Montieth, *Artest Explains Absence; Politics; Pacers Forward Says Flagrant Fouls Played a Part in His Not Being Selected to U.S. Squad*, INDIANAPOLIS STAR, Aug. 25, 2004, § D, at 5D:

> Artest, speaking from New York, said he's not on the team because of politics. Stu Jackson, who as the NBA's senior vice president of basketball operations has ruled on Artest's fines and suspensions the past two seasons, also is the non-voting chairman of the USA Basketball selection committee. Artest said he believes Jackson and NBA commissioner David Stern did not want him on the team because of the suspensions and fines for flagrant fouls he's accumulated.

Id.

See also Brad Weinstein, *Pacers Stay Hot as Artest Keeps Cool*, SAN FRANCISCO CHRON., Nov. 30, 2003, § B, at B8 (noting Artest's good behavior to date). League suspensions have not punished other assaults as seriously, even when Vernon Maxwell received a 10 game suspension and $20,000 fine. *See* Rob Parker, *The Powder Keg Wouldn't Have Exploded if Artest hadn't Lit the Fuse*, DETROIT NEWS, Nov. 21, 2004, § D, at 10D (blasting Artest's involvement in the game against the Detroit Pistons).

[139] Ron Artest, before the 2005 exhibition opener, his first league game since his suspension for his role in the Brawl at the Palace. *See* [Tribune Wire], *Expect Out-of-Control Artest*, CHICAGO TRIBUNE, October 12, 2005, § C, at C8.

for years. The connection between the Artest suspension and the racial connotations of league image was more elusive before the league began the 2005-2006 season by instituting a new "NBA Player Dress Code."[140] Both the terms and timing of this decision reveal its impetus.

Unlike the NBA's regulation of baggy shorts[141] or off-color sneakers,[142] the Dress Code is not limited to proscribing the player's uniform on the court. It instead regulates attire at almost every team function or activity, including travel.[143] The justification for this sweeping breadth was the need to instill a sense of professionalism. Yet this need for professionalism did not extend to owners, even those who wore jeans and earned league penalties for engaging fans in hostile incidents.[144]

The descriptions of prohibited items leave even less doubt as to the target of these regulations. Dress shoes or dress boots are permitted, as are dress shirts and sweaters and khakis, slacks and "dress jeans."[145] More telling are the specifically excluded items: shorts, tee-shirts, sleeveless shirts, unapproved sports apparel, unapproved headgear, headphones, sunglasses indoors and "chains, pendants or medallions worn over the player's clothes."[146] These excluded items were quickly

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[140] In addition to cataloguing specifically prohibited items, the dress code generally prescribes a business casual attire "whenever they are engaged in team or league business." *See* NBA Player Dress Code, *available at http://www.nba.com/news/player_dress_code_051017.html.*

[141] *See* Oates, *supra* note 57.

[142] *See* articles cited *supra* note 51.

[143] *See* Chris Perkins, *Dress Code Seems to Suit Heat*, PALM BEACH POST (Florida), October 7, 2005, § C, at 14C (noting breadth of policy); Chris Silva, *New NBA Dress Code Doesn't Suit Most Pistons*, DETROIT FREE PRESS, October 19, 2005; Michael Lee, *League's Dress Code Doesn't Suit Everyone*, WASHINGTON POST, October 14, 2005, § E, at E06 (noting burden on traveling players); Frank Hughes, *Players Dress Down the New Dress Code; A New Dress Code Took Effect in the NBA, and the Sonics have one thing in Common With the Rest of The League-They Hate It*, NEWS TRIBUNE (Tacoma, Washington) October 18, 2005, § C, at C03.

[144] *See Mavericks Owner Hit With Fine, Suspension*, TIMES UNION (Albany, NY) April 14, 2001, at C5 (describing Mark Cuban's verbal encounter with fans and subsequent league punishment); *See also* Lee, *supra* note 143, at E06 (noting league dress code for coaches); Steve Aschburner, *NBA Players: Don't Tell Us What to Wear; NBA Commissioner David Stern's New Proposal For an Off-Court Dress Code has Angered Many Players who Say They Should Be Able to Dress How They Want*, STAR TRIBUNE (Minneapolis, MN) October 8, 2005, at 7C (noting dress codes for coaches and referees).

[145] *See* NBA Player Dress Code, *supra* note 140. The code does not specify what characteristics would make jeans "dressy," although some insight might be gleamed from another provision which permits warm-up uniforms when "neat." *Id.* One could conjecture that jeans that were baggy or rode low around the hips would not qualify as "dress jeans."

[146] *See* NBA Player Dress Code, *supra* note 140; Part II(B)(1)(e) (discussing the term "bling-bling"). This particular prohibition on "chains, pendants or medallions" makes the focus of the dress code difficult to doubt; it is hard to fathom what else besides the bling-bling of the NBA's hip-hop hug could prompt a specific exclusion in the code. In a league

and widely seen for what they are: strikes at the very same hip-hop culture that the league and sponsors had actively marketed for over a decade.[147]

This legacy of commercial support makes the context of the league's new dress code just as curious as its content. The Dress Code represented a marked departure from the NBA's prior commercial behavior, heralded by the hiring of Matthew Dowd, a former associate of Karl Rove brought in to consult on better reaching "red states."[148] Yet the Artest incident and others like it certainly helped motivate this consultation in the first instance. Whatever its wisdom or consequence, the Dress Code is the corollary of the Artest suspension. In it, the league codified the connection between appearance and professionalism. It is untenable for league defenders to maintain that professionalism can be

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where many players visibly wore chains, pendants and medallions, the prohibition on chains, pendants and medallions cannot be attributed to imaginative thinking or coincidence. The specific exclusion of unapproved sports apparel, including caps, as well as headphones and sunglasses similarly suggests a very narrow category of items considered "unapproved headgear." *See also* Greg Couch, *Image is Everything; NFL's Bandana Ban Raises Some Questions of Racial Sensitivity*, CHICAGO SUN-TIMES, March 30, 2001, at 138.

[147] Marlen Garcia, *Throw Out The Throwbacks: Dress Code In*, CHICAGO TRIB., October 18, 2005, at C4; Silva, *supra* note 143 (advising players to "leave the bling at home"); Sekou Smith, *League Dress Code Gets Mixed Reaction*, ATLANTA JOURNAL-CONSTITUTION, October 5, 2005, at 11D (quoting Atlanta Hawks coach Mike Woodson, "We don't need guys on the bench in do-rags and [throwback] jerseys."); Adrian Wojnarowski, editorial, THE RECORD (Bergen County, NJ), October 20, 2005, at S01:

> 'The Pacers' Ron Artest had to go running into those stands at Auburn Hills last winter, the fallout leaving Stern to believe white America had grown so disillusioned with the NBA, so wary of its young, black players with the understood uniform of hip-hop - cornrows, tattoos and do-rags. . . . We know who the league is going after right now, and it isn't Steve Nash and Mark Cuban,' one NBA official laughed on Wednesday. No, this desire for a so-called professional dress code isn't about the MVP's thrift-store wardrobe, nor the Dallas owner's T-shirt and blue jeans ensemble. . . . After all, those NBA stars aren't mildly foreboding to people. They don't frighten them. They don't make them change the channel, and tell their kids to change the channel and find something else to watch. This is the commissioner's target. This is about a generation of NBA star immersed in the hip-hop culture, inspiring a disconnect with the paying public.

Id.

David Moore, *NBA Players' Rags to Cost Them Riches, Dress Code Critics Cry Foul as League Tries to Clean Up Its Image*, DALLAS MORNING NEWS, October 19, 2005, at 1A (connecting dress code to Artest incident) ("Pacers guard Stephen Jackson wore four chains to Tuesday night's exhibition game and said the policy on jewelry unfairly attacked 'young black males.'"). *But see,* David Moore, *supra* (noting one player's query, "They were fighting in suits last year in Detroit, weren't they?"); Tom Knott, *Good Guys Can Dress Bad*, WASHINGTON TIMES, October 19, 1995, at C01

> ("The so-called image problem of the NBA does not emanate from the informal wardrobe of the players, which neutralizes the make-over attempt of commissioner David Stern").

[148] *See* Mark Heisler, *Linking Dress With Success*, LOS ANGELES TIMES, October 19, 2005, at D1.

instilled through appearance and attire but that a lack of professionalism is not seen as a problem with those dimensions. No less, it is inauthentic to assert that such appearances have nothing to do with race.[149]

From this vantage, the line Artest crossed—storming the stands and engaging fans instead of engaging just other players—acquires new meaning. This line had been crossed before; by players and coaches and by the many fans who threw cups and later chairs.[150] Many hazards encountered by the professional athlete are assumed risks of the game[151] but these are not. And if they were supposed to be, how could an event that pays black participants to get insulted and pelted with beer by white participants be denied as racist?[152] Artest crossed a

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[149] John M. Kang, *Deconstructing the Ideology of White Aesthetics,* 2 MICH. J. RACE & L. 283, 288-298 (1997)

("First, the ideology attaches a powerful normative component to aesthetics. Second, it involves a process of negative self-identification which results in racialization. Third, the ideology speaks in an unmediated, aperspective voice that casts its subjective preferences as objectively legitimate. Fourth, the ideology deculturalizes the unique cultural expressions of people of color.");

Oates, *supra* note 57, at C3

("Rejecting middle America—which they consider a closed society—they reject, in the process, established notions of aesthetic appearance.").

[150] *See* Povtak, *supra* note 105, at D01 (noting charges facing several fans, including one for allegedly throwing a chair at exiting Pacers). *See also* Branson Wright, *Scout Saw Melee Up Close; Artest "Came Right Over Me" In Pursuit of Fan, Cavs' Wilcox Says*, PLAIN DEALER (Cleveland, OH), Nov. 21, 2004, § C, at C5 (recounting other incidents with chairs).

[151] Courts routinely excuse on-the-field injuries as assumed risks. *See, e.g.,* Hackbart v. Cincinbati Bengals & Charles Clark, 435 F.Supp. 352, 356 (D. Colo. 1977) (Matsch, J.) (finding

"that the level of violence and the frequency of emotional outbursts in NFL football games are such that Dale Hackbart must have recognized and accepted the risk that he would be injured.");

Regina v. Green, 16 D.L.R.3d 137 (Ont.1971) (Canadian case concluding that

"no hockey player enters onto the ice of the National Hockey League without consenting to and without knowledge of the possibility that he is going to be hit in one of many ways once he is on that ice.").

But see Hackbart v. Cincinnati Bengals & Charles Clark, 435 F.Supp. at 358

("I have considered only a claim for an injury resulting from a blow, without weaponry, delivered emotionally without a specific intent to injure, in the course of regular play in a league-approved game involving adult, contract players.").

[152] *See* Araton, *supra* note 2, § 8, at 1

("If the imagery of large black men beating on defenseless white fans was alarming, the too-widely accepted pastime of affluent whites feeling empowered to verbally abuse half-dressed, sweaty black men should have evoked even more discomfort and disturbing American historical chapters.");

Todd Boyd, *Did Race Play a Role in Basketbrawl?*, LOS ANGELES TIMES, Nov. 26, 2004, at B15 (hereinafter "Basketbrawl"). Boyd uses the urban origins of black athletes to help construct their need for respect. Boyd, Basketbrawl, *Id.*

("They want respect, which is not something that has always been accorded to black men in this country. Though they are highly paid, the idea of "performing" for white audi-

line between player and fan but it was the NBA that had as an entire league steeped that line so heavily in social and racial significance. The lines on the court were turned into "a color line."[153]

The racial connotations of the Ron Artest fight illustrate the broader explanation for the suspension regimes of professional sports leagues. Although the systems are aimed at deterring detrimental conduct, the lens of detriment is financial, measured by the social response of largely white, largely male fan bases. Suspension regimes are highly susceptible to the racist impulses of segments of their fans and appear widely cognizant of the indifference towards crimes against women.[154]

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ences is not always something they're comfortable with, considering U.S. racial history.").

Boyd argues:

> "[F]ans see it all differently. Many believe that the price of their ticket entitles them to express their displeasure in any way they choose, however boorish, inappropriate or disrespectful that behavior might be."

Id. This disagreement went to the core of the brawl for Boyd. The depiction is a good one. My point here is only that it seems overtly racist and therefore unconscionable to actually include the privilege of throwing beer and hurling insults into the cost of ticket attendance or the salary paid black athletes. *See* Michael Wilbon, *Friday Night Fracas Was Criminal on Every Level,* WASHINGTON POST, Nov. 21, 2004, § E, at E01

> ("The price of a ticket allows a paying customer to boo, even taunt, players from the stands. It does not allow for turning concessions into projectiles and throwing chairs.").

I interpret "taunt" to mean ridiculing of a player's or team's errors or deficiencies in the game or sport, as opposed to insulting or degrading them on other levels. *See* Fred Kerber, *Heckle This! Garden Taunts Fuel Jason's Fires*, N.Y. POST, Apr. 26, 2004, at 97 (noting chants of "wife-beater" directed at Jason Kidd); Mark Murphy, *Rude Fans Let Foul Shots Fly,* BOSTON HERALD, June 2, 2002, at 14:

> A group of misguided Celtics fans taunted New Jersey Nets guard Jason Kidd, in full view and earshot of the player's wife and 3-year-old son, with shouts of 'wife beater' during an NBA playoff game last weekend at the FleetCenter - a chilling allusion to Kidd's 2001 arrest for domestic assault. In apparent retaliation last Wednesday at Continental Airlines Arena in East Rutherford, N.J., two Nets fans stood behind the basket where Celtics co-captain Paul Pierce was about to shoot free throws and held up a sign that read: 'Will Someone Please Stab Paul Pierce?' The sign, which invoked the near-fatal stabbing of Pierce at a Boston nightclub in fall of 2000, was quickly confiscated by security.

Murphy, *supra.*

[153] *See* W. E. B. Du Bois, THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES 13 (Penguin 1953) ("The problem of the twentieth century is the problem of the color-line,—the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea"). *See also* John H. Franklin, THE COLOR LINE: LEGACY FOR THE TWENTY-FIRST CENTURY (1993); Patrick B. Miller & David K. Wiggins, SPORT AND THE COLOR LINE: BLACK ATHLETES AND RACE RELATIONS IN TWENTIETH-CENTURY AMERICA (Routledge 2004).

[154] The recent incident involving 17 Minnesota Vikings players on a lake cruise party has been affectionately named "the Love Boat," despite allegations of excessive drinking, public nudity, sexual harassment, public sex acts, drug use, and feloniously bringing women across state lines for illicit purposes. *See* Michael Silver & George Dohrmann, *Adrift on Lake Woebegone; A Night of Debauchery on Two Yachts is the Latest Scandal for the Minnesota*

Sports organizations will assuredly remain beholden to profit incentives, which are especially unlikely to change where fans' attitudes remain fickle when criminal incidents are accompanied by athletic success[155] or where the organization can be insulated from the costs while sharing in the profit.[156] Thus, league policies almost invariably lend themselves to sexism and racism[157] and will continue do so until these prejudices are addressed.

Vikings, a Once Proud Franchise That Has Become a Rudderless Ship, SPORTS ILLUSTRATED, October 24, 2005, at 48.

Some commentators dispute an emphasis on bias. *See* Boyd, Basketbrawl, *infra* note 152 at B15:

> So was it a race war? Well, this is America, and race has something to do with practically everything. But that's just the easy answer. What happened last Friday certainly wasn't any kind of race war we're familiar with. There are too many other factors: wealth, the culture of the players, the assumptions of the fans. The culture we live in today makes it more complicated than black versus white—just as the whole issue of race is more complicated than black versus white, and it's time we woke up to that.

Id.

Though agreed that factors like wealth and culture were involved, these are compatible rather than contradictory explanations for the brawl at the Palace. The wealth and culture of the players, the assumptions of the fans—these are factors already steeped in race, as Boyd makes clear. Michael Wilbon notes the role of alcohol sales in the brawl. *See* Wilbon, *supra* note 152, at E01. Beer made fans aggressive; but it does not create the target of their aggression. Though race is an easy answer because it is also the most immediately visible. But race is also an important answer because it is the most readily made invisible as well.

[155] *See* Benedict, OUT OF BOUNDS, *supra* note 17, at 151

> ("By the time Mack finished up at the University of Houston, the spring of 1992, he had attended four different colleges in five years. . . .during [which] he had been investigated for a felony sexual assault, arrested four times, and charged with four felonies and three misdemeanors, shot by police officers, tried and acquitted for armed robbery, and convicted of theft and forgery. Despite all this, he reached the NBA unscathed.").

[156] *See* Benedict, OUT OF BOUNDS, *supra* note 17, at 193

> ("The NBA can wring its hand all it wants and say that today's players simply mirror the culture of the day. That's like the NFL inviting MTV to produce its Super Bowl halftime show and then acting surprised when the games become overshadowed by the embarrassing, crude actions of the performers.");

Kevin A. Fritz, Note, *Going to the Bullpen: Using Uncle Sam to Strike Out Professional Sports Violence*, 20 CARDOZO ENT. & SPORTS L. J. 189, 197 (2002) (asserting that "no one can doubt that violence sells.").

[157] *See* Gary S. Becker, THE ECONOMICS OF DISCRIMINATION 14 (2d ed. 1971). (locating a tendency to discriminate when one

> "acts as if he were willing to pay something, either directly or in the form of a reduced income, to be associated with some persons instead of others. When actual discrimination occurs, he must, in fact, either pay or forfeit income for this privilege. This simple way of looking at the matter gets at the essence of prejudice and discrimination.").

The economic model of discrimination represents one of the more limited views in anti-discrimination theory in so far as it relies on market forces to resolve racial inequities. If discriminators pay minorities a lower wage and non-discriminators do not, non-discriminators will gain a market advantage and force discriminators to reform to compete.

There are several assumptions of the economic model that do not pertain to the professional sports industry, however. First, the model assumes competitive market conditions in

IV. INVESTIGATING LEGAL SOLUTIONS

"You can make excuses or you can make history.
You can get in where you fit in or you can make room."[158]

Even more troubling than the immediate suspensions is the extent to which the justification for the league's actions seems to excuse the affirmation of a racist fan base. Existing legal remedies are unlikely to adequately address this form of market racism.

A. *Existing Legal Remedies: Common Law, Statutory and Constitutional Claims*

Several existing legal theories could extend to issues of discrimination in sports but none appear adequate to address the impact of bias on league suspension policies.

1. Common Law

Some commentators have suggested a theoretical foundation for combating aversive racism in college sports with an implicit antidiscrimination norm in the common law. Public service companies have historically been required to serve the public without discrimination[159] and Davis connects these requirements to a "duty to serve."[160] He also draws on the work of Neil Williams in investigating an antidiscrimination norm under the concept of "good faith."[161] Williams' argument constructs "good faith" as socially contingent and therefore ripe for a normative antidiscrimination principle.[162] Davis' project explores these

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contrast to the few organizations that monopolize the sports industry. *See* John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WILLIAM AND MARY L. REV. 703 (1977). Second, it assumes the rational market behavior is non-discrimination. The pay difference in commercial advertising may be an example of discrimination by either the advertisers or the market or both; the same is true of the cultural commodification of the black professional athlete. Beyond an economic vision of discrimination, league suspension policies are suspect because they represent the knowing acquiescence of the racist impulses of the market.

[158] J. Ivy, *NBA Finals*, *at* http://SphinxMng.com (Sphinx Management website).

[159] Davis, *supra* note 23, at 685, n. 354.

[160] *See* Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993, 1994-96 (1989) (noting common law requirement for public service companies to refuse service only on reasonable grounds).

[161] Neil G. Williams, *Offer, Acceptance and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183, 184-85 (1994) (concluding that

> "the duty of good faith and fair dealing is the most promising vehicle for requiring that parties who have entered into a contract not discriminate in performing, enforcing, or terminating the contract").

[162] *Id.* at 190

concepts from the common law of contracts in constructing a norm he then mobilizes in the defense of collegiate athletes.[163]

Davis and Williams offer an innovative look into the common law but the NBA's collective bargaining agreement does not seem an opportune instrument on which to test them because of the broad discretion granted officials. It is unclear how an authority's exercise of a discretionary power would violate his duty to serve or good faith.

2. Statutory Remedies

Federal statutory law is somewhat more encouraging. Both Title II and Title VII of the 1964 Civil Rights Act seem potentially applicable to the racial concerns demonstrated in the Artest suspension.[164]

a. Title II

Title II of the Civil Rights Act of 1964 was intended to provide "full and equal treatment" in public accommodations.[165] Professional

("The great hallmarks of the common law have been its fluidity, its capacity for evolution, and its ability to change with changing times. One tribunal has noted that courts applying the common law have a well-established duty . . . to reflect contemporary values and ethics. Similarly, Judge Benjamin Cardozo once observed: A rule which expresses the mores of the day, may be abrogated by courts when the mores have so changed that perpetuation of the rule would do violence to the social conscience. As I shall demonstrate, the common law of contracts up to now has failed to mirror adequately modern society's contempt for racial discrimination; it is evolving, however, in directions that are compatible with its recognition of a broad antidiscrimination norm applicable prior to, at, and after the formation of a contract.").

[163] *See* Davis, *supra* note 23, at 683-86 (discussing theoretical import of common law duty to serve); *id.* at 686-697 (discussing and applying concept of good faith in antidiscrimination discourse). Davis' advancement of a "good faith performance doctrine premised on limiting discretion in order to promote reasonable expectations," *id.* at 695, may be particularly useful.

[164] A few words are appropriate here regarding Professor Baynes proposed introduction of an "ordinary viewer test" to determine whether the absence of minority representation or the persistence of stereotypes regarding minorities constitute discrimination in broadcasting actionable under the Communications Act. *See* Baynes, *supra* note 102, at 349-53 (introducing ordinary viewer test). Broadcasting of the Ron Artest fight would not itself generate the systemic use of stereotypes contemplates by Baynes. More importantly, my claim is not that by focusing on and reproducing the Ron Artest fight, the media proved guilty of broadcasting stereotypes. Rather, the media and the NFL alike drew attention to an image of NBA players that was accurate but selected because of the commercial gain made by exploiting existent stereotypes. *See* Kane, *infra* note 210, at 10 ("Producers of oral, written, and visual texts either consciously or unconsciously create or articulate one set of preferred readings over another."). League suspensions are a result of the regurgitation of these racist prejudices into wrath at Artest, suspensions which it should be obvious Professor Baynes' proposal of an ordinary viewer test would not address. Professor Baynes is certainly correct that "as scholars and educators we should challenge the media to reflect reality," *see* Kane, *infra* note 210, at 127.

[165] Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000(a) (1994).

sports arenas are clearly covered within the ambit of Title II.[166] It is less clear, however, whether the leagues themselves would fall under the act. Although the Boy Scout's use of private homes has protected them from Title II,[167] teaching associations,[168] boating clubs[169] and a YMCA chapter have fallen within Title II[170] due to their close connection to a physical facility.[171] Under this line, it may be the case that sports teams fit but leagues do not.[172]

More problematically, a successful Title II claim demands the plaintiff show a discriminatory interference with the "full and equal enjoyment" of the accommodation.[173] The NBA's exceptional standard in black attendance appears to contradict any claim that black fans are discouraged from the enjoyment of accommodations.[174] Additionally, the NBA's high percentage of minority athletes suggests that its suspension policy does not generally deter minority athletes from entering the league.[175] The suspended players may be denied the "equal treatment" of the facilities if it can be shown that their punishment is racist, but proving discriminatory intent seems entirely implausible and even establishing a discriminatory impact or effect would be at the least onerous.[176]

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[166] Note, *A Public Accommodations Challenge to the Use of Indian Team Names and Mascots in Professional Sports*, 112 HARV. L. REV. 904, 908, n. 33 (1999) (hereinafter "Team Names Note").

[167] Welsh v. Boy Scouts of America, 993 F.2d 1267, 1275 (7th Cir. 1993)

[168] Auerbach v. African American Teacher's Association, 356 F. Supp. 1046, 1048 (E.D.N.Y. 1973) (Bruchhausen, J.) ("The proof established that the defendant, a private organization of blacks, used a public facility to carry out its discriminatory practices.").

[169] United States Power Squadron v. State Human Rights Appeal Board, 452 N.E.2d 1199, 1203 (C. App. N.Y. 1983) .

[170] Smith v. YMCA, 462 F.2d 634, 648 (5th Cir. 1972) (Simpson, J.).

[171] *See*, Team Names Note, *supra* note 166, at 909.

[172] NCAA v. Tarkanian, 488 U.S. 179 (1988); *see also,* Team Names Note, *supra* note 166, at 910 (discussing close relationship between sports teams and their stadium). Leagues have no such interdependence with places of public accommodation, except is so far as the leagues are composed of teams which do.

[173] Title II is governed by the same framework for establishing a prima facie case, *see* Robinson v. Power Pizza, Inc., 993 F. Supp. 1462, 1464 (M.D. Fla. 1998), and is therefore hindered by the same difficulties, *see* Part IV(A)(2)(b) (discussing Title VII). *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (establishing framework).

[174] Though the attendance and general popularity figures are very different for the NBA, the attendance figure is appreciably higher than other sports leagues. *See* Kenneth Shropshire, *Diversity, Racism and Professional Sports Ownership: Change Must Come From Within,* 67 U. COLO. L. REV. 47, 59-60 (1995) (comparing statistics on popularity and attendance by race).

[175] Racial Report Card, *supra* note 35.

[176] Title II jurisprudence is still conflicted regarding the need for intent versus effect, largely because the unavailability of damages make other claims more lucrative. *See* Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333, 1340-42 (2d Cir. 1974) (suggesting effects test); Boyle v. Jerome Country Club, 883 F. Supp. 1422, 1429 (D. Idaho 1995) ("There are few

b. Title VII

Title VII's prohibition on employment discrimination has been the subject of frequent litigation, even in the sports world.[177] Though hiring and firing decisions are the most commonly challenged, Title VII extends to any discrimination with respect to "compensation, terms, conditions, or privileges of employment."[178] The dress code, and the Artest suspension's close connection to it, are particularly suspect.[179] A denial of salary and an inability to play may implicate these concerns and therefore fall under Title VII.[180]

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reported [Title II] cases discussing such important issues as the burden of proof, the level of scienter required, and other crucial matters."); Robinson v. Power Pizza, Inc., 993 F. Supp. 1462, 1465 (M.D. Fla. 1998) (requiring only a disparate impact proof). *Compare* Stephen E. Haydon, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations,* 44 UCLA L. REV. 1207, 1221 (1997) (referring to burden of proving discriminatory intent) *with* Note, *supra* note 160, at 914-15 (1999) (discussing the availability of the impact theory). Even assuming disparate impact is sufficient under Title II, this proof is still a rigorous standard to meet. *See infra* Part IV(A)(2)(b) (discussing the more commonly tested Title VII context).

[177] *See, e.g.*, Cureton v. NCAA, 1999 WL 118667 *1 (E.D. Pa. 1999).

[178] 42 U.S.C. § 2000(e)(2) (1998).

[179] Title VII jurisprudence has not recognized issues of conformity in appearance as discriminatory, even where laden in social and cultural values about propriety. *See, e.g.,* Jesperson v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004) (upholding termination based on failure of female employee to wear makeup); Rogers v. American Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981) (denying relief to black female employee against employment policy prohibiting all-braided hairstyles); Eatman v. United Parcel Serv., 194 F. Supp. 2d 256 (S.D.N.Y. 2002) (upholding race-neutral policy again "unconventional" hairstyles); *but see* Hollins v. Atlanta Co., 188 F. 3d 652 (6th Cir. 1999) (condemning unwritten policy applied only to black female employee); Bryant v. Begin Manage Program, 281 F. Supp. 2d 561 (E.D.N.Y. 2003) (cognizing failure to maintain "Afrocentric" style as actionable under Title VII).

Despite this reluctance from the courts, however, legal scholarship has robustly interrogated these cosmetic demands, particularly the Rogers case. *See* generally Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance,* 26 NEW ENG. L. REV. 1395 (1992); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender,* 41 DUKE L.J. 365 (1991); Kenji Yoshino, *Covering,* 111 YALE L.J. 769 (2002). Professor Yoshino's attention to covering, a demand to mute cultural characteristics that illustrate difference even while the core identity is acknowledged, is an apt description of the demands pressed on players through the dress code. The code stops short of regulating hair and body art but this theoretical perspective would apply to dress as well. Indeed, delineating between the hair and skin of an individual and their clothes and accessories overlooks the personal import those accoutrements may have to the individual.

[180] *See* Joanne Bal, Joanne Bal, *Proving Appearance-Related Sex Discrimination in Television News: A Disparate Impact Theory,* 1993 U. CHI. LEGAL F. 211, 226-32 (1999) (applying a Title VII disparate impact analysis to gendered appearance standards in television news). Bal begins her piece by asserting that Title VII "forbids employers from relying on discriminatory customer preferences as a basis for making business decisions," *Id.* at 211, relying heavily on a Fifth Circuit case, Diaz v Pan Am World Airways, Inc., 442 F2d 385 (5th Cir 1971) (Tuttle, C.J.) (holding that sex was not a bona fide occupational qualification for flight

Title VII looks to direct and circumstantial evidence in order to ascertain any disparate treatment or disparate impact on protected groups.[181] As Justice Powell explained, "determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[182] Questions of intent are invariably difficult but they are especially troublesome in the Artest example. Since a disparate treatment theory sees discrimination "primarily as isolated actions against individuals rather than as a societal policy against an entire group,"[183] it certainly does not help that Artest "engaged in a seriously disruptive act against the very one from whom he now seeks employment."[184]

Systemic accounts of the discrimination at work in league suspension policies are more promising; but, the empirical threshold required to sustain a Title VII claim is rigorous.[185] The "bottom line" number of black players in the league does not bar a claim but creates difficulties.[186] The difficulty in discerning a reducibly racial pattern stems

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attendants). The *Diaz* court distinguished business necessity from business convenience. 442 F2d at 388

> ("While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well as, according to the finding of the trial court, their apparent ability to perform the non-mechanical functions of the job in a more effective manner than most men, may all be important, they are tangential to the essence of the business involved.").

Diaz offers hope for a Title VII remedy to the influence of discriminatory bias in league suspension policies but that hope should not be overstated. *Diaz* addressed a policy premised on a simple customer preferences based on sex, not a policy premised on punishment and disproportionately enforced based on approximations of a customer base's aversive racist reactions. *Diaz* seems solid ground for rejecting business convenience as sufficient to overcome a Title VII claim. *See* Dothard v. Rawlinson, 433 U.S. 321, 333 (Stewart, J.) (citing Diaz approvingly). But it is not as certain that *Diaz* is firm footing for a commitment of Title VII to entirely eradicate the influence of bias preferences on the market.

[181] Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n15 (1977) (explaining different theories).

[182] Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (Powell, J.). *See also* Bal, *supra* note 72, at 219-21 (discussing promise of jury trials and greater damage awards in disparate treatment claims). Bal concludes that both disparate treatment and disparate impact claims are viable but argues that the benefits of disparate impact claims outweigh those provided under a disparate treatment claim. *See* Bal, *supra* note 180, at 222-26.

[183] Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1342 (1998).

[184] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806.

[185] *See* Griggs v. Duke Power, 401 U.S. 424, 430 (1970); *see also* Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories and Realities*, 46 ALA L. REV. 375 (1995) (reviewing development of Title VII jurisprudence).

[186] *See, e.g.*, David N. Yellen, *The Bottom Line Defense in Title VII Actions: Supreme Court Rejection in Connecticut v. Teal and a Modified Approach*, 68 CORNELL L. REV. 735 (1983); James P. Scanlan, *The Bottom Line Limitation to the Rule of Griggs v. Duke Power Company*, 18 U. MICH. J. L. REFORM 705 (1985).

from the variety of offenses included under league suspension policies, their relative severity, and their relative publicity.[187] As Professor Davis says of hiring practices, there are "potentially insurmountable evidentiary barriers to sustaining a Title VII disparate treatment or disparate impact claim."[188] Proving disparate impact in league policies would require an empirical excavation of the entire racist system of professional sports.

The sporadic and discretionary use of suspensions to punish player misconduct makes it especially difficult to discern any disparate impact. Though the problem of subjective decision-making is a persistent one in employment discrimination law, it is not one that the Title VII regime is well-suited to solve.[189] As Professor Tristen Green recognizes, the major "problem with subjectivity in decisionmaking for the antidiscrimination project is its tendency to enable, facilitate, or permit the operation of discriminatory bias in decisionmakers."[190] Professor Green is among several scholars to note the need for new and partly extra-legal solutions for better addressing systemic issues of covert or subtle racism in the workplace.[191] The discriminatory concern in league

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[187] *See, e.g.,* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (denying sufficiency of comparison between minorities employed in cannery and non-cannery jobs to establish prima facie disparate impact claim).

[188] Davis, *supra* note 23, at 894.

[189] *See, e.g.,* Barnett v. W. T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975) ("Nonobjective hiring standards are always suspect because of their capacity for masking racial bias."); United States v. Hazelwood Sch. Dist., 534 F.2d 805, 809-10 (8th Cir. 1976) (calling subjectivity 'the crux of the problem"). *Compare* Green, *infra* note 190, at 138-42 (discussing difficulties with subjective decision-making) *with* George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination,* 73 VA. L. REV. 1297, 1330-34 (1987) (disputing need for scientific validation of subjective hiring).

[190] Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 142 (2003). Professor Green elaborates:

> In other words, the discrimination is not typically in the requirement of friendliness or leadership ability itself; the employer's search for applicants with that characteristic may indeed be job related and justified by business necessity. Rather, the discrimination arises in the application of that criterion by members of the white majority according to dominant definitions of the term.

Id.

See also Brooks v. Circuit City Stores, Inc., Civil Action No. DKC 95-3296, 1996 U.S. Dist. LEXIS 9869, at *12 (D. Md. June 17, 1996), rev'd in part on other grounds, 148 F.3d 373 (4th Cir. 1998):

> Plaintiffs do not and cannot allege that subjective decisionmaking itself is a practice that discriminates. Rather, they can only allege that it allows a situation to exist in which several different managers are able to discriminate intentionally. The focus of the claim remains the individual employment decisions.

Id.

[191] *See* Green, *supra* note 190, at 144

suspension policies shares the complexities of this "second generation," as well as the peculiar problems of race-based marketing.[192]

3. Constitutional Claims

The guarantees of the Fourteenth Amendment would only provide another route fraught with obstacles. Seeking protection under the Fourteenth Amendment requires a connection to state action.[193] In *NCAA v. Tarkanian*, a basketball coach at UNLV alleged due process violations stemming from the NCAA's strong pressure on UNLV to disassociate from him based on personnel violations. A split Supreme Court decided that the National College Athletic Association was not a state actor within the Fourteenth Amendment.[194] The dissent dis-

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("The complex, contextual nature of the problem requires a correspondingly innovative, problem-based, collaborative solution that does not fit easily within the existing disparate impact remedial paradigm.").

Green's vision would rely on a new lens for judicially assessing systemic discrimination. *Id.* at 148 (proposing a structural account of disparate treatment); *Id.* at 152-154 (applying structural account to resolved legal cases). Other commentators have proposed even more expansive solutions to address a new generation of employment discrimination. *See* Sturm, *infra* note 192. Professor Sturm's project is to address the complexities of covert discrimination through a "de-centered, holistic, and dynamic approach [where] normative elaboration occurs through a fluid, interactive relationship between problem solving and problem definition within specific workplaces and in multiple other arenas, including but not limited to the judiciary." Sturm, *infra* note 192, at 462-63. As Professor Sturm elaborates, "in this framework, compliance is achieved through, and evaluated in relation to, improving institutional capacity to identify, prevent, and redress exclusion, bias, and abuse." Sturm, *infra* note 192, at 463. This framework shifts the regulatory burden in part away from the courts and lawyers.

[192] *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

> "'Second generation' claims involve social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups. . . . second generation manifestations of workplace bias are structural, relational, and situational."

Id. at 460-61. *See also id.* at 468-69 (further describing second generation of employment discrimination claims).

The problem of league suspensions indubitably implicates social patterns of interaction and popular stereotypes concerning race and racial culture. Professor Sturm notes the harm of penalizing departures from stereotypes, *id.* at 468-68, but Artest's wrong could just as easily be described as a penalty for the confirmation of those stereotypes or, more complexly, a penalty for the destruction of what made that stereotype palatable and therefore marketable. The issue of subjective decision-making is more complex as well. Though subjective and discretionary league suspensions "allow a situation to exist in which several different managers [would be] able to discriminate intentionally on the basis of race," they also allow managers and officials to make decisions based on the public's transmutation of racism into cultural difference, safety, or professionalism. *See* Brooks v. Circuit City Stores, Inc., Civil Action No. DKC 95-3296, 1996 U.S. Dist. LEXIS 9869 at 12.

[193] *See, e.g.*, United States v. Harris, 106 U.S. 629 (1882); The Civil Rights Cases, 109 U.S. 3 (1883).

[194] NCAA v. Tarkanian, 488 U.S. 179 (1988) (Stevens, J.).

agreed on the ground that the NCAA was "jointly engaged" with UNLV in the facts of the case.[195] Fourteenth Amendment jurisprudence also makes clear that the state may not act to indirectly promote private biases.[196]

It is not clear that an arbitration proceeding[197] would constitute state action. One district court has opined that "since the arbitration tribunal or arbitration proceedings are in many instances a substitute for traditional judicial remedies, it follows that the rules of due process and other constitutional protections must extend to the substitute proceedings."[198] This is the limit of state action in the Ron Artest suspension; the courts' only involvement came in affirming the authority of the arbitrator and sustaining the injunction against full enforcement of Jermaine O'Neal's NBA suspension.[199]

An equal protection claim also requires many of the same findings necessary in statutory contexts. Disparate impact analysis in the Fourteenth Amendment has been the subject of sustained controversy.[200] As in the statutory contexts, proving a specific discriminatory intent is difficult. Circumstantially demonstrating racism—through a history of

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[195] NCAA v. Tarkanian, 488 U.S. 179, 199 (White, J., dissenting).

[196] Palmore v. Sidoti, 466 U.S. 429 (1984) (unanimously reversing custody award based on subsequent interracial marriage of child's mother); Shelley v. Kraemer, 334 U.S. 1 (1948) (rejecting the use of restricted racial covenants).

[197] Notably, the NBA even contested the authority of the arbitrator to resolve the dispute. *See* Associated Press, *NBA Players Union Has Unexpected Strategy*, AP NEWSWIRE, November 24, 2004, *available at* http://www.msnbc.msn.com/id/6567792; *see* Liz Robbins, *NBA Skipping Brawl Hearing,* N.Y TIMES, Dec. 8, 2004, § D (Sports Desk), at D4; Liz Robbins, *Four Pacers Plead Case With N.B.A. on Sideline,* N.Y. TIMES, Dec. 10, 2004, § D (Sports Desk), at D3 (noting purposes of arbitration hearings and league's refusal to send representation).

[198] Dewey v. Reynolds Metals Co., 291 F. Supp. 786 (S.D. Mich. 1968).

[199] When resolving the arbitration dispute, Judge Daniels declines resolution of the other suspensions. *See* National Basketball Association v. National Basketball Player's Association, 176 L.R.R.M. 2487, n. 10 (2004):

> Given the unique facts of this case, this decision is limited to the application by defendant O'Neal to confirm the arbitration award as to him. Defendants Johnson, Jackson, and Artest have not moved to confirm the arbitration award as to them. The reward as to them, therefore, will not be confirmed and has no force and effect. The arbitration award relating to defendants Artest, Jackson and Johnson does not change the period of their suspensions. The issues regarding players Artest, Jackson and Johnson are moot and no longer present a live case or controversy ripe for determination. This Court declines to decide or otherwise opine on the appropriateness of those arbitration awards.

Id.

[200] *See* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229, 252 (1976) (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.");

Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes and Proxies,* 141 U. PA. L. REV. 149, 213 (1992).

hiring practices and disciplinary policies that disproportionately harm blacks and through visible market trends that make racist behavior economically attractive—is similarly onerous. Besides the leagues, few if any organizations have the resources and access to evidence necessary to detail a pattern. One well-situated champion, the player's union, has strong deterrents from entering such litigation.[201]

B. *The Politics of Proportionality: Reform, Private or Public*

These avenues therefore appear unlikely to redress this form of discrimination, signaling the need for further efforts. As Congress recognized in the steroid controversy, professional sports have a significant effect on the instillation of values in children. It would be similarly appropriate for either the leagues or Congress to reform suspension policies specifically by installing predetermined and proportional punishment systems.

1. A Proportional Response

Sentencing guidelines have grown out of favor in the federal courts,[202] but may prove useful to sports leagues. Insisting on an articulated range of possible suspensions for particular misconduct would provide reasonable expectations for players and could be based on the actual harms caused by incidents. Artest critics were quick to note the negative example he set for future generations but no better example is set by punishing based on racial reaction or by serially excusing violence against women. Proportionality in punishment is the essential remedy.[203]

Just as advisable is a standard for the timing and implementation of suspensions. Especially where leagues and teams exercise concur-

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[201] Litigation of such magnitude is invariably costly and fan response to racially charged incidents in sports suggest that the public reaction to bringing such litigation would be largely negative. This in turn would damage future negotiations with the league, as would potential rifts within the union over devoting attention to this matter, if future negotiations with league officials were even feasible during or after such a socially visible and significant dispute. Individual athletes will also be reticent to bring charges on their own, both because of costs and for fear of being shunned by the industry.

[202] *See* United States v. Booker, 125 S.Ct. 738 (2005) (making sentencing guidelines advisory). These sentencing guidelines have proven a source of sustained academic interest. *Compare* Kate Stith & Jose A. Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998) (critiquing guidelines) *with* Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L. J. 395 (2005) (analyzing Booker and Fanfan decisions).

[203] See Part III(C)(2)(discussing the proportionality standard in criminal punishment.)

rent suspension powers,[204] discretion leads to uneven enforcement. Some teams respond quickly when an incident arises, others await the filing of charges or the results of a trial.[205] Even a conviction will not necessarily lead to a suspension.[206] This broad discretion limits the effectiveness of suspension policies as deterrents. It also needlessly exposes team and league officials to inflamed market bias whereas a clearly defined punishment system would limit the room for the discretionary post hoc decisions that have proven so open to criticism.

These two relatively facile suggestions better accomplish most deterrence objectives[207] and distribute the costs of incidents more evenly between the players and organizations.[208] They also insulate authorities from the impulsive biases of the market, potentially reducing the overall costs borne by sports leagues.[209] The implementation of such a system would therefore present a marked improvement over the status quo.

2. The Significance of the Steroid Debate

Congress recognized the importance of sports and problems of bias long before reports of steroid use prompted federal attention to address the issue.[210] The premise of this federal intervention is the sig-

[204] Like leagues, teams have profit motives that contribute to irregular enforcement. Teams have more particularized competitive goals, however, which make them even more fickle; leagues benefit from a generally high level of competition whereas teams benefit from playing particular competitors.

[205] League authorities did not attend the legal process before suspending players after the brawl but teams routinely rely on that excuse while playing athletes suspected or charged with criminal offense. *See, e.g., supra* note 12 (noting Kobe Bryant trial); *supra* note 10 (noting Sean Taylor incident).

[206] *See, e.g.*, articles cited *supra* note 7, (describing the Ray Lewis incident).

[207] *See* Part III(C)(2).

[208] *See* Part III(C)(3).

[209] The assertion here is that the costs incurred from a racist response to a league that has an established policy that is viewed as insufficient will be less than those incurred from a racist to a league authority that exercises discretion in a displeasing way.

[210] Title IX is probably the most visible instance of a recognized connection between cultural biases and sports, with athletic opportunities serving as a hotly contested arena for litigation and commentary. *See generally* Mariah Burton Nelson, ARE WE WINNING YET? HOW WOMEN ARE CHANGING SPORTS AND HOW SPORTS ARE CHANGING WOMEN (Random House, 1st edition, 1991); Diane Heckman, *Women & Athletics: A Twenty Year Perspective on Title IX*, 9 U. OF MIAMI ENTER. & SPORTS L. REV. 21 (1992); Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the "Equal Opportunity" Standard*, 3 DETROIT COLLEGE OF LAW REV. 953 (1994). *See also* Deborah Rhode, GENDER AND JUSTICE 300-04 (1989) (situating Title IX debate in broader feminist context). Another thoughtful discussion of the influence of media in representing the female athlete is provided by Professor Mary Jo Kane. *See* Mary Jo Kane, *Media Coverage of the Post Title IX Female Athlete: A Feminist Analysis of Sports, Gender and Power*, 3 DUKE J. GENDER L. & POL'Y 95 (1996).

nificance of sports culture in America and that culture's ability to influence the country's youth.[211] Federal legislation to protect against bias in the sports industry may similarly be justified by the industry's visibility and cultural import.[212]

As with the steroid controversy, it would be preferable to permit the leagues and unions to generate their own solutions if and only if they provide meaningful ones. A Congressional promise to act pressed the MLB player's union to accept stern penalties for performance enhancers and that same commitment should be politically mustered to resolve the reverberations of bias in league suspension policies. Most parties have some common incentives to reform; reducing the potential for backlash at extraordinarily publicized incidents and more effectively deterring player misconduct. Yet neither side has any particular

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When Congressional action was initiated through the Drug Free Sports Act of 2005, the impetus was quite clearly the impact of steroid use on America's youth. *See* 151 Cong. Rec. § 6221

> ("Every day, millions of young people dream of one day playing in the big leagues. . . . Like it or not, young people look up to professional athletes as role models.").

Indeed, the Act as proposed imposed multi-year suspensions for the first positive test and a career ban for the second. *Id.*

> ("We must send a strong message to professional athletes. If you choose to cheat and use illegal steroids, you risk ending your career. In turn, our young people will hopefully get the message that using steroids to improve athletic performance is absolutely the wrong way to go.").

See also Edwards, *supra* note 24 at 186 (discussing athlete's drug use dilemma).

[211] *See* Davis, *supra* note 23, at 616 ("Racism in sport thus represents a reflection of the pathology that pervades our society in general."); Kellner, *supra* note 116, at 306; Kane, *supra* note 210, at 123 ("By portraying females in ways that systematically highlight their sexual difference from males, the media contribute to the limiting of women's full potential as athletes.").

In 1980 and again in 1981, Representative Ronald M. Mottl introduced a bill, the Sports Violence Act, to specifically criminalize excessive violence at sports events. See H.R. 7903, 96th Cong. (1980); H.R. 2263, 97th Cong. (1981). Representative Tom Daschle followed these efforts with a similar act aimed at elevating civil as opposed to criminal liability. *See* H.R. 4495, 98th Cong. (1983), reintroduced as H.R. 2151, 99th Cong. (1985). Though the goal of further punishing violence in sports and the goal of muting the impact of racism and sexism on league responses to misconduct are clearly different, these bills share in the understanding that sports events and sports television have a tremendous impact on American society and therefore warrant federal attention.

[212] *See* Baynes, *supra* note 102, at 341 (chronicling governmental concerns about media image of minorities). Professor Baynes' careful attention to President Johnson's "Kerner Commission" on Civil Disorders is noteworthy. *Id.* Many of the Kerner Commission's conclusions regarding the failure of the media to communicate the reality of the black condition remain apposite today, in media representation generally and in sports media specifically. *See also* Kane, *supra* note 210, at 95

> ("Sport has become such a bedrock of our national psyche that sport figures often come to symbolize larger pressing social concerns such as date rape (Mike Tyson), never-ending and seemingly ran- dom acts of violence (Tonya Harding/Nancy Kerrigan, Monica Seles), and spousal abuse (O.J. Simpson).").

interest in punishing other crimes, such as those against women, more seriously. What leagues lose in racist reactions to their violent athletes they gain in the indifference shown to those athletes who are only violent towards women. Collective bargaining is likely to produce only a partial improvement, potentially redressing one problem while allowing the other to persist. Reform advocates and legislatures must be attentive to both issues and must demand that sports leagues be so as well.

V. CONCLUSION

Excessively punishing Artest and other players for the fight in Detroit perpetuates the cost-shifting of racial exploitation onto the exploited. In so doing, league sanctions facilitate cultural forces like racism and sexism. Law ignores this wrong even while insisting that it has a responsibility to regulate sports and entertainment in other regards.

The Ron Artest fight is just one instance in the cultural battle over professional sports. Leaving these punishments to the forces of the market serves to entrench the harmful ideologies that riddle American society. It is precisely because sports figures can be such influential role models that recognizing Artest and others like him as victims of the economics of racism is essential towards a more tolerant future. Violent conflicts in sports provoke a great amount of popular attention but little consideration or candor concerning the actual social dimensions of the controversies. There must be an honest accounting for league punishments because "with every worthless word we get more far away."[213]

[213] Kanye West, *Heard 'Em Say*, LATE REGISTRATION (Roc-A-Fella Records 2005).