Merit, Ol' Boy Networks, and the Black-Bottomed Pyramid

Kenneth L. Shropshire
Essay

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by

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They've [blacks] got everything. If they take over coaching like everybody wants them to, there's not going to be anything left for white people.¹
—Former CBS broadcaster Jimmy "the Greek" Snyder

We [white people] decide when, how many and which ones.²
—Sociologist Andrew Hacker regarding the hiring of African-Americans in top-level positions in corporate America

Introduction

Suppose that at some moment in the future, no one questions the merit of African-Americans seeking management positions in corpo-

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1. See Michael Goodwin, CBS Dismisses Snyder, N.Y. TIMES, Jan. 17, 1988. Snyder further proclaimed:
The difference between blacks and whites . . . goes all the way back to the Civil War, when, during the slave period, the slave owner would breed his big black with his big woman so that he would have a big black kid—that's where it all started. The black is a better athlete to begin with, because he's been bred to be that way because of his thigh size and big size . . . . Thus, . . . blacks can jump higher and run faster.

Id.


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rate America. Imagine further that merit issues are satisfied but the statistics reveal that a disproportionate number of these positions are still filled by white males. Further, what if African-Americans possessed these qualifications for decades but the underrepresentation of African-Americans at the management level persists decades later?

The sports industry, often considered a microcosm of society, provides an opportunity to examine these issues. In terms of merit, the sports industry represents the best we could hope for in America—in one respect—large numbers of qualified African-Americans for every position at the highest levels. Without question African-Americans are qualified to be commissioners, head coaches, and other front office executives; yet the top positions are still largely filled by white males. In the harshest of terms, the sports industry resembles a black-bottomed pyramid: large numbers of African-American athlete-participants, but few African-Americans in non-

3. A similar assumption could be raised regarding other institutions with merit barriers such as undergraduate and graduate schools. The focus here, however, is on top-level positions in management. Critical race scholars have been highly skeptical about traditional notions of merit. In much of the critical race theory literature on affirmative action, the focus is on merit and the invalidity of many of the standards in place in the workplace. This criticism has particularly focused on the standards used for the hiring of law professors. See, e.g., Richard Delgado, Rodrigo's Tenth Chronicle: Merit and Affirmative Action, 83 GEO. L.J. 1711 (1995). Delgado's fictional voice eloquently criticizes traditional notions of merit:

"Merit is what the victors impose. No conquering people ever took a close look at the conquered, their culture, ways, and appearance and pronounced them superior to their own versions. Those in power always make that which they do best the standard of merit."

Id. at 1721 (citations omitted). See also Daniel A. Farber, The Outmoded Debate over Affirmative Action, 82 CAL. L. REV. 893 (1994).

4. According to the late commissioner of baseball and former Yale University president A. Bartlett Giamatti:

"It has long been my conviction that we can learn far more about the conditions, and values of a society by contemplating how it chooses to play, to use its free time, to take its leisure, than by examining how it goes about its work."


5. Across the board in top-level sports management positions, many who hold the jobs as head coach, general manager, and other top executives were former players. There is certainly no need to expect an exact replication of the percentage of African-Americans on the field and in the front office but some correlation would presumably exist. See infra note 16 and accompanying text.

6. Id. See also infra note 15 and accompanying text. The percentages at the top level of sports management mirror those portrayed by the glass ceiling commission regarding overall corporate America. Ninety-seven percent of the positions of vice president and above are held by white males in American companies. See Good for Business: Making Full Use of the Nation's Human Capital, FEDERAL GLASS CEILING COMMISSION REPORT 9 (1995) [hereinafter GLASS CEILING COMMISSION REPORT].
playing positions at the highest levels. The sports industry's efforts at remedying this situation may provide lessons as to how the rest of American society may deal with discrimination once objective questions of merit are resolved.\(^7\) And, as will be illustrated, the initial efforts to address the black-bottomed pyramid in the sports industry have been inadequate.\(^8\)

Snyder's comments in the opening epigraph reflect today's "angry white male" in other contexts.\(^9\) But here the fear expressed by Snyder is not of someone presumably less qualified.\(^10\) The fear is of losing long possessed employment territory. If there is no question regarding the qualifications or merit of African-Americans, then why does the underrepresentation continue? And once underrepresentation is recognized, will the sports industry—and soon society—then agree that it is time to aggressively introduce (or re-introduce) race-conscious measures such as affirmative action?\(^11\) Seemingly, the only other alternative to affirmative action is to allow those in power to continue to employ definitions of merit in the context of their own personal affirmative action.\(^12\) These are the broad issues this essay examines.

I. Problem: African-American Underrepresentation in the Front Office

The most visible non-player personnel in sports are those who reside in the front office. Although there is no rigid definition as to which jobs constitute positions in the front office, the top-level positions generally include chief executive officers, team presidents, general managers, and the head coach who straddles both the field or

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7. See infra notes 13-15. It is the subjective questions that will remain problematic.
8. For a discussion of some attempts, see infra note 65.
10. See supra note 1.
11. Again, the presumption is that what constitutes merit can be agreed upon. See Delgado, supra note 3, at 1746. For general discussions of the role of race consciousness in American law, see, e.g., T. Alexander Aleinikoff, A Case for Race Consciousness, 91 COLUM. L. REV. 1060 (1991); Charles R. Lawrence, The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987); and Barbara J. Flagg, 'Was Blind But Now I See': White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953 (1993). In this context, race consciousness is used as the opposite of color blindness—race consciousness denotes the incorporation of race as an element in a given decision-making process.
court and the administrative offices. The front office also includes non-sports professionals such as team doctors, lawyers, and accountants. At present, minorities account for less than five percent of these key management positions in professional sports.

On the playing field or court, it is a different story. In 1995 African-Americans constituted nearly eight out of every ten players in the National Basketball Association, sixty-eight percent of the players in the National Football League, and nineteen percent of the players in Major League Baseball.

Although it may be argued that the on-the-field percentages are an indicator of equality, equal achievement has not occurred in terms of success at the highest levels. Despite the statistics on the field, with less than five percent representation at the top levels, African-Americans remain woefully underrepresented in the front office.

For those athletes who do desire a career in management following their playing days—and not all do—the transition up the sports management business ladder occurs for some, but generally not for African-Americans. For example, it has happened for white players...
Pete Rose, Larry Bowa, and Lou Piniella, who became managers in baseball shortly after retiring from playing the game. The day that Kansas City Royals star George Brett announced his retirement in 1993, he also announced that the following year he would become the Royals’ Vice President for baseball operations. Rarely are such promotions included in retirement ceremonies featuring African-American athletes.

The concept of African-Americans lacking merit to manage is quickly and easily disproved at all levels in sports by comparing the qualifications of those who hold or have held the power positions with those African-Americans seeking to make the move to the management side of the table. In Major League Baseball, while Rose, Piniella, and Bowa are just a few examples of whites who went straight from the playing field to managing, Don Baylor and Dusty Baker are representative of African-Americans who have arguably been even more successful in making that same transition. But the time that it takes for African-Americans to obtain such positions is far greater. Dan Duquette, Kevin Malone, Bill Bavasi, Jim Bowden, Ed Lynch, and Randy Smith are examples of the young white men, some just barely in their thirties, occupying baseball general manager posi-

See Both Sides with Jesse Jackson (CNN television broadcast, May 29, 1993).

20. Frank Robinson, the first African-American to serve as a manager in Major League Baseball, speaking on this difference in treatment said: “They tell us [minorities] to be patient. We’ve been patient. You still see those things. Lou Piniella, with the experience, is a general manager . . . . How long do you have to be patient?” PHILLIP M. HOOSE, NECESSITIES: RACIAL BARRIERS IN AMERICAN SPORTS 50 (1989).


22. The appointment of Isiah Thomas by the Toronto Raptors of the NBA is a notable exception. See LAPCHICK, supra note 13, at 4. Concurring with this view is former Hall of Fame baseball All-Star and now Atlanta Braves executive Hank Aaron:

They think the only thing that blacks can do is just go out and hit the baseball, run the bases, and after that, you know, when you ride in the front seat of the bus for ten years and after your career is over with, then they flop you right in the back of the bus again.


23. What constitutes merit may be more subjective in sports than in other industries. For example, it is well known that the best player does not necessarily make the best coach. Similarly, great coaches do not necessarily make the best general managers. Those with little or no playing experience have excelled in coaching. A personal experience is illustrative of this: I once observed an exchange between two former major leaguers, both of whom were great hitters. One was a hitting coach and could describe in detail the intricacies of how to hit a baseball. The other simply stated, “I couldn’t teach it, I just did it.”
tions in the early 1990s. Where are the young African-Americans, both with and without playing experience, in these positions of power?

David Shula, the youthful Cincinnati Bengals head coach, is an example of a fast-tracker in the National Football League. Shula is an excellent illustration of racial advantage. His father, Don Shula, has been a head coach in the NFL for over three decades. No African-American has benefitted from a similar connection. David Shula offers in his merit package a long-term understanding of the NFL that only someone with similar long-term family connections could possess. Therefore, when African-American candidates are compared to him, none measure up. Shula is exceptional among all coaches, but the Shula relationship to a position of power illustrates the type of relationship whites can define as merit in a former roommate, teammate, or friend.

Corporate America has been under pressure to attain equality in hiring since the civil rights movement and subsequent legislation in the 1960s and 1970s. Some companies responded after legal action; others responded voluntarily for moral reasons or as part of a public relations program. Even with years of this type of activity, however, one still will rarely find an African-American in a top position at a Fortune 500 corporation. Only 2.8 percent of top level managers in corporations are African-American. Although the percentages in sports management are similar, one should recall the higher percentages of African-Americans that have been long-term participants in

26. See supra note 3.
28. See Ruben Navarrette, Debating Affirmative Action, Race Gender, Ethnicity, and the Politics of Inclusion 5-34 (Nicolaus Mills ed., 1994). ("Our current battles over affirmative action did not suddenly arise with the hard times brought about by the 1980s. The roots of our affirmative action crises lie in the 1960s, when affirmative action was still an uncontroversial term." Id. at 5.).
30. See GLASS CEILING COMMISSION REPORT, supra note 6, at 10. See also John R. Dorfman & Udayan Gupta, Choice for Four Blacks Masks Problems, WALL ST. J., Feb. 15, 1995, at B1 (noting that there are no black chief executive officers of Fortune 500 companies).
the sports industry. The larger numbers of African-Americans prepared to move into management, relative to other industries, is significant.

Then why do the disparities in African-American representation still continue at the management level in sports? Racism—both institutionalized and unconscious—is certainly part of the answer. As Charles Lawrence has observed, racism persists in all of us. Lawrence writes:

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites. 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.

A product of this unconscious racial motivation, in sports as well as in the rest of America, is the informal or “ol’ boy” networks that have traditionally excluded minorities. In sports, as has been noted, being part of the network is an indicator of merit. According to Hall of Fame football coach Bill Walsh, coaching positions in football are “[a] very fraternal thing. You end up calling friends, and the typical coach hasn’t been exposed to many black coaches.”

There is nothing unique about Walsh’s view. In the non-sports industry these networks are the reality as well. Jason Wright, an African-American vice president at RJR Nabisco, Inc., said about the business world, “The reality of life in America is that if you’re white,

31. See supra note 16 and accompanying text. It should be emphasized again, however, that it is unreasonable to expect exact replications of on the field race percentages in the front office. As Supreme Court Justice Sandra Day O’Connor warned in another setting: “. . . it is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer . . . absent unlawful discrimination.” See Sheet Metal Workers v. EEOC, 478 U.S. 421, 494 (1986) (O’Connor, J., concurring in part and dissenting in part); quoted in United States v. Paradise, 480 U.S. 149, 197 (1987) (O’Connor, J., dissenting).
32. See infra notes 48-59 and accompanying text.
33. See generally Lawrence, supra note 11.
34. See id. at 322.
35. See supra notes 26-29 and accompanying text.
most of the people you know are white. If someone says to you, 'Do you know anyone for this job?' the people you recommend will probably be white.' The tendency to create candidate pools through this networking method often leaves blacks out of the running for positions.

Informal social and managerial networks have long been an institutionalized part of both sports and other business settings. These networks combined with the absence of anti-discrimination laws have historically worked to ensure the dominance of the white majority. The continued existence of these networks, even with the existence of stronger antidiscrimination laws, provides a justification for affirmative action.

II. Affirmative Action as a Solution?

A. Breaking Down Barriers to Networks

The ol' boy networking cycle is hard to break. It will take affirmative steps to bring greater diversity into the sports hiring networks, and systems aimed at breaking down this key barrier are not easily implemented. Even top level management has difficulty building diversity, especially on the field. The qualifications used to

37. See Race In The Workplace, Bus. Wk., July 8, 1991, at 50, 52. For a thorough examination of the role of networks in the corporate sector and the difficulty minorities have in accessing them, see Herminia Ibarra, Race, Opportunity, and Diversity of Social Circles in Managerial Networks, 38 ACAD. MGM. J. 673-703 (1995).

A central theme that has emerged in the organizational literature on racial minorities in corporate settings is the difficulties members of minority groups experience gaining significant social and instrumental support in the workplace. Many have argued that exclusion from social networks explains the failure of minority managers to advance more rapidly in their careers and organizations . . .

Id. at 673. (citations omitted).

38. According to Richard Delgado's fictional "professor:"

Before 1964 white males benefitted from old-fashioned laws that cut down on the competition by eliminating blacks and women. They also benefitted from old-boy networks by which they helped each other. The events of 1964 changed just the first part—the other remained intact. In fact, merit today is a principal means by which empowered people, ones who have been to the best colleges, taken the same tests together, know each other, and talk the same way, ensure that they and their class remain in charge. It's especially important today because the population is changing. Whites are no longer going to be a numerical majority. In some parts of the country, they are already in the minority. Thus, it's even more important than before to have the mechanisms to ensure that their class replicates itself in circles of power.

Delgado, supra note 3, at 1724.

39. See discussion infra notes 60-95 and accompanying text.

40. One Major League Baseball executive reported:
select personnel, particularly for on-the-field jobs, can be extremely subjective. The comfort level a hiring party has with another may also include race. These powerful institutional and structural barriers to entry support the need for affirmative action. Affirmative action ensures that “qualified” minorities are included in any given contracting situation. Justice Harry Blackmun’s dissent in Regents of the University of California v. Bakke is often cited in support of employing this brand of race consciousness to combat racism. In Blackmun’s opinion, “In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.”

Strategies that “take account of race” may hold the key where underrepresentation exists. Implementation of such strategies, however, has become difficult. The most formidable barriers to such programs are arguments that selections of this sort should be based solely on merit—and racism persists when the determination of what constitutes merit is subjective.

B. The Conundrum of Anti-Discrimination Law

Competing tensions in anti-discrimination law create a conundrum that will not easily be solved. Unquestionably this issue is not limited to the sports industry. Any form of affirmative action, even

I can have a lot more influence, I do have a lot more influence about who we hire, and certainly about who we interview, for a front office job, including the manager, even at the upper level, than I would have over who’s going to be our next first base coach. That is a “baseball” decision, which means it’s basically the general manager and ownership. And my own feeling, is that the so-called old-boy network or remnants of it is still a lot stronger when you get into the true baseball positions.

Confidential Telephone Interview (Mar. 4, 1995) (on file with author).

41. See Delgado, supra note 3.

42. One of the earliest uses of the phrase “affirmative action” was in the National (Wagner) Labor Relations Act of 1935. That use, however, had no relation to race. It was probably popularized by President Lyndon B. Johnson in Executive Orders 11246 and 11375, which were intended to increase the federal government’s use of minority and female contractors. Prior to these orders, President John F. Kennedy issued Executive Order 10925, which required employers to recruit minorities into their applicant pools. Lance Liebman, Justice White and Affirmative Action, 58 U. COLO. L. REV. 471, 472 (1987).

43. Id. For further discussion of the types of affirmative action, see infra note 60 and accompanying text.

44. 438 U.S. 265, 407 (Blackmun, J., dissenting).

45. Id.

46. Id.

47. See supra note 3 and accompanying text.

48. Id.
with regard to broadening networks alone, may be viewed as reverse discrimination and a violation of the law.\textsuperscript{49} On the other hand, racial preferences designed to remedy the effects of past discrimination, even societal discrimination, may be benign and legal.\textsuperscript{50} The sports industry, like most industries, faces the pressure from both sides.\textsuperscript{51}

The Supreme Court has cautioned that racial preferences must be employed with great caution.\textsuperscript{52} In \textit{Wygant v. Jackson Board of Education}, Justice White wrote, “Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.”\textsuperscript{53} Justice John Paul Stevens observed earlier that, “[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.”\textsuperscript{54}

The law embraces two goals in any effort to bring about change in an industry troubled by discrimination.\textsuperscript{55} The first goal is to prohibit racial discrimination; the second is to improve the economic condition of the underrepresented group.\textsuperscript{56} Absent an act that approaches malicious discrimination, the law can do little to force sports leadership to change. The law allows for remedial steps when specific individual discrimination can be identified.\textsuperscript{57} The emphasis of anti-discrimination law is on specific events of discrimination in that particular industry, not discrimination that occurs in society at large.\textsuperscript{58}

C. The Appropriate Affirmative Action Approach

At least four forms of affirmative action have been identified: the concerted effort to recruit members of the underrepresented group;

\textsuperscript{51} For a collection of essays on both sides, see NAVARRETE, supra note 28.
\textsuperscript{52} This basic concept was amplified by the U.S. Supreme Court in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). There the Court aligned the previously more relaxed “intermediate” standard for affirmative action programs by the federal government to the same level of “strict” scrutiny as applied to state and other governments. Thus, any future judicial reviews of private affirmative action programs may push relevant levels of scrutiny to higher levels as well.
\textsuperscript{54} Fullilove, 448 U.S. at 537 (Stevens, J., dissenting).
\textsuperscript{55} See MICHAEL SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 7-8 (1966).
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Wygant, 476 U.S. at 274-76 (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.”).
the utilization of programs such as diversity and sensitivity training; the modification of employment practices which tend to underutilize underrepresented individuals; and—the most controversial conception of affirmative action—the preferential hiring and promotion of members of underrepresented groups. The last, and most extreme, version is not necessary in sports, at least if racism is not, in fact, the universal barrier to African-American hiring. What is needed are strategies that open up the hiring networks, and encourage the recognition that merit can be measured in a manner that does not include long-term membership in traditional networking groups.

Absent specific identifiable acts of discrimination, very little can be done legally to force the owners to change their hiring practices. However, a commissioner or an individual team owner can assume a strong leadership role in promoting voluntary affirmative action. Increasing the numbers of minorities in management and coaching positions in sports could be the flagship item on a league commissioner's or team owner's agenda. The presentation of a meaningful plan for change, one incorporating strong affirmative action principles, could be a part of such an agenda.

Any commissioner-initiated plan would both signal that a league was serious about reform and provide a roadmap for those owners interested in bringing about change and promoting diversity in league and franchise management areas. Any such plan would have to pass legal scrutiny before race could be factored into the bundle of qualifications.

As has been noted, affirmative action in sports is unique in that no valid meritorious basis supports the presumption of the African-American being less qualified than a white candidate. The only missing element in the resume of African-Americans in the industry is


60. See id.

61. Traditionally, race probably has been a factor, with white skin positive and black skin negative. In this regard Tony Dungy, an African-American NFL head coach, asked to describe a head coach, said "cerebral guy, Bill Walsh; Vince Lombardi, disciplinarian. Is it Bill Parcells? Is it Joe Gibbs? Is it Paul Brown, George Halas, Weeb Ewbank? Go back for eons, and no matter what characteristics you think of the guy, you think of a somewhat older, white man. Those are two classic characteristics." See Gwen Knapp, His Quiet Demeanor Isn't Biggest Hurdle Dungy Must Face, Phila. Inquirer, Jan. 1, 1995, at C10.

62. This presumes that the long, successful history of African-American participation in sports is an indication of merit. See also supra note 3 (setting forth that any standards of merit used as a barrier to employment or other opportunities should be closely scrutinized).
long-term membership in networks with the power-wielding parties in
the industry. Affirmative action in sports should be concerned with
access for those who do not normally have access to these hiring net-
works. This is not a question of lack of merit but rather a lack of
opportunity. More importantly, it is these forms of affirmative ac-
tion which will increase the comfort and knowledge level of deci-
sionmakers regarding truly meritorious African-American candidates.
This type of effort presumes racism is not the sole reason for the nu-
merical shortfall.

The implementation of any type of affirmative action program
will meet resistance. Those who implement such programs will have

63. See supra notes 27-29 and accompanying text.
64. This is certainly the difference in other business sectors as well. According to
Tyrone Willingham, the African-American head football coach at Stanford University:
Right now, in our country, not just in athletics, there's a great deal of talent we let
go unnoticed. Coming from an ethnic background, you see it. You see talent not
being derived, not being noticed, not showing what it can really do. There are a
lot of people who could be doing the job I'm doing, given the opportunity.
65. To reiterate, this is certainly not to imply that racism does not remain a formi-
dable barrier. However, where racism is not a barrier, traditional networks are. Examples
of sports networking enhancement programs have included:

1. The Achieving Coaching Excellence Conference: This organized networking suc-
cess was a four-day conference presented by Stanford University and Bill Walsh. The
stated goal of the conference was to enhance the teaching skills of black football coaches as
well as their career ambitions. The informal goal was greater exposure of talented African-
American coaches to networks that would lead to head coaching positions. This confer-
ce included contact with those that make hiring decisions. The end result was the hiring
of five participants as head coaches at the college and professional levels within a year
following the conference. Telephone Interview with Ted Leland, Director of Athletics, Stanford University (Apr. 10, 1995).

2. NFL Coaching Fellowship Program: Similarly the National Football League has
instituted a coaching internship program. The program brings the entire staff from histori-
cally black colleges and universities to work with an NFL staff. As a result of this league-
instituted program, approximately 20 of 200 participants have been hired by NFL
franchises as assistant coaches. The internship is essentially a four-week interview. Tele-
phone Interview with Harold Henderson, Executive Vice President, NFL (Apr. 10, 1995).

3. PGA Tour Internship Program: Another illustration of opening hiring networks to
the general population is the PGA internship program. This program focuses on minority
undergraduate students with an interest in a career in sports. The internship possibilities
include work in public relations, communications, data processing, and on-site promotions,
with no initial golf experience required. According to the consultant for the PGA Tour
program, Ralph Stringer:
The one thing that we really try to stress is the business opportunities that are
being missed out on, because everybody thinks of it as just a game that they see
on the television, but there's an awful lot going [on] around there . . . marketing
positions, the sales positions, promotions, that have been untouched.
Telephone Interview with Ralph Stringer (Mar. 4, 1995). Stringer attempted to convince
other professional sports leagues to institute similar programs. None were interested. Id.
to find ways to counter pervasive charges of reverse racism, paternalism and the presumption of necessity.

(1) Countering "Reverse Racism"

The conscientious managers of sports enterprises must be concerned with moving cautiously in establishing any affirmative action program. The nature of the law is that it is illegal to discriminate against any race. Accordingly, the argument that affirmative action programs are in fact a form of discrimination, or reverse discrimination, is not lost on either its supporters or its critics. The anti-discrimination laws are generally intended and interpreted to disallow discrimination against any race. This creates the obvious problem of devising ways to help one race without harming another. Hence, the use of terms such as "reverse discrimination" and "reverse racism" in response to affirmative action plans is not constructed within the guidelines of the law.

While cautiously putting guidelines in place, the management public relations focus should be on the broadening of the traditional recruitment networks. It is important from both a legal and business

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66. See Adarand Constructors, 115 S. Ct. at 2118 (holding a federal minority contracting program to be illegal).

67. The 1995 California initiative seeking to eliminate all affirmative action programs is indicative of this reverse discrimination viewpoint. See Kevin Johnson, Affirmative Action Next Target in Calif., USA TODAY, Jan. 11, 1995, at 1.

68. See id.

69. In Adarand Constructors, Justice Clarence Thomas argues how unreasonable it is to believe that such a goal could ever be accomplished. According to Justice Thomas: It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefitted, the classification could surely be called "benign." Accordingly, whether a law relying upon racial taxonomy is "benign" or "malign," either turns on "whose ox is gored."

Id. at 2119-20 (citations omitted).

70. Harvard professor Nathan Glazer has been credited with coining the phrase "reverse discrimination." See, e.g., Ruben Navarrette, Jr., If You Hadn't Been Mexican, in Debating Affirmative Action, supra note 28, at 131. Stanley Fish writes of those who view affirmative action plans as a form of reverse racism: "Reverse racism" is a cogent description of affirmative action only if one considers the cancer of racism to be morally and medically indistinguishable from the therapy we apply to it. A cancer is an invasion of the body's equilibrium, and so is chemotherapy; but we do not decline to fight the disease because the medicine we employ is also disruptive of normal functioning. Strong illness, strong remedy: the formula is as appropriate to the health of the body politic as it is to that of the body proper.

Stanley Fish, Reverse Racism or How The Pot Got To Call The Kettle Black, ATLANTIC MONTHLY, Nov. 1993, at 128, 130.
standpoint to convey that there is no exception being made in the quality of person being hired.

(2) Countering Paternalism

Another major criticism of affirmative action is that it is paternalistic and places a stamp of approval on the concept that African-Americans are inferior and need help to succeed.\(^7\) The view by some commentators is that this image is too dear a price to pay, even if a few African-Americans do benefit from affirmative action programs.\(^7\) A further argument is that the programs create a "preference" that any black that succeeds does so at the expense of a more qualified white, and, were it not for the program, the African-American would not succeed.\(^7\) T. Alexander Aleinikoff provides an example from the University of Michigan Law School student newspaper.\(^7\) He cites an article where a white student calls for the abolition of a program at the school which provides academic and non-academic support to non-white students.\(^7\) The white student wrote that the program "[i]mplicitly brands every minority student with a scarlet 'D.' I can't believe so many bright people allow themselves to be insulted and stigmatized in such an obnoxious way ... ."\(^7\) Broadening his attack to reach affirmative action programs in general, he stated, "I see stirrings of resentment everywhere. If a black student makes a silly classroom comment (and we all do), some white students—not racists, mind you—will think in their heart of hearts about affirmative admissions policies."\(^7\)

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Racial preferences are founded on the proposition that the achievements of their beneficiaries would be fewer if the preferences did not exist. Supporters of preferences cite a whole catalogue of explanations for the inability of people of color to get along without them: institutional racism, inferior education, overt prejudice, the lingering effects of slavery and oppression, cultural bias in the criteria for admission and employment. All of these arguments are most sincerely pressed, and some of them are true. But ... they all entail the assumption that people of color cannot at present compete on the same playing field with people who are white.

Id. at 69.

72. Id.

73. Id.

74. Aleinikoff, supra note 11, at 1068-69.

75. Id.

76. Id.

77. Id.
The truth is that whether or not formal programs are in place, the qualifications of African-Americans will continue to be questioned. It is the nature of the racism and discrimination that have been present in this country since its earliest days. It is a permanent part of our American culture.\(^7\) This perception of paternalism will not easily be overcome. The public relations focus here should be on the historic absence of African-Americans in upper management, and the need for corrective measures in the industry to counteract those historic deficiencies.

**(3) Countering the Presumption of Necessity**

Maybe the most compelling argument against the use of network broadening affirmative action programs comes from African-Americans who participate in them. "This has now become a prerequisite for brothers to get an NFL job," one African-American college coach said regarding an NFL coaching internship program.\(^9\) "White guys less qualified don’t have to do this—but they’re ready [to do the job] ... I'm not unless I do."\(^8\)

It is unfortunate that society is not yet at the point that broad-based networking comes naturally. Following the infamous statements by former Los Angeles Dodgers executive Al Campanis that blacks lacked the "necessities," to manage in Major League Baseball, Hall of Famer Reggie Jackson wrote "[b]ecause of the unfortunate things Mr. Campanis said, the time has come to break down the wall between whites and blacks. The time has come to say we have a problem and to address it. Together."\(^8\) Jackson’s point is that the sacrifice necessary to close the networking gaps must be made by African-Americans as well as whites. The best counter to the necessity presumption is the argument that effective affirmative action may be as much in the interests of whites as blacks.

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78. Regarding the permanence of racism in America, see generally DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM xiii (1992) ("[R]acism is an integral, permanent, and indestructible component of this society.").

79. Confidential Interview in Canton, Ohio (July 29, 1995) (on file with author). See supra note 65 for a description of the program.

80. Id.

81. Reggie Jackson, We Have a Serious Problem that isn't Going Away, SPORTS ILLUSTRATED, May 11, 1987, at 40, 48.
III. Conclusion: Selling Affirmative Action to the Sports Industry and Public

Affirmative action is still necessary because appropriate standards of merit have not yet become the sole determinant in society of who gets a particular job. The definition of merit seemingly continues to incorporate participation in key networks as a component. This is particularly the case in the business of sports where institutionalized and unconscious racism persists.

For affirmative action to be successful, there must be evidence to all that such programs are for the good of all involved. A good example of this is the "cut-out curbs" in our cities today that were put in place to improve wheelchair accessibility. Society overall has benefited from these curbs because of easier access not only for wheelchairs, but for bicycles, strollers, and by foot. In the area of sports it is difficult to articulate what this overall societal benefit would be. Certainly the value of society's microcosm successfully tackling the diversity issue is, in an abstract sense, compelling. If increased diversity did occur, the sports industry could be pointed to as the model for equal opportunity and diversity at all employment levels. The sense of diversity as an overriding positive principle has not been enough for all people in other segments of society.

The convincing argument by those in the power positions in sports must be that diversity is good

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82. See supra notes 3, 27-29 and accompanying text.

83. According to a Wall Street Journal/NBC News poll, 61 percent of all adults favor eliminating affirmative action based on race. See supra note 15, at A24. This type of poll is indicative of the difficulty any affirmative action plan may have in gaining acceptance.

84. The Supreme Court has, however, been consistent in its support of the concept and importance of diversity. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (holding that, in the broadcasting industry, increased minority participation will produce "more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group"). Apparently, this proposition is not abandoned by the more recent Court ruling in Adarand Constructors, 115 S. Ct. 2097 (1995). In dissent, Justice John Paul Stevens wrote:

The majority today overrules Metro Broadcasting only insofar as it is "inconsistent with [the] holding" that strict scrutiny applies to "benign" racial classifications promulgated by the Federal Government. The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case—and I do not take the Court's opinion to diminish that aspect of our decision in Metro Broadcasting.

Id. at 2127-28 (citations omitted).
for the sport; there has been much racism in the past and the strong medicine of corrective change is necessary.85

The sports owners who desire greater profits should see the market of African-Americans (who largely do not attend sporting events en masse) as an untapped source of greater profits.86 African-Americans at the management level in sports may have an interest in finding ways to attract African-Americans to the games, and highly visible, on-the-field management personnel may attract more African-American fans.87 A study released in 1994 found that African-American spending power was growing faster than the spending power of the U.S. population as a whole.88 Researchers found that African-American buying power would increase to $399 billion by 1995, an increase of 33.9 percent. The gain in black buying power was attributable to overall rising incomes coupled with a growing black population.89 With the proper efforts, this greater African-American buying power could be a tremendous revenue target for the business of sports.90

85. For a thorough discussion of the historical role of racism in sports in America, see, e.g., 1-3 ARTHUR ASHE, A HARD ROAD TO GLORY: A HISTORY OF THE AFRICAN AMERICAN ATHLETE (1993); HARRY EDWARDS, THE SOCIOLOGY OF SPORT (1973); and JACK SCOTT, THE ATHLETIC REVOLUTION (1971). One commentator has written on the unique perspective African-Americans bring to a situation:
The possibility of a special burden born of "the experience of being black in America" is anything but mysterious to blacks. Blacks fully understand that to be an African American is in many respects to be uniquely branded for failure. It is to grow up constantly being told, in the schools and in the streets, that blacks are not as bright as whites and are not academically inclined.


87. There is evidence of such an impact based on the race of players. When Jackie Robinson made his debut with the Brooklyn Dodgers, more than half of the 26,000 fans in attendance were black. GREGORY C. WARD & KEN BURNS, BASEBALL: AN ILLUSTRATED HISTORY 291 (1994). In 1988, two professors calculated that fielding an all-white team rather than an all-black team would change annual fan attendance in the National Basketball Association from between 137,885 to 157,040 fans. They further found that replacing a single black player with a white of the same ability would increase team revenues by over $100,000. See Jim Myers, FAN PREFERENCE CAUSES PAY DISPARITY, USA TODAY, Dec. 18, 1981, at 4C.


89. Id.

90. According to the Vice President of Communications for the Milwaukee Brewers, Laurel Pieb, regarding the African-American market, "we in baseball have not tended that particular market. We let it slide, to our discredit, and we need to get it back." See Carter, supra note 86.
The flourishing National Basketball Association provides evidence of the value of diversity for other major professional leagues. The NBA has certainly seen continued success with increased racial diversity at all levels. At the same time the public perception of the fairest professional sports league, from a race relations standpoint, is clearly the NBA.\footnote{See Lapchick, supra note 13, at 1. Basketball was the only sport to receive an overall “A-” grade in the Northeastern University’s Center for the Study of Sport in Society’s RACIAL REPORT CARD. Id.} The league has consistently received high marks from the Center for the Study of Sport in Society in its annual evaluation of the racial progress made by individual leagues.\footnote{However, the NBA has not been immune from criticism. In 1992, a period during which 25 consecutive white head coaches were hired by NBA teams, Charles Grantham, the Executive Director of the NBA Players Association, wrote an opinion article in the CHICAGO SUN-TIMES condemning this problem in coaching as well as in the upper levels of management. See Charles Grantham, NBA: A Land of Unequal Opportunity, CHI. SUN-TIMES, Sept. 27, 1992, at 30.} It takes a strong and courageous administration to lead any enterprise in the direction of greater diversity. This is the appropriate stand for an important business to take in society today.

The sports industry has uniquely relevant characteristics that cannot be disputed. Off the field, the evaluations for whom to employ are extremely subjective. There is a documented history of widespread discrimination.\footnote{See supra note 88.} In fact, it is these distinct industry characteristics which should make aggressive affirmative action programs in the sports industry more palatable to critics than in other areas of society.

Clearly, the importance of the sports industry working through these underrepresentation problems is greater than just improving that single industry.\footnote{See supra notes 1-12 and accompanying text.} If networking-type affirmative action programs can work in sports, we may be able to hold out hope that such success may be transferable to general American society.