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Pushing Weight

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I. INTRODUCTION

The plight of the black athlete in United States professional and collegiate sports reflects a historical road burdened by strident discrimination, yielding assimilation and gleeful exploitation. As African American athletes in the 1950's began to enter the lineups of storied professional sports clubs, they did so only under the strict conditions placed upon them by the status quo white male dominated regime. Often the very terms of black athlete participation required a rigid commitment to "covering" racial identity and outright suppression of self. Once African American athletes burst onto the

* Professor of Law, West Virginia University College of Law. J.D., 1997, Howard University School of Law. I wish to express appreciation to Texas Southern University, Thurgood Marshall School of Law for inviting me to participate in its exceptional Johnnie Cochran Symposium held November 2, 2007. Particular thanks to Dean L. Darnell Weeden and Andereaus Boise of Thurgood Marshall Law School. I am grateful to the Hodges Research Grant from the West Virginia University College of Law that supported this work. I am exceedingly appreciative of the exceptional research assistance provided by J. Brandon Shumaker, WVU Law, Class of 2008.


2. See WILLIAM C. RHODEN, FORTY MILLION DOLLAR SLAVES: THE RISE, FALL, AND REDEMPTION OF THE BLACK ATHLETE 127 (2006); see also BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS (2006); SHROPSHIRE, supra note 1, at 36.

3. See KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS ix (2006). Professor Yoshino describes his concept of covering as follows: Everyone covers. To cover is to tone down a disfavored identity to fit into the mainstream. In our increasingly diverse society, all of us are outside the mainstream in some way. Nonetheless, being deemed mainstream is still often a necessity of social life.... Famous examples of covering abound. Ramon Estevez covered his ethnicity when he changed his name to Martin Sheen, as did Krishna Bhanji when he changed his name to Ben Kingsley...

Covering is a hidden assault on our civil rights. We have not been able to see it as such because it has swaddled itself in the benign language of assimilation. But if we look closely, we will see that covering is the way many groups are being held back today. The reason racial minorities are pressured to "act white" is because of white supremacy.

Id. at ix, xi.
nation’s consciousness in the forms of Jesse Owens, Jackie Robinson, Althea Gibson, Kenny Washington, Chuck Cooper, Bill Willis, Sweetwater Clifton, Marion Motley, Wilma Rudolph, and Muhammad Ali, white America responded in a way that can only be described as both terrified⁴ and enthralled.⁵

4. See R. Reese, The Socio-Political Context of the Integration of Sport in America, CAL POLY POMONA, Spring, 1999, available at http://www.csupomona.edu/~rreese/INTEGRATION.HTML ("[Jackie]Robinson endured ‘racial slurs, fans throwing watermelons and placing shoe shine kits outside of the team’s dugout; they likened him to an animal and disparaged his family."); see also, Mike Paul, Zidane—You Are No Jackie Robinson, MIKENPAULBLOG.COM, July 17, 2006, available at http://www.mikepaulblog.com/blog/index.php?title=zidane_you_are_no_jackie_robinson&more=1&c=1&tb=1&pb=1&cat=22 (discussing Zidane’s reaction to on field slurs during the 2006 World Cup where Zidane reacted by headbutting the spewing opponent). Mike Paul makes a comparison to what Jackie Robinson had to endure, stating:

One can only imagine Mr. Robinson laughing an ironic laugh at the excuse Zidane offered: “You mean someone said something mean about his mother? That would have been a good day for me!” And, of course, it would have been, for a couple of not nice words were the least of what Jackie Robinson faced every day he put on his Dodgers uniform — words so vile that today we only describe them with their first letter (the “n” word). But Robinson faced more than mere words. More than once, opposing managers ordered their pitchers to throw 100-mile-per-hour fastballs at his head. Many players slid into second base, cleats high, in order to injure or intimidate him. Death threats were not uncommon.

But Jackie Robinson, unlike Zidane, was an uncommon man. In spite of treatment never endured to that extent—before or since—by any other major sports figure, he persevered, winning Baseball’s highest honors: the Rookie of the Year award in 1947, the Most Valuable Player award in 1949, a world’s championship in 1955 and election to the Hall of Fame in 1962. All this while winning the hearts and minds of Americans and changing the world in doing so.

Id.; Richard Lapchick, A Reason to Celebrate Sports: Buck O’Neil, ESPN.COM, (October 14, 2006), available at http://sports.espn.go.com/espn/columns/story?columnist=lapchick_richard&id=2621475 ("In 1950, a week before Earl Lloyd and Chuck Cooper became the first African-Americans drafted by the NBA, the New York Knicks signed Nat “Sweetwater” Clifton from the Harlem Globetrotters. All three took the courts in October of 1950. I was five years old that year, and recall to this day the fear I felt when I heard people call my dad, who coached the Knicks then, ‘n****r-lover’ after he signed Clifton.").

5. See Henry Aaron, Jackie Robinson: He Thrilled Fans, Shattered Baseball’s Color Barrier and Changed the Face of the Nation, TIME.COM, June 14, 1999, available at http://www.time.com/time/time100/heroes/profile/robinson01.html. Hammerin’ Hank Aaron discussed the impact Jackie Robinson had on him as a boy:

I was 14 years old when I first saw Jackie Robinson. It was the spring of 1948, the year after Jackie changed my life by breaking baseball’s color line. His team, the Brooklyn Dodgers, made a stop in my hometown of Mobile, Ala., while barnstorming its way north to start the season, and while he was there, Jackie spoke to a big crowd of black folks over on Davis Avenue. I think he talked about segregation, but I didn’t hear a word that came out of his mouth. Jackie Robinson was such a hero to me that I couldn’t do anything but gawk at him.
Tracing through the past 50 years, African Americans have been able to join and dominate the ranks of players and entertainers in American sports.\(^6\)

\(^6\) See generally, Statistics, NBA.com, available at http://www.nba.com/statistics/default_all_time_leaders/AllTimeLeadersPTSQuery.html?topic=4&stat=1 (recording that all of the NBA’s top ten all-time rebound leaders and nine of the NBA’s top ten all-time scorers
but have been resolutely denied admission as “decision makers”. In 2008, African Americans, while dominating the fields of play in number and talent, represent only a sliver of those in power. Scarcely can a minority face be found amongst U.S. professional team owners, or amongst collegiate presidents and athletic directors. Many powerful spokespersons both are African American); see also The NBA at 50, NBA.COM, available at http://www.nba.com/history/players/50greatest.html (listing the NBA’s Top 50 players of all time, of which thirty-two (32) are African American); Record and Fact Book, NFL.COM, available at http://www.nfl.com/history/randyf (revealing that African Americans hold the all-time records in the NFL for rushing yards (Emmitt Smith), receiving yards (Jerry Rice), touchdowns (Jerry Rice), and sacks (Bruce Smith)); Stats: Historical Player Stats, MLB.COM, available at http://mlb.mlb.com/stats/historical/entry.jsp (last visited November 19, 2007) (revealing that African Americans hold the all-time records in MLB for home runs (Barry Bonds), runs batted in (Hank Aaron), runs (Rickey Henderson), and stolen bases (Rickey Henderson)).

7. See Terry Bowden, Uneven Playing Field, YAHOO! SPORTS, June 30, 2005, available at http://sports.yahoo.com/ncaaf/news?slug=tb-minoritycoaches062905&prov=yhoo&type=lgns (“There are 117 colleges participating in Division I-A football and there are only three black head coaches. You don’t have to be too smart to know how stupid this looks. Let me lay it out for you: Fifty percent black athletes leads to 25 percent black assistant coaches leads to 3 percent black head coaches.”); see also Bob Highfill, Part 2: Zero Tolerance, RECORDNET.COM, August 14, 2006, available at http://www.recordnet.com/apps/pbcs.dll/article?AID=/20060814/SPORTS/608140321/-1/aspecial20. Highfill reports that:

The numbers are similar across the country, according to studies by the NCAA. only 3.3 percent (6 out of 185) of head football coaches in NCAA Division I are minorities, excluding the historically black colleges and universities, according to the 2003-04 Race and Gender Demographics of NCAA Member Institutions' Athletics Personnel report. The report also showed . . . the percentage of black athletic directors at NCAA Division I institutions, however, fell from 10.1 percent in 1995-96 to 9.3 percent in 2003-04.


Every professional sport had lower averages for employing women compared with the last Racial and Gender Report Card two years ago, and minority hiring slipped in pro and college sports . . . The 12th issue of the report card studied players,
sublime\(^9\) and unrestrained\(^10\) have spoken out in response to this dearth of coaches and front office/athletic department employees of major league baseball, the NFL, NBA, NHL, WNBA, Major League Soccer and college sports. It found: Minorities (blacks, Asians, Latinos, Pacific Islanders and American Indians) lost ground in most of the top management positions in college and professional sports, including general managers, team vice presidents and college athletic directors. Id.

9. See Elmore, supra note 1 (describing eloquently the historical underpinnings of racism in professional and collegiate athletics in the United States); see also Robert Strauss, Play Hard and Negotiate Well, WHARTON ALUMNI MAGAZINE, Fall 2003, available at http://www.wharton.upenn.edu/alum_mag/issues/fall2003/feature_3.html. Strauss describes an interview with Kenneth Shropshire discussing the lack of minority front office personnel in professional sports:

"But just because there has been some progress, does that mean you slow down? Does it push you to do more?" [Shropshire] asked. "If people have set up a system to interview more minority candidates for front office jobs, don't you have to make sure the system works correctly? . . . On the field, yes, there is more acknowledgement that you get the best player out there—Donovan McNabb or Michael Vick—and don't worry about race," he said. "But the front office—general managers and the like—still abounds in an old-boy network." Id.; Elia Powers, Mulling Ways to Add Minority Coaches, INSIDE HIGHER ED, March 1, 2007, available at http://www.insidehighered.com/news/2007/03/01/coaches. Power reports in Inside Higher Education that Congressman Bobby Rush intends to open a congressional investigation into the lack of minority representation in collegiate athletic front offices:

"College sports is big business, 'interstate commerce in its truest sense,' Rep. Bobby Rush (D-III.), who heads the U.S House of Representatives Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection, said during his opening statement.” In a message that Rush said was directed to Republican critics across the aisle, he added that “racial and gender discrimination in college sports is worthy of our examination.” Rep. Joe Barton (R-Tex.), the senior Republican on the House committee, assured Rush that he and other Republican members supported the inquiry, which officially examined “the lack of diversity in leadership positions in NCAA collegiate sports.”


In 2003, [Warren Sapp] called the NFL a “slave system” after he was fined $50,000 for brushing an official during warm-ups. “I've never changed,” Sapp says. “I've never jumped through hoops for anyone. I've always said what's on my mind and had stuff to back it up. I called it a slave system and now W.C. Rhoden gets all the credit for writing Forty Million Dollar Slaves. It's a joke. I've never gotten credit for having any credibility.”

minority representation amongst American sports power brokers. One powerful man that could no longer abide this unconscionable deficiency was Johnnie L. Cochran, Jr.11

Johnnie Cochran is widely considered the most prolific trial lawyer of his generation.12 Cochran, while notorious for his successful representation of Orenthal James Simpson in the murder trial of Nicole Simpson and Ron Goldman,13 deserves much greater notoriety for a career devoted to social justice, equality and contempt for racism and the status quo.14 In fact, one of

When most of my fellow journalists and various electronic-media commentators discuss this issue, they talk about social realities, the comfort zones of those doing the hiring and a lack of awareness about attractive minority candidates. That’s one way to say it. Or, you could just do what I do and talk about what’s really going on: Racism. I’m not merely talking about subconscious or subtle racism, either. I’m saying that it seems to me that some of the people who run NFL franchises don’t want a non-white man running their football teams.

Id.

11. See Johnnie Cochran Biography—Longed for the Good Life, Took First Race-Related Case, J.RANK.ORG, available at http://biography.jrank.org/pages/2740/Cochran-Johnnie.html (“Johnnie L. Cochran, Jr. led the winning team of lawyers in what has been known as the ‘trial of the century,’ and in the process became arguably the most famous lawyer in the world. Cochran’s successful defense of former football great O.J. Simpson against charges of murder in the televised trial was followed by millions of Americans.”).

12. See Thomas A. Mesereau, Jr. Johnnie Cochran’s Humility Moved Mountains, ANN.2006 ATLA-CLE 1537 (2006) (“Johnnie Cochran was the only lawyer to be named criminal defense lawyer of the year and civil trial lawyer of the year by the Los Angeles County Bar. Early in his career, he won 10 murder trials in a row. . . . Johnnie L. Cochran, Jr. was the greatest trial lawyer I have ever seen.”); see also Katy Berezny, The Nation’s Greatest Attorney, Johnnie L. Cochran, Jr., of Shreveport, LA, ASSOCIATED CONTENT, February 13, 2007, available at http://www.associatedcontent.com/article/149354/the_nations_greatest_attorney_johnnie.html (“Well known for his competitive spirit and cunning personality, Cochran will always be the Nation’s Greatest Attorney. He surely has gone down in history.”).


14. See Kevin Merida, Johnnie Cochran, the Attorney On the People’s Defense Team, WASHINGTON POST, March 31, 2005 at C01, available at http://www.washingtonpost.com/wp-dyn/articles/A14554-2005Mar30.html (“He was willing to fight for the underdog to achieve social justice and equality, particularly when it came to police brutality and excessive use of force,’ says Ogletree. ‘The reason an O.J. Simpson would even know about Johnnie Cochran,’ Ogletree adds, ‘was because he was successful for 25 years before the Simpson case was even on the radar.’”); see also Toccara Castleman, Johnnie Cochran—Civil Rights Advocate, THE ESPECTRUM, available at http://www.omsa.uiuc.edu/publications/espectrum/2006.1.2/articles/
Cochran’s greatest achievements occurred at the twilight of his life and career. Following on the heels of his successful defense of O.J. Simpson in the criminal trial, Cochran returned to his legal roots of social justice and civil rights. What enfolded thereafter, was a case study of the type of social

peopleofpurpose_johnniecochran.asp ("Throughout the 1970s [Cochran] made a name for himself in the black community by litigating a number of high profile police brutality and criminal cases. During his lifetime Cochran was dedicated to civil service and civil rights and ensuring justice and equal treatments of minorities in the legal system.""); Johnnie L. Cochran, Jr. ’62, Loyola Law School, available at http://alumni.lls.edu/profiles/Cochran.html (last visited November 8, 2007) ("[Cochran] was a superstar among star litigators. The attorney and civil rights leader rocked the legal world with landmark victories in police misconduct cases and with such high-profile clients as O.J. Simpson, Michael Jackson, Reginald Denny and Geronimo Pratt . . . . Throughout his career Cochran was guided by the words of Dr. Martin Luther King, Jr.: ‘Injustice anywhere is a threat to justice everywhere.’").


16. See Caroline Forell, Gender Equality, Social Values and Provocation Law In The United States, Canada and Australia, 14 AM. U. J. GENDER SOC. POL’Y & L. 27, 62 (2006) ("Perhaps the most famous American case in recent years that led to public outcry about men who kill in the heat of passion were the murders of OJ Simpson’s ex-wife and her male friend. Even though Simpson was acquitted because the State did not prove beyond a reasonable doubt that he was the killer..."); see also Not Guilty: “Trial of the Century” Ends With Simpson Acquittal, CNN.COM, October 3, 1995, available at http://www.cnn.com/US/OJ/daily/9510/10-03/index.html ("Orenthal James Simpson is a free man. He was acquitted Tuesday in the brutal stabbing murders of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman..."); When Jeopardy Protection Applies: Only in Certain Proceedings, FINDLAW.COM, available at http://criminal.findlaw.com/crimes/criminal_rights/double-jeopardy/when-jeopardy-protection-applies(1).html ("The state of California prosecuted Simpson for the murders of his former wife and her friend."); Johnnie Cochran, INFOPLEASE.COM, available at http://www.infoplease.com/biography/var/johnniecochran.html ("Johnnie Cochran’s successful defense of football star O.J. Simpson in a 1995 murder trial made him, for a time, the most famous trial lawyer in America. Cochran’s triumphant cry to the jury after Simpson had struggled to put on the killer’s abandoned glove—‘If it doesn’t fit, you must acquit!’—was the signature moment of the widely-televisioned trial.").

17. See Barry C. Scheck, A Tribute to Johnnie L. Cochran, Jr., 29 MAY CHAMP 4 (2005) ("Before he became the most famous lawyer on the planet, Johnnie L. Cochran, Jr. was already known as a great civil rights lawyer in the tradition of Thurgood Marshall and Clarence Darrow. Whether the case involved police abuse, employment discrimination, or civil liberties, Johnnie was always an advocate who sought reforms as well as money, and used public pressure to get both."); see also Laura B. Randolph, Best in the West, EBONY, April 1994, available at http://findarticles.com/p/articles/mi_m1077/is_n6_v49/ai_14969864. Ebony reported that:

Cochran . . . is not just a hired gun for the beautiful, the famous and the affluent. On the contrary, perhaps more than any other lawyer in L.A., Cochran is a legal hero because he takes the kind of cases ordinary citizens can identify with, cases
change that can be orchestrated once a passionate individual reaches a state of influence and prestige that simply cannot be ignored. The day that Johnnie Cochran and class action plaintiffs' attorney Cyrus Mehri walked into National Football League Commissioner Paul Tagliabue's office and demanded that Tagliabue lead a social movement in the NFL, was a day that should be hallowed in a career full of memorable victories. Cochran and Mehri "encouraged" a professional sports league commissioner to "do the right thing" and what ensued from that interaction has become very nearly remarkable.

On the evening of February 4, 2007, as the Chicago Bears and Indianapolis Colts squared off in Super Bowl XLI, few people thought of Johnnie Cochran on that historic occasion—historic not just because it was the

where his clients not only are not rich and famous but nameless and faceless people of average to meager resources.

Id.; Adam Bernstein, Showy, Tenacious Lawyer Rode Simpson Murder Trial to Fame, WASHINGTON POST, March 30, 2005, at A01. The Washington Post detailed Cochran's civil rights legacy as follows:

As a former prosecutor in Los Angeles County, Cochran's early legacy was fostering changes in the handling of police shooting cases. In private practice, he also was well-regarded for his prowess in police brutality cases and was reported to have won more than $45 million in judgments. He liked to say his career was equal representation for O.J. and 'no-Js'; among the latter was Haitian immigrant Abner Louima, who had been sodomized in a N.Y. police station and for whom Cochran won an $8.75 million settlement. He called helping win the release of Black Panther Elmer 'Geronimo' Pratt, who spent 27 years in jail on a murder charge before being freed, "the happiest day of my life practicing law."

Id.

18. See Paula Farmer, Johnnie Cochran Pursues His Lifelong Passion to Promote Racial Justice, BLACK COLLEGIAN, October 1999, available at http://findarticles.com/p/articles/mi_qa3628/is_199910/ai_n8876708 (last visited May 6, 2008) ("Prior to [the Simpson] trial, Cochran garnered significant victories such as Leonard Deadwyler, a Black motorist stopped for speeding his pregnant wife to the hospital, then fatally shot, and Ron Settles, a Black college football star whose death at the hands of police was made to look like a suicide.").

Super Bowl but because it would be like no other National Football League championship game in history. On the Chicago Bears sideline, Lovie Smith piloted his team as the first African American head coach to ever lead an NFL team to the Super Bowl.20 Across the field that evening stood Smith's mentor and friend, Tony Dungy who became the second African American head coach (by about four hours) to lead his NFL team, the Indianapolis Colts, into a Super Bowl.21

Whatever barriers existed between African American head coaches and the Super Bowl prior to 2007, Dungy and Smith shattered in their exemplary displays of leadership, fortitude and dedication leading up to Super Bowl XLII.22 For the first time in the forty-one years of Super Bowl play, one of the participating teams was to be coached by an African American. The magnitude of that event cannot be overstated: Johnnie Cochran, unbeknownst to the casual observer, deserved credit and respect for what would transpire


21. See Jones, supra note 20; see also Cole Wiley, Let Us Be Wary of Celebrating Too Much, ESPN.COM, February 27, 2007, available at http://sports.espn.go.com/espn/blackhistory 2007/columns/story?id=2782051 (last visited November 17, 2007) ("At the beginning of the month, we celebrated when Chicago Bears Coach Lovie Smith and Indianapolis Colts Coach Tony Dungy became the first two black head coaches in the NFL to lead their teams to the Super Bowl—and Dungy became the first black coach to hoist the Lombardi Trophy.").

22. See Michael Smith, It's Character, Not Color That Separates Smith, Dungy, ESPN.COM, January 24, 2007, available at http://sports.espn.go.com/nfl/playoffs06/columns/story?columnist=smith_michael&id=2740318 (last visited October 21, 2007) ("Dungy and Smith are role models, not just for coaches who look like them or men who look like them, but for all coaches and all men. They live their lives the right way, and as a result they do their jobs the same way. Their priorities are, in order: faith, their families and football."); see also Jarrett Bell, On The Doorstep of History, USA TODAY, January 17, 2007, available at http://www.usatoday.com/sports/football/nfl/2007-01-16-dungy-lovie_x.htm (last visited October 21, 2007) ("'We can say that it really shouldn't matter, but we know that it does,' says John Wooten, chairman of the Fritz Pollard Alliance, which monitors and promotes the hiring of minority coaches. 'That's why it's rewarding to see that Tony and Lovie have reached this point. I'm proud of them. And they are so aware of the historical context.'").
Super Bowl XLI— a Super Bowl Champion would be coached by a black man.\textsuperscript{23}

Cochran's career, while noteworthy for a variety of reasons, was first and foremost a career that was devoted to equality and social justice.\textsuperscript{24} Cochran cut his powerful teeth representing civil rights and police brutality victims in cases during the tumultuous Watts riots era in Los Angeles.\textsuperscript{25} As a young, aggressive African American lawyer, Cochran gained acclaim for confronting racism and challenging the white male dominated criminal justice system.\textsuperscript{26} After a career of stunning legal victories and barrier breaking triumphs, including the dramatic representation of O.J. Simpson in the mid-1990s, Cochran's legend and acclaim had grown to near mythical proportions.\textsuperscript{27}

\textsuperscript{23} See Jones, supra note 20 ("Today, let's celebrate these two amazing brothers— Lovie Smith of the Chicago Bears and Tony Dungy of the Indianapolis Colts—and pay tribute to those who helped them get to the top of the game."); see also Chris Stevenson, Smith and Dungy Kick the Door Down: Two Black Super bowl Coaches Come None-too-soon, POLITICALAFFAIRS.NET, February 5, 2007, available at http://www.politicalaffairs.net/article/articleview/4805/1/239 (last visited October 21, 2007) ("If you want an official name for the Super Bowl XLI then call it the Cochran/Mehri Bowl. In the immediate term the Black leader who made it possible for two head coaches to be in this game was the late famed attorney Johnnie Cochran.").

\textsuperscript{24} See Merida, supra note 14; see also Scheck, supra note 17.

\textsuperscript{25} See Johnnie Cochran, A Lawyer's Life, COMMONWEALTHCLUB.ORG, October 24, 2002, available at http://www.commonwealthclub.org/archive/02/02-10cochran-speech.html (last visited October 21, 2007) ("Early on as a young lawyer I was involved in a matter in Los Angeles, shortly after the Watts riots in 1966, the Deadwyler case.... I became known at that time in L.A. Still, my goal was to handle these civil rights cases, and as I became more experienced I started looking at certain things that I thought needed to be changed."); see also Cliff Hocker, Johnnie L. Cochran, Jr., Celebrity Lawyer, 8 NBA NAT'L B. A. MAG. 6 (1994) ("Following the 1965 Watts riots, Cochran entered private practice... [t]hroughout the 1970's, Cochran built a flourishing trial practice with criminal cases and police brutality complaints.").

\textsuperscript{26} See, supra note 25; see also Merida, supra note 14 ("he took the case of Reginald Denny, the white truck driver dragged from his cab and beaten by black assailants during the Los Angeles riots... [t]he suit was eventually dismissed, but in the name of Denny, he had waged a campaign for better police protection for that neighborhood.").

\textsuperscript{27} See Gerald F. Uelman, Who is the Lawyer of the Century?, 33 LOY. L.A. L. REV. 613, 625 (2000) ("Cochran can confidently be labeled the most famous living lawyer in America today, and his fame (or infamy) can just as confidently be attributed to his role as lead defense counsel in the trial of O.J. Simpson. He has remained in the news since the Simpson trial as host of a nightly television show on Court TV, and as counsel in some newsworthy lawsuits alleging police misconduct in New York and Los Angeles."); see also Blake D. Morant, Resolving the Dilemma of the Televised Fair Trial: Social Facilitation and the Intuitive Effects of Television, 8 VA. J. SOC. POL'Y & L. 329, 342 (2001) ("Two of Simpson’s defense attorneys had achieved appreciable fame before the trial actually commenced. F. Lee Bailey and Johnnie Cochran, the defense team’s lead attorneys, enjoyed significant fame due to their participation in high-profile cases."); Merida, supra note 14 ("[A]rguably the most famous criminal defense lawyer in America... Cochran talked to, took time for, everyone. He was a cheerleader for his craft, the Dick Vitale of the legal profession.").
Cochran became determined, post O.J., to throw his considerable weight behind yet another injustice that had undoubtedly been troubling him for some time—the absence of minority coaches in professional sports, particularly the National Football League.28

Cochran’s partner in the crusade to provide equal access and opportunity to minority coaches in the NFL was Cyrus Mehri. Mehri, a lawyer of considerable renown, cut his formidable teeth fighting corporate discrimination in the class action context.29 Together, Mehri and Cochran drafted the groundbreaking report “Black Coaches in the National Football League: Superior Performance, Inferior Opportunities.”30 In this report, Cochran and Mehri painstakingly detailed the great success rate of minority coaches in the National Football League, and the significantly fewer opportunities that minority coaches receive to propagate their success.31

Imagine the force felt by Commissioner Paul Tagliabue when Johnnie Cochran and Cyrus Mehri entered his office to discuss the NFL’s woeful
record of hiring and promoting black coaches in the NFL. The result of Cochran and Mehri’s groundbreaking report and eventual meeting with Paul Tagliabue was the NFL’s adoption of the Rooney Rule. The Rooney Rule, as proposed by Cochran and Mehri and as facilitated by Dan Rooney, the owner of the Pittsburgh Steelers, requires that all NFL club owners and NFL teams conduct a meaningful interview, in person and by a principal club decision maker, with at least one minority candidate during the hiring process for any open head coaching position. The NFL owner’s adoption of the Rooney Rule in 2002 has significantly impacted the real and subconscious barriers that had been erected as obstacles in the paths of African American and minority coaches.

This article seeks to examine two important conceptualizations: First, the impact of the Rooney Rule in crashing through the real and subconscious barriers erected against minority head coaches; and second, the role of Johnnie

32. See Cochran Releases Report on NFL’s Lack of Black Head Coaches, Threatens Lawsuit, JET, October 21, 2002, available at http://findarticles.com/p/articles/mi_m1355/is_18_102/ai_93307027 (last visited October 21, 2007) (“Cochran said he is to talk to the commissioner about the proposal and wants reforms in place before the hiring cycle for the 2003 season. Cochran said he is prepared to take legal action.”); see also Marianne M. Jennings, Rush Limbaugh: Part 1, JEWISH REVIEW ONLINE, October 5, 2003, available at http://www.jewishworldreview.com/cols/jennings1011503.asp (last visited November 9, 2007) (“The NFL has been consumed with fear since September 30, 2002 when Cyrus Mehri and Johnnie Cochran released their report, ‘Black Coaches in the National Football League: Superior Performance, Inferior Opportunities,’ and threatened class action discrimination lawsuits.”); The History of the Fritz Pollard Alliance, supra note 15 (“On October 31, 2002, NFL Commissioner Paul Tagliabue announced the formation of a diversity committee, headed by Pittsburgh Steelers owner Dan Rooney, to address the NFL’s minority-hiring practices. Within two months, the League announced a diversity plan, which included the requirement that each team interview at least one minority candidate prior to selecting a head coach.”).

33. See McCune, supra note 19 (McCune describes Tagliabue’s response to Cochran and Mehri as follows: “The NFL responded to the Cochran/Mehri report by establishing a committee of owners to investigate diversity. The committee was chaired by Dan Rooney, owner of the Pittsburgh Steelers. As a result of the work done by the committee, the NFL enacted ‘The Rooney Rule.’”).

34. See The History of the Fritz Pollard Alliance, supra note 15.

35. See Nik Hut, NFL Minority Program Celebrates 20th Anniversary, BCASPORTS.ORG, October 21, 2007, available at http://bcasports.cstv.com/genrel/102507aab.html (last visited November 17, 2007). BCA sports reports that: In 2002, the only black head coaches among the 32 NFL teams were Indianapolis Colts coach Tony Dungy and New York Jets coach Herman Edwards (who has gone on to Kansas City). In 2006, there were a record seven black head coaches in the league. There are six this season [2007], including the Bears’ Lovie Smith, who last season became one of the first two minority coaches (along with Dungy) to lead a team to the Super Bowl.

Id.; see also infra Part III.B.
Cochran in the inception and adoption of this important advancement. Part II describes the timely conflation of three powerful legal personalities that conceptualized the Rooney Rule, Cyrus Mehri, Paul Tagliabue and Johnnie Cochran. Part III tracks the Rooney Rule from its promulgation through its successful continuing existence. The article concludes in Part IV with a description of Johnnie Cochran's very influential role in not only the adoption of the Rooney Rule, but in his commitment to challenging inequities and aggressively pursuing social justice.

The evolution of the Rooney Rule is the story of three lawyers. On a fateful day in October of 2001, three powerful attorneys met to discuss one more dreadful race statistic in the United States; the failure of the National Football League to hire African American coaches in a league that had become dominated by African American athletes.36

II. CONFLATION OF POWERFUL LEGAL PERSONALITIES

A. Johnnie Cochran

Johnnie Cochran's career was representative of many things. To the parents of Ron Settles, a young African American college athlete who was pulled over, jailed, and later found dead in his jail cell, Johnnie Cochran was their only hope for justice.37 To Geronimo Pratt, he was a confidante and

36. See Phyllis Raybin Emert, Playing Racial Games: Minority Coaches in the NFL, NEW JERSEY STATE BAR FOUNDATION, available at http://www.njsbf.org/njsbf/student/respectfall04-1.cfm (last visited October 31, 2007). Emert reports that: Commissioned by Cochran and Mehri, Dr. Janice Madden of the University of Pennsylvania analyzed the data compiled in the 2002 report. Dr. Madden found that while 70 percent of all NFL players were black, only 28 percent of the assistants and coordinators and six percent of all head coaches were African-American. Whereas whites accounted for 30 percent of all NFL players, they comprised 72 percent of the assistant coaches and coordinators, and 94 percent of the head coaching positions. Id.; see also Mark Curnutte, NFL Gaining in Minority Hires, THE CINCINNATI INQUIRER, December 14, 2006, available at http://www.fpal.org/article-cincinnati-enquirer-dec142006.php (last visited November 9, 2007) ("There were only two minority head coaches in late October 2002, when Mehri and the late Johnnie Cochran met with Tagliabue and other league officials.").

friend that refused to give up the fight.³⁸ To African American lawyers around the nation, Johnnie Cochran was a role model and trail blazer.³⁹ From representing the indigent to defending celebrities, Cochran’s body of work had a generally consistent theme, fighting social injustice and advocating equality.⁴⁰

To many, Johnnie Cochran is best known as the attorney who successfully defended NFL legend O.J. Simpson.⁴¹ That however, is not Cochran’s

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³⁸. See Calvin Ben Lester, Jr., Remembering Johnnie Cochran, LOS ANGELES LAWYER, July-August 2005, 10 (“Johnnie Cochran said that his greatest pleasure as a lawyer came not from the Simpson case or other multimillion-dollar cases in which he prevailed. He made it clear that securing the freedom of Geronimo Pratt after over 25 years of imprisonment provided him his greatest reward.”); see also Fans, Friends and Family Bid Farewell to Famed Attorney Johnnie L. Cochran During Funeral in L.A., JET, April 25, 2005, available at http://findarticles.com/p/articles/mi_m1355/is_17_107/ai_n14735817 (last visited November 17, 2007). Jet magazine reports that:

A thunderous ovation went out when Elmer “Geronimo” Pratt rose and took the podium. Pratt is the client who provided Cochran with his proudest moment. Pratt was jailed for 27 years for the murder of a White woman in Santa Monica. Cochran fought tirelessly for his release and finally was able to get the charges dropped. “I’m still numb behind my brother’s leaving,” he said. He called Cochran “the chief” and went on to say: “Johnnie taught me so much.”


Johnnie Cochran was an outstanding lawyer in spite of, not because of, his race. I hope when people reflect on Johnnie Cochran’s career, that they will appreciate and understand the enormity of his generosity, his commitment, his love for the law, and his deference to others. These are the qualities that made him an exceptional people’s lawyer. He is a role model for all of us, lawyers and non-lawyers alike, and his commitment to fairness and justice reminds us of how great he was in changing the way people thought about the legal profession.

Id.

⁴⁰. See Merida, supra note 14; see also Castleman, supra note 14; Scheck, supra note 17; Randolph, supra note 17; Bernstein, supra note 17.

only, or most significant, affect on the NFL or the sporting world in general. In 2002, three years before his death, Cochran was a leading force in changing the landscape of hiring practices of head coaches in the National Football League.

Cochran was born in Shreveport, Louisiana, the great-grandson of a slave. He moved at a young age with his father and mother to Los Angeles, California. Cochran graduated from the University of California, Los Angeles (UCLA) in 1959 and attended the Loyola Marymount University School of Law. Following law school graduation and passing the California bar exam, Cochran began his law career working as a deputy city attorney for the city of Los Angeles in the criminal division. Two years later, Cochran left the prosecutor's office and entered private practice as a criminal defense attorney. Early in his career as a defense attorney, Cochran represented high profile individuals including Geronimo Pratt, a former Black Panther, and Leonard Deadwyler who was shot and killed by Los Angeles police as he tried to rush his pregnant wife to the hospital. "Such headline-grabbing cases quickly made Cochran's name among the black community in Los Angeles, and by the late 1970s he was handling a number of police brutality and other criminal cases." Cochran took a brief respite from his criminal defense practice when he joined the Los Angeles District Attorney's office for five years from 1978 to 1983. As an Assistant District Attorney, Cochran himself brushed up against the corrupt Los Angeles Police Department while driving his two daughters through L.A. Cochran, driving a Rolls Royce, was pulled over, ordered out of his car at gunpoint and illegally searched. During the illegal search the

("When O.J. Simpson was accused of murdering his ex-wife, Nicole Brown Simpson, and Ronald Goldman, Simpson summoned a 'dream team' of attorneys led by Johnnie Cochran, Jr."); see also Hocker supra note 25, at 6. Hocker writes that:

Johnnie L. Cochran, Jr., is an attorney who has advanced beyond legal victories in court to triumph before the forum of public opinion. In fact, he has become one of the law legends of popular culture. In Southern California, folk wisdom dictates that if you are in big trouble, you had better talk to Cochran. Michael Jackson sought his services in 1994, and as the O.J. Simpson murder case unfolded, Cochran's name was the standard of reference for lawyers.

Id.

42. See, Who2 Biography, Johnnie Cochran, supra note 38.
43. See id.
44. See id.
45. See id.
46. See id.
47. Id.
police came across Cochran’s D.A. office badge and went “apoplectic.”

While Cochran never brought charges against those officers’ he often repeated the story that despite the success or power a black man attains, to some, and often the police, he will always be a criminal and in danger as a black man in America.

Once Cochran returned to private practice in 1983, he immediately began winning high profile cases that cemented his reputation as one of the best trial attorneys in the country. First came the Settles case settlement against the Los Angeles Police Department for $760,000 when a coroner determined that Settles had been killed by a police chokehold. Next, Cochran won a settlement against the LAPD for molestation of a teenager by an off duty police officer.

“As Cochran’s fame grew, his client list began to include more celebrities of which pop singer Michael Jackson is the best known.” Of course, Cochran is most known for his representation of O.J. Simpson. Still, Johnnie Cochran began his career and ended his career fighting against the status quo and seeking social justice. To wit, Cochran himself stated that as a young lawyer he “read everything that I could find about Thurgood Marshall and confirmed that a single dedicated man could use the law to change society.”

While Cochran’s life and career were filled with acts that furthered social justice and equality, his campaign for equal hiring practices in sports deserves acclaim for the success it had and the future it promises in the sporting world and other more critical professions.

49. See id.

50. See id.; see also Merida, supra note 14. Merida reports in the Washington Post that Cochran’s experience of being illegally searched and seized in Los Angeles:

“was dehumanizing.” . . . But [Cochran] never filed a complaint and never demanded an official apology. What he did, in his own shrewd way, was to tell the story over and over and over again. It became a signature Cochran anecdote, forever memorialized in magazines and newspapers across the land. The point: Even a black man with a Rolls-Royce and his own initials on his plates can be stopped by police and treated like a criminal.

Id.


52. See id.

53. See id.

54. Id.

55. See JOHNIE COCHRAN, A LAWYER’S LIFE (2002).
B. Cyrus Mehri

Cyrus Mehri, whose parents hail from Iran, was born an activist. Mehri’s mother was expelled from University courses in Iran for speaking out against the Iranian government and the then sitting Shah. After fleeing Iran, Mehri’s parents settled in New York where his father became an ophthalmologist and his mother an artist. "Politics and protest were important issues in the Mehri household"; Mehri grew up with family friends and guests visiting to debate current political issues and world events.

Mehri took his activist sensibility to Hartwick College in upstate New York where he spent his undergraduate days organizing student bus trips to protest various U.S. foreign policy. Following graduation from Hartwick, Mehri moved to Washington, D.C. to join Public Citizen and work with Ralph Nader assisting in community and consumer organization and activism. As a “Nader Raider,” Mehri would barnstorm on an issue that was before Congress, swooping into towns in Tennessee, Texas, and Washington State. He would mobilize local organizers, plead his case to the newspaper editorial board and offer up a concise, compelling argument for the TV cameras—an early blueprint for his class-action work.


57. See id.
58. See id.
59. See id.
60. See id.
62. See Salter, supra note 56.
63. See id. (“As a key member of the legal team that filed a racial-discrimination class-action suit against Texaco, [Cyrus Mehri] helped wrangle a then-record $176.1 million settlement in 1996. In 2000, he won a $192.5 million settlement in a suit against Coca-Cola.”); see also Mehri & Skalet, supra note 29.
Mehri played the pivotal role in litigating a class action lawsuit against the Texaco Corporation for race discrimination. Texaco executives were recorded on cassette tape making racist and derogatory comments about African American Texaco employees and discussed destroying documents rather than turning them over in discovery. Mehri was instrumental in securing a hugely significant settlement against Texaco in the amount of $176 million.

Buoyed by his success in the Texaco race discrimination settlement, Mehri started his own firm and pursued Coca-Cola in a class action after being approached by a Coca-Cola employee who claimed discrimination based on race. Once again Mehri was successful, securing a settlement against Coke for $190 million. Thus, Mehri was intimately involved in two of the largest

64. See Wiscombe, supra note 61, at 3 ("A self-described progressive, he got his start in law as an associate at Cohen, Milstein, Hausfeld & Toll... where he played a key role in the Texaco [race discrimination] victory in 1996."); see also Roberts v. Texaco, Inc., 979 F. Supp. 185 (1997); Salter, supra note 56; Mehri & Skalet, supra note 29.

65. See Wiscombe, supra note 61, at 3 ("The company turned out to be his best weapon. After a collection of audiotapes was leaked to the New York Times implying that high-level executives had used racial slurs, the damage was done. The company quickly settled."); see also Thomas S. Mulligan and Chris Kraul, Texaco Settles Race Bias Suit for $176 Million, L.A. TIMES, November 16, 1996, at A1. The L.A. Times reports:

An unusual aspect of the settlement, valued by plaintiffs’ lawyers at $176 million in all, calls for Texaco to form a seven-member “equality and tolerance task force” that will give the plaintiffs a say in hiring and promotion policy at the giant oil company. “The era of the ‘good ole’ boy network at Texaco is coming to an end,” plaintiffs’ lawyer Cyrus Mehri said, adding: “It’s going to be a new Texaco.” Id.; Roberts, 979 F. Supp. at 189-94.

66. See Sara Klassen, Discrimination Attorney Mehri Speaks at LC, THE GREYHOUND, October 30, 2007, available at http://media.www.loyolagreyhound.com/media/storage/paper665/news/2001/04/10/ArtsSociety/Discrimination.Attorney.Mehri.Speaks.At.Lc-724404-page2.shtml (last visited October 31, 2007) ("After the settlement with Texaco, Mehri became a founding partner in the firm Mehri, Malkin and Ross. Their first case presented them with a daunting challenge; they defended minority employees in a discrimination suit against Coca-Cola."); see also Hays, supra note 61 ("The case against Coke was the first for his law firm, Mehri, Malkin & Ross, which he opened in September 1998. "People thought I was crazy to risk the future of my firm on this case," Mr. Mehri said. But he was confident that his case was solid.").

67. See Ingram v. The Coca-Cola Co., 200 F.R.D. 685, 686-97 (2001) (approving the settlement entered into between class plaintiffs and Coca-Cola); see also Mehri & Skalet, Ingram v. the Coca-Cola Company, FINDJUSTICE.COM, available at http://www.findjustice.com/cases/rights-discrimination/ingram-cocacola/ (last visited November 16, 2007) ("A final Settlement Agreement, valued at $192.5 million and designed to ensure dramatic reform of Coca-Cola’s employment practices, was officially approved by the Court on June 7, 2001."); Klassen, supra note 66. The Greyhound reports:

This trial also ended in a settlement—specifically, Coca-Cola agreed to pay $192.5 million, the largest settlement ever in a case of this sort. More importantly, the
class action race discrimination settlements in United States history. This involvement finds some admirers referencing Mehri as a "legal pioneer." Nader himself claims that "before [Mehri] came along, these [employment discrimination class action] settlements were relatively small. . . . He has broadened their significance beyond the amount of compensation by expanding them into an arm of the civil-rights movement."

C. Paul Tagliabue

Paul Tagliabue was born in Jersey City, New Jersey, the third of four children in a working class family. As a high school honor student, Tagliabue was an exceptional basketball talent and was widely recruited to play college basketball. Tagliabue enrolled at Georgetown and played basketball for the Hoyas, while simultaneously excelling academically.

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company has pledged to invest $1 billion into an effort to enforce "reforms from the top down," which would theoretically improve diversity and create more just hiring, evaluation and promotion policies.

Id.; Daisy Maxey, Can Pay Policies Help Create a More Diverse Workplace?, WALL STREET JOURNAL ONLINE, April 16, 2007, available at http://www.careerjournal.com/hrcenter/articles/20070416-maxey.html ("Cyrus Mehri, a founding partner of the Washington-based law firm Mehri & Skalet PLLC who served as class counsel in both the Texaco and Coca-Cola actions, says incentives are critical to increased diversity in the workplace.").

68. See Cheryl L. Wade, "We Are An Equal Opportunity Employer": Diversity Doublespeak, 61 WASH. & LEE L. REV. 1541, 1550 (2004) ("In the 1990s, African-American employees at Texaco and Coca-Cola received the largest amounts ever paid to settle race discrimination litigation."); see also Michelle Gabrielle, Coke Employees Demand Equality, CFO.COM, December 5, 2000, available at http://www.cfonet.com/article.cfm/2990260?f=search (last visited May 6, 2008) ("The $192 million settlement between Coca-Cola Co. and its salaried African American employees is the largest ever in a racial discrimination case, exceeding the $176 million racial discrimination judgment against Texaco Inc. in 1997.").

69. See Salter, supra note 56.

70. Id. Salter continues: "In addition to seeking damages and back pay for victims of discrimination, Mehri is determined to reshape the companies that he sues. His settlements often include substantial changes that go beyond the 'programmatic relief' that a judge would impose in a trial." Id.


72. See Paul Tagliabue—NFL Executive, supra note 71.

73. See Paul Tagliabue, WIKIPEDIA, supra note 71 ("He still ranks in the school's top 20 in career rebounds and top 10 in rebounding average."); see also Paul Tagliabue—NFL Executive, supra note 71 ("He also was president of his senior class, a Rhodes Scholar Finalist, and a Dean's List honor graduate in 1962.").
Following graduation from Georgetown, Tagliabue enrolled at the New York University School of Law where he graduated with honors in 1965. Following law school graduation, Tagliabue clerked for the U.S. Claims Court and then later accepted a job with the prestigious Washington, D.C. law firm of Covington & Burling. It was at Covington that Tagliabue first became exposed to the inner workings of the National Football League, as the firm acts as the NFL’s principal outside counsel. Beginning in 1969, Tagliabue became intimately involved in NFL legal issues as he worked through the process of the NFL—AFL merger and assisted in the origination of Monday Night Football. During the 1970s and ‘80’s, Tagliabue represented the NFL as an attorney in important areas: television, business and legislative affairs and labor and antitrust cases. During that time, Tagliabue was a partner at Covington & Burling. Tagliabue also served in the office of the United States Secretary of Defense as a policy analyst and was a member of the Council on Foreign Relations where he worked with the Council’s Homeland Security Task Force.

Based on his extensive experience as lead outside counsel to the NFL, club owners elected Tagliabue to succeed Pete Rozelle to become commissioner of their league in 1989. Tagliabue was well suited for the position having worked closely with Rozelle for nearly two decades, as Rozelle presided over the NFL’s dynamic rise as a spectator sport and a television powerhouse.

74. See Paul Tagliabue—NFL Executive, supra note 71.
76. See Paul Tagliabue—NFL Executive, supra note 71.
77. See id.
78. See id.

Tagliabue took office in November 1989, succeeding Pete Rozelle. For the prior two decades he had represented the NFL as an attorney in the areas of television, expansion, legislative affairs, franchise moves, labor and antitrust cases. His involvement with the NFL began in 1969 when the merger of the NFL and the American Football League was being implemented and Monday Night Football was being launched. Before becoming Commissioner, Tagliabue was a partner at Covington & Burling, a Washington, D.C., law firm, then the NFL’s principal outside counsel. Earlier, Tagliabue served in the office of the U.S. Secretary of Defense as a defense policy analyst on European and North Atlantic affairs. Upon
Tagliabue was handed the unenviable task of succeeding Rozelle, roundly considered one of the most successful commissioners in professional sports history. The league that Tagliabue took over as commissioner in 1989 was one that had been wracked by labor unrest repeatedly, including a strike season of 1987 that found the NFL using replacement players. Tagliabue is often credited with taking the NFL franchise baton from Rozelle and safely guiding the league into the 20th century, making the NFL the most successful professional sports league in the United States, in terms of revenue and fan

leaving the department, he was presented by the Secretary of Defense with the Meritorious Service Medal, the department’s highest civilian award. Id.; see also NFL Commissioner Paul Tagliabue, supra note 75 (“It was as a lawyer that Tagliabue first came into close contact with the NFL. He began his career as a law clerk in the U.S. Claims Court in 1965. In 1969 he joined Covington & Burling, where he gradually took on more and more of the firm’s NFL account. In the 1980s, Tagliabue became a managing partner at the firm and was made its lead lawyer on NFL matters.”).


Pete Rozelle would retire in 1989 after nearly 30 years running the league. Four years after being inducted in the Hall of Fame he helped establish in 1963. Rozelle, who died in 1996 from a Brain Tumor, would leave beyond a grand legacy making him the Commissioner of all Commissioners “Moving the NFL from the back page to the front page,” New York Giants owner Wellington Mara said. “From daytime to prime time.” Following his death the Super Bowl MVP Trophy was renamed in his honor.

Id.; see also Pete Rozelle, Pro Football Hall of Fame, PROFOOTBALLHOF.COM, http://www.profootballhof.com/hof/member.jsp?player_id=185 (last visited November 7, 2007). The Pro Football Hall of Fame site recognizes:

During his 30 years as commissioner of the National Football League, Pete Rozelle was recognized as the premier commissioner of all professional sports. Rozelle’s accomplishments are legendary, and the NFL’s many challenges during his tenure are well documented. Such things as blockbuster television contracts, the war with the competing American Football League and the resulting merger, the development of the Super Bowl into America’s premier sporting event, difficult player issues including strikes and threatened strikes, plus numerous court and legislative battles, all dominated headlines during his stewardship.

Id.

81. Press Release, Nat’l Collegiate Athletic Ass’n, supra note 79; see also Paul Tagliabue—NFL Executive, supra note 71.

popularity. As an attorney/commissioner, Tagliabue skillfully guided the NFL through various permutations of the Collective Bargaining Agreement and presided over labor peace in the NFL for the entirety of his leadership period.

During Tagliabue's tenure as commissioner of the NFL, labor peace existed in an unprecedented fashion. Revenue for team owners grew exponentially, as did salaries for players. The player's union smartly, during collective bargaining, tied salary escalation to the gross revenue of the game. Other noteworthy accomplishments during Tagliabue's tenure as commissioner include: (a) no players' strikes or lockouts; (b) the strengthening of revenue sharing and institution of a workable salary cap system; (c) the strictest substance abuse policy of any professional sports league; (d)

83. See Paul Tagliabue—NFL Executive, supra note 71 ("Under [Tagliabue's] leadership . . . [T]he interest, as reflected in game attendance, television audiences, and other measures, is at record levels, and the NFL is widely recognized as holding a preeminent position in sports entertainment."); see also Hub Arkush, NFL's Popularity Proves No Need to Expand Playoffs, PRO FOOTBALL WEEKLY, January 5, 2004, available at http://www.profootballweekly.com/PFW/Commentary/Columns/2003/harkush1826.htm (last visited October 31, 2007). Pro Football Weekly reports that:

The National Football League is almost perfect. That is why it's named as Americans' favorite sport by a more than 2-to-1 margin over any and all challengers in every sports-marketing poll you look at. That's why almost all of America's most-watched television programs are NFL games. That's why the league sets all-time attendance records almost every year, and its 32 teams play to the highest percentage of capacity crowds of any sport anywhere. That's why more money is wagered legally in Las Vegas on the NFL than on all other sports combined.

Id.; Maloney, NFL's Popularity Reaches Hall of Fame Level, BUSINESS FIRST, August 3, 2001, available at http://www.bizjournals.com/buffalo/stories/2001/08/06/newscolumn2.html (last visited November 15, 2007) ("The National Football League carries on as the most popular team sport in the country while the others lag behind, as will be evident this weekend at Hall of Fame ceremonies in Canton, Ohio.").

84. See Paul Tagliabue, Testimony before the Senate Judiciary Committee, (June 22,1999) available at http://judiciary.senate.gov/oldsite/62299pt.htm (last visited May 6, 2008) ("We have extended our Collective Bargaining Agreement on two occasions, thus ensuring labor peace well into the next decade."); see also Dave Goldberg, Ghost of St. Wellington Brokers NFL Labor Peace, DESERET NEWS, March 10, 2006, available at http://findarticles.com/p/articles/mi_qn4188/is_20060310/ai_n16144498 (last visited October 31, 2007) ("But also credit Tagliabue for keeping the NFL the nation's most successful sports endeavor by once again avoiding the kind of labor strife that has plagued baseball, basketball and hockey."); NFL Commissioner Tagliabue to Retire in July, ESPN.COM, March 21, 2006, available at http://sports.espn.go.com/nfl/news/story?id=2376850 (last visited November 7, 2007) ("Paul Tagliabue is leaving the NFL, and he's leaving it both peaceful and prosperous. The 65-year-old commissioner will step down in July after 16 years, his tenure marked by labor harmony and unprecedented riches through television deals . . . . His term will be remembered most for labor peace following strikes in 1982 and 1987.").

85. Paul Tagliabue, WIKIPEDIA, supra note 71.
television rights and contracts that substantially increased each time the NFL negotiated a new television deal; (e) seventeen new stadiums built; (f) expansion of the league from twenty-eight to thirty-two teams; and (g) separation in the popularity of the NFL compared to the other North American major sports leagues. While the NFL was a powerful North American presence during Rozelle’s tenure, Tagliabue:

will leave the NFL as the world’s most lucrative sports league with annual revenues that tower over its three main North American rivals and its one major financial rival in Europe—all despite the fact that the NFL plays a much shorter schedule and only a fraction of the games played by Major League Baseball, the National Basketball Association, the National Hockey League, or the Premier League in English soccer.

With the preceding as a backdrop, three powerful and highly skilled lawyers and negotiators, Cochran, Mehri and Tagliabue sat down together in October 2001 to discuss the race problem in the NFL.

III. THE ROONEY RULE

A. Evolution

One thing is certain, when Johnnie Cochran and Cyrus Mehri sat down with Commissioner Paul Tagliabue and demanded that the league improve its dismal record of hiring and promoting minority coaches, Tagliabue’s attention was undoubtedly seized. For Cochran and Mehri did not merely suggest that the NFL improve its hiring practices, they threatened to sue the NFL for race and hiring discrimination if the League did not acquiesce to their demands.
The demand came from the rising superstar in the class action race discrimination realm, Cyrus Mehri, and, from perhaps one of the most celebrated lawyers of the 20th century Johnnie Cochran. Without doubt, Tagliabue recognized the gravity of Mehri’s and Cochran’s threat. If any two lawyers could bring the mighty NFL to its knees in embarrassment for its discriminatory hiring practices, it would be Cochran and Mehri.

Tagliabue, who had spent the previous fifteen years carefully shepherding the NFL into the professional sports phenomenon that it remains today, recognized that he had a “crossroads” type of decision to make. Astutely, Tagliabue acknowledged the considerable negative impact a race discrimination lawsuit would have on a league that was at the very apex of its power and popularity. Certainly not one to be bullied, Tagliabue likely recognized the opportunity that had been laid bare before him. Tagliabue had been quietly working and cajoling team owners to consider diversity candidates in their hiring practices before Cochran and Mehri showed up on the NFL’s doorstep. Understanding that more than 70% of players in the

Cochran and Cyrus Mehri threatened litigation if the NFL didn’t change its hiring process to include the top minority candidates, the league has been championing the cause of black coaches.”); Emert, supra note 36 (“Cochran declared at a news conference in September 2002 that black coaches were being held to a higher standard than their white counterparts and threatened to take the NFL to court.”).


The business press has long followed Mr. Mehri’s work. The New York Times stated, “Mr. Mehri’s vision for corporate America involves sweeping change, not the piece meal kind.” Fast Company says “He is something of a one-man army in the battle against business as usual... [H]is impact—both in terms of penalties and remedies—is undeniable.” In 2001, he was named by Regardie’s Power magazine as one of “Washington’s Ten Most Feared Lawyers” and in 2003, by Workforce magazine as “Corporate America’s Scariest Opponent”... Trial Lawyers for Public Justice named Mr. Mehri a finalist for “Trial Lawyer of the Year” in 1997 and 2001 for his work on the Texaco and Coca-Cola matters respectively.

Id.

90. See Collins, supra note 88; see also Mulligan, supra note 88; Emert, supra note 36.

91. See, supra notes 83-85 and accompanying text.

92. See Dave Goldberg, The NFL’s Minority Program is Working—Slowly, NEW ENGLAND PATRIOTS, Dec. 13, 2004, http://www.patriots.com/news/index.cfm?ac=general newsdetail&pcid=76&pid=10063 (last visited November 19, 2007). Goldberg notes that Tagliabue had been concerned with diversity in the coaching ranks for some time: But Mehri and Cochran were only saying publicly what commissioner Paul Tagliabue and some powerful NFL people had been urging privately. Tagliabue used their “threat” to appoint a committee headed by Pittsburgh owner Dan Rooney and stacked with like-minded owners and executives. It recommended—and
league are minorities, and only 6% of the men coaching them were persons of color, Tagliabue turned to one NFL club owner who had the clout and wherewithal to effectuate the kind of change needed to address the race problem in the NFL. Dan Rooney not only commanded respect amongst his fellow owners, but was a man that could appreciate the delicacy with which the Cochran and Mehri threat was to be handled, the impact that not responding appropriately could have on the league and the long term value of each of the individual franchises.93

Rooney was no doubt aware that in 2002, Cochran and Mehri had released "Black Coaches in the National Football League: Superior Performance, Inferior Opportunities," a report illuminating and calling into question the NFL’s practices and record of minority hiring.94 Relying on fifteen years worth of statistical information, the report pointed out that while the NFL is the most popular and financially successful professional sporting league in America, it was comprised of 70% African-American players but only 6% of head coaches were black.96 Furthermore, only 28% of assistant

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Tagliabue enacted—a policy that required all teams with coaching vacancies to interview at least one minority candidate.

Id.; see also Mike Freeman, On Pro Football: Diversity Is the Goal In the NFL, N.Y. TIMES, January 8, 2002, available at http://query.nytimes.com/gst/fullpage.html?res=9E06EEDB1539F93BA35752C0A9649C8B63 (last visited November 19, 2007) ("Tagliabue has long been concerned with the lack of black head coaches in a sport in which more than 60 percent of the players are black, and he has never relented in his pursuit to improve the numbers.").


94. Cochran & Mehri, supra note 30.

95. See, supra notes 82-84.


The report looked at the league’s hiring and firing practices of minority coaches, using statistical information compiled over the last 15 years and relied on labor economist Dr. Janice Madden’s input, which determined that “black coaches averaged 1.1 more wins per season than white coaches and led their teams to the playoffs 67% of the time, compared with 39% of the time for white coaches.”

coaches were black. The report also provided that there had only been five black head coaches since 1986 and those few African American coaches had considerably more success in both wins and playoff appearances than white coaches.97

Rooney was also no doubt aware that Cochran had threatened the NFL with a lawsuit if it did not make a change. Cochran did not make empty demands, but always offered proposals, as with other issues he believed in. One proposed change was that the NFL require team owners to include diverse racial groups in the interviewing process for head coaches or be forced to forfeit a draft pick, a highly valuable commodity to owners and teams. Similarly, Cochran and Mehri suggested that teams be rewarded with an additional draft pick each year for having a diverse front office.98

Following the release of the report, the summit meeting with Tagliabue, the origination of the diversity commission that Rooney chaired, and the continuous media coverage of the issue the report brought forth, the NFL owners adopted the “Rooney Rule,” named after the owner of the Pittsburgh Steelers who also advocated parity in hiring practices. The rule (which based on the proposal in Cochran and Mehri’s report, could be alternatively called the “Cochran Rule,”) requires that teams meaningfully interview at least one minority candidate, in person and by a key club decision maker during the hiring process for any open head coaching position.99

Since the inception of this requirement, the percentage of African American head coaches in the NFL has risen from the 6% reported by Cochran and Mehri to 20% in 2007. Perhaps the greatest impact of the Rooney Rule and the groundwork laid by Cochran occurred in February 2007, when two African American head coaches faced off in the NFL’s biggest game—the Super Bowl.100 Not only did Johnnie Cochran bring to light the issue of inequality in NFL hiring, attention has since been turned to other sports, leagues, and associations as well.

98. See Cochran & Mehri, supra note 30, at 5-6.
100. See Jones, supra note 20.
B. In Practice

The impact and success of the Rooney Rule is significant and clear. Prior to adoption of the Rooney Rule, the number of African American head coaches in the NFL was two, a mere 6% of all NFL head coaches. In 2007, the number of African American head coaches has climbed to six, or 19% of all NFL head coaches. In a league where more than 70% of players are African American, it is noteworthy that the number of black head coaches continues to climb.

Since the 2002 inception of the Rooney Rule, the following black head coaches have been hired by NFL clubs: Marvin Lewis by the Cincinnati Bengals, See Cochran & Mehri, supra note 30, at 5 ("This season [2002] the number of black head coaches among the 32 NFL teams has dropped from (a never-impressive) three to two."); see also Jarret Bell, Group Comes to Defense of Black NFL Coaches, USATODAY.COM, Sept. 30, 2002, available at http://www.usatoday.com/sports/football/nfl/2002-09-30-black-coaches_x.htm (last visited November 17, 2007) ("Since Art Shell was hired by the Los Angeles Raiders in 1993, there have been five black NFL coaches— including two current coaches, the Indianapolis Colts' Tony Dungy and the New York Jets' Herm Edwards."); Don Banks, Quotas Won't Solve NFL's Minority Hiring Issues, SPORTS ILLUSTRATED, Oct. 2, 2002, available at http://sportsillustrated.cnn.com/inside_game/don_banks/news/2002/10/02/banks_insider/ (last visited November 18, 2007) (Senior SI writer Don Banks observed back in 2002 "Johnnie Cochran is right about the problem. There is no good excuse for the NFL's not having more black head coaches. No matter how you dress it up, a ratio of two out of 32 cannot be called progress.").

While six black head coaches is noteworthy, and denotes progress, many see this as progress too slow in materializing and unacceptable still. See Zirin, supra note 7 ("About 70% of the players in the NFL are black, but out of the league's 32 teams, only six African Americans are head coaches."); see also Yoji Cole, Despite Black Super Bowl Coaches, Sports Aren't Level Playing Field, DIVERSITY, INC., February 2, 2007, available at http://www.diversityinc.com/public/1226.cfm (last visited November 17, 2007) ("There only are six black head coaches in the NFL out of 32 teams, while about 70 percent of the players are black.").

Cochran & Mehri, supra note 30, at 5; see also Morgan Campbell, Black Coaches Owe It All to the Rooney Rule, THESTAR.COM, Jan. 23, 2007, http://www.thestar.com/Sports/article/173852 (last visited Nov. 17, 2007) ("In 2002, the NFL had two black head coaches—Dungy and Edwards. When this season [2006] kicked off, there were seven."); Hut, NFL Minority Program Celebrates 20th Anniversary, supra note 35 (describing the progress in minority hiring in the NFL between 2002 (when there were only two black head coaches to 2006 (when there were seven) and 2007 (where there were six)); NFL's Hiring Rules: A Model for Diversity?, CBSNEWS.COM, Feb. 3, 2007, available at http://www.cbsnews.com/stories/2007/02/03/eveningnews/main2429700.shtml (last visited Nov. 17, 2007) ("No NFL team will say that the Rooney Rule prompted it to hire a minority coach. But the number of black coaches since the Rooney Rule was instituted has tripled, from two to six.").

See Mark Cumette, Bengals Pin Their Hope On Lewis, CINCINNATI INQUIRER, Jan. 15, 2003, available at http://bengals.enquirer.com/2003/01/15/lewis15.html (last visited Nov. 19, 2007) ("Marvin Lewis, introduced Tuesday night at a resort hotel here as the ninth Bengals head coach, promised to bring a blue-collar work ethic and discipline to a struggling team and
Lovie Smith by the Chicago Bears, Romeo Crennel by the Cleveland Browns, Dennis Green by the Arizona Cardinals (subsequently terminated), Herman Edwards by the Kansas City Chiefs, Art Shell by the Oakland Raiders (subsequently terminated) and Mike Tomlin by the Pittsburgh Steelers. Seven head coaching hires in a five year span.
Unbelievably, prior to 2002 and the Rooney Rule, there had been only five black head coaching hires in a 75 year span.Absent the controversial Rooney Rule, while impossible to determine precisely, it appears extremely unlikely that many of these hires would have ever been made.

The 2007 hiring of Tomlin by the Pittsburgh Steelers provides a clear example of the Rooney Rule working contextually and positively. Perhaps lost amongst the deserved hoopla for Dungy and Smith leading up to the 2007 Super Bowl, was the relatively quiet hiring of Mike Tomlin by the Pittsburgh Steelers as their new head coach. Tomlin, the thirty-four year old African American former defensive coordinator of the Minnesota Vikings, becomes the first black head coach in the Pittsburgh Steelers seventy-four year history. Tomlin became the sixth black head coach in the 2007 NFL joining Smith, Dungy, Edwards, Crennel and Lewis.

As discussed previously, the owner of the Pittsburgh Steelers, Dan Rooney, is one of the most influential owners in professional sports and it is he who championed the Rooney Rule as a means of opening access and opportunity to African American coaches. Failure to follow the rule can result in a stiff penalty (as Matt Millen and the Detroit Lions can attest after being...

defensive coordinator, was hired by the Pittsburgh Steelers—the first black head coach in the 74-year history.

111. See Emert, supra note 36 (“[S]ince the NFL began in 1920, over 400 head coaches had been hired, but only six were African-Americans (five since 1989.”); see also Wes McElroy, The Story That Won’t Go Away, C-VILLE, February 15, 2007, available at http://www.c-ville.com (follow “Archives” hyperlink; then search “the story that won’t go away;” then follow “The Story That Won’t Go Away” hyperlink) (“Prior to Shell in 1989, the NFL went 68 years without an African-American head coach.”).

112. See, supra notes 20-22 and accompanying text.

113. See Steelers Fans Have Faith in Rooney’s Choice of Tomlin as Coach, ESPN.COM, http://sports.espn.go.com/espn/print?id=2739200&type=story (last visited May 6, 2008) (“Steelers fans . . . welcomed the news that Mike Tomlin had been named the team’s head coach, saying the Minnesota Vikings defensive coordinator could bring a fresh perspective and youthful energy to the job.”).

114. See Steelers Coaches Since 1969: Noll, Cowher and now, Mike Tomlin, ESPN.COM, http://sports.espn.go.com/espn/print?id=2738674&type=story (last visited May 6, 2008) (“Tomlin was a not-widely-known Tampa Bay Buccaneers assistant coach less than two years ago and was a college assistant as late as 2000. On Monday, the Steelers are expected to introduce Tomlin as only their third head coach in 38 years and the first black head coach in their 74-year history.”).

115. See, supra notes 104-110 and accompanying text.

fined $200,000 for hiring Steve Mariucci without interviewing a single minority candidate for the open head coaching position in 2003).117

In interviewing Tomlin, Rooney was following the very rule that he helped to establish. The obvious purpose of this rule was to begin to introduce the young minority coaches in the league to the primarily older, white male owners of the NFL clubs.118 As in any "good old boy network" scenario, individuals will hire who they know, and by in large, the older white male NFL owners knew the same cadre of coaches and contacts who for so many years were primarily, if not absolutely, white.119 The Rooney Rule has forced NFL owners to develop lists of promising minority coaches and to have them in for what often amounts to day-long interviews, allowing the owners to become familiar with a group of candidates they had not known previously.120 The Fritz Pollard Alliance, an affinity group composed of NFL minority coaches, scouts and front office personnel, promotes minority hiring for NFL coaching jobs and provides a list of eligible and qualified minority coaching candidates to NFL club owners.121 This list was provided to Steelers owner

117. See Scott Brown, Rooney Rule Helping Minority Coaching Candidates, PITTSBURGH TRIBUNE-REVIEW, available at http://www.pittsburghlive.com/x/pittsburghtrib/sports/steelers/print_488048.html (last visited May 5, 2008) ("The rule that bears Rooney’s name got an early test when the Detroit Lions hired Steve Mariucci in 2003 without interviewing any other candidates for their head coaching job. The NFL responded by slapping the Lions with a $200,000 fine."). In addition, Commissioner Tagliabue announced that future offenders would be sanctioned through a stiff fine of $500,000, thereby firmly establishing the importance of the Rooney Rule in NFL culture.


119. See NFL’s Hiring Rules: A Model for Diversity?, supra note 103. CBS News discussed the "good old boy" hiring process in the NFL as:

"There are two different types of systems, in terms of hiring selection in terms of promotions [in the NFL]. One is the tap on the shoulder, the good ole boys network . . . then there is another approach" says Cyrus Mehri, an attorney who specializes in corporate racial discrimination. Mehri helped develop the other approach—after he and late attorney Johnnie Cochran wrote a scathing report in 2002 about National Football League hiring practices.

It’s called the “Rooney Rule”—named for Pittsburgh Steelers owner Dan Rooney—who helped develop the policy requiring teams to interview at least one minority candidate for every head coaching job, or, face stiff fines.

“That doesn’t mean because you interview minority candidates that you have to give them a job, but I think what it does is it exposes you to everyone,” says Herm Edwards, head coach of the Kansas City Chiefs.

Id.

120. See Brown, supra note 117.

121. Id.; see also N. Jeremi Duru, The Fritz Pollard Alliance, the Rooney Rule, and the Quest to “Level the Playing Field” in the National Football League, 7 VA. SPORTS & ENT. L.J.
Dan Rooney during a December 19, 2006 meeting at the NFL’s main office in New York, identifying 10 or 11 minority coaches “as viable candidates for head coaching jobs.”

Mike Tomlin’s name was on this list provided to Rooney.

When long-time Steelers coach and beloved Pittsburgh native Bill Cowher announced his resignation, the early speculation was that Rooney would stay in-house and offer the head coaching position to one of two successful white assistant coaches on Cowher’s staff, offensive coordinator Ken Wisenhunt or offensive line coach Russ Grimm. Reports indicated that Russ Grimm would land the job with Pittsburgh, particularly after Wisenhunt was hired as head coach of the Arizona Cardinals. Yet, Rooney, in keeping with his rule, interviewed Tomlin, the young, aggressive promising defensive coordinator of the Vikings. Tomlin so impressed Rooney that he was offered the head coaching position almost immediately. As advocated by proponents of the Rooney Rule, the key to the process is the interview—the opportunity for talented minority coaches to meet and interact with the owners of the 32 NFL clubs. “It’s been excellent,” Fritz Pollard Alliance chairman John Wooten said of the Rooney Rule. “The most important part of this process is the interview. Get him in the door, and it works.”

In describing the process employed by the Steelers’ in hiring just their third head coach since 1969, ESPN scribe Michael Smith writes:

The diligence with which Steelers’ ownership approached their nearly two-week search for Bill Cowher’s replacement serves as a textbook example of what the NFL had in mind when it established the Rooney Rule (named after Pittsburgh owner Dan Rooney, it requires teams to interview at least one minority head coach candidate).

(forthcoming 2008) (describing the critical role played by the Fritz Pollard Alliance in ensuring success of the Rooney Rule) (manuscript on file with author).

122. See Brown, supra note 117.

123. See id.

124. See Steelers Coaches Since 1969: Noll, Cowher and, now, Mike Tomlin, supra note 114 ("Tomlin’s hiring completed a 2 1/2 week search in which he was initially viewed as an unlikely choice behind perceived front-runners Ken Wisenhunt and Russ Grimm . . . ").

125. See id. ("Wisenhunt later accepted the Arizona Cardinals’ job."); see also Associated Press, Rooney Denies Steelers Offered Job to Grimm, Then Hired Tomlin, ESPN.COM, http://sports.espn.go.com/espn/print?id=2739612&type=story (last visited May 6, 2008).

126. See Smith, supra note 116.

127. See Brown, supra note 117.
The policy seeks to promote a fair, inclusive and thorough process. Which "Race/Ethnicity" box the coach checked on his application is irrelevant.

The Steelers believe former Vikings defensive coordinator Mike Tomlin to be the best man to lead one of the league's flagship franchises. Tomlin just so happens to be African-American.

From the looks of it, Rooney and team president Art Rooney II started the selection process with a clean slate. Meaning it wasn't Coach X's job to lose, though many believed the Steelers ultimately would promote former offensive coordinator Ken Wisenhunt or assistant head coach/offensive line coach Russ Grimm. The Rooney's didn't go for broke in a hurried pursuit of a big-name college coach. They didn't conduct courtesy interviews with members of the majority or token interviews with minorities.

No side or backdoor deals, no circumventing. It was all legit. In fact, in the end the leading candidates were minorities—Tomlin and Bears defensive coordinator Ron Rivera, who is Hispanic.\textsuperscript{128}

The Tomlin hiring portends important changes taking place throughout the league. Absent the Rooney Rule, it is very unlikely that Tomlin would have been contacted by Rooney for an interview.\textsuperscript{129} Had he not been interviewed, Tomlin would not have had the opportunity to impress Rooney with his presentation, preparation and potential.\textsuperscript{130} Dan Rooney admits as much:

To be honest with you, before the interview he was just another guy who was an assistant coach. Once we interviewed him the first time, he just came through and we thought it was great. And we brought him back and talked to him on the phone and went through the process that we do, and he ended up winning the job. [The rule] wasn't the most important thing

\textsuperscript{128} See Smith, supra note 116.

\textsuperscript{129} See Rooney Denies Steelers Offered Job to Grimm, Then Hired Tomlin, supra note 125 ("Pittsburgh Steelers owner Dan Rooney strongly denied the team told assistant head coach Russ Grimm he would be Bill Cowher’s successor, then changed his mind and hired Mike Tomlin. . . . 'He (Tomlin) probably was a long shot when we began our discussions,' Art Rooney II said.").

\textsuperscript{130} See Smith, supra note 116. ESPN reports:

For a change, a minority didn't have to be twice as qualified from a resume standpoint to land the gig. The 34-year-old Tomlin spent five seasons as Tampa Bay's secondary coach and this past season overseeing Minnesota's defense. But what he lacks in experience Tomlin more than makes up for, according to those who know him, in charisma, football knowledge and the ability to get players young and old to buy into what he's selling.

\textit{Id.}
because he was the most important thing. Mike got the job because he showed us his ability and showed us what he could do, and we believed in him.131

"'Mike Tomlin wouldn’t have gotten this opportunity without this rule,’" said [Art] Shell, the first modern black NFL head coach. "'He never would have sat down with Dan Rooney.’"132

Many believe that the Rooney Rule has been an unmitigated success. "The Rooney Rule has been one of the most important rules in professional sports in terms of racial hiring practices. . . . It’s definitely had the effect of going beyond the head coaching position."133

The Rooney Rule is not without its critics.134

131. Garber, Thanks to Rooney Rule, Doors Opened, supra note 118 (emphasis in original).
132. Id.
133. See Brown, supra note 117, at 3 (quoting Dr. Richard Lapchick, head of the sports business management program at Central Florida University).
134. See Nordlinger, supra note 28, at 1-4; see also Ward Connerly, Enough of this 'First' Stuff, Please!, TALKING JUSTICE, March 6, 2007, available at http://communities.justicetalking.org/blogs/day05/archive/2007/03/06/enough-of-the-first-stuff-please.aspx (last visited November 17, 2007). Connerly, famous for his nationwide crusade against affirmative action, had the following to say about the Rooney Rule:

[R]acial discrimination against black people had receded to a very low level by the year 2000. . . . There comes a time . . . when it is no longer meaningful or newsworthy to comment on the fact that someone is the “first black” or the “first female” or the first whatever to achieve a certain status in a nation that has become as pluralistic as American society. One would think that with all of the visible signs of racial and gender progress within the past two decades, our nation would be over this “first black” or “first female” thing. . . . A recent example of this “first” racial stuff can be found in the clamor about the two first black Head Coaches in the February 4, 2007 Super Bowl. The annoying discussion from the “diversity” industry focused on the fact that the . . . NFL has what is called the “Rooney Rule,” named after Pittsburg [sic] Steelers’ owner Art [sic] Rooney. . . . The Rooney Rule enables race advocates to assign credit to affirmative action for the fact that Tony Dingy [sic] of the Indianapolis Colts and Lovie Smith of the Chicago Bears became Head Coaches and eventually wound up as the “first black” Head Coaches in the Super Bowl. . . . Dingy [sic] was the prior Head Coach of the Tampa Bay Buccaneers. He gave Smith his first job as an assistant coach and half of Dingy’s [sic] Colts’ coaching staff consists of “minorities.” All of this is a function of the circumstances surrounding professional football as a business; it has little to do with affirmative action.

Some argue that the rule is subterfuge and that NFL club owners only comply to avoid a fine. Others argue that the Rooney Rule is nothing more than affirmative action that props up African American candidates that are less “qualified” than the white candidates. Still others argue that some owners,

executive director Gene Upshaw on Wednesday termed ‘ridiculous’ a plan submitted by civil rights activists that would reward or penalize franchises via draft picks for considering minority candidates.); Paul Zimmerman, Pride or Prejudice?, SPORTSILLUSTRATED.COM, March 27, 2003, available at http://sportsillustrated.cnn.com/inside_game/dr z/news/ 2003/03/27/drz_ insider/ (last visited November 17, 2007) (“So now we have the NFL, with its rather feeble attempt to answer the challenge by setting up a form chart. . . . The league addressed the form but not the substance. It set up a guideline that could be easily circumvented by a little deceit, and that’s what I find wrong with it.”).

135. See Jon Watje, Civil Rights Approach New Era in the Realm of Sports, THE TALON ONLINE (January 19, 2007) http://blogs.oc.edu/ee/index.php/?talon/cat/civil_rights_approach_new_era_in_theRealm_of_sports (last visited May 5, 2008) (“This highlights one criticism of the rule,” Anthony Prior wrote in his book, The ‘Slave Side’ of NFL Sundays. ‘The candidates who know they are not going to get a particular head coaching job are trotted out like show ponies simply to meet an arbitrary requirement.’”); see also Nordlinger, supra note 28, at 1-4 (“Now, this business of interviewing candidates of a certain color is a tricky one. Gene Upshaw, head of the Players Association, warned of this, way back. He said that, if you mandated something like the Rooney Rule, ‘it will lead to sham interviews and sham lists of coaches.’”); Collins, supra note 88, at 901-902. Collins notes:

But if an accomplished coach like Mariucci is under consideration, the Rule merely results in an elaborate public charade, in which a team must contact candidates it has no interest in hiring. Likewise, the Rule asks minority “candidates” to play along by agreeing to be interviewed for an opening that they know does not really exist. In this sense, the Rooney Rule may result in a series of sham interviews scheduled solely to satisfy its requirements.

Id.; Pasquarelli, supra note 134 (“I think if you have a mandated, diverse list of candidates, all you invite are sham interviews and sham hiring lists.”) (quoting Union Chief Gene Upshaw).

136. See Hawkins, supra note 134, at 1. Hawkins writes:

Twenty-seven months ago, the National Football League adopted the Rooney Rule, a league-wide statute that essentially penalizes teams that fail to interview minority candidates for head coaching jobs. As a result, a record six African Americans will start the next season as head coaches of pro football teams. While that statistic should be applauded, we also have to question whether these coaches were hired because they represented the best coaching talent or because they brought diversity.

Id.; see also, Connerly, supra note 134 (“Implemented in 2002, the Rooney Rule is regarded by many race advocates as a form of ‘affirmative action’ to achieve racial ‘parity’ among NFL Head Coaches, of which there are 32. The reasoning goes that team owners are either too racist to appoint a minority or too blind to know that sufficient talent lurks among assistant coaches to even interview them without being required to do so.”); Collins, supra note 88, at 911 (“A core argument against affirmative action policies like the Rooney Rule is that classification and preferential treatment solely on the basis of race inherently leads to stigmatization and racial hostility by promoting notions of racial inferiority and stimulating latent race consciousness.”); Bram A. Maravent, Is the Rooney Rule Affirmative Action? Analyzing the NFL’s Mandate to its Clubs Regarding Coaching and Front Offices, 13 SPORTS LAW. J. 233, 248 (2006). Maravent observes that:
who have a specific white candidate in mind for head coach, are engaging in tokenism and sham interviews by interviewing minority candidates solely to comply with a rule, thereby avoiding a fine and disrespecting the minority candidate who has no real chance at securing the head coaching position. Critics go so far as to refer to minority candidates that are being interviewed merely to comply with the rule as “show ponies” that are being “trotted out” to comply with an arbitrary rule.3

IV. AFFIRMATIVE ACTION?

Of course, the critics of the Rooney Rule entirely miss the point. Never intended to be a quota or even traditional affirmative action, the Rooney Rule is all about exposure. Cochran and Mehri intended no more or no less than for NFL owners to consider a “diverse slate of head coaching candidates” whenever an open head coaching position surfaced. The Rooney Rule does not require an owner to hire a minority—ever. The Rooney Rule does require NFL owners to interact with and meaningfully interview minority candidates. In fact, Jerry Jones touched off a firestorm when he attempted to comply with the Rooney Rule by conducting a 30 minute telephone interview with Dennis Green prior to hiring Bill Parcells as his Dallas Cowboys head coach several years ago. Still, the bottom line imperative of the Rooney Rule is that NFL

When the Miami Dolphins wanted to hire [Nick] Saban as its head coach, it is impossible for anyone, other than those on the inside, to know what team officials were thinking. It is possible, as some argue, that the team just wanted to interview any minority to satisfy the Rooney Rule. Others even suggest that some within the NFL hierarchy urged Art Shell, an African-American candidate, to ignore the pleadings of groups like the Fritz Pollard Alliance and not participate in such a dog and pony show. The rule does not force a team to hire one minority head coach, or interview ten minority coaches; the rule requires one interview.

Id. 137. See, supra notes 132-134 and accompanying text.

138. See Watje, supra note 135, at 1.


140. See Maravent, supra note 136 (discussing Jerry Jones interview with Dennis Green over the telephone as attempting to satisfy his Rooney Rule obligation prior to hiring Bill Parcells). This attempt to comply with the Rooney Rule led to the NFL clarifying the policy that
owners become exposed to and familiar with the viable minority candidates for head coaching positions.\(^{141}\)

Those critics that claim that pro forma interviews by owners with majority head coaching candidates in mind (i.e., Steve Mariucci in Detroit and Bill Parcells in Dallas) badly miss the point of the Rooney Rule. Occasionally, a minority candidate will eschew an interview opportunity for a head coaching position that seems predetermined to go to a majority candidate. The decision to refuse an interview on this basis is short sighted as well. The Rooney Rule is about exposure. The more an NFL owner knows about a candidate, majority or minority, the more likely (or unlikely) it is that that candidate will be hired by that owner in the future. The hiring bias that existed (and still exists) in the NFL is based primarily on lack of exposure. No interview, no matter how unlikely it will end in a job offer, should be considered "sham" if a minority candidate is being exposed to an NFL owner and that owner is becoming familiar with that minority candidate. To wit, the lack of familiarity that the Rooney brain trust had with Mike Tomlin prior to interviewing him and complying with the Rooney Rule.\(^{142}\) Tomlin could well have listened to pundits and determined that the job belonged to Wisenhunt or Grimm and turned the interview down. The Rooney's could have married themselves to the idea that Wisenhunt or Grimm would be their next coach bar none. Cowher himself recommended NFL retread white male coach Chan Gailey.\(^{143}\) Instead, Tomlin took the interview, the Rooney's conducted the interview, and Tomlin seized the job with his passion, preparation and foresight. This was a textbook example of exposure leading to Rooney Rule success.

Further, the shelf life of an average NFL head coach is only four or five years. Steve Mariucci only lasted two plus seasons in Detroit.\(^{144}\) A minority


\(^{142}\) See supra notes 124-131 (and accompanying text).

\(^{143}\) See Steelers Coaches Since 1969: Noll, Cowher and, now, Mike Tomlin, supra note 114, at 1 ("Georgia Tech coach Chan Gailey, recommended by Cowher, also didn't get a second interview.").

candidate that shunned the interview with Detroit when it was clear Mariucci had the job, missed an opportunity to impress general manager Matt Millen and the William Clay Ford family ownership group for the opening that unexpectedly occurred just two and a half seasons later (the job ultimately went to Rod Marinelli—a former Tony Dungy white assistant coach in Tampa Bay). No interview should be considered "sham" when genuine interaction is occurring between white male owners and minority head coaching candidates.

Again, the Rooney Rule does not mandate any hiring action on the part of the owners of the privately owned NFL clubs. The Rooney Rule does not even assign a "plus factor" to the minority candidates that are interviewed by NFL clubs. The Rooney Rule simply requires that one minority candidate receive an interview for every head coach opening that becomes available in the NFL. The Rooney Rule focuses on best practices, an inclusive process ensuring fairer competition and removing barriers such that the best and most uniquely qualified rise to the top. The Rooney Rule is about inclusion, exposure and leveling the playing field for minority head coaching candidates in the NFL. The Rooney Rule is not about timetables, quotas, goals or promoting the "underqualified."

Significantly, because a collective of thirty two private owners of professional football franchises voted together to adopt such a diversity plan, traditional opponents of affirmative action cannot argue a discriminatory state action in opposing such a rule. The only colorable opposition to the Rooney Rule would have to be in the form of a "reverse discrimination" claim under Title VII of the Civil Rights Act of 1964. The chance of this type of claim ever being successful, under the current employment discrimination laws and cases, is remote at best.

record, Mariucci was fired... after he was unable to turn around a franchise with one playoff victory since 1957.

145. Classic affirmative action in the context of public education allows the Constitutional assignment of a "plus factor" to minority candidates that apply for admission into Universities or graduate schools. See andré douglas pond cummings, Grutter v. Bollinger, Clarence Thomas, Affirmative Action and the Treachery of Originalism: The Sun Don't Shine Here In This Part of Town, 21 HARV. BLACKLETTER L.J. 1, 1-88 (2005) (reviewing the holding in Grutter v. Bollinger affirming the 25 year old Bakke rule allowing positive consideration of race as a plus factor in making holistic admissions decisions).

146. See Maravent, supra note 136, at 263 (quoting Cyrus Mehri).

147. See cummings, supra note 145 (describing the role of a state action in a typical constitutional challenge to an affirmative action policy).

148. See Collins, supra note 88 (detailing the extreme unlikelihood that a Title VII reverse discrimination claim would have of being successful in the Rooney Rule context); see also Maravent, supra note 136 (describing that the Rooney Rule as implemented safely insulates
The Rooney Rule was instituted at the insistence of two brilliant lawyers and one equally talented Commissioner. The brainchild of Cochran, Mehri and Tagliabue has proved its worth and found a place in the NFL collective conscience.

IV. PUSHING WEIGHT

Johnnie Cochran's intimate role in implementing the NFL's Rooney Rule showcases the impact a powerful lawyer can have on society. When Cochran attained the pinnacle of his power and influence, rather than rest on his considerable laurels, Cochran set about to right the wrongs he perceived to exist in his community and country. Cochran chose to wield his weight and authority to effectuate positive social change. The implementation of the Rooney Rule is just a singular example of the many pursuits that Cochran engaged post his stunning O.J. Simpson victory. While some may quibble as to the importance of forcing social change in a professional sports league, none can plausibly argue with the social importance that this change effectuates. On February 4, 2007, grown black men wept and young minority children thrilled as two African American head coaches shook the NFL and its club owners from any serious employment discrimination challenge. Examination of Title VII claims is beyond the scope of this article.

149. See Who2 Biography, Johnnie Cochran, supra note 38. Cochran continued his fight against governmental abuse of African Americans taking on the case of four men shot by the New Jersey police in what Cochran termed a "racial profiling" traffic stop. In 2001, Cochran established the Cochran Law Firm in Memphis Tennessee and later opened several additional offices in thirteen States across the United States. The aim of the Cochran Law Firm was to provide legal assistance to those who would otherwise not receive "proper" and fair representation. Cochran turned his considerable attention to corporate wrongdoing and sued, with Cyrus Mehri, Coca-Cola for employment race discrimination and Johnson & Johnson for race discrimination.);. See id. Following the O.J. Simpson trial, Cochran became a celebrity lawyer across the United States representing the likes of Sean "P-Diddy" Combs and Rosa Parks, amongst many others. See id.

150. Id. at 1. ("Cochran's dream [to initiate and promote healing between the races] was not yet realized when he passed away as the result of an inoperable brain tumor . . . on March 29, 2005.").


152. See id.
hands to begin Super Bowl XLI, arguably the most important sports spectacle in the world. That handshake sent an unmistakable message to old and young alike: to the young minority, the simple message was that "yes" you can become anything in the world that you wish, including the head coach of a Super Bowl football team. To the old, the simple message was that however slow, purposeful progress can indeed be made when dedicated individuals pursue legitimate ends with power and vigor.

One notable absentee at Super Bowl XLI was the irrepressible Johnnie Cochran. Having passed before he could fully appreciate the fruits of his and Mehri’s efforts, Cochran deserved to bask in the light of that moment. Inspired by the life of Supreme Court Justice Thurgood Marshall, he who proved the impact a single dedicated man can have on the world around him, Cochran set about to become a social engineer. It was after all, Thurgood Marshall’s mentor and Howard Law School Dean Charles Hamilton Houston that boldly prepared Marshall for his life of astonishing pioneering with the pronouncement that “a lawyer’s either a social engineer or he’s a parasite on society.”

Johnnie L. Cochran, Jr. chose the road of the “social engineer.”

153. See Mark Maske, Super Bowl’s Black Coaches Indicative of ‘Great Strides,’ WASHINGTON POST (January 30, 2007), available at http://www.washingtonpost.com/wp-dyn/content/article/2007/01/29/AR2007012901409.html (last visited May 6, 2008) (“‘It couldn’t have happened to two finer people and two finer coaches,’ Mehri said [Dungy and Smith] . . . . ‘We came into this to change America’s game. . . . Sunday gives us a chance to have America’s game change America’s consciousness.’”).

154. The power of this message cannot be overstated. Certainly in the 21st century young minority children can clearly see a pathway to “play” in the U.S. professional sports leagues. In fact, my experience working as a “Big Brother” in Chicago indicates, most youth aspire to become NFL or NBA athletes. See cummings, supra note 145, at 1-7 (describing conversations with young minority youth on Chicago’s south side detailing the intentions of each to be the next Allen Iverson, DMX or Donovan McNabb). Now, with increasing numbers of head coaches in the NFL, and visibly successful, young people can now begin to aspire to be coaches and owners, not merely players.

155. See, supra note 55 and accompanying text.

156. See id.