Texas Entertainment and Sports Law Journal

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Pro Football
Major League Baseball
Olympic Medalist

JIM THORPE

JONATHAN CHEECHOO

National Hockey League

PGA

NOTAH BEGAY

Pro Golfer

NATIVE AMERICAN INDIAN ATHELETES

IN THIS ISSUE:

CHAIR'S REPORT

Thank you for being a member of the **TESLAW, the** State Bar of Texas Entertainment & Sports Law Section!

The Section Council has been working to increase the benefits you receive in exchange for your membership dues. As a member of **TESLAW**, you are currently entitled to:

1) receive the acclaimed *Texas Entertainment and Sports Law Journal*;
2) join the **TESLAW** listserve (*eandslawsection@yahoogroups.com*);
3) earn free CLE credits;
4) receive a discount on the cost of the Annual Entertainment Law Institute;
5) become a friend of **TESLAW** on MySpace (*http://www.myspace.com/teslaw*) and,
5) become part of the growing Texas-based entertainment and sports lawyer community.

Want more? Let your voice be heard. What would you like to see the section provide its members? E-mail me at *austinentertainmentattorney@gmail.com* with your thoughts or post a message to the **TESLAW** listserve.

TESLAW ON THE WEB

www.teslaw.org - The first place for TESLAW members and out of state attorneys to visit to retrieve Texas, national, and international entertainment and sports lawyer resources.

www.myspace.com/teslaw - A place to communicate, socialize and for persons to find section members who are entertainment and sports lawyers.

eandslawsection@yahoogroups.com – The TESLAW Yahoo Group Listserve and the primary source of communication among the TESLAW members and between the members and the TESLAW leadership.

What's Happened?

TESLAW held a Council Meeting in October during the 16th Annual Entertainment Law Institute (ELI).

The 16th Annual ELI was first class and provided critical legal insight and analysis on a number of topics, including the protection and distribution of digital recordings; copyright and estate issues; copyright infringement claims; sampling; TV and stadium sponsorships; and, film distribution. In addition, TESLAW presented Los Angeles attorney Jay Cooper with the Entertainment and Sports Law Section 2006 Texas Star Award. Jay expressed his gratitude to the Section and commented on his career, the state of the industry, and what he believed our practices will face in the future.

Mark you calendar to attend the 17th Annual Entertainment Law Institute to be held in Austin on October 11-12, 2007.

Our community lost a valuable person in January with the passing of Austin attorney Cindi Lazzari. As many of you know, Cindi was a former Council member and long-time entertainment attorney. She was instrumental in passing legislation protecting artist's rights in a consignment distributor's bankruptcy proceedings. The Section Council felt compelled to honor Cindi's efforts by establishing the Cindi Lazarri Artist Advocate's Award. The Award is expected to be presented annually to a person who has made outstanding efforts on behalf of artist rights. The specific details of the application and qualification process are currently being discussed.

TESLAW also held a Council meeting on March 14, 2007 in Austin during SXSW. The Council discussed the Cindi Lazarri Artist Advocate Award and established a committee to facilitate its implementation. Nominations for the 2007-2008 officer and council terms were discussed and a committee was established to solicit and slate nominations. If interested, please contact a Section Council member.

What's next?

TESLAW will hold its regular Council meeting and Annual Section meeting at the State Bar Annual Meeting in San Antonio on Friday, June 22, 2007. The Section will elect new officers to serve during the 2007-2008 fiscal year.

Only a few "Rock Star -Attorney" shirts remain! So if you are a Rock Star Attorney, or if you just slept in a Holiday Inn Express last night, then you need a shirt. Contact Craig Barker, Chair-Elect, if you want buy one.

We anticipate presenting another Sports CLE Teleseminar soon, so let us know if there is an interest amongst the membership and what topics you may want presented.

"Do you think that when they asked George Washington for ID that he just whipped out a quarter?"

-- Steven Wright

It was a pleasure serving as your chairman. Thank you!

Kenneth W. Pajak, Chair

Mark Your Calendar!

17th Annual Entertainment Law Institute will be held Thursday and Friday, October 11 and 12, 2007, in Austin at the Hyatt Regency on Town Lake.

You Wouldn't Want to Miss it!!

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Check out the Section's Website!

Check it out at www.teslaw.org. The password for members is "*galeria3*". Should you have any comments or suggestions to improve the site please feel free to e-mail Yocel at Yocelaw@aol.com or the editor at srjaimelaw@pdq.net …

FOR THE LEGAL RECORD ...

The fabric of sports law …

Charges were filed against Michael Houston, a prospective running back for the University of Washington and he was charged with taking a motor vehicle without permission, namely, stealing a taxicab. Houston, a former University of Texas player, was initially indefinitely suspended after being arrested. UW coach Tyrone Willingham tried to accommodate Houston by waiting to see how the charges would be handled by the King County prosecutors. After being charged with a second degree Class C felony and also being accused of driving while intoxicated, Houston was asked to leave the team. Houston faces up to two months in jail if convicted …

A temporary restraining order saved prep superstar O. J. Mayo. Cabell County Circuit Judge Dan O'Hanlon was faced with allowing the nation's best guard prospect of sitting on the sidelines or playing in a high school basketball game against Artesia of Lakewood, Calif. Mayo is considered to be the best guard prospect since LeBron James. After receiving 2 technical fouls and an ejection for allegedly bumping a referee, the West Virginia Secondary Schools Activities Commission suspended Mayo and 5 teammates from playing against Artesia, ranked No. 11 in the USA Today Super 25 boys basketball rankings. Huntington High was ranked No. 2 in the USA poll. Mayo and his team were also scheduled to play highly regarded Scott County high of Lexington, Kentucky, and appeared to be on their way to the mythical national championship. William Bands, an attorney from Charleston, West Virginia, was quoted as saying "This official wanted to be the star of the show. … That resulted in a situation that could have stopped Huntington High School's, and the state of West Virginia's, once-in-a-lifetime honor, to win a mythical national championship." Mayo was called for his 1st technical foul for taunting. A video, put on the website of WSAZ in West Virginia, appears to show Mayo saying and doing nothing when referee Mike Lzao called the second technical foul on Mayo. "We feel O. J. certainly didn't do anything intentional," stated his attorney, who also is an assistant coach at Huntington Woelfel High School. "If there was contact, it was inadvertent or may have been accidentally initiated by the referee himself." Mayo is the prime recruit for the University of Southern California for the 2008 season, because of the TRO was allowed to play against both nationally ranked teams …

Agents and or Lawyers in the practice of Sports Law:

Contract law at its finest:

Mike Shula gets dumped, the University of Alabama pays him $4 million to leave …

John L. Smith gets asked to leave, Michigan State pays him $3.05 million …

Dirk Koetter bids adieu, Arizona State pays him $2.85 million …

North Texas State bought out Darrell Dickey's contract for "only" $524,000.00 …

North Carolina gave John Bunting $856,000.00 to go away …

North Carolina gave Chuck Amato $555,000.00 to ease the pain of his dismissal …

Larry Coker got a bunch of money when he was let go by the University of Miami, but as a private school, nobody has to disclose how much they gave him to go away …

Did the agents/lawyers for the coaches negotiate great deals for their clients or did school administrators not read the contracts drafted by their lawyers and just see more favorable results with their new coaches? Could certainly fund a lot of scholarships, courses and professors with all that money paid to get out "unwanted" coaches contracts. …

Personal Injury: Notre Dame coach Charlie Weis' filed a medical malpractice lawsuit, claiming doctors Charles Ferguson and Richard Hodin "botched his care after gastric bypass surgery". The judge declared a mistrial when a juror collapsed during the trial and two of the defendant doctors rushed to aid the fallen juror. Weis' attorney conceded "it was with great reluctance that he asked for the mistrial." Boston Mass, Judge Charles Spurlock overruled the doctors' lawyers' objections …

Athletes committing crimes or criminals playing sports?:

NFL Commissioner Roger Goodell is cleaning up the league's image. Goodell suspended Tennessee Titan cornerback Adam "Pacman" Jones for the 2007-2008 season and Cincinnati wide receiver Chris Henry for the team's first 8 games. The suspensions are the Goodell's first efforts to make players accountable for their off-field legal problems. With more guaranteed money and more free agency, the NFL has instituted new policies which will make players aware that their off-field legal problems will not be ignored by the league.

Players on the radar:

- Minnesota Viking's Cedric Griffin, who was jailed for scuffling with bouncers after being kicked out of a nightclub. The Vikings cornerback was unhappy that his saggy pants failed to meet the nightclub's dress code, and was booked on a charge of misdemeanor disorderly conduct. The 2006 second-rounder could face a suspension if convicted of a crime, under the commissioner's new policies.
- Chicago defensive tackle Tank Johnson, was allowed to travel beyond the borders of Illinois and play in the Super Bowl by Lake County Judge Theodore Potkonjak overturned restrictions on Johnson's ability to travel following Johnson's arrest for violating his 2005 probation involving 6 weapons and 550 rounds of ammunition found at Johnson's home on 12/14.06. However, following Johnson's 4 month prison sentence on the probation, the commissioner may still have something to say to Tank …
- Johnathan Joseph, a cornerback of the Cincinnati Bengals, was arrested and charged with marijuana possession. Joseph became the ninth Bengal player arrested in the past 9 months.

The NFL Players Association has endorsed the Commissioner's efforts, which include making teams responsible for their player problems including the potential for teams to forfeit draft choices if they draft players whose off-field legal issues become post-draft problems. …

Characterized as a "disgraced" lawman, by his lawyers, former state trooper James Harney of New Jersey, pleaded guilty to conspiracy, promoting gambling and official misconduct. The guilty plea allowed Harney to avoid a 7 year prison term, and was accepted by prosecutors because Harney also agreed to assist in building a case against Phoenix Coyotes assistant coach Rick Tocchet, who allegedly ran an illegal gambling operation prior to his indefinite leave from the team …

Wofgang Schwarz, winner of an Olympic gold medal in figure skating 1968, confessed that he planned to ransom a Romanian businessman's daughter and was sentenced to 8 years in prison. Schwarz' plan called for payment of $4 million for the 18 year old. The 59 year old Austrian, admitted to the plot, and responded to the court at his sentencing "I cannot explain it." …

Israel was barred from hosting international soccer matches by the UEFA, governing body of European soccer. Ruling that all games set to be played in Israel would be played outside of Israel, the governing body cited the violence in the region in support.

Women fans acting for their favorite players:

An 81-year-old Texas Woman was indicted on extortion charges. She is alleged to have attempted to extort $2 million from Bart Starr, former Green Bay and Hall of fame quarterback. Ruby Y. Young, was charged with two extortion counts, alleging that she mailed letters from her Kerrville, Texas home with the intent to extort money under "a threat to injure the reputation" of the recipient. The Federal grand jury did not identify Starr, but after her arrest, Young told the federal court in Texas that she understood the charges and "it's not true." Prosecutors allege that the basis of Young's threats against Starr go back to a 1960 encounter. Starr in his complaint leading to the charges denies knowing the women …

She only wants a hug and an autograph from Houston Rockets' center You Ming. The Chinese woman registered the name of the basketball player as an Internet domain address. She claimed in the China Youth Daily newspaper that she was trying to "protect Yao, not harm him, from others trying to take advantage of his name. "I want to keep Yao's name from being misused just like everyone else," she was quoted as saying. "That's why I registered his name ahead of those who want to take advantage. The woman identified as "Jin" said that her price for releasing the name to Yao was "a hug and an autograph"…

The breath of sports law:

Michael Vick, quarterback for the Atlanta Falcons, was caught by security at Miami International Airport and his water bottle was seized. The water bottle contained a secret compartment which smelled of marijuana and contained "a small amount of dark particulate" which was later lab tested. Deisy Rodriquez, an assistant state attorney, dismissed the bottle as evidence following the tests and Vick was not charged. …

The 9th Circuit overruled 3 lower courts, and decided that more than 100 Major League Baseball players can have their names and positive drug tests used by federal authorities in ongoing investigations of steroid use. The San Francisco, California based court does not appear to concern San Francisco Giant star Barry Bonds or his lawyers. Bond's attorney Michael Rains stated, "If he had tested positive, boy that would have leaked out already. But they didn't bother to leak anything out because they knew it was negative." Rains was referring to the ongoing investigation of whether Barry Bonds committed perjury when he testified before a grand jury that he never knowingly used steroids …

The India chess federation handed down a 10-year ban for a competitor cheating at chess. Umakant Sharma was caught using a cell phone to win chess matches. Sharma was caught when tournament officials discovered that he had sewed a Bluetooth device into a cap that was worn over his ears during matches. The communication was made with an accomplice outside the chess site. The India chess federation secretary D. V. Sundar sated that "We have banned him for 10 years. We wanted to send a clear message to such people." Sharma had qualified for the national champions before he was discovered cheating …

The University of Alaska at Anchorage posted a job search for a hockey coach. The coach of the Seawolves, Dave Shyiak was a potential candidate. Shyiak was a Canadian working under a temporary permit when he was hired. He is applying for permanent residency. UAA must conduct a national search for a head coach as part of the green card application process. UAA is required to receive "permanent labor certification" from the U. S. Department of Labor before it will be permitted to hire a foreign worker seeking permanent residence. It must advertise for a new coach and must certify to the Labor Department that there are no qualified workers who are U. S. citizens and want the job. UAA could have a new coach if another applicant qualifies for the job. Shyiak lead the Seawolves to their first season above .500 since 1992-93 and was a candidate for the Western Collegiate Hockey Association coach of the year …

And finally, the new and improved Section web site is www.teslaw.org. …

Sylvester R. Jaime--Editor

THE DISAPPEARANCE OF THE GREAT AMERICAN INDIAN ATHLETE

BRAD M. GALLAGHER
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Mr. Callagher is currently serving as a law clerk to the Hon. Stuart Peim in the Superior Court of New Jersey. He graduated from Syracuse University College of Law in May 2006 and will be joining the firm of Landman, Corsi, Ballaine, & Ford, P.C. in September 2007. *Brad would like to offer a special thanks to Prof. Robert Porter, his parents and family, and Keather Papa. This article was first published in the ABA Entertainment and Sports Lawyer, Fall 2006, Vol. 24, No. 3.*

INTRODUCTION

What do ice hockey, the overhand swimming stroke, and basketball all have in common? Each has their roots in the American Indian culture. American Indians invented the roots of ten olympic sports and many non-olympic sports, such as lacrosse.[1] "While the rest of the 'civilized' world played war games [American Indians] were settling disputes playing team sports with long bats and lacrosse sticks."[2]

American Indians, such as Jim Thorpe and Billy Mills, have long been recognized as some of the greatest athletes of all time. Today, however, American Indians have virtually disappeared from the ranks of the athletes competing at the collegiate, olympic, and professional levels. Surely, American Indians still are playing sports.

The disappearance of the American Indian athlete has occurred because of poor education, bias and prejudice in sporting circles, poverty, and because of a general lack of opportunity, encouragement, and support from within their own culture and from the outside world. Until the American Indian can overcome these obstacles at the collegiate level, it is virtually impossible for them to succeed at the elite levels as professionals and olympians.

Part I will provide a brief history of American Indians in sports. Part II will look at the recruitment of athletes at the collegiate level and discuss why the recruitment of American Indians is virtually non-existent. Part III will discuss the problems American Indians face at the collegiate level and how these problems affect the number of American Indians that compete at the olympic and professional level. Part IV will look at efforts create more opportunities for American Indians at the elite levels of athletics.

I. HISTORY OF AMERICAN INDIANS IN SPORTS

American Indians have a rich tradition of being some of the most spectacular athletes ever seen. These athletes competed in a broad range of sports. However, the great American Indian athlete has vanished from the forefront of society and is now only ghost in the past.

The United States used sports as a way of assimilating American Indian children into mainstream culture.[3] To accomplish this, the United States used boarding schools located off reservations.[4] In the mid-1890s, the Carlisle Indian School began fielding football teams.[5] In 1899, the school hired Glenn S. "Pop" Warner.[6] Mr. Warner led the football team over the next fifteen years achieving tremendous success.[7] In 1911, Carlisle beat Harvard 18-15 on a 48-yard field goal by the greatest athlete of all-time, Jim Thorpe.[8] The following year they beat second-ranked Army 27-6.[9] Carlisle also competed successfully, in baseball and track.[10] Charles Albert "Chief" Bender, a future Hall of Fame pitcher, attended Carlisle. Louis Tewanima, who competed for the United States Olympic team in 1908 and 1912 and won a silver medal setting the world record for the 10,000 meter, also attended Carlisle.[11] Carlisle closed in 1918.[12]

In 1897, Haskell Institute in Lawrence, Kansas began playing football.[13] Haskell was the Carlisle west of the Mississippi. Haskell would play schools such as, Texas, Texas A&M, and Nebraska.[14] Haskell became financially successful enough to build a 10,000-seat stadium on its campus by 1926.[15] During the Hoover Administration, a shift in policy ended the success of Haskell's football prowess.[16] The last elite athlete Haskell produced was Billy Mills, who in 1964 became the only American ever to win a gold medal in the 10,000 meters at the olympics.[17] Mills broke the world record held for fifty two years by Louis Tewanima.[18]

Boxing was another sport that was popular at boarding schools. Many boxers went on to compete nationally in Golden Gloves and Amateur Athletic Union competitions.[19] However, the Bureau of Indian Affairs was not a fan and banned boxing in 1948.[20]

James Madison Toy was the first American Indian to play baseball in 1887, but it was not discovered until the 1960's.[21] Louis Sokalexis broke the color barrier in baseball in 1897 as the first openly American Indian athlete.[22] New York Giants manager John McGraw described Sokalexis as the "greatest natural talent he had ever encountered."[23] Unfortunately, alcohol abuse cut Sokalexis' career short.[24] Major League Baseball claims the Cleveland Indians are named after Sokalexis, but it is unclear if this is actually true.[25]

It is hard to find any modern great American Indian athlete. One of the most prominent American Indians in professional sports is Notah Begay III, who plays on the PGA tour. Begay, however, has not won an event since 2000.[26] There are a handful of American Indians in the National Hockey League, such as Jonathan Cheechoo, who is a rising star.[27] From 1972 until 1996, no American Indians competed in the Olympic Games.[28] Out of the dozen or so that have ever competed, most came early in the twentieth century.[29]

II. COLLEGE RECRUITMENT OF AMERICAN INDIAN ATHLETES

It seems as though college coaches have always been reluctant to recruit American Indian athletes. Reluctant meaning colleges pretty much ignored. This is reflected in the statistics provided by the National Collegiate Athletic Association (NCAA).

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In 1993, there were 87,739 Division I and II athletes.[30] Three hundred fifteen (less than 0.4%) of these athletes were American Indians.[31] Two years later, of the Division I athletes, 38,996, only one hundred seventeen were American Indians.[32] This is an even lower percentage than in 1993. Female American Indian athletes represent equally low number of athletes as their male counterparts.[33] Over the next several years, the amount of American Indian athletes remained steady at 0.3%.[34] In 2004, there were approximately 113,000 Division I, II, and III athletes and only five hundred eighty one where American Indian.[35] While the number of student-athletes is increasing, the representation of American Indians within that population is staying the same, though. This is unfortunate because American Indians account for 1.5% of the total population in the United States.[36]

The biggest revenue producing sports in college athletes are by far football and men's basketball.[37] An athlete in these sports who excels that can continue on to the professional level has the opportunity to make millions or even hundreds of millions of dollars.[38] In 1995, only five American Indians were given scholarships to play men's basketball, representing barely 0.1% of the athletes.[39] The same year, there were only forty-five American Indians on a football scholarship of the 14,540 athletes.[40] These numbers have not increased through 2004.[41] In fact, out of the sixty-five teams in the NCAA Men's College Basketball tournament in March 2006, there was only one American Indian, who played for Montana, out of more than 700 athletes.[42] Furthermore, even in sports that have great tradition among American Indian culture and for which professional leagues exist, such as lacrosse, under-representation occurs.[43]

III. OBSTACLES FACED BY AMERICAN INDIAN ATHLETES AT THE COLLEGIATE LEVEL

It is obvious that American Indians are under-represented at the collegiate level in athletics. The question remains, why is this happening? Are colleges simply not recruiting American Indian athletes or are American Indian athletes choosing not to participate in college athletics? Either way, the under-representation of American Indians at the collegiate level directly results in under-representation at the professional and Olympic level. It is common knowledge that collegiate sports work as "feeders" to the professional and Olympic level. There are few exceptions. It is a natural progression.

The American Indian athlete is under-represented in collegiate athletics for a number of reasons. Section A will discuss the effect of poverty on American Indian athletes. Section B will provide an overview of American Indian education in the United States and its effect. Section C will discuss bias and prejudice in sporting circles. Section D will discuss lack of opportunity, encouragement, and support that is received by American Indian athletes. Overcoming these obstacles is the only way more American Indian athletes will succeed at the collegiate level and beyond.

A. POVERTY

American Indians are the poorest segment of society in the United States.[44] The poverty rate for American Indian families with children under age eighteen is 26.9%, which is almost double the national average.[45] Of more concern is that 43% of American Indian children under five years old live in poverty.[46]

While it is true that some tribes are achieving great economic success, most are not.[47] The average income of American Indians is well below the national average.[48] The unemployment rate for American Indians in mid-2004 was 46%.[49] The unemployment rate for American Indians historically has been at least double the national average.[50]

Poverty is the most serious problem American Indians must overcome to earn a college degree.[51] High unemployment rates on reservations make going to college even more difficult for many American Indians to justify.[52] For many, the lack of earning potential after earning a college degree does not justify going to college, in the first instance.[53] Without American Indians reaching levels of economic success more on par with the rest of the nation, the obstacle of poverty alone will be too great for many American Indians to even reach the collegiate level, whether they are an athlete or not. Poverty is intertwined with the next section on education. But for poverty, better educational opportunities would exist for American Indians.

B. EDUCATION

The United States has taken several different approaches to the education of American Indians. None of these approaches has provided an adequate education system that allows American Indians to succeed. The primary obstacle faced by American Indians has always been inadequate education. Today, this is still the main obstacle that must be overcome by American Indians in general and is true for American Indian athletes as well. Without the proper education, American Indian athletes will not be able to succeed at the collegiate level because they will not be able to complete the educational requirements. This problem begins in the elementary schools and high schools that are teaching American Indian youth.

The United States policy of education from 1776 through 1926 was a policy of "assimilation".[54] From 1778 through 1871, the United States entered over 370 treaties with American Indians.[55] Under these treaties, the federal government would provide, inter alia, education to American Indians.[56] The federal government created non-reservation boarding schools as a way to civilize young American Indians to accept white culture and beliefs.[57] Carlisle Indian School and the Haskell Institute were among these schools.[58] Carlisle was the most famous of the assimilation schools.[59] The creation of the football team at Carlisle was for the specific purpose of teaching American Indian youth the value of winning.[60] Many parents and students gained distrust for the non-reservation schools because of this policy.[61] This is because the goal of these schools was never education.[62]

In 1926, the government moved away from "assimilation" as a national policy after the release of the Merriam Report, which detailed the shortcomings and problems of American Indian education.[63] After the issuance of the Report, Congress acted passed several statutes.[64] These statutes would fail to provide a better education to American Indians due to a lack of funding, which was little, if any.[65]

During the 1940s and 1950s, the federal government passed the burden of American Indian education onto the individual states. The goal was again assimilation, but in a different form.[66] The government moved to terminate tribal recognition and place

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American Indian youth into public schools.[67] Again, education was not the focus.

By 1969, the federal government again changed its position. That year a report titled the "Indian Education: A National Tragedy, A National Challenge" and commonly known as the "Kennedy Report" was published. This report detailed how "assimilation" was the wrong approach and how it "had disastrous effects on the education of Indian children."[68] The national policy now became "self-determination."[69] Education was left to American Indians themselves.[70]

The United States still oversees tribal education even though it has a policy of "self-determination"[71] "Unlike public schools, Indian schools and Indian programs across the nation are totally reliant on the level of federal funding received to ensure they meet even minimal standards."[72] The federal government feels it has a moral obligation to American Indians for the education of American Indian youth.[73] The Bureau of Indian Affairs (BIA) provides grants to 108 tribal schools that are operated by tribes or tribal organizations.[74] The remaining schools are operated directly by the BIA.[75]

The government's moral obligation has not lead to a better education for American Indian students. Today, teachers continue to be vastly underpaid.[76] Physical facilities are in shambles.[77] There is no state assistance.[78]

The graduation rate for American Indian students is 54%.[79] This is extremely low, especially when compared to the national graduation rate for public high school students, which is 70%.[80] To make the matter worse, only 14% of American Indians are college ready.[81] Furthermore, absenteeism is highest among American Indians.[82] This is a very disturbing. The prospects for American Indian youth do not appear to be getting any better. Federal funding is still lacking and does not appear to be coming any time soon.[83] A common feeling among students is that they are not prepared for college.[84] They never feel as if they are ready for the next step.[85] The U.S. Civil Rights Commission calls the state of American Indian education in the United States a violation of civil rights.[86]

It is obvious American Indians are facing a far worse education system than any other minority group within the United States. The lack of a proper foundation to build on only exasperates every other obstacle faced by Native Americans. The focus of this Note is athletes. However, the education provided to American Indians in general is lacking. This foundation must be laid before the American Indian athlete will be able to succeed at the collegiate level.

C. BIAS & PREJUDICE IN SPORTING CIRCLES

> "When you're from a reservation, you're being judged before anyone meets you. The recruiters see us from a Hollywood stereotype of the drunken Indian. They think we're lazy, not worth the scholarship."
>
> - Kyle Goklish

There is no lack of success for American Indians in high school when it comes to athletics. State champion basketball and cross-country teams are found at many reservation-based high schools.[88] However, few of these athletes ever attend college.[89]

1. BY FANS

The cause of this problem is the outright hatred and prejudice of American Indians in the culture of the United States. American Indians that compete in athletic events off the reservation are often targets of overt racism by fans.[90] This is most often observed in tensions between American Indians who live on the reservation and the white communities adjacent to the reservations.[91] The athletes that compete in events off the reservation are often targets of "derogatory caricatures and gestures, such as tomahawk chops, war whoops, and taunts of 'dog eaters, 'squaw,' and 'dirty old Indians.'"[92] American Indian athletes have been the targets of overt racism since they first stepped on the field.[93]

2. BY PLAYERS

The problem is not only the fans. It is fellow players too. One female basketball player told ESPN with a "straight face" "she never liked playing against Native American schools because the facilities weren't nice and the Native Americans smell funny."[94] She would quickly add that her teammates were not like this.[95]

If this player was willing to say this on camera, imagine what others say when the "world-wide leader in sports"[96] is not filming them. Players that think like this probably are not very welcoming to American Indians.

3. BY COACHES

The biggest problem lies not with fans or players, but with coaches. Although the overt comments to the media, such as those made in the 1950s and 1960s by Clemson coach Press Maravich,[97] are harder to find and more cleverly disguised, they still exist. Vernon Bellecourt, president of the National Coalition on Racism in Sports and Media, argues, "There's still a lot of institutional racism out there. It's a condition that's ingrained into coaches and athletic directors. They don't even know they're perpetuating it."[98]

Chad Lavin, the women's basketball coach at the University of South Dakota, believes the low numbers of American Indians in college athletics is not indicative of anything.[99] Mr. Lavin claims his program simply "tries to find good student-athletes to fit our program, no matter what their nationality is or where they live."[100] Other coaches are less evasive about the current situation. The most common reason for not recruiting American Indian athletes given by college coaches is they are "high risk."[101] Coaches will say American Indian athletes "lack discipline and desire."[102] Many coaches rely on stereotypes to bolster their beliefs that American Indian athletes are "high risk."[103] Coaches will avoid the American Indian athlete and recruit a similar type player, so they will not have to "worry about all that other stuff."[104] The "other stuff" these coaches are concerned with are common stereotypes of American Indians.[105]

Many college coaches believe American Indian athletes will return to the reservation because they will not be able "stick it out" and adjust to life off the reservation and therefore it is not worthwhile to offer a scholarship.[106] Mick Durham, former basketball head coach at Montana State[107] a Division I institution, said, "It seems like the reservation is their comfort zone more than it would be for an inner-city kid. To me, I just think they get their government checks, and they stay. I don't know. I guess it's the way they're raised."[108]

Some college coaches believe American Indian athletes cannot resist alcohol.[109] On a recruiting trip to the University of Minnesota, Russell Archambault, remembers one of the coaches telling his best friend to not "take him out too many places; because you know how Indians are, they like to drink."[110] Mr. Archambault, who ended up

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playing at Minnesota and was a member of the 1997 Final Four team, did not even go to high school on a reservation.[111] Kyle Goklish a five-sport star with an A average from a reservation based high school heard much of the same as did Mr. Archambault.[112]

Rusty Gillette, men's basketball coach at United Tribes Education and Technical School, believes "there's room to be the coach and have rules, but there's room to be supportive, too."[113] However, many coaches do not want to deal with the cultural differences. Laura Merritt, head coach at Huron University, says, "Coaches don't feel comfortable with the culture. They feel more comfortable with an inner-city player than one off a reservation."[114] She says the "bigger schools" see the American Indian athlete as "too much work."[115] Mr. Durham takes an even more hardened stance. Mr. Durham asks,

> "Have you ever been to a reservation? There's hardly any green grass. They park right in front of their front door. That's always amazed me. There's no self-pride in having a nice house and taking care of it. They don't care if they have five cars broken down, sitting in the yard."[116]

College coaches are obviously prejudicing American Indians unfairly. Comments such as those by Mr. Durham are very harmful in trying to bring about an end to the stereotypes and bias that exist. If the coach believes the player is not going to succeed before ever setting foot on campus, there is a very real likelihood the student-athlete will not be welcomed to the team in the first instance. It is hard to succeed when the deck is stacked against you.

Coaches are the ones that have the ability to change the situation. They can force other players to play with someone, they can ask fans to stop chanting and be respectful. There are numerous incidents of coaches doing such things. However, it does not appear that coaches are ready to take a stand for American Indian athletes.

D. LACK OF OPPORTUNITY, ENCOURAGEMENT, & SUPPORT

If the American Indian athlete can overcome extreme poverty, poor education, and prejudice by non-Indians, they still face additional obstacles, such as tribal sabotage, lack of access to facilities and coaching, and the plain fact that recruiter's do not come to reservations. Other minority athletes do not face these types of obstacles. They are unique to American Indian athletes. For this reason, these obstacles are discussed separately.

1. TRIBAL SABOTAGE & PULL BACK TO THE RESERVATION

> "Instead of helping someone get out and make a name for themselves, we just pull them back in."
>
> - Rich Sanchez[117]

When most of us think of an apple, we think of a fruit that has red skin on the outside and white on the inside. In American Indian culture, tribal members use this term as a derogatory name for a young American Indian, especially athletes, who "sells out" to mainstream America or is seen as being "too ambitious."[118] The religion and culture of many tribes teach unity and collectiveness rather than the egotism exhibited by many others minorities stricken with similar obstacles of poverty and poor education use to reach elite levels of athletics.[119] Many American Indian athletes that exhibit this drive and ego that leads many athletes to levels of superstardom are therefore seen as rejecting their culture and religion.

The reservation is often described as a crab pot, meaning, "each and every time a crab attempted to crawl from the pot, a claw from one of his own would reach up and pull him back in."[120] Many athletes who try to leave the reservation are viewed as traitors or are shunned.[121]

American Indians say they feel a pull or even a subtle push back to the reservation, especially those going off to college.[122] Many American Indians who grew up on reservations experience a culture shock when they get to college.[123] There is a sense of security within on the reservation.[124] The lack of other American Indians at college is one cause of this shock.[125] Many athletes have family issues at home that pull them back due to the reservation for various reasons, many of which are caused by poverty and poor education. These athletes return home because of guilt.[126] Other American Indian athletes never leave the reservation in the first place. Some players with good grades have intentionally done poorly on college admission tests, hoping to frustrate any hope of a scholarship.[127] Many of the American Indians who have succeeded in collegiate sports have gone to public schools, such as Syracuse University lacrosse standout Brett Bucktooth.[128] They are therefore accustomed to a non-Indian setting and forming relationships outside the tribe.[129]

The reluctance to leave the tribe or eagerness to return is often a common reason given by college coaches as to why they are not recruiting American Indian athletes.[130] Coaches claim the main difference between the American Indian athlete and the black athlete is the American Indian athlete wants to return home to the reservation whereas the Black athlete is not looking to return to the inner-city.[131]

Many coaches also claim parents put limitations on American Indian athletes in order to keep them from succeeding and leaving the tribe behind.[132] Mike Daney, head coach of cross-country at Southwestern Indian Polytechnic Institute, has said parents have told him they would prefer their children to stay on the reservation.[133] "The extended family doesn't want to lose one of its members. Maybe underneath there's that fear that they might like their new environment and decide not to return," says Daney.[134] This reasoning by coaches although valid in some cases is likely true of all athletes in general.

Some tribal members attempt to sabotage American Indian athletes who are on their way to becoming stars at the next level. Community members have attempted to turn in players for drinking and smoking marijuana to get them thrown off the team.[135] Players have even received death threats.[136] Religion is heavily intertwined with sports in American Indian culture. This has caused some players to believe community members have supernatural ability to harm them.[137] Some players have fallen ill on the court or seen shadowy figures, claim coaches and players.[138] Certain teams have hired spiritual bodyguards to usher players from the parking lot to the gym, so that no one touches or breathes on the player.[139]

2. LACK OF ROLE MODELS

> "When there are very few crossing that bridge (to attend college), young athletes can't see the road"
>
> – Mike Daney[140]

Unemployment, poverty, alcoholism, physical abuse, single-parent households, teenage pregnancy, low life expectancy,

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suicide, illiteracy are all things that American Indians face at a rate much higher than most Americans.[141] Young American Indians, therefore, have very few people to look up too.[142] There have been even fewer athletes to emerge as role models to American Indian youth.[143] American Indian children need someone with whom they can identify.[144]

It has been more than 40 years since Billy Mills won the gold medal in the 1964 Olympics.[145] Since Mills, there has not been any athlete to step to the forefront and become a legend as he has become. Notah Begay III, a Stanford University graduate, won an NCAA title in 1994 a year before Tiger Woods joined the team, stormed the PGA tour in 1995 and in 1999-2000 won four tournaments.[146] Plagued by injury and a couple of drunken driving offenses, Begay has not been able to match his early success on the tour.[147] However, Begay has been instrumental in his efforts to help other American Indians. Begay has worked with the Boys and Girls Clubs of America to promote clubs in American Indian communities.[148] Since 1996 the number of clubs has increased from twelve to one hundred eighty-four in twenty-three different states as part of Begay's efforts.[149] Begay has also starting NB3 Consulting to develop golf courses in American Indian communities.[150] Russell Archambault played for University of Minnesota Final Four team in 1997. He was kicked off the team the next season[151] and became a key figure in the NCAA investigation into the program. Mr. Archambault received illegal payments from his head coach, Clem Haskins, and had coursework completed for him.[152] Mr. Archambault admits he "let down a lot of people, especially Native American kids who looked up to him."[153] This is the story of many American Indian athletes.[154] Instead of seeing these athletes succeed and looking up to them as heroes and for inspiration and motivation, they are seeing these guys still on the reservation playing pick-up games with all the other athletes who could have been great.[155]

Kids need a hero, someone to inspire them. This is especially true in sports. While every kid dreams of being Michael Jordan, many others identify with someone from a similar background as their own. American Indian youth lack this role model. Kids do not identify as well with figures of the past, as they do not know as much about them. While Jim Thorpe is arguably the greatest athlete of all time, he is not still breaking tackles and scoring touchdowns on SportsCenter. Just about every other ethnicity or race has numerous people to identify with on the professional, Olympic, and collegiate level.

3. LACK OF ACCESS TO FACILITIES & COACHING

> "It's confusing in a way because there was Jim Thorpe, so there must be other great athletes out there. I just don't think Native Americans get the same opportunity."
>
> – Bob Harrison[156]

Imagine Tiger Woods without golf clubs or a course to play on. Imagine Michael Jordan without the teachings of Dean Smith or Phil Jackson to coach him. Imagine Michele Kwan without an ice rink and skates. It would have been very difficult for these athletes to reach the elite levels and legendary status they reached without having access to facilities and coaching.

American Indians struggle to finance their training.[157] Training an elite athlete in 2000 was about $30,000 to $40,000 per year for resources, coaches, and facilities.[158] Today, college recruiting takes place at Nike Camps or NCAA programs.[159] This too costs money.[160] Athletes have to work odd jobs, doing whatever it takes to earn a few extra dollars to pay for training.[161] Furthermore, the proper facilities are commonly unavailable, even if financing could be obtained.[162] This is why the most popular sports on reservations are basketball and track.[163] This is because a person can "run without shoes" and needs only "a ball and an old bicycle rim to make a basket."[164]

4. RECRUITERS DON'T COME TO RESERVATIONS

> "These kids endure so much. But they play hard, play unselfish and have talent no one ever sees."
>
> - Charles Gover[165]

No matter how many state basketball championships are won or how many cross-country races an American Indian kid wins, the phone never rings.[166] It seems as though recruiters never call or visit American Indian athletes.[167] Over the years, the practice has not changed and many American Indian high school stars have simply gone unnoticed by the next level.[168] The next Michael Jordan, Tiger Woods, or Carl Lewis could be left undiscovered and forever lost.

In 1989, only one American Indian signed to play major college basketball.[169] Canonchet Neves went unnoticed by scouting services, even though he was named the Southwestern League most valuable player and played in a high-school all-star game against city kids were he was the second highest scorer and rebounder, despite only playing in half of the game.[170] He was never invited to other all-star games where scouts watched other star players.[171] Neves never expected to make it to Division I and if his high school athletic director had not sent a highlight videotape to college coaches he never would have been.[172] Like many that do succeed, Neves was not raised on a reservation.[173]

It is very apparent recruiters are ignoring American Indian athletes.[174] They are ignoring talent, and lots of it.[175] "The problem is most of these white coaches are scared as hell to go onto the reservation," says Leonard Bruguier, director of the Institute of American Indian Studies at the University of South Dakota.[176] Coaches simply are not willing to make a recruiting trip to the reservation.[177] This problem goes deeper than "reservations being tucked away in remote locations, far from college recruiters."[178] Just look to a college roster from any sport and see how many foreign players are on the team. This excuse given by college coaches is obviously flawed. If a college coach can find the time to access a player from the remotest parts of Africa or Serbia, they surely can find the time to visit a reservation in South Dakota or Oklahoma.

5. SELF-ESTEEM

> "You have to have somebody to give you hope. Some of the most talented people don't take advantage of the opportunity."
>
> - Kelvin Sampson[179]

Low self-esteem is caused by never feeling a sense of belonging. Low self-esteem leads American Indian athletes to the pitfalls that are so perverse on the reservation, such as alcoholism, drugs, and suicide.[180] The stereotype that American Indians "lack desire" and are "high risk," is perpetuated in some cases because American Indian athletes feel no matter what they do they will not get a scholarship. They see even the top athletes on the reservation not being recruited. A defeatist attitude is bound to exist when the athlete

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loses hope of ever succeeding. J.R. Cook, the Executive Director for the United National Indian Tribal Youth, says, "There has almost been more pressure to fail then to succeed."[181] American Indian athletes are bound to feel they should not succeed. If they are told this enough times and see enough examples, they will inevitably begin to feel it is their destiny to fail. If a lie is told enough times, people begin to believe it.

The athletes who have gone to college only to return to the reservation many times lack confidence to succeed.[182] The backlash that exists in some cases against athletes who are trying to better themselves is also a problem that leads to low self-esteem. It has led many players who may have succeeded and gone on to higher levels to return home with nothing to show for their great talents and opportunity.

IV. EFFORTS TO CREATE MORE OPPORTUNITY FOR AMERICAN INDIANS AT THE ELITE LEVELS OF ATHLETICS

As a way to combat high dropout rates, some colleges have teamed with area high schools to develop student outreach programs in an effort to teach youth the importance of staying in school and getting an education.[183] There is a need for more programs. Athletes are not prepared academically or socially to meet the demands of college athletics.[184] Many American Indian leaders are looking beyond the common cries of racism and looking within to the boost the number of athletes who continue on to college.[185]

A. ENABLING AMERICAN INDIAN YOUTH

High schools need to modernize the methods they use to promote American Indian athletes that attend their school in an effort to gain more attention from college recruiters.[186] It was not until 2001 that the first American Indian was invited to play at the prestigious Nike basketball camp.[187] Many coaches do not know prospective student-athletes must register with the NCAA clearinghouse to make sure they are meeting requirements to maintain eligibility.[188] The primary goal, however, should be to modernize and energize academics in the throughout the educational system that exists on reservations. More needs to be done to fund schools located on reservations. Some have suggested using tribal casino funds to generate the needed money.[189]

No child should be left behind. Students need to be prepared to succeed at the college level. This is fundamental to bettering the population and solving some of the social pitfalls that exist on reservations. Parents need to allow and want their children to be better off then they are. It is possible to both celebrate the culture and spirituality and become educated at the same time. Parents need to realize they are harming the future of their children and the tribe itself by not promoting education.

Many organizations have been formed in recent years to support the advancement of American Indian athletes. Running Strong for American Indian Youth, whose spokesperson is Billy Mills, helps create opportunities to strengthen the self-esteem of American Indian youth.[190] The program also sponsors youth runners.[191] The Native Voices Foundation (NVF) is another organization doing many great things for American Indian youth. NVF obtains lift tickets, equipment, and lessons from ski resorts in efforts to develop opportunities for youth to learn to ski and snowboard.[192]

Efforts to make American Indians more recognizable to college recruiters have also been undertaken. The Native Visions Program, a partnership between Johns Hopkins Center for American Indian Health and the National Football League, holds an annual summer camp that allows youth to meet with top professional and collegiate level athletes from a variety of sports.[193] The camp gets bigger each year involving more American Indians.[194] In 2006, Native Visions is expecting over 800 American Indian youth to participate and to award two $4,000 scholarships.[195] The creation of other basketball and football camps has also been successful in garnering more exposure and opportunity for American Indians to meet college recruiters and receive scholarships.[196]

Colleges need to take steps to make American Indian students more welcome when they arrive on campus.[197] Many colleges now have clubs or facilities for American Indian students.[198] American Indians are unique in respect to their culture and situation within the context of the United States that does not parallel that of other minorities.[199] Some argue, however, these groups only separate American Indians further.[200]

B. CREATING OPPORTUNITY AT THE PROFESSIONAL & OLYMPIC LEVEL

Some feel that if American Indians had an Indigenous team that more athletes would be willing to compete at the elite levels.[201] NVF and several other American Indian organizations have lobbied the International Olympic Committee for recognition of American Indian nations as being sovereign, which would allow for the establishment of the Native American Indigenous Olympic Team.[202] The United States Olympic Committee has not supported this effort.[203] There is still hope, since Puerto Rico, Guam, Hong Kong, and Palestine, which are all colonized areas, are recognized.[204] Furthermore, the Iroquois National Lacrosse team competes in international competition, such as the World Games.[205]

Even without recognition, the Assembly of First Nations has formed a hockey team and received a grant of $3 million from the 2010 Vancouver Olympic Organizing Committee.[206] The Native American Sports Council, a member of the USOC and USA Boxing, provides funds for several Olympic and Para-Olympic American Indian athletes.[207] Para-Olympic Games have also been developed, such as the North American Indigenous Games and the Sports Warrior Games to get more American Indian athletes involved.[208]

American Indians are beginning to be recognized again at the Olympic Games. There are many organizations working towards a common goal and providing support for American Indian athletes to succeed at the elite levels. Hopefully, someday very soon we will begin to see more American Indian athletes appearing at the collegiate level, which will inevitably lead to more American Indian athletes at the professional and Olympic level.

CONCLUSION

The American Indian athlete never disappeared, but rather was forgotten. The American Indian athlete has always been playing basketball or running cross-country. They never stopped. The obstacles faced by these athletes, from poverty, poor education, and overt racism, has caused the American Indian athlete to disappear from the mainstream of popular sport in the United States. The

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movement from within the culture itself will soon bring the American Indian athlete back to the national spotlight and will inspire many more American Indian youth to strive for the same.

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121. Strickland, supra note 34, at 6C; Roberts, supra note 84, at 1 ("It's hard when I go home for spring break. They look at you differently, talk to you differently. They think, 'Oh, you're better than us.' Just because I go to school and have gotten an education, they call me white boy. They say 'You're not really an Apache.' That's what hurts the most" says Kyle Goklish); Longman, supra note 16, at 52 (Donnie Belcourt says he is called a "white boy" and that some feel that he has betrayed the tribe by training for the Olympics).
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123. Stu Whitney, Squandered Chances, ARGUS LEADER, Sept. 15, 2002, at 6A [hereinafter Squandered Chances].
124. Bright Hopes, Dashed Dreams, supra note 47, at 1A; Roberts, supra note 84, at 1.
125. Squandered Chances, supra note 118, at 6A.
126. Strickland, supra note 34, at 6C (quoting Adrea Lalum, former University of Washington player, "Then all my friends that lived on the reservation, their sister had two kids or their family needed help with something; there is a lot of guilt. You don't want to leave your family, and if you do, they always want you to come back.")
127. Roberts, supra note 84, at 1.
128. Bright Hopes, Dashed Dreams, supra note 47, at 1A; Van De Voorde, supra note 93, at C14; Media Guide, Syracuse University, Syracuse Lacrosse 26 (2006), available at http://www.suathletics.com/sidebar.asp?id=502&path=mlacrosse (last visited May 2, 2006).
129. Strickland, supra note 34, at 6C (quoting Larry Colton, who lived on the Crow Reservation for 15 months and chronicled the story of female basketball player Sharon LaForge in "counting Coup", "You go to a university environment – which is white – you don't have that support system. You can't run home."); Bright Hopes, Dashed Dreams, supra note 47, at 1A
130. Bright Hopes, Dashed Dreams, supra note 47, at 1A.
131. Id. (statement by South Dakota State Senator Ron Volesky, who is a Harvard-educated Lakota).
132. Id.
133. Id.
134. Id.
135. Roberts, supra note 84, at 1.
136. Id. (Raul Mendoza, basketball coach at Alchesay High school, says one of his star players was physically threatened by a community member).
137. Id.
138. Id..
139. Id. (Lt. Lawrence Yazzie, a Navajo who played basketball on the Reservation says, "You wouldn't let anyone close enough to breathe on you or touch you. You wouldn't shake your opponent's hand before the tip.")
140. Bright Hopes, Dashed Dreams, supra note 47, at 1A (Mike Daney is a head coach of cross-country at Southwestern Indian Polytechnic Institute)
141. Richins, supra note 117, at D1; Todd Wilkinson, The Two Worlds of Native American Teens, CHRISTIAN SCI. MONITOR, Mar. 29, 2005, at 2; Strickland, supra note 34, at 6C; Bright Hopes, Dashed Dreams, supra note 47, at 1A.
142. Wilkinson, supra note 136, at 2.
143. Bright Hopes, Dashed Dreams, supra note 47, at 1A (quoting Jessica Squirrel Coat, former Crow Creek basketball standout, "Growing up, I looked to a lot of the great Native American players who were really successful in high school, but when it came down to it, they never played college ball. They just went to community college or got pregnant and stayed on the reservation and did nothing. I remember thinking what a letdown that was."). See, Youths Find Few Models, supra note 16, at 7A; Van De Voorde, supra note 93, at C14.
144. Dwight Perry, Sideline Chatter, SEATTLE TIMES, Sept. 21, 2001, at D2.
145. Youths Find Few Models, supra note 16, at 7A.
146. Media Guide, PGA Tour.com, supra note 25.
147. Bobby Hall, Begay Exercises Rights – And Lefts, PLAIN DEALER, June 21, 2000, at 2D (Notah Begay received a seven-day jail sentence for his second drunken-driving offense in 2000).
148. Indian Country Initiative, at http://www.notah.com/index.php?page=philanthropy (last visited May 1, 2006).
149. Id.
150. NB3 Consulting, at http://www.notah.com/index.php?page=consulting (last visited May 1, 2006).
151. Archambault violated team policy by leaving the hotel. He claims he left to get something to eat. A teammate that left with Archambault was only suspended briefly. John Harjo & Brent Cahwee, Swift Bird: Archambault Ends Fabulous, Controversial Career, 21 INDIAN LIFE 14, 14 (2001).
152. Youths Find Few Models, supra note 16, at 7A.
153. Id.
154. Strickland, supra note 34, at 6C.
155. Richins, supra note 117, at D1; Strickland, supra note 34, at 6C.
156. Roberts, supra note 84, at 1 (Bob Harrison is one of six American Indians known to have played in the NBA and was a member of the 1951-52 Minneapolis Lakers championship team.).
157. Jaime Monastyrski, Native American Javelin-Thrower Prepares for Second Olympic Games, INDIAN COUNTRY TODAY, Feb. 25, 2000; Hall, supra note 142, at 2D; Reid English, Notah Begay III tells Students at Chemawa Indian School to Strive for Their Goals, STATESMAN J., Nov. 11, 1999, at 1B.
158. Monastyrski, supra note 149.
159. Stu Whitney, Finding Success, ARGUS LEADER, Sept. 17, 2002, at 1A [hereinafter Finding Success].
160. Id.
161. Will Webber, Pueblo Players Get to Shine, ALBUQUERQUE J., Sept. 21, 2003, at 1; Longman, supra note 16, at 52.
162. Hall, supra note 142, at 2D.
163. Id.
164. Id.
165. Roberts, supra note 84, at 1 (Charles Gover is a boys high school basketball coach at Tuba City.)
166. Id. (The Tuba City boys and girls basketball teams won the state championship two years in a row, but not one college coach contacted the high school.)
167. Webber, supra note 153, at 1; Roberts, supra note 84, at 1.
168. Bright Hopes, Dashed Dreams, supra note 47, at 1A.
169. Van De Voorde, supra note 93, at C14.
170. Id.
171. Id.
172. Id.
173. Id.
174. Bright Hopes, Dashed Dreams, supra note 47, at 1A.
175. Id. (quoting Dough Martin, Dakota Wesleyan University men's basketball coach, "All the guys you ever wanted are on the reservations.") See, Roberts, supra note 84, at 1.
176. Bright Hopes, Dashed Dreams, supra note 47, at 1A. NOTE: Mr. Bruguier is no longer the director of the Institute of American Indian Studies at the University of South Dakota.
177. Strickland, supra note 34, at 6C; Bright Hopes, Dashed Dreams, supra note 47, at 1A.
178. Strickland, supra note 34, at 6C.
179. Id. (Kelvin Sampson is the men's basketball coach at the University of Oklahoma and a member of the Lumbee Tribe based in North Carolina). NOTE: Kelvin Sampson left Oklahoma University on March 28, 2006 to coach at Indiana University. Sampson left Oklahoma amid an NCAA investigation into recruiting violations. Indiana hires Sampson to Replace Davis, ESPN.COM, Mar. 29, 2006 at http://sports.espn.go.com/ncb/news/story?id=2389192 (last visited May 2, 2006).
180. Bright Hopes, Dashed Dreams, supra note 47, at 1A.
181. Strickland, supra note 34, at 6C.
182. Roberts, supra note 84, at 1.
183. Bright Hopes, Dashed Dreams, supra note 47, at 1A (South Dakota State University has created a program with area high schools offering college-preparatory assistance to students).
184. Id.
185. Finding Success, supra note 151, at 1A (quoting Maurice Smith, Executive Director of the Native American Sports Council, "We have a lot of talent and desire in Indian Country. Now, we need to do a better job of preparing our kids."); Bright Hopes, Dashed Dreams, supra note 47, at 1A.
186. Finding Success, supra note 151, at 1A.
187. Perry, supra note 139, at D2.
188. Finding Success, supra note 151, at 1A.
189. Miller, supra note 87, at 260-70; Finding Success, supra note 151, at 1A.
190. AM. INDIAN YOUTH RUNNING STRONG, RUNNING STRONG FOR AMERICAN INDIAN YOUTH ®: ANNUAL REPORT 2004 1 (2005).
191. Id. at 10-11.
192. Briggs, supra note 1; Cate Montana, Native Children Learn to Ski, Join Red Road to the Olympics, INDIAN COUNTRY TODAY, Dec. 13, 2000, at http://www.indiancountry.com/content.cfm?id=2429 (last visited May 2, 2006).
193. Native Vision, History, at http://www.nativevision.org/ov_history.html (last visited May 2, 2006).
194. Native Vision, Sports and Like Skills Camp, at http://www.nativevision.org/sports.html (last visited May 2, 2006).
195. Id.
196. Strickland, supra note 34, at 6C; Finding Success, supra note 151, at 1A.
197. Finding Success, supra note 151, at 1A.
198. Id.
199. Id.
200. Id. (comments by Billy Mills).
201. Briggs, supra note 1.
202. Id.
203 Id. (quoting Jeff Howard, director of Corporate Communications for the USOC, "The U.S. Olympic Committee is recognized by the IOC as the steward for the Olympic movement in the United States, and only one entity within a nation can have that distinction.")
204. Id.
205. Iroquois Nat'l Lacrosse, Our Progress, at http://www.iroquoisnationals.com/progress.html (last visited May 2, 2006).
206. Briggs, supra note 1.
207. Id.; Press Release, Native American Sports Council, NASC Receives Grant to Conduct National Olympic-style Amateur Boxing & Wrestling Championships, June 30, 2005, available at http://www.nascsports.org/index.php?page=news&id=84 (last visited May 2, 2006).
208. Press Release, Native American Sports Council, Colorado Ute Tribes Announce $1.2 Million Pledge as Host Sponsors of the 2006 North American Indigenous Games, July, 26, 2005, available at http://www.nascsports.org/index.php?page=news&id=86 (last visited May 2, 2006); Press Release, Native American Sports Council, NASC Receives Grant to Conduct National Olympic-style Amateur Boxing & Wrestling Championships, June 30, 2005, available at http://www.nascsports.org/index.php?page=news&id=84 (last visited May 2, 2006).

Student Writing Contest

The editors of the *Texas Entertainment and Sports Law Journal ("Journal")* are soliciting articles for the best article on a sports or entertainment law topic for the TESLAW Annual Writing Contest for students currently enrolled in Texas law schools.

The winning student's article will be published in the *Journal*. In addition, the student may attend either the annual Texas entertainment law or sports law seminar without paying the registration fee.

This contest is designed to stimulate student interest in the rapidly developing field of sports and entertainment law and to enable law students to contribute to the published legal literature in these areas. All student articles will be considered for publication in the *Journal*. Although only one student article will be selected as the contest winner, we may choose to publish more than one student article to fulfill our mission of providing current practical and scholarly literature to Texas lawyers practicing sports or entertainment law.

All student articles should be submitted to the editor and conform to the following general guidelines. Student articles submitted for the writing contest must be received no later than September 1, 2007.

Length: no more than twenty-five typewritten, double-spaced pages, including any endnotes. Space limitations usually prevent us from publishing articles longer in length.

Endnotes: must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form.

Form: typewritten, double-spaced on 8½" x 11" paper and submitted in triplicate with a diskette indicating its format.

We look forward to receiving articles from students. If you have any questions concerning the contest or any other matter concerning the *Journal*, please email Andrew T. Solomon, Professor of Law and Articles Editor, Texas Entertainment & Sports Law Journal, at asolomon@stcl.edu.

The New and Updated Section Website is at www.teslaw.org. Comments or suggestions may be submitted to Yocel Alonso at Yocelaw@aol.com or your editor at srjaimelaw@pdq.net …

NOTICE:

Art-friendly journal seeking budding artist to display artwork on cover! If you would like to see your (or your client's, mother's, spouse's, friend's, etc.) artwork on the cover of our journal, please submit a JPEG or EPS file (no less than 300 dpi) along with a PDF of the artwork to Sylvester Jaime at *sylvrbulit@pdq.net.*

SAVE THE DATE

TESLAW will hold its regular Council meeting and Annual Section meeting at the State Bar Annual Meeting in San Antonio on Friday, June 22, 2007. The Section will elect new officers to serve during the 2007-2008 fiscal year.

Speakers to be announced.

Mark Your Calendar!

17th Annual Entertainment Law Institute will be held Thursday and Friday October 11 and 12, 2007 in Austin at the Hyatt Regency on Town Lake

Legal experts and industry veterans will discuss the latest issues impacting the sports and entertainment industries.

You Wouldn't Want to Miss it!!

Articles appearing in the Journal are selected for content and subject matter. Readers should assure themselves that the material contained in the articles is current and applicable to their needs. Neither the Section nor the Journal Staff warrant the material to be accurate or current. Readers should verify statements and information before relying on them. If you become aware of inaccuracies, new legislation, or changes in the law as used, please contact the Journal Editor. The material appearing in the Journal is not a substitute for competent independent legal advice.

CWA PROPOSES BAN ON MALE PRACTICE PLAYERS

Courtesy NCAA

The NCAA Committee on Women's Athletics has issued a position statement calling for a ban on the use of male practice players in women's intercollegiate athletics. The statement comes after months of debate within the governance structure and elsewhere in the membership about whether the practice should be allowed to continue.

The CWA first raised the issue in October 2004 when members said the practice was contrary to the committee's mission of providing opportunities for women in college sports. The committee has pushed since then to eliminate the practice.

The matter has been surveyed and debated in each division, but Division III is the only one to have legislation on the table at this year's Convention. The proposal being considered does not eliminate the practice, but limits it to the traditional season and in only one practice per week. The proposal also would limit the number of male practice players in team sports to no more than half of the number required to field a starting women's team (for example, only two male practice players would be permitted in a sport with five starting players).

The other two divisions are still gathering information and feedback on the matter.

The CWA statement says that the use of male practice players "violates the spirit of gender equity and Title IX." The committee believes that "any inclusion of male practice players results in diminished participation opportunities for female student-athletes, contrary to the Association's principles of gender equity, nondiscrimination, competitive equity and student-athlete well-being." The committee acknowledges that the most common argument in favor of using male practice players is that it improves the skills of female student-athletes and strengthens the team as a whole. "While there is no way to measure the true validity of that argument," the committee said, "if accepted, it still leads to the question -- what cost in participation opportunities for women is the Association willing to pay for such improvement? The message to female student-athletes seems to be 'you are not good enough to make our starters better, so we need to use men instead.'"

The CWA believes that approach implies "an archaic notion of male preeminence that continues to impede progress toward gender equity and inclusion." Members see the increasing use of male practice players as a threat to the growth in female participation at all levels.

"To have talented, capable female student-athletes stand on the sidelines during official practice while the team's starters practice against 'more talented men' is a lost opportunity," the CWA states. "Many of these female student-athletes are on full scholarship and were recruited to participate in intercollegiate athletics at many other institutions. To have them sitting out of practice while a full 'scout team' of men come to practices is costing them the opportunity for growth and betterment that they were promised during recruitment."

The CWA cited "tremendous growth and betterment in women's intercollegiate athletics" over the years without the use of male practice players. Committee members say they believe of the use of male practice players does more harm than good in the long run and discriminates against female athletes.

"Since Title IX was enacted," the committee states, "the coaching and administrative opportunities for females have been diminished greatly. In this same period, participation opportunities for female student-athletes have not only risen, but the quality of the experience has improved. The concern that CWA has is that the continued growth of male practice players will jeopardize the opportunities and quality experience available for female student-athletes."

A March 20, 2007 update from David Pickle, Managing Director of Publishing for the NCAA, indicates that the media reports about the Committee on Women's Athletics statement did not represent an NCAA action or necessarily indicated the direction in which NCAA policy is likely to go. In fact, the matter continues to be discussed throughout the Association.

Also, in January 2007, the Division III membership referred proposed legislation on this subject to the Division III Management Council for further study (http://www.ncaa.org).

REPLAYING APPELLATE STANDARDS OF REVIEW: THE NFL'S "INDISPUTABLE VISUAL EVIDENCE": A DEFERENTIAL STANDARD OF REVIEW

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I. INTRODUCTION

In 1999, the National Football League ("NFL") reinstituted a policy of instant replay to allow for the limited review by referees of questionable calls made their officiating crews ("officiating crew" or "officials"). Rule 15, Section 9 of the Official Rules of the NFL (the "rules") provides for a standard of review of "indisputable visual evidence";[1] however, nowhere do the rules provide a definition or explanation of what "indisputable visual evidence" is.[2] Consequently, misunderstanding abounds among commentators, officials, and fans. This essay attempts to offer guidance by providing a definition and explanation of the applicable standard of review for use in NFL instant replay.

In attempting to provide a definition and explanation of "indisputable visual evidence," this essay looks to the law for guidance. Although not a source of authority for the NFL's rules, as a source of many well-established appellate standards of review and explanations for them, the law is an appropriate source for guidance. Indeed, other commentators have attempted to define the standard, "indisputable visual evidence," in terms of established appellate standards of review. One such commentator, a judge, referred to the NFL's standard of review as *de novo*.[3] Another commentator, in a published essay, concludes that the NFL's standard of review should be a "manifest weight of the evidence" standard.[4] This essay concludes that those conclusions are unsatisfactory. Leading jurists have concluded that there are two standards of review: plenary and deferential.[5] The NFL's standard of review for use in instant replay is most appropriately defined and explained as a deferential standard of review.

The NFL's standard of review, "indisputable visual evidence" is most appropriately defined as a deferential standard of review based upon confusion in the law about the applicability of multiple standards of review, the view that there are really only two standards of review: plenary and deferential, and that the provisions and application of instant replay by the rules themselves support giving deference to the decisions of the crews officiating NFL games.

Part II of this essay provides a brief background of the history and operation of instant replay. Part III provides the several common appellate standards of review, as well as a discussion of the view that there are just two standards of appellate review: plenary and deferential. Part IV provides support from the provisions and application of the NFL's rules for instant replay for the proposition that the NFL's standard of review is a deferential standard of review. Part V concludes that defining the NFL's standard of review for review of instant replay as anything other than deferential is unsatisfactory.

II. BACKGROUND

A. History

> Even with quarterback Chris Miller coming back from concussions, and with wide receiver Chris Doering coming back from obscurity, [it] just might be the biggest comeback story of the [1999] preseason.
>
> No football since 1992.
>
> Six full seasons out of the league.
>
> Maybe no single player has overcome any more adversity trying to get back into the league. But . . . to the relief of most players, coaches and fans, another chance.[6]

Instant replay made its NFL comeback debut on August 14, 1999, in a preseason game at Mile High Stadium between the Denver Broncos and the Arizona Cardinals as a "leaner, faster, more talented version" of the system that had been voted out of the league in 1992.[7]

A version of instant replay had been in effect in the NFL from the 1989 season through the end of the 1991 season, but it was voted out of the league in 1992 after complaints from coaches and owners that it was too "cumbersome."[8] There had been no limit to the number of plays that could be reviewed, and it was not uncommon for an "instant replay" to last more than three minutes,[9] thereby "slow[ing] the game dramatically."[10] Moreover, "it [was not] uncommon to later discover that the replay system had overturned a call on the field that was correct to begin with. Replay was understandably scrapped."[11] After four years out of the league, efforts to revive instant replay for the 1997 and 1998 seasons were unsuccessful; however, on March 17, 1999, on the final day of their annual meeting, the owners of the then thirty-one teams voted 28-3 to allow instant replay back into the NFL.[12] It was the first time since replay's revival had become an issue two years earlier that proponents had the three-fourths vote needed for replay's reinstatement.[13]

The difference in 1999 that led to the overwhelming margin in favor of reinstating instant replay was several high-profile, controversial calls during the 1998 regular and post-seasons, which included a 14-13 victory for the San Diego Chargers when a Baltimore Ravens' 90-yard punt return for a touchdown was reversed because officials ruled that Baltimore's Jermaine Lewis was down by contact. Television replays showed that the officials were incorrect.[14] On November 15, 1998, the Dallas Cowboys won by a touchdown when officials failed to call pass interference on the Cowboys on the final play of the game.[15] During the Thanksgiving Day game in Detroit between the Pittsburgh Steelers and the Detroit Lions, officials incorrectly awarded the overtime coin toss to the Lions

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although television replays showed that the Steelers had correctly called tails. The Lions won with a field goal on the only overtime possession of the game.[16] Three days later, two bad calls assisted the New England Patriots in their victory over the Buffalo Bills.[17] The most infamous bad call of the season came on December 6 between the New York Jets and the Seattle Seahawks when officials declared that Vinny Testeverde's five-yard sneak at the end of the fourth quarter had resulted in a touchdown. Televised replays showed that Testeverde was a good five yards short of the goal line. The "phantom touchdown" gave the Jets a victory.[18] Finally, on January 3, 1999, in a post-season game between the San Francisco 49ers and the Green Bay Packers, officials called Jerry Rice down by contact after he had fumbled and the Packers recovered, allowing the 49ers to retain possession. With three seconds left in the game, the 49ers scored to win the game.[19] The foregoing, game-changing plays, in addition to improved technology in the intervening years, prompted replay's comeback for the 1999 season.

B. Operation of Instant Replay

Rule 15, Section 9 of the Official Rules of the NFL establishes and governs the use of instant replay.[20] During the first twenty-eight minutes of each thirty minute half, a "Coaches' Challenge System" ("coaches' challenge") is in effect, giving each team two challenges with which to initiate a replay.[21] The use of a coaches' challenge requires the use of a team's timeout.[22] A team cannot exercise a challenge unless it has a remaining timeout.[23] If a challenge is successful, the team's timeout is restored, and if a team is successful on both of its challenges, it is awarded a third challenge; however, the award of a fourth challenge is not permitted.[24] After the two-minute warning of each half, and during overtime, any replay is initiated from a replay booth by a replay assistant.[25] There is no limit to the amount of replays that the replay assistant can initiate, and his ability to do so is unrelated to either team's remaining timeouts.[26]

All replays are conducted by the referee from a field-level monitor. The referee may reverse a decision only "when the [he] has indisputable visual evidence available to him that warrants the change."[27] The types of replays that are reviewable are limited to (1) those governed by the sidelines, goal lines, end zones, and end lines,[28] (2) passing plays,[29] and (3) other detectable infractions: a runner ruled not down by defensive contact, forward progress with respect to a first down, the touching of a kick, and the number of players on the field.[30] There are several non-reviewable plays, which include the status of the clock, the proper down, penalty administration, forward progress not relating to first down or the goal line, force-outs, recovery of a loose ball in the field of play, and field goals.[31]

Although the rules provide for a standard of review of "indisputable visual evidence"[32] for the referee to apply when reviewing the officiating crew's decisions, nowhere do the rules provide a definition of "indisputable visual evidence."[33] Thus, the feeling pervades that while "[t]he term indisputable evidence sounds good . . . what [is] indisputable to one person might not be to another."[34] However, as a standard of review, a precise meaning can and should be attributed to the phrase "indisputable visual evidence." The rules provide no textual definition of the phrase "indisputable visual evidence"; however, using the law for guidance, a precise definition may be discerned from the rules themselves.

III. LEGAL STANDARDS OF REVIEW

The standard of review of legal decisions "[is] traditionally divided into three categories": questions of law, questions of fact, and matters of discretion. Within these three categories, questions of law are typically reviewed *de novo*; questions of fact are typically reviewed for clear error; and matters of discretion are typically reviewed for abuse of discretion. Within these three traditional categories and typical standards of review, however, there is an array of standards of review that courts apply in various situations, including clearly erroneous, substantial evidence, arbitrary and capricious, and abuse of discretion.

A. Questions of Law

Questions of law are routinely reviewed *de novo*, the most stringent standard of review. *De novo* review is "review without deference";[35] it is instead "independent and plenary."[36] Under *de novo* review, a reviewing court "look[s] at the matter anew, as though it had come to the courts for the first time,"[37] and it exercises its own "independent judgment without giving special weight to the prior decision."[38] The reason that questions of law are reviewed *de novo* is that a reviewing court is in as good a position to judge questions of law as the trial court.[39] *De novo review* is also appropriate for mixed questions of law and fact.[40] Thus, motions to dismiss,[41] motions for summary judgment,[42] and motions for judgments as a matter of law[43] are appropriately reviewed *de novo*, as well as issues of statutory construction[44] and interpretation of written instruments.[45]

B. Questions of Fact

Question of fact are reviewed deferentially because the trial court is in a better position than the reviewing court to make determinations of credibility.[46] Thus, a reviewing court may view deferentially mixed questions of law and fact "when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine."[47] While questions of law are reviewed under a single standard of review, there are several standards of review that courts apply to questions of fact: clear error, clearly erroneous, substantial evidence, and arbitrary and capricious.

1. Clear Error

Clear error requires a court of appeals to "not reverse a lower court's findings of fact simply because [it] 'would have decided the case differently.'"[48] This standard is derived from Rule 52(a) of the Federal Rules of Civil Procedure, which provides for a standard of clearly erroneous.[49] Like the clearly erroneous standard, "a reviewing court must ask whether, 'on the entire evidence,' it is 'left with the definite and firm conviction that a mistake has been committed.'"[50] Although a reviewing court may not substitute its own judgment for the findings of fact of a lower court simply because it would have found differently, it is not without the ability to do so if an error by the lower court is clear.

2. Clearly Erroneous

Established by Rule 52(a) of the Federal Rules of Civil Procedure, clearly erroneous is the same as the clear error standard of review: "review under the 'clearly erroneous' standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.'"[51]

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3. Substantial Evidence

Substantial evidence is a term of art used by Congress "to describe the basis on which an administrative record is to be judged by a reviewing court."[52] This standard of review "goes to the reasonableness of what the agency did on the basis of the evidence before it."[53] To the extent that this standard of review requires the application of a reasonableness standard, it is purportedly more deferential than the clear error and clearly erroneous standards of review because it "require[es] the reviewer to sustain a finding of fact unless it is so unlikely that no reasonable person would find [the decision] to be true."[54] Additionally, "a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body."[55]

4. Arbitrary and Capricious

The arbitrary and capricious standard of review is purportedly "the most deferential standard of judicial review of agency action."[56] Under an arbitrary and capricious standard of review, a reviewing court "cannot substitute its own judgment for that of the [fact-finder]" unless the fact-finder has demonstrated a "clear error of judgment."[57] Indeed, a reviewing court must uphold those decisions that are supported by a "rational connection between the facts found and the choice made":[58] that is, "those outcomes supported by a reasoned explanation, based upon the evidence in the record as a whole."[59]

C. Matters of Discretion

Matters of discretion are routinely reviewed for an "abuse of discretion." "'Abuse of discretion' is also a deferential standard of review. However, whereas 'clearly erroneous' and 'substantial evidence' apply to findings of fact, 'abuse of discretion' applies to those numerous judgment calls a trial court must make during the course of litigation."[60] Thus, the abuse of discretion standard of review applies to a wide range of judicial decisions, including awards of attorney's fees,[61] sanctions under Rule 11,[62] the relevancy and admissibility[64] of evidence, discovery motions,[65] motions to amend,[66] entries of default,[67] and motions for a new trial.[68] An abuse of discretion occurs when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact,"[69] or when an agency "provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where [it] has acted in an arbitrary or capricious manner."[70]

D: An Alternative View: Plenary and Deferential Review

Some courts have expressed reservations about the applicability of the above several standards of review, particularly those that apply to review of questions of fact. In *Morales v. Yeutter*,[71] for example, Justice Posner, concurring, articulated two positions regarding standards of review:

> One school of thought holds that the verbal differences in standards of judicial review (arbitrary and capricious, clearly erroneous, substantial evidence, abuse of discretion, substantial basis, etc.) mark real differences in the degree of deference that the reviewing court should give the findings and rulings of the tribunal being reviewed.[72]

However:

> The other school holds that the verbal differences are for the most part merely semantic, that there are really only two standards of review—plenary and deferential—and that differences in deference in a particular case depend on factors specific to the case, such as the nature of the issue, and the evidence, rather than on differences in the stated standard of review.[73]

Some jurists have been critical of the former position because "[i]t greatly exaggerates the utility of verbal differentiation. It reflects the lawyer's exaggerated faith in the Word."[74] The Seventh Circuit Court of Appeals, therefore, "has expressed skepticism . . . about the ability of judges to apply more than a few standards of review."[75]

Indeed, courts have been known to confuse the meanings they attribute to the language they use to articulate their standards of review.[76] For example, although:

> [t]he [United States] Supreme Court has said that "the court/agency standard [substantial evidence] . . . is somewhat less strict that the court/court standard [clear error]. . . . the difference is a subtle one—so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome."[77]

In *Dickinson v. Zurko*, the First Circuit had applied the clearly erroneous standard to its review of findings of fact made by the Patent and Trademark Office.[79] The Supreme Court reversed, holding that the applicable standard of review under the Administrative Procedure Act was substantial evidence.[80] The Court stated that substantial evidence "is somewhat less strict than clear error," (i.e., more deferential).

Nevertheless, courts have subsequently disagreed on the degree of scrutiny they should apply to each standard of review: substantial evidence and clear error.[81] For example, in *In re Zurko*,[82] the Federal Circuit stated, correctly after *Dickinson*, that substantial evidence is more deferential than clear error. In *Qui v. Ashcroft,*[83] however, the Second Circuit stated, contrary to *Dickinson*, that substantial evidence is "slightly stricter" than clear error.[84] Even after a clear rule statement from the Supreme Court, confusion abounds in the application of these two standards of review. Thus, the Seventh Circuit, in addition to other courts, has taken the position that there are no appreciable differences in the "different" standards of review.

1. Clearly Erroneous vs. Substantial Evidence

In *Johnson v. Trigg*,[85] Justice Posner addressed a discussion concerning the applicable standard of review for federal habeas corpus review of state court findings of fact.[86] The federal habeas corpus statute provided only that a state court's findings of fact "shall be presumed to be correct."[87] The statute had been interpreted only to mean that federal courts should give state court findings of fact "great deference."[88] In response to the argument that the appropriate standard of review was "either the clearly-erroneous rule that guides federal appellate review of findings of fact by federal district courts or the substantial evidence rule that guides judicial review of findings of fact made by a federal administrative agency,"[89] Justice Posner

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responded that "it is unclear whether the two rules are different. . . . [T]here is deferential review, and plenary review, and that the verbal distinctions within the deferential category . . . have little consequence in practice."[90] Justice Posner concluded that it did not matter what the exact standard of review was.[91]

2. Clearly Erroneous vs. Abuse of Discretion

In *Haugh v. Jones and Laughlin Steel Corporation*,[92] a marshal had made a comment to members of the jury that there could be no hung jury, and that they would be held until they reached a unanimous verdict. In determining whether the jury had been improperly influenced, the trial judge questioned members of the jury. The trial judge ultimately decided that the marshal had, indeed, made the statement to members of the jury and that the jury had been improperly influenced by it. The court applied the clearly erroneous standard to the trial judge's finding that the marshal had, indeed, made the statement to the jury,[93] and it applied the abuse of discretion standard to the trial judge's finding that the jury had been improperly influenced. [94]

The court commented that "[a]buse of discretion is conventionally regarded as a more deferential standard than clear error, though whether there is any real difference has been questioned."[95] The court continued:

> The alternative view is that both standards denote a range rather than a point, that the ranges overlap and maybe coincide, and that the actual degree of scrutiny in a particular case depends on the particulars of that case rather than on the label affixed to the standard of appellate review.[96]

Based on the foregoing discussion, the court concluded that "[w]hatever the standard is called, appellate judges properly give great weight to the trial judge's assessment of the impact of an improper communication on the jury because he has the inestimable advantage over the appellate judges of having actually observed the jurors."[97]

3. Clear Error vs. Substantial Evidence

In *School District of Wisconsin Dells v. Littlegeorge*,[98] the appellant argued that the district court judge had failed to give the administrative law judge's decision proper deference.[99] The court began that, "in ordinary cases of judicial review of administrative action . . . the court must defer to the agency's decision if the decision is supported by 'substantial evidence.'"[100] However, the court continued that, "realistically—[it] is the same standard as clear error."[101] The court explained that whatever it is called, the standard of review in administrative law cases is deferential, but "the actual amount of deference given the finding of a lower court or an agency will often depend," not on the label affixed to it, but "on the nature of the issue."[102] For example:

> [T]he more technical the issue resolved by the agency, the less likely the reviewing court is to feel comfortable second-guessing the agency's resolution. As a practical matter, having nothing to do with the precise articulation of the standard of review, the agency's finding will receive greater judicial respect in such a case.[103]

Additionally:

> [A] reviewing court that has before it evidence not considered at the administrative level will naturally defer less to the administrative decision, as it has an information advantage over the administrator that it lacks when judicial review is limited to the record that was before him. Judicial review is more searching the greater the amount . . . of the evidence that the court has but the agency did not have.[104]

In this case, the court held that regardless of the standard of review that the district court judge applied—substantial evidence or clear error—it was harmless error to apply one and not the other.[105]

4. Substantial Evidence vs. Arbitrary and Capricious

The sentiment that different expressions of standard of review do not have different meanings has not been limited to Justice Posner and the Seventh Circuit. In *Association of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve System*,[106] Justice Scalia, writing for the majority, expressed the opinion that "the distinction between the substantial evidence test and the arbitrary and capricious test is 'largely semantic.'"[107] The court, quoting favorably from a leading commentator, reasoned:

> "[s]ubstantial evidence and arbitrary or capricious] criteria converge into a test of reasonableness. . . . Review without an agency record thus comes down to review of reasonableness. [T]he question of reasonableness is also the one which the court must now ask itself in reviewing findings of fact under the . . . substantial evidence rule."[108]

The court concluded that the substantial evidence requirement applicable to the court's review was no different than that demanded by an arbitrary and capricious standard.[109]

Based on the foregoing discussion, *supra* Parts III.D.1 – 4, there is no appreciable difference in the "different" standards of review. Indeed, judges themselves have demonstrated the difficulty in articulating what they believe to be different standards of review, and various courts have held that differences in articulation are virtually meaningless in their application. If, as Justice Posner hypothesizes, judges are incapable of applying different standards of review, part-time NFL officials stand in no better position. There is, however, an appreciable difference between plenary and deferential review as articulated by Justice Posner:

> In the former setting the appellate judge must say to himself "The issue has been given to me to decide, and . . . the ultimate decisional responsibility is mine and must be exercised independently." In the latter setting the appellate judge must say to himself, "The issue is not mine to decide because the [fact-finder] has a better feel for it, or for other institutional reasons . . . the responsibility for deciding has been given to him and I must go along unless persuaded that he acted unreasonably, or in other words unless I am clear in my mind that he erred."[110]

Any intermediate position "has only semantic significance."[111] Thus, the articulation of a standard of review for NFL instant replay narrows itself to either plenary or deferential review.[112]

IV. INDISPUTABLE VISUAL EVIDENCE: A DEFERENTIAL STANDARD OF REVIEW

The standard of review employed by the NFL for its instant replay is a deferential standard of review.[113] The rules themselves

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establish a deferential standard of review to be employed when the official reviews a decision by the officiating crew. First, the language of the rules establishes a standard of review of "indisputable visual evidence." Nowhere do the rules define the phrase "indisputable visual evidence"; however, a single court, the Court of Criminal Appeals of Texas, has adopted and applied this standard when confronted with the review of videotaped evidence.

In Texas, "as a general rule, the appellate courts . . . give almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's findings are based on an evaluation of credibility and demeanor."[114] In *Carmouche v. State*,[115] officers, based on the tip of an informant that the appellant was carrying approximately ten ounces of cocaine, pulled appellant's car over when they observed him commit a traffic violation.[116] The officers received consent to search appellant's car, and they conducted a pat-down of appellant.[117] Finding no cocaine in the appellant's possession, they were told by the informant that the appellant had concealed the cocaine down his pants.[118] One of the officers, Officer Williams, accompanied by three other officers, approached appellant and asked if they could search him. Appellant responded that he had already been searched.[119] According to Williams, "he responded by asking, 'Do you mind if I search you again?' Williams further testified that appellant then threw his hands up, said, 'All right,' and turned around and placed his hands on the car."[120] Williams searched the crotch area of appellant's pants and discovered a package containing approximately 253 grams of powder cocaine.[121] Meanwhile, the traffic stop had been videotaped by a camera mounted on the patrol car.[122]

The appellant moved to suppress the cocaine seized during the second, warrantless search of his person. The judge, relying on the testimony of Officer Williams, admitted the evidence, finding that the appellant had consented to the search. The videotape was presented at the suppression hearing and admitted into evidence at appellant's jury trial.[123] Notably, there was a conflict between Officer Williams's testimony and the videotape of the stop.[124] The videotape revealed not only that appellant was completely surrounded by officers, but also the following:

> Appellant [could] be heard, in mid-sentence, saying ". . . searched me." A second voice, although faint, [could] then be heard saying, "Turn around and put your hands on the car." Appellant [could] then be seen standing up and complying with the order. Only after appellant [had] raised his hands, turned around and faced the car, [could] Williams be heard asking, "Mind if I pat you down again?" Williams' "request" to search [was] made *as* he [was] reaching for the crotch area of appellant's pants. Moreover, no oral response from appellant [was] audible on the tape. In fact, the next voice heard [was] Williams, presumably as he [found] the drugs, saying, "What you got here?"[125]

The Court of Criminal Appeals, acknowledging the rule that "appellate courts . . . should give almost total deference to a trial court's determination of the historical facts that the record supports," stated that, "[i]n the unique circumstances of this case, however, we decline to give 'almost total deference' to the trial court's . . . findings" because "the videotape presents *indisputable visual evidence* contradicting essential portions of Williams' testimony."[126]

Subsequent cases have interpreted the phrase "indisputable visual evidence" to mean that the videotaped evidence must unequivocally contradict the decision of the lower court. For example, in *Douglas v. State*,[127] the court, addressing the videotaped evidence of the events in that case, stated that "[a]ny possible discrepancies" in the interpretation of the tape "[would] be considered . . . as implicitly establishing a fact favorable" to the eyewitness testimony.[128] Similarly, in *Olguin v. State*,[129] the court stated that where "the parties interpret the events on [a] tape differently . . . the testimony of the officer is not in . . . conflict with the evidence on the video."[130] Furthermore, in *Peace v. State*,[131] although the videotape of a field sobriety test lent itself toward the inference that the appellant in that case was not intoxicated when pulled over, the court held that other circumstances about which the arresting officer testified, (e.g., the odor of alcohol, slurred speech, and glassy eyes), were sufficient to uphold the decision of the lower court that there had been probable cause to arrest the appellant.[132]

Taken together, the foregoing cases suggest a definition of "indisputable visual evidence" that means just what the phrase expresses: videotaped evidence must be indisputable (i.e., unequivocal), and it must be visual (i.e., non-inferential). As applied to NFL instant replay, a replay might allow for an obvious inference that a runner is down by contact given the position and movement of the players involved in the play; however, unless the replay actually shows contact between the players and the runner's knee or elbow actually touching the ground, a reversal of a decision that the runner was not down by contact would be inappropriate.[133] Thus, "indisputable visual evidence," provides a deferential standard of review of the officiating crew's decision because, when replayed, reversing a decision based on even an obvious inference, to achieve what any reasonable person would conclude inferentially to be the right decision, would be inappropriate.

Not only is the standard of review as interpreted by the courts a deferential standard of review, but the rules themselves provide for deference to the officiating crew's decisions. Not only must there be "indisputable visual evidence," but it must be also be available to the reviewing official.[134] There are several factors which effect the availability of evidence to the referee. The referee receives a video feed from the replay assistant in the replay booth to the referee's replay monitor on the field.[135] Games have at least seven cameras capturing various angles of plays.[136] Oftentimes the reviewing referee will have an advantage over the officiating crew, which may have had fewer angles from which to view a play; however, not every video of a play is available for the official's review:

> Replays are limited to what [is] shown on TV: Even if the replay on the stadium's Jumbotron proves that a call clearly was wrong, the official's can[not] use it. . . . [T]he best angle might only exist on the Jumbotron camera, which [is not] part of the TV broadcast. In this instance, 70,000 people, and possibly the officials themselves, may know that an erroneous call will stand despite what they've seen on the big screen.[137]

Nor what is shown on television is necessarily available for the official's review. For example, during a preseason game in Baltimore between the Baltimore Ravens and the New York Giants, the Giants fumbled and the Ravens recovered.[138] The reviewing official received only the Baltimore feed, which did not show indisputable visual evidence.[139] The video feed shown in New York, however, clearly showed that the Giants had not fumbled.[140]

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The limitations of video replay facilitate further deference to the officiating crew's initial decisions. First, "[a]udio is not part of the replay: This problem occurred in the 49ers-Raiders [1999] preseason game. While replay might show a fumble, if the covering official says he blew the whistle before the fumble was recovered, the bad call stands."[141] Furthermore, "TV angles sometimes lie because they provide only two dimensions—and football games, like life, are played in three. Depending on where a camera is placed, it is difficult to say, for instance, whether a ball was thrown laterally or ever-so-slightly forward."[142] In such a situation, although the truth might be that the ball was thrown "ever-so-slightly forward," if the replay does not show "indisputable visual evidence" that the ball was not thrown laterally, the call on the field will stand.

The availability of evidence in a given review determines the amount of deference a referee gives an officiating crew's decisions. A referee who has "before [him] evidence not considered" by the officials "will naturally defer less to the" officials' decision, "as [he] has an information advantage over the [officials] that [he] lacks when . . . review is limited to the [evidence] that was before" the officials. A referee's "review is more searching the greater the amount . . . of the evidence that the [referee] has but the [officials] did not have."[143] Of course, in the above quoted language, Justice Posner was addressing a court's review of agency decisions; however, it is equally applicable to instant replay review. The amount of evidence that a referee has before him determines the amount of deference he gives a decision based on the number of cameras, their angles, and their availability for his viewing. These factors will vary play by play and game by game, and "[a]s a practical matter, hav[e] nothing to do with the precise articulation of the standard of review."[144]

Beyond the evidence that may be considered by a referee, the rules themselves provide further deference to the officials' on-field decisions because there are limited opportunities to review officials' decisions. During fifty-six minutes of a sixty minute game, replay must be initiated by a coaches' challenge,[145] but coaches are limited to two challenges per game, with the possibility of receiving a third challenge only if the first two are successful.[146] This limit on the number of challenges restricts both the number and types of plays challenged, thereby allowing for a number of plays to go unchallenged that might otherwise be reversed:

> "The question is, all of a sudden, you might see an out route that [is] a 10-yard gain and you know the (officials) made a mistake . . . . But do you want to take the chance and challenge when you only have two in the game, even though you know you [are] only going to save 10 yards? No. So what are you going to save challenges for? The game-deciding plays. A turnover. A touchdown. And that's what it [is] for."[147]

Not only are coaches limited in the total number of challenges they may exercise, but they are also penalized for exercising their challenges: the use of a challenge requires the use of a timeout, and a timeout is restored only if the challenge is successfully upheld.[148] This is significant in limiting the use of challenges because coaches jealously guard their timeouts;[149] consequently, they are willing to use a challenge, and therefore a timeout, only for "drastic," game altering situations,[150] thereby allowing many of the official's decisions to go unreviewed.

Even within the fifty-six minutes when coaches may challenge a decision, coaches are limited. There are several types of plays that are non-reviewable;[151] the most notable among them is "penalty administration,"[152] which involves judgment calls on the part of the officials,[153] but which can result in game-changing decisions, such as a loss of up to half the distance to the goal line,[154] the ball being placed on the 1-yard line,[155] or the award of a touchdown,[156] none of which game-changing decisions are reviewable.

Even if a coach decides to use one of his two coaches' challenges, and even if the play is considered reviewable,[157] a coach may nevertheless be prohibited from challenging a play if another play ensues before the coach signals his challenge.[158] Thus, a coach may be, once again, prevented from challenging even a game-changing play:

> More than anything else, coaches are apt to challenge plays that involve scoring. The problem is that once the ball is snapped for the ensuing play, the opportunity to challenge is lost. Think about what happens when a team scores. Immediately, the scoring team rushes onto the field and kicks the extra point. The majority of the plays challenged . . . involve scoring. It's quite possible that before network TV gets to a replay that would prompt a coach's challenge, the extra point will have taken place and the opportunity to correct a bad call will be lost.[159]

Thus, once again, deference is given to the officials' decision, even when faced with the possibility of a game-deciding play that may have been decided incorrectly.

V. CONCLUSION

Instant replay was first used in the NFL from 1989 to 1999, during which time it proved unsuccessful because it allowed for too much review of game officials' decisions. In 1992, it was voted out of the league; however, in 1999 it was reinstated with new procedures in place to limit the amount of review of game officials' decisions. With the reinstatement of instant replay came the reemergence of the elusive standard of review, "indisputable visual evidence,"[160] for which the league provides no definition.[161] Previous commentators, attempting to define it within a legal framework, have classified it as *de novo*,[162] and "manifest weight of the evidence."[163] These definitions are unsatisfactory. Although there is an array of other standards of review from which to draw comparisons[164] these standards of review are likewise unsatisfactory.

Leading jurists have concluded that different articulations of standards of review are mere exercises in semantics.[165] They have concluded that there are no appreciable differences between standards of review, arguing that judges are incapable of applying more than two standards of review. Justice Posner and the Seventh Circuit Court of Appeals have concluded that there are just two appreciable standards of review: plenary and deferential.[166] They argue that there is no intermediate standard of review; rather, there are varying degrees of deference rather than of kind, determined by institutional factors, such as the increased availability of evidence to the reviewing body.[167] If judges schooled in the law are incapable of applying more than two standards of review,[168] part-time NFL officials stand in no better position. Thus, the standard of review used in NFL instant replay, "indisputable visual evidence," is either plenary or deferential.

The Official Rules of the NFL to which reviewing officials are bound provide for deference to an officiating crew's decisions. First, the standard of review used by the NFL, "indisputable visual evidence," as applied by the courts of Texas, is a deferential standard

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of review.[169] Decisions that come under review under the standard are upheld unless there is unequivocal visual evidence that the fact-finder ignored or misinterpreted. Inferential evidence is insufficient under the standard of review to warrant a reversal. Second, in addition to limiting the number of opportunities there are to challenge officials' decisions, thereby allowing a number of decisions to go un-reviewed, the rules limit the availability of visual evidence to reviewing officials, thereby allowing even reviewable bad calls to be upheld.

Selecting a single standard of review from the array commonly used by courts is unsatisfactory, not only because of cognitive difficulties in their application,[170] but because the degree of deference given to a particular decision will vary depending on the availability of evidence to a referee. The appropriate standard of review for NFL instant replay is deferential. Given that instant replay is on the schedule through the 2008 season,[171] a better understanding of its application is needed by commentators, officials, and fans.[172]

1. OFFICIAL RULES OF THE NFL 193 (Game Action ed., Triumph 2005) [hereinafter "OFFICIAL RULES"].
2. *See generally id.*
3. *See* National Football Players Ass'n v. Pro-Football, Inc., 857 F.Supp. 71, 74 (D.C. Cir. 1994).
4. *See* Jack Achiezer Guggenheim, Essay, *Blowing the Whistle on the NFL's New Instant Replay Rule: Indisputable Visual Evidence and a Recommended "Appellate" Model,* 24 VT. L. REV. 567, 579 (2000).
5. *See, e.g.*, School District of Wisconsin Dells v. Littlegeorge, 295 F.3d 671, 674-76 (7th Cir. 2002).
6. Adam Schefter, *Replay Back After a Long Review*, DENVER POST, at D-01 (Aug. 13, 1999).
7. *Id.*
8. Thomas George, N.F.L. *Backs Limited Replay After Complaints of Bad Calls*, N.Y. TIMES, at A1 (March 18, 1999).
9. Lonnie White, *NFL Give It a Second Look, and Tagliabue Says New Computerized System Is Huge Improvement Over Version Used in the Late '80s,* L.A. TIMES, at D15 (Sept. 12, 1999).
10. Tim Green, *Replay's Back and There's Going to Be Trouble—Again,* USA TODAY, at 13F (Sept. 10, 1999).
11. *Id.*
12. Ron Borges, *Upon Further Review, Replay Back*, BOSTON GLOBE, at D1 (March 18, 1999).
13. George, *supra* note 8.
14. Mike Bruton, *NFL Brings Back Instant Replay*, DAILY NEWS OF LOS ANGELOS (March 18, 1999).
15. *Id.*
16. George, *supra* note 8.
17. *Id.*
18. Alan Abrahamson, *NFL Reviews Replay and Says Yes,* N.Y. TIMES, at D1 (March 18, 1999).
19. *Id.*
20. OFFICIAL RULES, *supra* note 1, at 192-94.
21. *Id.* at 192-93.
22. *Id.* at 192.
23. *Id.*
24. *Id.*
25. *Id.* at 193.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 194.
30. *Id.*
31. *Id.*
32. *Id.*
33. OFFICIAL RULES, *supra* note 1, at 14-33.
34. Green, *supra* note 10.
35. Zervos v. Verizon New York, Inc., 252 F.3d 163, 168 (2d Cir. 2000) (citing Salve Regina College v. Russell, 499 U.S. 225, 238 (1991)).
36. *Id.*
37. *Id.*
38. U.S. v. Brian N., 980 F.2d 218, 220 (10th Cir. 1990).
39. U.S. v. Valdez, 931 F.2d 1448, 1451 (11th Cir. 1991).
40. FDIC v. Providence College, 115 F.3d 136, 140 (2d Cir. 1997).
41. Tropeano v. Dorman, 441 F.3d 69, 75 (1st Cir. 2006).
42. *Id.*
43. Wedow v. City of Kansas City, Mo., 442 F.3d 661, 665 (8th Cir. 2006).
44. Lippert v. Community Bank, Inc., 438 F.3d 1275, 1278 (11th Cir. 2006).
45. Terran v. Kaplan, 109 F.3d 1428, 1432 (9th Cir. 1997).
46. Miller el v. Cockrell, 537 U.S. 322, 339-40 (2003).
47. Salve Regina College v. Russell, 499 U.S. 225, 233 (1st Cir. 1991).
48. Easley v. Cromartie, 532 U.S. 234, 242 (2000) (quoting Anderson v. Bessemer City, 470 U.S. 564, 573 (1985)).
49. *Zervos*, 252 F.3d at 168.
50. *Id.* (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).
51. Concrete Pipe and Products of California, Inc., v. Constr. Laborers Pension Trust for Southern California, 508 U.S. 602, 623 (1993).
52. United States v. Carlo Bianchi and Co., 373 U.S. 709, 715 (1963) (citing the Administrative Procedures Act, 5 U.S.C. § 1009; the Fair Labor Standards Act, 29 U.S.C. § 210; the National Labor Relations Act, 29 U.S.C. § 160)).
53. *Id.*
54. *Concrete Pipe*, 508 U.S. at 623.
55. *Id.*
56. Michigan Bell Telephone Co. v. MCIMetro Access Transmission Services, 323 F.3d 348, 354 (6th Cir. 2003).
57. Bloch v. Powell, 348 F.3d 1060, 1068 (D.C. Cir. 2003).
58. Indiana Forest Alliance, Inc., v. U.S. Forest Service, 325 F.3d 857, 858-59 (7th Cir. 2003).
59. *Bell Telephone*, 323 F.3d at 354.
60. Randall H. Warner, *A Crash Course in Appellate Standards of Review*, 36 Oct. ARIZ. ATT'Y 30, 32 (1999).
61. *E.g.*, Evans v. Jeff D. 474 U.S. 717, 742-43 (1986).
62. *E.g.*, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).
63. *E.g.*, Richards v. Relentless, Inc., 341 F.3d 35, 49 (1st Cir. 2003).
64. *E.g.*, U.S. v. Anderson, 441 F.3d 1162, 1194-95 (10th Cir. 2006).
65. Fed. R. Civ. P. 56(f); e.g., Tatum v. City and County of San Francisco, 441 F.3d 1090, 1100 (9th Cir. 2006).
66. Fed. R. Civ. P. 59(e); e.g. Ingle ex rel. Estate of Ingle v. Yelton, 439 F.3d 191, 197 (4th Cir. 2006).
67. *E.g.*, Payne ex rel. Estate of Calzada v. Brake, 439 F.3d 198, 203 (4th Cir. 2006).
68. Fed. R. Civ. P. 33; e.g., U.S. v. LaValle, 439 F.3d 670, 700 (10th Cir. 2006).
69. U.S. v. Gleason, 432 F.3d 678, 681-82 (6th Cir. 2005)
70. *E.g.*, Ke Zhen Zhaov v. DOJ, 265 F.3d 83, 93 (2d Cir. 2001).
71. 952 F.2d 954 (7th Cir. 1991) (Posner, J., concurring).
72. *Id.* at 957.
73. *Id.*
74. United State v. McKinney, 919 F.2d 405, 422 (7th Cir. 1990) (Posner, J., concurring).
75. *Wisconsin Dells*, 295 F.3d at 674 (quoting Aegerter v. City of Delafield, 174 F.3d 886, 890 (7th Cir. 1999)).
76. *See* id. at 674.
77. *Littlegrove,* 295, F.3d at 674 (quoting Dickinson v. Zurko, 527 U.S. 150, 162-63 (1999)).
78. 527 U.S. 150 (1999).
79. *Dickinson*, 527 U.S. at 153.
80. *Id.* at 162-65.
81. Littlegrove, 295 F.3d at 674 (*comparing* In re Zurko, 258 F.3d 1379, 1384 (Fed. Cir. 2001) (substantial evidence less searching than clear error) *with* Aruta v. INS, 80 F.3d 1389, 1393 (9th Cir. 1996) (substantial evidence more searching than clear error) and General Electro Music Corp. v. Samick Music Corp., 19 F.3d 1405, 1408 (Fed. Cir. 1994) (same)).
82. 258 F.3d 1379 (Fed. Cir. 2001).
83. 329 F.3d 140 (2d Cir. 2003).
84. *Id.* at 149.
85. 28 F.3d 639 (7th Cir. 1994)
86. *See* id. at 643-44.
87. 28 U.S.C. § 2254(d)
88. *Id.* at 643 (citing Arizona v. Fulminante, 499 U.S. at 287)).
89. *Id.*
90. *Id.*
91. *Id.* at 643.
92. 949 F.2d 914 (7th Cir. 1991).
93. *Id.* at 916.
94. *Id.*
95. *Id.* (citing State v. McKinney, 919 F.2d at 422-23 (concurring opinion)); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982).
96. *Id.* (citing River Road Alliance, Inc. v. Corps of Engineers, 764 F.2d 445, 449 (7th Cir. 1985); Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 388-89 (7th Cir. 1984); Owen v. Duckworth, 737 F.2d 643, 646 (7th Cir. 1984)).
97. *Id.*
98. 295 F.3d 671 (7th Cir. 2002).
99. *Id.* at 674.
100. *Id.*
101. *Id.* (citing Thomas v. Chicago Park District, 227 F.3d 921, 926 (7th Cir. 2000); United States v. Hill, 196 F.3d 806, 808 (7th Cir. 1999); Johnson v. Trigg, 28 F.3d 639, 643-44 (7th Cir. 1994); Ingram v. ACandS, Inc., 977 F.2d 1332, 1340 (9th Cir. 1992); Aegerter v. City of Delafield, 174 F.3d 886, 890 (7th Cir. 1999)).
102. *Id.* at 674-75.
103. *Id.* at 675.
104. *Id.*
105. *Id.* at 676.
106. 745 F.2d 677 (D.C. Cir. 1984).
107. *Id.* at 684
108. *Id.* at 684 (quoting B. SCHWARZ, ADMINISTRATIVE LAW 604, 606 (1976)).
109. *Id.* at 686.
110. *McKinney*, 919 F.2d at 422 (Posner, J., concurring).
111. *Id.*
112. *But see* Guggenhem, *supra* note 4, at 579 (arguing for "manifest weight of the evidence" standard).
113. *But see* Players Ass'n, 857 F.Supp. at 74 (characterizing the standard of review as de novo).
114. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).
115. 10 S.W.2d 323 (Tex. Crim. App. 2000).
116. *Id.* at 326.
117. *Id.* at 327.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 327 n.4.
123. *Id.*
124. *Id.* at 327.
125. *Id.* at 332.
126. *Id.* at 332 (emphasis added).
127. No. 09-00-484 CR, 2002 WL 538859 (Tex. App. 2002).
128. *Id.* at *5 n.3.
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131. No. 07-02-0347-CR, 2003 WL 22092707, at *2 (Tex. App. 2002)
132. *Id.* at *3.
133. *See* MAKE THE RIGHT CALL 71 (Triumph 1999).
134. OFFICIAL RULES , *supra* note 1, at 193.
135. Green, *supra* note 10.
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147. Schefter, supra note 6 (quoting Mike Shanahan, Coach, Denver Broncos).
148. *Id.* at 192.
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154. OFICIAL RULES, supra note 1, at 213.
155. *Id.*
156. *Id.* at 215.
157. *Id.* at 193-94.
158. Green, *supra* note 10.
159. *Id.*
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161. *See generally id.*; MAKE THE RIGHT CALL, supra note 134.
162. *See Players Ass'n*, 857 F.Supp. at 74.
163. *See* Guggenheim, *supra* note 4, at 579.
164. *See supra* Part III.A – C.
165. *See, e.g., Wisconsin Dells,* 295 F.3d at 674-77; McKinney, 919 F.2d at 422 (Posner, J., concurring); Assoc. of Data Processing, 745 F.2d at 684.
166. *See, e.g., Wisconsin Dells*, 295 F.3d at 674-77.
167. *See id.*
168. *Id.* at 674.
169. *See supra* Part IV.
170. *See Wisconsin Dells*, 295 F.3d at 674.
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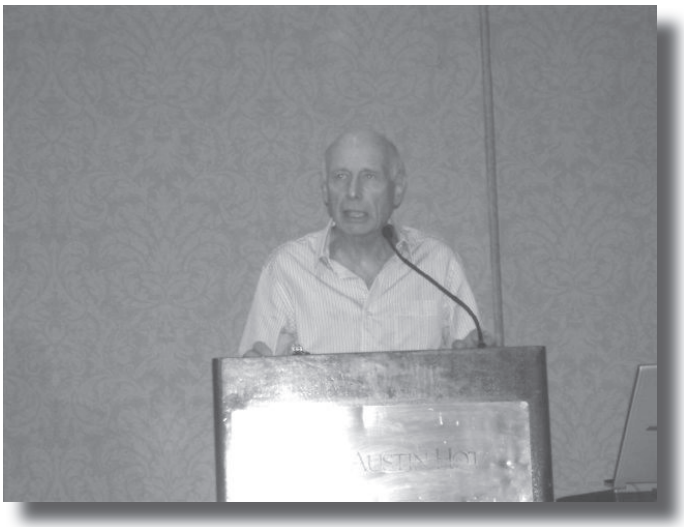
172. *See Players Ass'n,* 857 F.Supp. at 74; Guggenheim, *supra* note 4, at 579; Green, *supra* note 10.

2006 ENTERTAINMENT LAW INSTITUTE: *ANOTHER SECTION SUCCESS!*

The 2006 Entertainment Law Institute was held at the Omni Hotel, Austin, Octber20 and 21. Thirteen topics were presented by twenty-eight speakers which covered such timely issues as Estate Issues for Entertainers, Copyright Litigation, Interpretation of Recording Contracts in the Digital Era, and Film Distribution. Greenberg Traurig attorney and longtime artist advocate, Jay Cooper, received the Texas Star Award for his contributions and achievements in the field of entertainment law.

Casey Monahan (left), Director of the Texas Music Office and Terry Lickona, Producer of the Austin City Limits television series and Chairman of the Recording Academy Board of Governors, review the state of the Texas music industry.



Jay Cooper talks to the lunch audience about legal and legislative issues coming up for the music industry.

(left to right)Stan Soocher, Editor of Entertainment Law and Finance, Steve Winogradsky, President of the Winogradsky Company, Jay Cooper, Texas Star Award recipient, and Mike Tolleson, Course Director of the Entertainment Law Institute, gather at Roy's with other presenters and Council members for the annual Speaker's Dinner.

RECENT CASES OF INTEREST

Prepared by the South Texas College of Law Students
South Texas College of Sports Law & Entertainment Society

ATHLETIC TRAINERS BARRED FROM SUING FOR MEDICARE REIMBURSEMENT

The United States Court of Appeals for the Fifth District recently affirmed a ruling from the Northern District of Texas that dismissed a suit for injunctive and declarative relief by the National Athletic Trainers' Association (NATA) against the United States Department of Health and Human Services for lack of subject matter jurisdiction. *Nat'l Ath. Trainers' Ass'n v. United States HHS*, 455 F.3d 500 (5th Cir. 2006). NATA brought the suit challenging a rule handed down by the Department of Health and Human Services concerning Medicare Part B that disallowed reimbursement to athletic trainers incident to a physician's services.

The National Athletic Trainers' Association is the professional membership association for certified athletic trainers and others who support the athletic training profession. NATA has an obvious interest in rulings about Medicare coverage because the athletic trainers have fees paid through Medicare.

In late 2004, the Secretary of the U.S. Health and Human Services department issued a final rule that limited the therapy services provided by athletic training professionals from eligibility for reimbursement, even when these services were incident to a physician's services. Under the ruling, athletic training professionals who did not meet the qualifications provided in *42 C.F.R. ' 484.4 69 Fed. Reg. 66,236, 66,352* (Nov. 15 2004) were not eligible to categorize their bills as "therapy services incident to a physician's services," taking such services out of the realm of Medicare coverage.

The trial court analyzed two issues put forth by the U.S. Department of Health & Human Services as arguments for summary judgment. First the Secretary argued that NATA lacked standing to bring suit (the trial court disagreed). Second, the Secretary argued that the district court lacked subject matter jurisdiction over the issue (the trial court agreed and dismissed the case). The Fifth Circuit reviewed both issues de novo.

The Fifth Circuit agreed with the trial court that the plaintiff satisfied both Article III of the Constitution, and the "zone of interest" test requiring that the interest sought to be protected by the compliant is arguably within the zone of interests to be regulated by the statute in question. "NATA's interest in providing services to Medicare beneficiaries is sufficient to satisfy the zone of interests tests; accordingly, the district court correctly concluded that NATA has standing to challenge the rule." *Nat'l Ath. Trainers' Ass'n v. United States HHS*, 455 F.3d 500, 503 (5th Cir. 2006).

Under the Medicare Act, federal courts do not have jurisdiction until all administrative remedies have been exhausted. The parties agreed that NATA's members could not obtain administrative review because they were neither beneficiaries nor providers. However, their views differed about whether it was sufficient that administrative review and thereafter suit could be brought by a third party (the physician). The Secretary argued that because the physician can, and in fact has incentive to, get administrative review on behalf of the athletic trainers included under the new rule, NATA does not fall within the "Illinois Council Exception," which allows the suit to be brought when there is essentially no avenue for administrative review (the exception is named after *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000)). NATA conversely claimed that its situation fell within the "Illinois Council Exception" because even though third parties could assert claims, there were substantial disincentives to do so.

The Fifth Circuit wrote that the chief question is whether those to whom statutory provisions apply are completely precluded from administrative and judicial review. The court concluded that although there may be some disincentives for physicians to litigate on behalf of excluded athletic trainers, there are as many or more incentives for them to bring suit. Disagreeing with another of NATA's arguments, the court stated that the lack of pending challenges by third party physicians was irrelevant because of the relative youth of the rule. A sufficient period of time had not elapsed by which the court could infer that no challenges will occur.

The Fifth Circuit held that physicians have administrative remedies available to them that have yet to be exhausted, and that the *Illinois Council* exception should not apply to the case. Thus, the district court correctly held that it lacked subject matter jurisdiction over NATA's suit.

By: Davis Jackson

COACH LOSES BATTLE FOR RE-INSTATEMENT

Middle school athletics Coach Mike Adams recently lost his long battle with Groesbeck Independent School district dating back to April of 2003 over his 1999 dismissal as coach and teacher at the school. *Adams v. Groesbeck Indep. Sch. Dist.,* 475 F.3d 688 (5th Cir. 2007).

Coach Adams served as a coach and teacher at Groesbeck middle school beginning in 1971. In 1999, due to "complaints regarding his coaching abilities," Groesbeck elected to not renew Coach Adams' contract for the 2000-2001 school year. Adams then filed his first suit against the school district claiming Title VII violations (this suit was ultimately settled by the parties). At that time, the school decided to not fill Adams' position and the coaching staff for the girls sports teams consisted of the two remaining coaches from the previous year, Allison Adams (who was Coach Adams' wife) and Allen Grimes. This arrangement lasted until Grimes was placed on administrative leave in October 2001, leaving a coaching and teaching vacancy. Groesbeck selected Michael Milnes to fill Grimes' teaching spot, but he was not asked to fill-in as a girls sports coach because he lacked coaching experience. With Allison Adams as the only girls coach, Groesbeck enlisted several high school girls to assist her with her coaching duties. Principal Karen Golden decided that the coaching position need not be filled immediately and delayed the hiring of a new teacher/coach until the 2002-2003 school year. In the meantime, unbeknownst to Principal Golden and even though no coaching vacancy was publicized, Coach Mike Adams reapplied for the position of girls middle school coach. Principal Golden never interviewed applicants for the teacher/coach position and never posted any related available job announcements. In April 2003, after not being re-hired, Coach Adams filed another suit under Title VII against Groesbeck. This suit claimed that the school district's failure to hire him was a retaliation for his original suit.

The district court rejected Groesbeck's motion for judgment as a matter of law, and the appeal was heard by the Fifth Circuit *de novo*. Groesbeck contended that Adams applied for a position that was not even available because the district had decided not to fill Grime's job for the spring semester, and therefore Adams had no legitimate basis for his suit. The court noted that "[a]n employer does not discriminate or retaliate illegally if it has no job opening."

The crutch of Coach Mike Adams' argument was based on his wife's testimony (Allison Adams was also a coach in the school district) concerning statements made to her by the Athletic Director (AD). Mrs. Allison alleged that the AD made statements to her regarding the hiring of a new coach and that her husband would not be considered because of his previous lawsuit. Despite being contested by the AD, the Court pointed out that AD's duties did not consist of deciding whether an open coaching position existed at the middle school in the spring semester. Adams further argued that the Superintendent's testimony admitted that a vacant position existed. The Court, however, distinguished a "vacant" position from an "available" position. In essence, Groesbeck had not made the position available for reasons completely independent of Adams' situation. Therefore, the Court concluded, Coach Adams had failed to show an adverse employment action and consequently had not established a prima facie case of retaliation.

By: Jack Eggleston

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