August 27, 2008

Good Ole’ Boys Apply Only: How the NCAA Discriminates Against Minorities & Women in Collegiate Coaching

Nathan Berkeley, California Western School of Law

Available at: https://works.bepress.com/nathan_berkeley/12/
Good Ole’ Boys Apply Only: How the NCAA Discriminates Against Minorities & Women in Collegiate Coaching

Nathan Berkeley
On December 1, 1955 Rosa Parks sparked the Civil Rights movement when she refused to give up her seat to a white man. An infant Tony Dungy was almost 2 months old when this happened. Dungy is the head coach for the Indianapolis Colts and the first African American to win the Super Bowl. His career is an inspiration for all those aspiring to better their lives. After a short stint in professional football, Dungy began his coaching career in 1980 at the University of Minnesota as a Defensive Backs coach.\(^1\)

Three short years later, Dungy got a chance to prove himself as the first African American Defensive Coordinator in NFL history.\(^2\) Then in 2007, equality reached a new milestone where for the first time, two African American head coaches faced off against each other in the Super Bowl. Both Dungy and Chicago Bears Head Coach Lovie Smith humbly acknowledged the accomplishment as an important step in furthering all minorities in coaching.\(^3\)

A year after this monumental accomplishment the NCAA demonstrated again how closed minded its hiring practices are. Texas A&M introduced Mike Sherman as it’s head coach only three days after firing its former head coach.\(^4\) Ole Miss hired Houston Nutt only three days after firing incumbent Ed Orgeron.\(^5\) Arkansas hired former Atlanta Falcons head coach Bobby Petrino \textit{one day} after he coached the Falcons in a Monday

\begin{flushright}
\footnotesize
\textsuperscript{2} Marc Topkin, \emph{Breaking The Barriers}, St. Petersbourg Times, January 29, 2007, at 4C, \textit{available} at 2007 WLNR 1733948.
\textsuperscript{5} Chris Talbott, \emph{Ole Miss Welcomes Nutt}, New York Post, November 29, 2007, at 77, \textit{available} at 2007 WLNR 23569215.
\end{flushright}

2
night game. After Rich Rodriguez left West Virginia, the University created a “search committee” to look for a new coach. However, one day after West Virginia’s Fiesta Bowl victory the Mountaineers hired Bill Stewart without ever conducting an interview with him.

These stories are saddening and have a deep effect on the opportunities for all in college football coaching. Three days is not long enough to conduct a thorough search for a head coach. Hiring a coach the day he resigns shows the process was not open. Hiring a head coach without ever subjecting him to an interview disrespects the other interviewees and subverts the purposes of having interviews in the first place. In response to these issues, the NCAA needs a comprehensive affirmative action program that includes minorities and women in the interviewing process. In addition, this program must have some mechanism for enforcement that is lacking in the recently passed NCAA rule.

I. AFFIRMATIVE ACTION PROGRAMS

A. HISTORY OF AFFIRMATIVE ACTION PROGRAMS

The term “affirmative action” appears in Title VII’s Enforcement Provision section. Section 706(g)(1) gives District Court judges the power to order “affirmative action” to remedy intentional discrimination. In response to the threat of litigation and these involuntary affirmative action punishments, many organizations began implementing voluntary affirmative action programs.

---

8 Id.
9 See infra at FN 56.
In a June 1965 commencement speech to the graduates of Howard University, President Lyndon Johnson defined and explained the importance of affirmative action in addition to civil rights laws. Johnson said:

You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, 'you are free to compete with all the others,' and still justly believe you have been completely fair . . . [Affirmative Action] is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity (emphasis added); not just legal equity but human ability; not just equality as a right and a theory, but equality as a fact and as a result.\(^\text{11}\) President Johnson’s words still ring true today. Though those coaches who have “made it”, (like Dungy and Smith)\(^\text{12}\) are judged largely on their accomplishments, it does not solve the problem that there is still a lack of opportunities for minorities and women that must be addressed. The NFL has successfully addressed this issue and now the NCAA must as well.

B. TYPES OF AFFIRMATIVE ACTION PROGRAMS

Affirmative action programs can take many forms. Below is a discussion of some affirmative action programs and how they could work for NCAA coaches.

a. QUOTAS


\(^{12}\) One of the success stories in 2007 was Sylvester Croom. Croom led Mississippi State to it’s first winning record since 2000 and won the 2007 Liberty Bowl. Croom was an assistant under legendary Alabama head coach for ten years in the 70’s and 80’s before moving on to the NFL as an assistant. Croom is the first African American head coach in SEC football history. (CITATION TO APPEAR AS FULL SENTENCE)
One of the most divisive affirmative action plans is racial quotas. Racial quotas are plans that require a certain percentage of people within a company or organization to be minorities. While this might work with some industries it would not work with competitive athletics. The structure of an athletic organization is different than an average company. While every school and team is part of the NCAA they are also competitors and are competing against each other for fans and accomplishments. Demanding a quota from the NCAA or a specific athletic conference is patently unworkable because there would be no fair way in deciding which team should be mandated to have a minority head coach.

In addition to the unworkability of the rule, racial quotas have been deemed to violate the Equal Protection Clause of the Fourteenth Amendment. While race can be used as a factor in making employment decisions, a quota system is not narrowly tailored to promote a compelling government interest.\textsuperscript{13} Though ending discrimination against individuals who are currently being discriminated against is a compelling governmental interest, racial quotas were held to be strictly prohibitive.\textsuperscript{14} On both legal and practical matters, racial quotas cannot be used to further equality in collegiate coaching.

b. MANDATORY GUIDELINES

A slightly more likely possibility could be to mandate a streamlined process for how all head and assistant coach interviewees are judged in the interview process. This could take form through mandatory hiring guidelines passed down from the NCAA. Currently, the only hiring rules each school \textit{has} to abide by are the federal laws and the laws of the state that particular University is located in.

\textsuperscript{13} See \textsc{Grutter v. Bollinger}, 123 S. Ct. 2325 (2005), \& \textsc{Gratz v. Bollinger} 123 S. Ct. 2411 (2005) for a discussion of the principles that can and cannot be used in using race to make employment decisions.
\textsuperscript{14} Id.
This process would allow every interviewee to be evaluated on the same types of skill and criteria, and would allow race to be used as a “plus-factor” in calculating a score that would eventually lead to a determination of who the best candidate is. Though this process could or could not mandate that schools interview minority candidates, using a “plus-factor” system will give women and minorities a quantifiable edge in actually determining who obtains the position.

Of course, coaches are evaluated on many non-quantifiable skills and characteristics. This process would not have to change that. Qualities such as leadership, experience, winning, coaching strategies, psychological impact on athletes, recruiting skills, communication, trustworthiness and respect among both the players and coaching community could all be considered and given an appropriate subjective value in the evaluation process. This process would include including race and gender as a category and attach an NCAA-mandated positive value.

Though a system like this could work it is filled with problems. First, success of a program like this is entirely dependent on the good-faith compliance of the athletic directors who are charged with head coaching hiring decisions. Any athletic director who wishes to subvert a subjectively based, flexible system like this could do so by simply giving higher numerical values to the candidate they had already pre-selected in the hopes of offsetting any numerical value gain given to minorities or women.

The second problem with mandatory guidelines is that other evaluative criteria might get left out. Whatever criteria selected certainly can’t encompass all the criteria used by all athletic directors in making hiring decisions. Some athletic directors might use criteria not widely used by others. It would be unfair to tell them they cannot use
parts of a system they may have refined to success in the past. The cornerstone of sports is competition. The management side of sports competes just as much as the actual athletes and any advantage gained should be encouraged.

Additionally, a system like this might lead to a reinforcement of this “good ole’ boys” network. Without a very high numerical value being attached to a candidate’s race or gender, the experienced veteran coaches will still have a significant advantage in the quantifiable categories which would be used to judge coaches. Factors such as experience would tend to reinforce the same group of candidates.

Finally, with a mandatory guidelines system like this, determining a pay structure for coaches would be difficult. If a candidate is hired by a point total then who determines how much a particular point total is worth? And even if a candidate scores high on the guidelines who’s to say the school could even afford to hire that coach? In light of the restricted earnings cases,\textsuperscript{15} this problem seems nearly impossible to work out without violating antitrust laws.

While this is a very common affirmative action procedure in university admissions it is not used nearly as much in “quality” occupations as it is in “quantity” occupations.\textsuperscript{16} Mandatory guidelines are an undesirable option for increasing coaching diversity in college athletics.

c. RECRUITEMENT

Another common strategy implemented by universities and employers is to recruit for positions at high-percentage minority schools. The idea behind this is that promotion

\textsuperscript{15} See, \textit{Law v. Nat’l Collegiate Athletic Ass’n}, 134 F.3d 1010 (1998) (holding that a compensation limit on what collegiate coaches’ earn is an unlawful restraint of trade). If salaries were based on this “point system” it would likely violate that rule because their would be no way to determine pay.

\textsuperscript{16} See discussion \textit{infra} on my distinction between “quality” and “quantity” occupations.
and increased knowledge of your company within the minority community will lead to increased applicants and a more diverse population for the company to choose from.

Recruitment, in the traditional sense, would not work because of the “quality” dynamic\textsuperscript{17} involved in coaching positions. Recruitment of these positions, in the form of encouraging players to be coaches, would be an admirable action but is unlikely to result in real change. If athletic directors won’t interview the experienced assistants now, then an increase in applicants won’t result in any better diversity.

d. \textbf{MANDATORY INTERVIEWING}

The most promising affirmative action program is mandatory interviewing of a certain amount of qualified minorities. This is the type of program the NFL employs and that the NCAA has mirrored\textsuperscript{18} by mandating at least one minority be interviewed when a vacancy becomes available.

The first and most obvious benefit of this is that interviewing practices become more open & transparent. With the power of boosters in college sports there is no way to tell how much influence is being exerted on the athletic administration. With mandatory interviewing of minorities the process opens up and becomes more transparent. Take the Bobby Petrino hire at the University of Arkansas for example.\textsuperscript{19} The media and the public have no idea how the employment agreement came about. What we do know is that Petrino was hired about 24 hours after he coached a midseason Atlanta Falcons game. This process was not open and can easily lead to speculation that both the University of Arkansas and Petrino engaged in improper conduct. If Petrino entered into discussions

\textsuperscript{17} See discussion \textit{infra} on my distinction between “quality” and “quantity” occupations.
\textsuperscript{18} The recently passed NCAA Rule only applies to Division I football. For more in depth discussion on the NCAA Rule, see \textit{infra}.
\textsuperscript{19} See \textit{Supra} at FN 7.
with the University of Arkansas while under contract with the Falcons, (which is likely), then he most likely violated the terms of his Falcons contract.

Another benefit is that mandatory interviewing programs give minority candidates the opportunity to improve their interviewing skills. Interviewing is a skill that people only learn through experience. It is a skill that has to be practiced. Mandatory interviews help give the candidates an expectation of what is expected and how they can better improve in the future.

A mandatory interviewing policy will also ensure that there is a steady availability of minority coaching candidates. If minorities and women think they will never be seriously considered then they’ll never pursue a career in collegiate coaching. If already employed as an assistant coach they’ll be less likely to stay. Even if programs like this are not successful in increasing the actual numbers of minorities in coaching it will still show minorities and women that they have the opportunity to be heard and get a chance at a head coaching position.

One possible negative outcome is that interviewers will subvert the rule and conduct “sham interviews”. Sham interviews are where one token minority or women is brought in for an interview to fulfill the procedural requirement even though he or she is not being seriously considered. Though a valid concern, the NFL’s Detroit Lions incident played out exactly opposite. There, because everyone knew the Lions intended on hiring Steve Mariucci, no minority candidate would placate the Lions and go in for an interview. The implications of this are incredibly positive. Not only does it include a new minority candidate, it also requires employers to bring in legitimate, non-traditional, non-minority candidates as well. For interviewers, this is the surest way to ensure that

---

20 For a more thorough account see infra at FN 21 & 22.
minority candidates won’t think they are participating in a sham interview. If an interviewer is interviewing a select few high profile candidates and one random minority candidate, this candidate is more likely to assume he is just being sought out for the interview requirement and not because he has a legitimate shot at the position. This added insurance taken by interviewers works to break down the current “good ole’ boys” system by injecting new non-minorities, as well as the mandated minorities, into the hiring process. This is not only important, but imperative to the success of the program.

Everyone benefits when employment opportunities become more open and transparent. This is progress. When opportunities in any field are limited to a select group of people and the doors of opportunity are only held open to a select few, the quality of work suffers and progress is slowed.

C. “QUANTITY” V. “QUALITY” OCCUPATIONS

In deciding which affirmative action program is right for a particular industry, one must examine the type of job at issue. To determine this, a distinction must be drawn between “quality” occupations and “quantity” occupations. A “quantity” occupation is a job that many different people can fill by simply meeting some quantifiable job requirement. These are typically occupations where there is little to no independent decision making. These are jobs where the employer would likely need multiple people to fill in order to run his business. The majority of all labor oriented and service occupations would fall under this “quantity” label.

If you’re hiring for a job which requires heavy lifting the qualifications are fairly specific. If the employer requires that you can lift 100 pounds, either you can or cannot. These qualifications are definitively quantifiable. These “quantity” occupations would be
very conducive to affirmative action programs composed through mandatory guidelines or even quotas. While other factors can inevitably lead to a “quantity” workers termination, (I.E. absenteeism, etc.), it will not be because the employee cannot actually physically do the work.

On the other hand, “quality” occupations are based on more subjective criteria. Coaching is a prime example of this. How can one truly quantify psychological impact on athletes, ability to motivate athletes or respect in the coaching community? These are undoubtedly important and a candidate’s ability to do these things are almost certain to be judged differently by every interviewer.

“Quality” occupations are unique in the sense that only one person can fulfill them at a time and the employer will only be searching for one candidate. A “quality” occupation is also one where a change in that occupation can have a far-reaching impact on the success of the organization. For example, if Pete Carroll decides to leave USC football, the Trojans are not guaranteed continued success no matter how much diligence, effort and money USC dispenses in finding a comparable replacement. This is why it’s a “quality” occupation. No matter the lengths gone to, a replacement is not ensured to be as successful as the predecessor. While diversity is no less important in “quality” occupations, (probably more important), there must be an acknowledgement that affirmative action programs for “quality” occupations need to be treated differently than programs for “quantity” occupations.

II. COACHING DIVERSITY IN PROFESSIONAL SPORTS

Professional sports have consistently led the charge on programs to increase diversity. Below are some professional sports & examples of the measures undertaken to diversify.
A. NFL

In 2002, the National Football League (NFL) adopted what is known as the “Rooney Rule”. Named after the Pittsburgh Steelers owner who has been instrumental in the advocating diversity in the NFL, the Rooney Rule mandates a procedure for interviewing coaching candidates when there is a vacancy. The Rooney Rule is an affirmative action policy which requires every NFL team with a head coaching vacancy to interview at least one minority candidate in the hiring process. In 2003, when speculators were wondering whether the NFL would really enforce this rule, the Detroit Lions hired Coach Steve Mariucci without interviewing a minority candidate. After the Lions attempted to comply with the rule by asking many minority assistants to interview, the league fined the Detroit Lions $200,000 and indicated that the next violator would pay $500,000. Later that year, the league expanded on this rule requiring that interviews be documented, in person and that the team owner be involved in the final decision making process.

The Rooney Rule has been met with noted success. When the Rooney Rule came into being there were only two minority head coaches in the NFL. By 2007, there were seven minorities head coaching in the NFL. The 2006 Racial and Gender Report of the NFL states the rule as having a “dramatic” impact on diversity in the NFL.
has extended to the assistants and coordinators as well. For the 2006 season, thirty-eight percent, (165 total), of the assistant coaches were minorities.\textsuperscript{27}

B. NBA

Among all professional sports leagues, the National Basketball Association (NBA) has consistently gotten the best scores for racial and gender diversity. For the 2006-07 NBA season, forty percent of head coaches and assistant coaches were African-Americans (though none were female).\textsuperscript{28} Of the senior administration positions in the NBA, women hold twenty-five percent and twenty percent are minorities.\textsuperscript{29} Overall, the NBA earned an A+ for racial diversity and a B for gender diversity.\textsuperscript{30}

C. MLB

Like the NBA, Major League Baseball (MLB) does not have any drastic racial inequities. Years ago MLB adopted a policy where every team was required to put together a list of qualified minority candidates, and submit it to the front office.\textsuperscript{31} Once interviews began every team was required to interview at least one minority candidate.\textsuperscript{32} For the 2005 MLB season\textsuperscript{33}, twenty-nine percent of all coaches were African-American or Latino.\textsuperscript{34} When taken together, thirty-nine percent of the combined Major and Minor league coaching staffs are people of color.\textsuperscript{35} This is especially important in baseball because it shows that there are avenues for minorities to work their way up to the majors.

\textsuperscript{27} Id. at 7.
\textsuperscript{29} Id. at 15.
\textsuperscript{30} Id. at 4.
\textsuperscript{32} Id.
\textsuperscript{33} 2005 is the most current report for Major League Baseball.
\textsuperscript{35} Id.
Of the senior administration positions at MLB teams, women hold eighteen percent of the positions.\textsuperscript{36} As with other sports, these “senior administration” positions are an integral part to the advancement of minorities and women in MLB.

MLB has taken measures to diversify their employment and workforce diversity. In 1995 MLB addressed diversity through Human Resource programs both at the central office and at the club level.\textsuperscript{37} MLB has set benchmarks reports that profile and help clubs plan further diversity measures.\textsuperscript{38} These accomplishments have not gone unnoticed. In November, 2007, MLB Commissioner Bud Selig was honored for his commitment to diversity by having the McLendon Foundation scholarship named in his honor.\textsuperscript{39} The scholarship is designed to assist meritorious minority students in their higher education.\textsuperscript{40}

D. NASCAR

Even NASCAR, a historically white sport\textsuperscript{41}, has made serious commitments to diversify their sport. In 2004, NASCAR created the Drive For Diversity program. The Program seeks to develop minority & female drivers and crew members.\textsuperscript{42} So far, none of the drivers of this initiative have reached either of NASCAR’s top two series\textsuperscript{43} but that doesn’t mean progress hasn’t been made. In 2002, Shawna Robinson\textsuperscript{44} became the first

\textsuperscript{36} Id. at 9.
\textsuperscript{37} Id. at 28.
\textsuperscript{38} Id.
\textsuperscript{39} Tom Singer, Diversity Award to bear Selig’s name, November 29, 2007, available at mlb.mlb.com/content/printer_friendly/mlb/y2007/m11/d29/c2313851.jsp (last visited March 1, 2008).
\textsuperscript{40} Id.
\textsuperscript{41} In the fifty year history of the sport, NASCAR has only produced three African-American drivers (two of which have raced in a combined three races in NASCAR’s top division). The other, Wendell Scott, is the only African-American to have a victory in NASCAR’s top series and finished in the top 10 in points every year from 1966 to 1969. For more on Wendell Scott there is a forthcoming book. See Brian Donovan, Hard Driving: The Wendell Scott Story (forthcoming 2008).
\textsuperscript{42} Available at www.drivefordiversity.com/theprogram/index.asp (last visited February 23, 2008).
\textsuperscript{43} The Sprint Cup Series and Nationwide Series.
\textsuperscript{44} There have been many female drivers (I.e. Erin Crocker, Tina Gordon, Tammy Jo Kirk, Kelly Sutton and more), in NASCAR’s smaller series but Shawna Robinson is the only recent female driver to make the leap to NASCAR’s top series.
female driver to compete in the Sprint Cup Series in decades.\textsuperscript{45} In 2006, Bill Lester became the first African American to race in NASCAR’s top series\textsuperscript{46} since 1986 and the sixth in series history.\textsuperscript{47} Still more promising than Robinson and Lester is 19-year old, up and coming NASCAR Truck Series driver Chrissy Wallace. Wallace is the daughter of current Nationwide Series driver Mike Wallace and the niece of 1989 Sprint Cup Champion Rusty Wallace. Wallace finished 18\textsuperscript{th} in her first NASCAR Truck Series race in March of 2008.\textsuperscript{48} Though diversity among competitors in NASCAR is not completely analogous to diversity in coaching positions, these numbers still show a willingness to address diversity disparities.

The NFL, NBA, MLB and NASCAR have consistently addressed their diversity issues through the years while the NCAA has apathetically turned a blind eye.

III. COACHING INEQUITIES IN COLLEGIATE SPORTS

A. NCAA FOOTBALL

Since 1982, there have been 437 head coaching vacancies at the Division I level.\textsuperscript{49} African-American football coaches have been selected to fill 26 of those vacancies.\textsuperscript{50} That’s 6\% of the time. Even more damning are the possibilities of an African American coach after termination from a Head Coaching position. Of the 26 Division I Football head coaching positions filled by African-American Head Coaches, only one, Tyrone

\textsuperscript{45} Statistics available at www.nascar.com/drivers/dps/srobinso00/cup/index.html (last visited April 14, 2008).
\textsuperscript{46} Lester also was the first African American to race in NASCAR’s Nationwide Series.
\textsuperscript{48} Mike Wallace’s Daughter 18\textsuperscript{th} in Truck Series Debut, Virginia Pilot and Ledger Star, March 30, 2008, at 12, available 2008 WLNR 6031972.
\textsuperscript{50} Id.
Willingham, has gotten an opportunity to lead another program.\textsuperscript{51} This is in sharp contrast to their white counterparts who can fail drastically or act imprudently and still get other coaching opportunities.\textsuperscript{52} In an attempt to remedy this, the association of Division I athletic directors adopted the NCAA Rule.\textsuperscript{53} The February 2008, NCAA Rule states, “Athletic directors interviewing candidates for head football coaching positions should include one or more minority candidates for that position, resulting in a formal interview process.”\textsuperscript{54} Though similar to the NFL’s Rooney Rule, the NCAA Rule is drastically ineffective in solving the diversity inequities in collegiate coaching due to its lack of an enforcement mechanism.

a. Why Is There Inequalities In Collegiately Coached Football?

i. Pre-Existing Relationships

Almost all athletic directors have worked in some capacity for an athletic department before obtaining their head positions. Most people like to work with those they know and like, rather than take a chance on someone new. Though not done intentionally or in bad faith, this undoubtedly leads to networking and relationships that foster future employment opportunities. While networking itself is benign it can create a community that is hard for outsiders to infiltrate. When there is a disproportionate percentage of minorities, as in collegiate football coaching, steps need to be taken to make sure the

\textsuperscript{52} Two glaring recent examples are Rick Neuheisel and Bobby Petrino. Though moderately successful at the University of Colorado and the University of Washington, Neuheisel violated NCAA rules and left both programs facing the possibility of sanctions only to later land an even higher profile job at UCLA. Petrino didn’t even serve one full season on his 5 year contract, for the Atlanta Falcons before bolting for the University of Arkansas. Why would any school want a man who can fulfill approximately 1/10 of his contractual duty to teach our young athletes about how to deal with winning and losing.
\textsuperscript{54} Tony Barnhart, \textit{AD’s Tackle Fairness In Hiring}, Atlanta Journal and Constitution, February 19, 2008, at C1, available at 2008 WLNR 3200386.
process is open. Because of the drastic disparity between African Americans who play Division I football and the amount of African Americans in collegiate football coaching, any program needs to seek to increase the amount of potential candidates.

ii. Public Relations & Marketing

Another reason for the drastic percentages is the marketing aspect of hiring celebrity coaches. When a university needs a new head coach it is the result of losing or controversy. They are often on the tale end of consecutive losing seasons. They are likely to have lost booster support or have had the threat of losing booster support. Athletic Director’s are looking for a way to get in the press and stir up excitement over there struggling program. It is no wonder that they would turn to the same group of big name coaches when they’re looking to garner up this kind of support & excitement. These again are totally benign reasons but they prevent all people, (minorities and non-minorities), from breaking into the next level and leave out anyone not already in the "good ole’ boy” network.

iii. Competitive Nature of Sports

An argument can be made that all social programs, like affirmative action programs, are ineffective and implausible in sports because of the competitive nature of the business. The main objective of anyone who manages a program or runs a team is winning and little else matters.\textsuperscript{55} However, competitiveness is not unique to sports. Isn’t everything in private business a competition? Just because there is no winner declared at the end of every day, does not mean that Coke and Pepsi are no less competitors?

Everything in our free-market, capitalistic economy is a competition. Yet, almost all

industries have improved in diversity while NCAA collegiate coaching has not. The competitive nature of sports cannot be used as an excuse when the policy being recommended does not mandate who the university should actually hire.

iv. Boosters

The “booster” system of funding collegiate sports plays perhaps the largest role in how the hiring process is conducted. “Boosters” are people who support collegiate athletic programs. They are usually wealthy, former alumni who take great pride in the University’s athletic accomplishments and who seek a voice in the hiring process by providing dollars to their home schools. They typically exert great influence in Athletic Department decisions.

Though this devoted support might seem unharmedful, it plays an important role in the hirings and terminations of head coaches. A prime example recently occurred with Tyrone Willingham and the University of Washington. In January 2008, a booster offered to donate $100,000 to a law school scholarships fund if Willingham was fired. Though no one is accusing this of being racially motivated, it is a prime example of the manner in which a booster goes about trying to exert influence on a program he/she cares deeply about. Boosters can get away with actions like this because if they’re unhappy the University is less likely to receive contributions from them. This increases the chances that the Athletic Director will get fired. In a way, the Athletic Directors are held ransom by boosters.

The boosters influence is a problem for equality because a boosters’ discrimination\(^{58}\) can be imputed on a university. When Ron Brown, an assistant at the University of Nebraska for 15 years, interviewed at Brown University\(^{59}\) he was told by the Athletic Director, “Some alums are not happy because you’re African American…We don’t want that experiment here.”\(^{60}\) Unlike in the NFL, where owners can be held accountable for discrimination, boosters are not. Whatever the solution to the lack of diversity in collegiate coaching is, it must find a way to subvert the power the boosters currently play in the decision making process.

v. National Signing Day

A common reason for schools to ignore process and rush to hire a head coach is recruiting. National Signing Day, where college athletes are first permitted to sign scholarship offers, falls on the first Wednesday in February, (less than one month after the National Championship game is played.) Many mediocre schools who attended lower tier bowls are teams that regularly have vacancies to be filled\(^{61}\) and they don’t want to lose possible recruits. This concern is legitimate and the NCAA needs to institute rules to level the playing field in recruitment.

There are three chief possibilities for fixing this. First, National Signing Day could be pushed back approximately one month. This is unlikely to occur because the NCAA is a

\(^{58}\) I am not saying that all or even most boosters intentionally discriminate. However, at a minimum it can fairly be stated that they greatly underestimate the lack of opportunities for minorities in collegiate athletics. See, Congressional Testimony Before the House Energy, Commerce, Trade and Consumer Protection, 110th Cong. (2007) (statement of Dr. Fitzgerald Hill, President, Arkansas Baptist College).

\(^{59}\) It is worth pointing out that the University of Nebraska’s football program has been one of the most successful of the past 40 years. Since 1970, Nebraska has won 5 national championships. Needless to say, there are few football programs one would prefer to get there experience at other than the University of Nebraska.

\(^{60}\) Id.

\(^{61}\) For example, the 2007 Texas A&M Aggies, UCLA Bruins.
member-run organization and the schools are probably in favor of getting their enrollment numbers as close to solidified as soon as possible.

Secondly, the NCAA could institute a rule whereby any school who terminates a coach after the start of the football season, must wait until a certain date sometime after the National Championship to hire a new permanent replacement. This would ensure that those schools which are in bowl games that terminated their coaches are on a level playing field as far as recruitment of new coaches. It also could give schools more time to think about whether or not to terminate their current coaches.

Finally, the NCAA could mandate all signing day contracts have a flexibility clause where signees are allowed to undo their commitments in 6-8 weeks if they don’t like where the program has gone in that time. This has the benefit of giving signees the security of knowing they are with a school but that if things change drastically they can get out of there commitment.

B. NCAA BASKETBALL

Another significant defect in the NCAA rule is the fact that it only addresses football. If this rule is good enough for college football then why should it not include all sports? Why should it not include women coaches in sports (both women’s and men’s), they have first-hand experience in? It should. The NCAA Rule should extend to men’s sports that women have personal experience with, most notably basketball. There is no reason why women (who play and coach women’s basketball themselves), can’t coach men’s college basketball.\textsuperscript{62}

\begin{enumerate}
\item Do Female Coaches Have the Ability to Coach Men?
\end{enumerate}

\textsuperscript{62} Though my focus of women in men’s basketball will be limited to college basketball and the NCAA Rule, I acknowledge that women do not have these coaching opportunities in men’s professional basketball as well.
Though many might dismiss the idea of women coaching men as unreasonably progressive it is important for those who truly believe in equality. A typical argument against women coaching men is that men wouldn’t want to play for a woman. With the bevy of athletes who consistently say, “All I want to do is win” this is hard to believe. If a female coach establishes herself as a champion, competitor and competent men’s coach, men would have absolutely no problem playing for her.

Another argument is that men wouldn’t listen to women coaches and that women are incapable of communicating with a group of men on the same level as another man. First, if this were true here, it would be true in every job and men would never be able to work as subordinates to women. The second and most obvious rebuttal to this is that men are able to coach and communicate with women players. Some of the most successful women’s coaches are men. Geno Auriemma has been the head coach for the University of Connecticut Women’s Basketball team for 23 years. He has won five championships and has reached the Women’s Final Four nine times.

Finally, some argue that the men’s and women’s games are too different for women’s basketball to act as a channel to men’s basketball. They argue that the men’s game is too quick and athletic and that women’s basketball coaches wouldn’t have enough experience with that to be successful. Based on statistical probability, no team will always play an opponent they are more athletic than. In these situations many lessons could be learned.

---

63 This argument is the same argument used for segregating the races in the armed services. See Jeanne M. Powers & Lirio Patton, Article, BETWEEN MENENDEZ AND BROWN: GONZALES V. SHEELY (1951) AND THE LEGAL CAMPAIGN AGAINST SEGREGATION, 33 Law & Soc. Inquiry 127, 163 (2008).
from women’s basketball coaches. Former Executive Director of the Women’s Basketball Coaches Association, Betty Jaynes says:

Women’s basketball is more finesse. Finesse basketball requires masterful strategy by coaches. The women’s game is more of a coaches’ game since the power element isn’t as prominent as it is in the men’s game. This is not to say that coaching is less significant in men’s basketball, but rather women’s coaches must also compensate for the challenge of playing below the rim.66

Can no men’s team possibly benefit from learning to play below the rim? Can no men’s team benefit from learning finesse? If they can then the only reason female coaches are not given the opportunity to coach men is the other two reasons listed above and those are blatantly discriminatory & not valid.

b. Ways to Break Down the Barriers

Though females do not have adequate opportunities in men’s basketball currently there is hope for a change. There are two principal avenues for breaking down these barriers: A “groundbreaker”, or “systematic progression” approach.

The first possible way for women to coach in men’s basketball is through a “groundbreaker.” A “groundbreaker” would have to take the form of a very accomplished multi-time champion female coach. Tennessee’s Pat Summitt would be unquestionably the best candidate. Summitt has led the Tennessee Lady Vols to eight championships and seventeen Final Four appearances in her 34 years with the team.67 That’s a 50% Final

Four appearance record. Summitt is unquestionably the quintessential coach in collegiate women’s basketball. The hope behind this approach would be that Summitt would go to Men’s basketball, succeed and then everyone would realize that women can coach men. There has been a “groundbreaker” for every racial or gender barrier that’s been broken down, (I.E. Jackie Robinson in baseball), but to think that Summitt would completely break down the barriers in this arena is extremely unlikely. More would need to be done.

The second possible way is a “systematic progression” approach. Under this approach, the NCAA Rule should be expanded to include the mandatory interviewing of one woman for every certain amount of assistant coaching positions. If hired as an assistant, it is hopeful that a woman be able to prove they are capable of being considered for promotion and that someone would be able to make the leap to head coaching; and if they don’t, who cares. The goal of affirmative action programs should be opportunities. The actual numbers are just indicators of whether everyone is getting a fair chance at the opportunities associate with their industry.

Just like the NCAA & Rooney Rule, this does not mandate that any team actually hire a woman on there coaching staff. All it mandates is that women be given the opportunity to show Athletic Directors & current Men’s Head Coaches that any stereotypes about their inability to coach men are incorrect. If given this opportunity then the NCAA Rule will be a successful affirmative action program.

---

68 There are many other female coaches who would be more than capable at coaching men (I.E. Geno Auriemma at UConn, Vivian Stringer at Rutgers, etc). However, there is little argument that Summitt in the most successful and would thus, have the greatest social impact (and best chance), to coach a men’s team.  
69 Whether that number is one woman for every vacant assistant coaching position or one woman for every 10 vacant assistant coaching positions is not important to the idea. The number can be moved and determined by someone more familiar with the turnover ratio to the industry.
We don’t know if and to what extent there has been interest in Pat Summitt coaching men. However, if a school was interested in her coaching their men’s team I believe they would’ve used it as publicity for their program. If Summitt hasn’t been considered then that is just a blatant example of the discrimination present today. However, if she were hired tomorrow to coach a men’s team this would not solve the discrimination currently present. A female coach shouldn’t have to take her team to the Final Four 50% of the time before she is considered a competent men’s coach. The “systematic progression” approach is the way to remedy this discrimination. Through this, women will be able to prove their worth from the bottom up, as assistant coaches before being considered for head coaching positions.

c. Why Do Women Not Break Down These Barriers?

While integration is possible, one has to wonder why there has been such little interest, by women, in seeking opportunities in men’s basketball. Maybe no women have any interest in coaching men but I do not believe this is true. Men’s basketball generally has higher publicity and pays better. I believe women don’t attempt to break down these barriers because of Title IX. Title IX, the law which is supposed to equalize women and men in sports, is a limitation and barrier on the possibilities of women in coaching men’s sports.

It’s no secret that football and men’s basketball are the most profitable programs in any athletic department. They pay for the women’s sports. If women start to be able to compete on a more equal playing field in coaching men’s sports, some might endorse for repeal of Title IX on the basis that it is unneeded because equality is present. This is possible because Title IX’s specific application to intercollegiate athletics was originally
ruled ambiguous.\textsuperscript{70} It was only through the “Javits Amendment” that it was clarified that Title IX did in fact apply to athletics.\textsuperscript{71} While not imminent, it is possible that Congress could repeal the “Javits Amendment” without affecting the core of the Civil Rights Act of 1964. If an inclined Congress felt the desire to do this, something as “absurd” as women coaching men might be just the catalyst to do that. Though unlikely, it is likely that women look at the opportunities they have and just accept it.

The possibility of repeal and passive acceptance should not be a basis for inaction. Could you imagine if this was the thinking of African Americans in the Civil Rights movement? If so, we still might have “separate but equal” laws because African Americans were afraid of losing the rights and privileges they already had.

IV. SOLUTIONS

Though the NCAA Rule procedurally calls for much the same requirements as the Rooney Rule the NCAA version is completely lacking in enforcement. Unlike the Rooney Rule which will fine the next team to violate it $500,000, the NCAA Rule is basically voluntary. There is no penalty for non-compliance. Without some sort of enforcement mechanism the purpose of the rule will not be followed and will inevitably be subverted.

A. FINES

One possibility for noncompliance is fines. This is the mechanism used in the NFL. It has been a successful enforcement mechanism for them as no one has violated the rule.

\textsuperscript{70} Kevin J. Rapp, Notes, FORCED TO PUNT: HOW THE BOWL CHAMPIONSHIP SERIES AND THE INTERCOLLEGIATE ARMS RACE NEGATIVELY IMPACT THE POLICY OBJECTIVES OF TITLE IX, 80 Ind. L.J. 1167, 1170 (2005).
\textsuperscript{71} Id.
since the Detroit Lions did in 2002. However, a pure monetary sanction is not in the best interest of the NCAA for several reasons.

First of all, most of the Division I universities are publicly funded. Encouragement of a program to interview minorities is noble but to ask the taxpayers of a state to pay a monetary fine for a violation is not sound policy, and would be drastically unpopular.

Secondly, all universities are educational institutions. If we fine them large amounts of money for not complying with this rule it will cost the university resources that could have used on education. No one would advocate taking resources from education to pay fines.

The third and most convincing reason why monetary sanctions are undesirable is because boosters could just agree to pay off any fines encountered by the school if they do what the boosters want. No rule would stop this from occurring and the subversion of the rule would be inevitable.

B. SANCTIONS

A second and more viable option is sanctions. The NCAA imposes sanctions for violations of its member rules. Typical sanctions include loss of postseason play, loss of television rights, probation and loss of scholarships.

Many say the NCAA is unable to do this because of its structure. The NCAA has no institution wide hiring practices (other than the new NCAA Rule), and schools set there rules autonomously. Detractors argue this makes a stiff rule improbable. But the NCAA makes rules all the time. All universities set their own academic honor codes, but the NCAA has approved mechanisms to take back bowl money and scholarships when
athletic programs cheat.\textsuperscript{72} The NCAA already has passed measures in which member schools can loose athletic scholarships if their sports programs don’t meet a list of criterion that include \textit{acceptable graduation rates}.\textsuperscript{73} This shows how ridiculous this procedural argument truly is. If graduation rates can result in lack of athletic scholarships then why can’t not abiding by a mandatory interviewing policy.

Taking away scholarships is also a more effective remedy than fines because fines could just be paid for by boosters. However, there is nothing a booster can do about a scholarship getting taken away (short of paying off athletes and that itself is a NCAA violation which will lead to more NCAA sanctions).

The best result is a progressive set of punishment. When a university violates the NCAA Rule the first punishment should be to lose one scholarship from whatever program committed the violation. Recurring violations should result in more severe measures and scholarship cuts. For a culture so engrained with these practices, the means to fix the inequities in diversity need to be progressive and gradual so the ends are not demonized.

\textbf{V. CONCLUSION}

Diversity is good to grow sports. It shouldn’t be something to fight against. NASCAR has realized this. They know that to expand they have to seek people outside of their traditional southern white fan-base. NASCAR knows any minority or female driver will increase publicity and interest in their sport. Any affirmative action program used to increase diversity would not be permanent. Affirmative action programs are meant to be temporary.


\textsuperscript{73}Id.
No one is telling the NCAA they *have* to hire a certain amount of African American coaches. No one is telling the NCAA they *have* to start hiring women in men’s sports. All this note suggests is that the NCAA should insure that these people are talked to so they can be judged on their merits; so that they can have an opportunity to prove everyone wrong. Just like Tony Dungy and Lovie Smith.