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“IF YOU CAN PLAY . . . YOU CAN PLAY”--AN EXPLORATION OF THE
CURRENT CULTURE SURROUNDING GAY ATHLETES IN PROFESSIONAL
SPORTS WITH A PARTICULAR FOCUS ON APILADO V. NAGAAA

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I. Introduction

In 2011, New York Magazine ran an article titled *The Last Closet: When Will a Gay Professional Athlete Finally Come Out?*¹ This article highlighted that the world of professional sports is “catch[ing] up to the rest of us . . . extremely fast” with regard to accepting openly gay athletes and dismantling homophobia in the locker room.² However, to date, no *22 professional male athlete in any of the four major American sports leagues--the NBA, NFL, NHL, or MLB (Big Four)--has come out of the closet while he was still an active player.³

Part II of this Article explores recent events in men's professional sports pertaining to the attitude and culture surrounding gay men in professional athletics, mainly within the Big Four. In doing so, the Article tracks a shift in thought among those four leagues--away from the attitude of ignorance and intolerance that dominated the twentieth century (and into the twenty-first) and towards acceptance--brought about by a refocus of the issue, generated in large part by professional athletes, onto an athlete's ability rather than his sexuality.

Part III of this Article analyzes in detail a recent discrimination lawsuit brought by members of a gay softball team playing in the Gay World Series against the North American Gay Amateur Athletic Association (NAGAAA), the organization responsible for the event, highlighting the unique claims involved where an organization purporting to promote acceptance of gay athletes caps the number of straight players that can participate on a team and dismisses certain players for “not being gay enough.”⁴

Finally, Part IV of this Article argues that the NAGAAA's conduct in excluding participants based on a rigidly structured view of sexuality works to halt the progress towards tolerance for gay athletes by instating a gay versus straight regime that makes a person's sexuality the central issue rather than his ability to play and removes from gay sports the heterosexual audience necessary for dismantling stereotypes about gay male athletes.

II. The Last Closet

John Amaechi, a former NBA player who played for five seasons in the NBA with the Cleveland Cavaliers, Orlando Magic, and Utah Jazz *23 came out of the closet in 2007, after he had retired.⁵ He was not the first Big Four athlete to come out of

the closet after retirement,⁶ but his decision to go public regarding his sexuality, both in his book, *Man in the Middle*, and in an interview with ESPN's *Outside the Lines*, certainly sparked some debate.⁷

In response to Amaechi's revelation that he was gay, NBA All-Star LeBron James stated, “With teammates you have to be trustworthy, and if you're gay and you're not admitting that you are, then you are not trustworthy.”⁸ Retired NBA point guard Tim Hardaway, when asked about Amaechi, responded that he would not want play on the same team with him solely because of his sexual orientation.⁹ Hardaway continued on to say:

And second of all, if he was on my team, I would, you know, really distance myself from him because I don't think that's right. And you know I don't think he should be in the locker room while we're in the locker room. I wouldn't even be a part of that.¹⁰

Hardaway was not done yet. What were likely his most offensive remarks of the day pertained to gay people in general. He stated, “You know, I hate gay people, so I let it be known. I don't like gay people and I don't like to be around gay people. I am homophobic. I don't like it. It shouldn't be in the world or in the United States.”¹¹

***24** This shockingly offensive reaction from Hardaway to a fellow NBA alumnus's decision to be open about his sexuality came just five years ago;¹² however, as stated in *New York Magazine* in 2011, there is evidence to support the notion that “homophobia is no longer considered cool in sports.”¹³ During the 2011 NBA playoffs--the NBA's marquee event, which earned record-setting television ratings that year--the NBA ran a television public service announcement (PSA) featuring two members of the Phoenix Suns, well-known veteran Grant Hill¹⁴ and former Boston College standout Jared Dudley, explaining that it is offensive (literally “not cool”) for athletes to use the word “gay” as a substitute for “dumb or stupid.”¹⁵

***25** Also in 2011, in response to the coming out of Phoenix Suns President Rick Welts, NBA Hall of Famer and TNT analyst Charles Barkley said that he is certain that he played with gay teammates and that it never bothered him, nor should it bother anyone.¹⁶ Barkley stated:

First of all, every player has played with gay guys. It bothers me when I hear these reporters and jocks get on TV and say: ‘Oh, no guy can come out in a team sport. These guys would go crazy.’ First of all, quit telling me what I think. I'd rather have a gay guy who can play than a straight guy who can't play.¹⁷

Finally, Barkley said that gay athletes pose no threat to the NBA.¹⁸

The shift in focus on the fact that skill and ability, rather than sexuality, is what ultimately matters in any player is not unique to Barkley or the NBA.¹⁹ Philadelphia Flyers scout Patrick Burke, son of Brian Burke, the general manager of the Toronto Maple Leafs and the U.S. men's Olympic hockey team, believes that there will be an openly gay NHL player within the next two years.²⁰ In February 2010, Patrick's brother Brendan, who was openly gay, died in a car crash at only twenty-one years old.²¹

Brendan was a senior at Miami University and the student manager of the men's ice hockey team.²² Brendan had the courage to come out to ***26** his family, including his father, as well as to his entire hockey team.²³ He also graciously shared what it was like to come out in a hockey-dominated family and culture in an interview with ESPN.²⁴ Brendan stated:

Imagine if I was in the opposite situation, with a family that wouldn't accept me, working for a sports team where I knew I couldn't come out because I'd be fired or ostracized. People in that situation deserve to know

that they can feel safe, that sports isn't all homophobic and that there are plenty of people in sports who accept people for who they are.²⁵

In Brendan's memory, Patrick founded the You Can Play Project.²⁶ With the help of a number of NHL players and with the support of the NHL, You Can Play seeks to “ensure equality, respect and safety for all athletes, without regard to sexual orientation.”²⁷ Big-name players, such as the Boston Bruins' captain and NHL All-Star defenseman Zdeno Chara, have filmed PSAs in support of You Can Play.²⁸ In his PSA, Chara states, “I will always stand up for my teammates.”²⁹ Similar to Barkley's response regarding gay athletes in the NBA, the ultimate message that Chara, in addition to Buffalo Sabres captain Jason Pominville, portrays in the You Can Play PSA is simple and is repeated by both Chara and Pominville as the announcement comes to a close: “If you can play, you can play.”³⁰

In the last couple of years, the willingness of big-name athletes from both the NBA and the NHL to volunteer to speak out publicly against homophobia in professional athletics lends credence to the idea that a shift in thinking has occurred in professional athletics and in the Big Four in particular.³¹ Additionally, there is arguably some evidence to *27 support Burke's speculation that there will be a gay professional hockey player in the next couple of years.³²

In 2006, a study conducted by Sports Illustrated found that a majority of professional athletes in the Big Four would welcome a gay teammate.³³ The results varied across the Big Four with the NFL having the lowest percentage of players that would welcome a gay athlete on their team, at approximately 57%, and the NHL having the most accepting players, with just under 80% of them saying that they would welcome a gay teammate.³⁴

Ultimately, enough positive change has occurred over the last five years that one can arguably conclude that the tide is changing for gay athletes within the Big Four.³⁵ The movement is one towards acceptance, *28 with a focus on an athlete's ability and not his sexuality.³⁶ At the same time, however, a legal issue emerged in 2010 that was arguably a step backwards for gay athletes.³⁷ Shockingly, it was a gay amateur athletic association that was alleged to have discriminated on the basis of sexual orientation and that shifted the relevant question in sports away from acceptance and ability and back to an athlete's sexual preference--a misdirected focus that, until recently, haunted gay athletes.³⁸

III. Not Gay Enough?

On April 20, 2010, three male players who were disqualified from the 2008 Gay Softball World Series because of their perceived heterosexuality filed a complaint in the United States District Court for the Western District of Washington against the NAGAAA.³⁹ The plaintiffs alleged that the NAGAAA, after subjecting them to “a series of highly personal and intrusive questions about [their] predominant sexual interests . . . ruled that [p]laintiffs were ‘non-gay’” and that their team, who had made it to the championship game but lost, was in violation of the NAGAAA's rule limiting teams to only two heterosexual players.⁴⁰ As a result, the NAGAAA allegedly “stripped [their team] and [p]laintiffs of their World Series second place victory and recommended that the NAGAAA Ethics Committee suspend [p]laintiffs for a minimum of one year from participating in the Gay Softball World Series.”⁴¹

The plaintiffs brought a myriad of claims against the NAGAAA, including a claim that the NAGAAA “unlawfully discriminated against [p]laintiffs based on their actual or perceived sexual orientation” in *29 violation of Washington's Law Against Discrimination (WLAD), Washington Revised Code Chapter 49.60.⁴² In *Apilado v. North American Gay Amateur Athletic Alliance*, the Honorable Judge John C. Coughenour, in ruling on cross-motions for partial summary judgment filed by

both parties, held that, while the organization was subject to WLAD,⁴³ the NAGAAA's rule of exclusion was potentially constitutionally protected by the First Amendment.⁴⁴ The rule relied upon by the NAGAAA in conducting its investigation of the plaintiffs, known as rule 7.05 of the NAGAAA Softball Code (Code), states, “A maximum of two Heterosexual players are permitted on a GSWS [Gay Softball World Series] roster.”⁴⁵

Additionally, under the Code, “gay” was defined as “having a predominant sexual interest in a member or members of the same sex and includes both gay men and lesbians,” while heterosexual was defined as “having a predominant sexual interest in a member or members of the opposite sex.”⁴⁶ The Code further established a mechanism for compliance with rule 7.05 known as “the protest hearing.”⁴⁷ Rule 8.04 *30 stated, “A protest can be filed by the manager of the opposing team, an open division director, or an association's commissioner.”⁴⁸ The procedure for such a hearing was provided for by rule 8.06, establishing that a protest committee shall convene and hear evidence from both sides, has the authority to interview players, and finally, votes by secret ballot to arrive at a final determination.⁴⁹

In arriving at its decision that the plaintiffs were not entitled to summary judgment on their WLAD claims, and that genuine issues of material fact remained as to whether the exclusionary effect of rule 7.05 was protected by the Constitution, the court laid out a three-part test that the NAGAAA had the burden of meeting in order to fall outside the purview of Washington's antidiscrimination law.⁵⁰ The court stated that the NAGAAA must show (1) that it is an expressive association, (2) that forced inclusion of certain members would affect its ability to express its viewpoints, and (3) that its interest in expressive association outweighs the State of Washington's interest in combatting discrimination.⁵¹

Regarding the first factor, whether the NAGAAA is an expressive association, the court, relying on the United States Supreme Court's decision in *Boy Scouts of America v. Dale*⁵² and Justice O'Connor's concurrence in *Roberts v. United States Jaycees*,⁵³ held, “[The] NAGAAA is well within the wide boundaries that the Supreme Court has drawn [regarding expressive activity].”⁵⁴ The NAGAAA's proffered mission, accepted by the court for purposes of its “expressive association” analysis, is to “promote[] amateur sports competition, particularly softball, for all persons regardless of age, sexual orientation or preference,⁵⁵ with special emphasis on the participation of members of *31 the gay, lesbian, bisexual and transgender (GLBT) community.”⁵⁶ The court concluded that the NAGAAA's “goals and activities are similar in many respects to the very goals and activities specifically endorsed by the Supreme Court [particularly in *Dale* and *Jaycees*]” and thus the “NAGAAA is an expressive association.”⁵⁷

With regard to the second prong of the constitutional inquiry, whether forced inclusion of certain members, specifically an unlimited number of heterosexual softball players, would significantly affect the NAGAAA's ability to express itself, the court reasoned, “It would be difficult for NAGAAA to effectively emphasize a vision of the gay lifestyle rooted in athleticism, competition and sportsmanship, if it were prohibited from maintaining a gay identity.”⁵⁸ The court highlighted, “The Commissioner of NAGAAA submitted a declaration explaining that the desire for exclusivity was born of the fact that many members of the LGBT community come from backgrounds where team sports have been environments of ridicule and humiliation.”⁵⁹

In arriving at its conclusion, the court distinguished this case from *Jaycees*, which the plaintiffs relied on in their argument regarding this prong of the inquiry.⁶⁰ In *Jaycees*, the Supreme Court held that the United States Jaycees, an organization that promoted young men's civic activities, was not immune to the Minnesota Human Rights Act, which might require the Jaycees to admit women as full voting members.⁶¹ The Jaycees argued that the inclusion of women as voting members would impact the expression of multiple viewpoints that the organization stood for, particularly promoting the interests of young men.⁶² The

Supreme Court rejected the Jaycees position, holding that the organization *32 “relie[d] solely on unsupported generalizations about the relative interests and perspectives of men and women.”⁶³

The court in *Apilado* distinguished Jaycees from the case before it, stating that the plaintiffs reliance on Jaycees here “demonstrate[ed] that they misunderst[ood] the expressive purpose of NAGAAA.”⁶⁴ The court explained:

NAGAAA is not claiming that heterosexuals would have different opinions about the LGBT community than that community's own members in the way that the Jaycees claimed that women would have different views on foreign policy from men . . . [n]or is NAGAAA engaged in a merely symbolic act of exclusion akin to the Jaycees.⁶⁵

The court stressed that the NAGAAA's desire for exclusivity arose out of the oppression and ridicule of the LGBT community in traditional team sports environments.⁶⁶ Ultimately, the court concluded: “NAGAAA's efforts to promote an athletic, competitive, sportsmanlike gay identity, with a unique set of values, in response to a particular need, are protected by the First Amendment. Forced inclusion of straight athletes would distract from and diminish those efforts.”⁶⁷

On the final prong of the court's inquiry, “whether or not NAGAAA's interest in expressive association outweighs the state's interest in eradicating discrimination,”⁶⁸ the court found that the plaintiffs failed to show that no genuine issue of material fact existed.⁶⁹ Accordingly, summary judgment at this juncture was inappropriate.⁷⁰ While the court acknowledged that a state's interest can override an organization's interest in expressive activity, the court, again relying on the Supreme Court's language in *Dale*, stressed that state regulations that interfere with expressive association must “serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”⁷¹

The court found that the plaintiffs utterly “failed to argue a compelling state interest in allowing heterosexuals to play gay softball.”⁷² *33 For these reasons, the court denied the plaintiffs' motion for partial summary judgment but did not close the door completely; the court noted, “Whether or not Defendant's treatment of the plaintiffs at the protest hearing is deserving of First Amendment protection remains to be seen.”⁷³

On November 10, 2011, the court ruled definitively on a motion for partial summary judgment filed by the NAGAAA arguing that rule 7.05 was, in fact, protected by the First Amendment, thus answering the questions it left unresolved in denying the plaintiffs' motion earlier that year.⁷⁴ After acknowledging that its previous decision had resolved whether the NAGAAA is an expressive association and whether forced inclusion would affect the NAGAAA's ability to express its viewpoints, the court turned to the final prong of the three-part inquiry: “[D]oes NAGAAA's interest in expressive association outweigh the state interest in eradicating discrimination?”⁷⁵

On this question, the court acknowledged the “NAGAAA has made its intended message explicit: NAGAAA has chosen to send a message through the annual Gay Softball World Series that athletes can play competitive team sports as openly gay, lesbian, and bisexual individuals, and to demonstrate that there are such men and women.”⁷⁶ The court disagreed with the plaintiffs' argument that this new articulation of its message by the NAGAAA was merely a “retroactive pretext for discrimination against players who chose not to identify as such.”⁷⁷ The court reasoned that “[w]hile the precise nature of sexual identity is a subject on which this Court declines to opine, it is safe to say that sexual *34 orientation, unlike race or sex, is generally identifiable by private conduct or public expression,”⁷⁸ thus making examination of private conduct or public expression of its members necessary to limit participation to gay athletes.⁷⁹ The court therefore accepted the NAGAAA's statement of its expressive purpose.⁸⁰

The court continued on to weigh the NAGAAA's interest in expressive association.⁸¹ In doing so, the court laid out that it must weigh evidence of the impact that admitting heterosexual players who do not meet the NAGAAA's eligibility requirements would have on the association's expression.⁸² Again, the court highlighted the fact that the NAGAAA seeks exclusivity mostly because “many members of the LGBT community come from backgrounds where team sports have been environments of ridicule and humiliation.”⁸³ Ultimately, the court agreed with the NAGAAA that forced inclusion of straight athletes would significantly affect the NAGAAA's efforts to demonstrate that openly gay athletes exist and can play competitive team sports.⁸⁴

In balancing the state's interest in eradicating discrimination against the NAGAAA's interest in expressive association, the court favored the NAGAAA, holding that in order for the state's interest to outweigh an organization's interest in expressive association, the state's interest must *35 be “narrowly defined to a particular form of discrimination” rather than a general interest against all types of discrimination.⁸⁵ The court reasoned, “If state public-accommodation statutes truly prohibited discrimination against all groups and in any form, then freedom of association would be toothless.”⁸⁶ The court concluded, “The First Amendment protects NAGAAA's membership policy from Washington's public-accommodation laws.”⁸⁷ Accordingly, the NAGAAA's motion for partial summary judgment on the plaintiffs' WLAD claims was granted.⁸⁸

Within weeks of the court's decision, the parties agreed to settle the case for an undisclosed amount.⁸⁹ While it appears that the NAGAAA won the major battle at issue in this case--whether rule 7.05 violated Washington discrimination laws or was, alternatively, protected by the First Amendment-- the question remains, in light of the continuous struggle for gay athletes to integrate into professional sports, whether the NAGAAA, in its defense of rule 7.05, did more harm than good as far as promoting acceptance of gay athletes.

IV. They Can Play

Up front, I would like to acknowledge that I value the NAGAAA's appreciation of the fact that “many members of the LGBT community come from backgrounds where team sports have been environments of ridicule and humiliation.”⁹⁰ Having been a high school athlete myself who was closeted and never felt quite comfortable in the locker room with my teammates due to what I perceived to be a permeating antigay culture, I certainly respect the NAGAAA's goal to provide a safe space *36 for gay athletes and believe that it is an important one.⁹¹ However, I find rule 7.05 and the arguments put forth by the NAGAAA in favor of it in Apilado counterproductive to the general movement in sports away from focusing the inquiry on a gay or straight athlete's sexuality and towards his ability to play.

While there are certainly distinctions between professional sports/athletes and amateur leagues looking to promote certain values, there is arguably one overarching sports culture where both spheres have a tendency to influence the other. Ultimately, there are many troubling issues with rule 7.05, most importantly, in light of Part II of this Article, that it brings sexuality back into the sports arena and makes it the essence of the participant athlete, something that gay athletes have been fighting against for decades in the greater world of sports.⁹²

First, whether the locker room is still primarily the place of ridicule and humiliation it once was for gay athletes, as relied upon by the NAGAAA to justify rule 7.05, is the subject of much debate.⁹³ There is certainly evidence of a progression away from that place.⁹⁴ Besides the statements of Barkley and others in Part II, showing an ever-increasing acceptance of gay teammates within professional sports, recent studies suggest that perhaps what was once a virtual certainty--the antigay locker room--has at least begun to evaporate.⁹⁵

Eric Anderson, a sociologist with a Ph.D. from the University of California at Irvine and a Professor of Sports Studies at the University of Winchester, conducted research providing a window into the experiences of openly gay male high school and

collegiate athletes on ostensibly all heterosexual sports teams.⁹⁶ Anderson's results, published in 2002, found that “gay male athletes show that hegemony is not seamless and that there is a possibility of softening hegemonic masculinity in the sporting *37 realm.”⁹⁷ A decade has passed since Anderson conducted his research, and without a doubt, more high school and college athletes have reported positively on their experience as a gay athlete on a male sports team.⁹⁸

Elizabeth S. Cavalier conducted more recent research regarding gay men employed in professional, collegiate, and club sports.⁹⁹ Cavalier found that, while the “sport workplace is not necessarily a welcoming or affirming environment just yet . . . experiences of explicit hostility are becoming increasingly rare.”¹⁰⁰ The marked differences between these employees' experiences, representing “one of two extremes: either the *38 proverbial ‘horror story,’ or the extremely positive [representation of gay men's] experience[s],”¹⁰¹ led Cavalier to conclude that the institution of sport is already in the process of social change, “ultimately leading to a more open and affirming experience for all sexual minorities in sport.”¹⁰²

A second problem with rule 7.05 is that it excludes not only straight allies who wish to participate and are necessary to the deconstruction of bright line stereotypes in athletics, but also, as was highlighted by NCLR, closeted players and those who choose not to label their sexuality.¹⁰³ Rule 7.05 does not respect an athlete's personal autonomy; accordingly, what is lost is the athlete's freedom to select his or her own identity outside of what was two and is now four distinct bright-line categories: gay, bisexual, transgendered, or straight.¹⁰⁴ On this point, the court's rationale in *Apilado* is troubling.

In reasoning that it was justified for the NAGAAA to pry into the plaintiffs' sexual identities, the court stated, “[I]t is safe to say that sexual orientation . . . is generally identifiable by private conduct or public expression.”¹⁰⁵ In the case of a closeted athlete, this is not necessarily the case. It also is not true for athletes who may be attracted to members of the same sex but consider themselves straight and whose sexual activity is limited to persons of the opposite sex.¹⁰⁶

Additionally, in a time when this country is plagued with the suicides of a number of closeted teenagers,¹⁰⁷ through rule 7.05, the NAGAAA has chosen to send a message that regards those who have yet *39 to come out of the closet as second-class citizens compared to those members of the LGBT community who are open about their sexuality. In this sense, rule 7.05 has nothing to do with protecting the number of actual gay athletes in the league; rather, it serves merely to reward those who have chosen to openly identify as LGBT, arguably leaving those closeted gay, bisexual, and transgendered, as well as all questioning athletes out in the cold. This is alarming considering that those athletes, in particular, would likely gain the most from participation in an organization like the NAGAAA. Ultimately, the costs of rule 7.05, even as amended to include bisexual and transgender athletes, arguably outweigh the benefits.

Finally, there is an argument that heterosexual allies are an important and crucial piece to ending homophobia in athletics. As Anderson stated in *Openly Gay Athletes: Contesting Hegemonic Masculinity in a Homophobic Environment*, “[I]f gay male athletes who are stigmatized as being feminine, can be as strong and competitive as heterosexual male athletes, they may threaten the perceived distinctions between gay men and straight men.”¹⁰⁸ After revealing his research results, Anderson concluded, “[G]ay male athletes, especially those who prove to be as good as or better than heterosexual athletes, threaten to soften hegemonic masculinity.”¹⁰⁹ There are at least two ways to accomplish this that are pertinent to this Article.¹¹⁰

The first, relating to Part II of this Article, is for a professional athlete in the Big Four to come out of the closet.¹¹¹ If this event were to occur, a number of stereotypes regarding gay male athletes would immediately break down on the world stage, as it would become clear that a gay male athlete can compete with heterosexual athletes at what is considered the highest level and in the most popular sports.

The second way, relating to Part III of this Article, is for this phenomenon to occur gradually, through the integration of heterosexual and gay men in amateur athletics. Slowly, as more straight men observe *40 and experience that there are gay

men that are as athletic, if not more athletic, than they are, and do so in an environment where they are teammates on an equal playing field, this respect will arguably spread outside of the locker room and into the surrounding culture. It is difficult, if not impossible, for this to occur in a league, like the NAGAAA, where heterosexual male athletes are limited to an almost invisible number, due to the absence of a heterosexual audience on which to operate.¹¹²

The NAGAAA and rule 7.05 thwart any legitimate chance for gay male athletes to demonstrate to their straight male athlete counterparts that they are, in fact, equal. Accordingly, the NAGAAA's goal of “send[ing] a message through the annual Gay Softball World Series that athletes can play competitive team sports as openly gay, lesbian, and bisexual individuals, and to demonstrate that there are such men and women”¹¹³ is potentially fulfilled, but to a predominantly gay audience. If that is truly the message that the NAGAAA strives to deliver, then the inclusion of heterosexual allies is a key component to that end.

Ultimately, the NAGAAA, through rule 7.05 and its reinforcement in Apilado, has instituted what is typically the dominant regime's discourse regarding sexuality and placed it at the forefront of its mission. Rule 7.05 makes sexuality a central feature of the athlete, which, outside of the very small world of gay sports, has always operated as a detriment to gay men in athletics. Rule 7.05, however well-intentioned, is misguided in its current form. Additionally, the end it purports to achieve is questionable; the NAGAAA offered no reliable evidence in Apilado that, now or within the last decade, straight male athletes are knocking down the doors of gay amateur sports leagues and overrunning them, causing gay athletes to miss out on the opportunity to participate or a loss of a sense of community within the league.¹¹⁴ Finally, the extreme benefit that stems from the presence of straight allies in amateur gay *41 athletics should not be overlooked and rule 7.05 is completely ignorant of this advantage.

V. Conclusion

In the end, the NAGAAA should return to its mission as articulated by the court in its initial ruling on the WLAD claim in Apilado: To “promote[] amateur sports competition, particularly softball, for all persons regardless of age, sexual orientation or preference, with special emphasis on the participation of members of the gay, lesbian, bisexual and transgender (GLBT) community.”¹¹⁵ This mission can be accomplished without rule 7.05. The potential costs of the rule outweigh the benefits--particularly in light of the changing attitude in professional sports, and in the sports world in general, towards openly gay athletes.

Footnotes

a1 © 2013 Michael Stefanilo, Jr. Michael Stefanilo, Jr., is a 2012 graduate of Northeastern University School of Law and is currently a first-year associate at the Boston law firm of Brody, Hardoon, Perkins & Kesten.

1 Will Leitch, *The Last Closet: When Will a Gay Professional Athlete Finally Come Out?*, New York (Sept. 11, 2011), <http://nymag.com/news/sports/games/gay-athletes-2011-9/>.

2 *Id.* The article contrasted the culture in professional sports of almost a decade ago, when MLB catcher Mike Piazza “called a press conference just to let everyone know he wasn't gay,” or about seven years ago, when John Smoltz stated that gay marriage would open the door to “[m]arrying an animal,” with the culture in 2011, where the backlash from the sports world against Todd Reynolds, Vice President of Uptown Sports Management (a Canadian firm that has represented NHL players for over two decades), for his tweet in response to New York Rangers star forward Sean Avery's public service announcement in support of gay marriage, was immediate and strong. *Id.* Reynolds tweeted that he was “[v]ery sad to read Sean Avery's misguided support of same-gender marriage. Legal or not, it will always be wrong.” *Id.*

There are numerous other examples of professional athletes taking a stand against gay athletes or demonstrating a negative culture surrounding homosexuality in professional athletics to support that recent attitudes (discussed later in Part II) demonstrate a shift in culture. Smoltz's teammate, catcher Eddie Perez, stated, “If I knew a guy was gay, then I could work it out. I could be prepared. I could hide when I'm getting disrobed.” Paul Newbury, *Mixed Signals for Mixed Athletes*, CBS News (Feb. 11, 2009, 7:59 PM), http://www.cbsnews.com/2100-201_162-628303.html. While in Atlanta, current Philadelphia quarterback Michael Vick, like Piazza, also felt compelled to go on the radio to put an end to rumors that he was gay. *Id.* The 2009 article, discussing both Vick's reaction to

being labeled gay and other professional athletes', like Eddie Perez's, responses to the thought of a gay athlete in professional sports, begged the question, "When will someone come out in major league baseball? Or the NFL? Or the NBA? Or the NHL?" Id.

3 Jeremy Unger, NYU Volleyball Captain's Struggles as a Gay Athlete Inspire an It Gets Better Video, NYU Local (Apr. 9, 2012), <http://nyulocal.com/on-campus/2012/04/09/nyu-volleyball-captains-struggles-as-a-gay-athlete-inspire-an-it-gets-better-video/>. For a brief history of gay athletes and events in the twentieth century, see The Brief History of Gay Athletes, ESPN (Dec. 18, 1998), <http://espn.go.com/otl/world/timeline.html>.

4 Mike Carter, Judge Refuses To Toss Out Lawsuit over Gay Softball, Seattle Times (June 1, 2011), http://seattletimes.nwsource.com/html/localnews/2015209413_gaysoftball02m.html.

5 Chris Sheridan, Amaechi Becomes First NBA Player To Come Out, ESPN (Feb. 9, 2007, 6:30 PM), <http://sports.espn.go.com/nba/news/story?id=2757105>. See generally John Amaechi, *Man in the Middle* (2007).

6 Former NFL running back David Kopay came out in 1977; offensive lineman Roy Simmons and defensive lineman Esera Tuaolo came out more recently. Glenn Burke, an outfielder for the Los Angeles Dodgers and the Oakland Athletics in the 1970s, and Billy Bean, a utility player in the 1980s and 1990s, have also come out. Sheridan, *supra* note 5.

7 Id.

8 Id.

9 Retired NBA Star Hardaway Says He Hates 'Gay People,' ESPN (Feb. 16, 2007, 11:38 AM), <http://sports.espn.go.com/nba/news/story?id=2766213>.

10 Id.

11 Id. Hardaway's former coach Pat Riley and NBA Commissioner David Stern both spoke out against Hardaway's comments and in support of Amaechi. Id. Stern reinforced that a player's sexuality is not what matters in the NBA. He said, "We have a very diverse league. The question at the NBA is always, 'Have you got game?' That's it, end of inquiry." Sheridan, *supra* note 5. Other NBA players and coaches also came forward in support of Amaechi. Cyd Zeigler, Jr., Pro Sports Now Ready for Gay Athletes, Outsports.com, <http://www.outsports.com/nba/20062007/0214sportsready.htm> (last visited Jan. 27, 2013). Former New York Knicks coach and Detroit Piston Hall of Famer Isaiah Thomas said, "If there was an openly gay player in my locker room, we won't have a problem with it. I can't speak for somebody else's locker room, but if it's in mine, we won't have a problem. I'll make damn sure there's no problem." Id.

Support for Amaechi was not limited to the NBA. Id. Former Detroit Red Wing and current NHL Hall of Famer Chris Chelios said that for him, having a gay teammate was "a non-issue." Id. Former principal owner of the San Francisco Giants Peter Magowan stated that he would support one of his players if he were to come out and that "[i]t would not bother [him] at all." Id.

12 Hardaway did apologize for his statements; however, not for the substance itself but for bringing his bigotry to light. Retired NBA Star Hardaway Says He Hates 'Gay People,' *supra* note 9.

13 Leitch, *supra* note 1. Of course, there are always setbacks. In March 2012, Major League Soccer's (MLS's) Houston Dynamo midfielder Colin Clark had to apologize for directing a gay slur toward a ball boy during a match. Colin Clark Apologizes for Gay Slur, ESPN (Mar. 24, 2012, 2:09 PM), http://espn.go.com/sports/soccer/mls/story/_/id/7731259/houston-dynamo-colin-clark-sorry-gay-slur-seattle-sounders-fc-ball-boy. In remorse, Clark stated, "I'd like to offer a sincere apology to everyone who watched the game especially the ball boy for whom I used awful language towards.... I didn't mean to disrespect anyone and am sorry for letting my emotions get the best of me. It's not who I am and it won't happen again." Id. More recently, on September 18, 2012, the Toronto Blue Jays suspended shortstop Yunel Escobar for three games for wearing eye black during a game on which he had written a gay slur. David Waldstein, Blue Jays Suspend Shortstop 3 Games for Gay Slur Written on Eyeblack, N.Y. Times (Sept. 18, 2012), <http://www.nytimes.com/2012/09/19/sports/baseball/yunel-escobar-suspended-3-games-for-slur-on-eye-black.html>. The Blue Jays organization required Escobar to attend sensitivity training and to participate in educational outreach. Id. The money that Escobar lost during his suspension, approximately \$83,000, was given to the You Can Play Project (discussed in more depth later in this Part), which works to promote acceptance of gay athletes in professional sports. Id.

Although Escobar apologized for his actions, stating that he has nothing against homosexuals and listing off his gay friends, he proceeded to say, “The person who decorates my house is gay, the person who cuts my hair is gay.” *Id.* Escobar, perhaps without even realizing it, through his apology, perpetuated further the stereotypes associated with gay men, namely that gay men are your hair dressers and interior designers, but not your teammates.

- 14 Leitch, *supra* note 1. It is not surprising that Grant Hill volunteered to be part of the NBA's PSA last year. After Amaechi came out in 2007, Hill applauded his decision, stating, “The fact that John has done this, maybe it will give others the comfort or confidence to come out as well, whether they are playing or retiring.” Sheridan, *supra* note 5.
- 15 Leitch, *supra* note 1. The NBA has struggled with players using gay slurs during competition. *Id.* In 2011, two major stars in the NBA, Kobe Bryant and Joakim Noah, were both fined by the league for using the word “faggot.” *Id.* Noah used the term in response to hecklers while Bryant directed the term towards an NBA official. *Id.* Both players were fined substantially, with Bryant having to pay \$100,000. *Id.* The PSA, which was sponsored by the NBA, GLSEN (Gay, Lesbian, and Straight Education Network), and the Ad Council is available for viewing at NBA, GLSEN and Ad Council's Official Think B4 You Speak PSA, YouTube (May 13, 2011), http://www.youtube.com/watch?v=8D_XLCmY0D8.
- 16 Charles Barkley on Gay NBA Players: ‘Every Player Has Played with Gay Guys,’ Huffington Post (July 18, 2011, 6:12 AM), http://www.huffingtonpost.com/2011/05/18/charles-barkley-gay-nba-players_n_863444.html; see also Mike Wise, Charles Barkley: In Sports, Ability To Play Should Outweigh Sexual Orientation, Wash. Post (May 17, 2011), http://www.washingtonpost.com/sports/wizards/charles-barkley-in-sports-ability-to-play-should-outweigh-sexual-orientation/2011/05/17/AFSArk5G_story.html.
- 17 Charles Barkley on Gay NBA Players, *supra* note 16.
- 18 *Id.* In fact, outspoken Dallas Mavericks owner Mark Cuban has gone one step further. Zeigler, *supra* note 11. Cuban sees dollar signs for the first active professional basketball player to come out of the closet. *Id.* He said:
From a marketing perspective, if you're a player who happens to be gay and you want to be incredibly rich, then you should come out because it would be the best thing that ever happened to you from a marketing and an endorsement perspective On the flip side, if you're the idiot who condemns somebody because they're gay, then you're going to be ostracized, you're going to be picketed and you're going to ruin whatever marketing endorsements you have.
Id.
- 19 Adam Proteau, Hockey Closer to Having First Openly Gay Player, Yahoo! Sports (Apr. 19, 2012, 2:31 PM), <http://sports.yahoo.com/news/hockey-closer-having-first-openly-183100651--nhl.html>.
- 20 *Id.*
- 21 Emma Stickgold, Brendan Burke, 21; Raised Awareness by Coming Out as Young, Gay Athlete, Boston Globe, Feb. 8, 2010, at 12.
- 22 *Id.*
- 23 *Id.* at 2.
- 24 *Id.* Brendan Burke's interview with ESPN can be found here: John Buccigross, ‘We Love You, This Won't Change A Thing,’ ESPN (Dec. 2, 2009, 6:42 PM), http://sports.espn.go.com/nhl/columns/story?columnist=buccigross_john&id=4685761.
- 25 Buccigross, *supra* note 24.
- 26 Proteau, *supra* note 19.
- 27 *Id.*
- 28 *Id.* Chara's PSA is available for viewing here: Chara & Pominville PSA, You Can Play Project, <http://youcanplayproject.org/videos/entry/you-can-play-team-captains-zdeno-chara-jason-pominville> (last visited Feb. 5, 2013). Other videos can be found at youcanplayproject.org and include messages from NHL stars Claude Giroux, Rick Nash, Matt Moulson, Joffrey Lupul, and Duncan Keith. See Proteau, *supra* note 20 (“San Jose Sharks center Tommy Wingels and Phoenix Coyotes minor leaguer Andy Miele were the first two professional players to throw their support behind the YCP project.”).
- 29 Chara & Pominville PSA, *supra* note 28.

30 Id.

31 Id.; see also Charles Barkley on Gay NBA Players, *supra* note 16.

32 Jim Buzinski, Majority of Pros Would Welcome Gay Teammate, *Outsports.com* (Mar. 2, 2006), [http:// www.outsports.com/news/20060302gayteammatesurvey.htm](http://www.outsports.com/news/20060302gayteammatesurvey.htm).

33 Id.

34 Id. The NBA came in slightly higher than the NFL at approximately 60% and the MLB slightly above that at approximately 62%. Id. It is interesting that the NHL, arguably the most violent of the four major sports (at least more physical and violent than the NBA or the MLB) ranked the most welcoming of gay teammates. Id. This is noteworthy because many argue that homophobia in sports is a result of a gay person's deviance from traditional gender roles where men are expected to be solely powerful, dominant, and physical. See Anne Gregory, *Rethinking Homophobia in Sports: Legal Protections for Gay and Lesbian Athletes and Coaches*, 1 *DePaul J. Sports L. & Contemp. Probs.* 264, 267-68 (2004) (“In the sports world, men have power, and they seek to preserve it. In doing so, this dynamic ‘enters into the web of power relations between straights and gays, men and women, and groups of men within the intermale dominance hierarchies that make up contemporary gender relations.’” (quoting Michael Messner & Donald Sabo, *Sex, Violence and Power in Sports* 108 (1994))); see also Claire Williams, *Sexual Orientation Harassment and Discrimination: Legal Protection for Student-Athletes*, 17 *J. Legal Aspects Sport* 253, 255 (2007) (“Homophobia in sports stems from the premise that sport is an expression of masculinity. Characteristics such as strength, power, and speed are associated with male heterosexuality and are often defining components of stereotypically male sports such as football, baseball, and ice hockey.”). Buzinski found the fact that the NHL was the most welcoming league for gay athletes “not surprising.” Buzinski, *supra* note 32. He explained, “Many of the league's players are from Canada and Northern Europe, where gay marriage is allowed or where homosexuals have equal rights. The percentages for the three U.S.-based pro sports leagues are all close enough as to be statistically equivalent.” Id.

If this is true, then it is more than just a gay athlete's deviance from traditional gender roles that catalyzes homophobia in professional sports; political and social forces also play a large role in shaping acceptance of gay athletes among professional sports teams. Yet, those political and social norms are also shaped by the surrounding culture, so it is difficult to decipher the root of the cultural stance since many of these factors--political, social, and cultural--inform one another. In the United States, our culture is arguably one where deviance from traditional gender roles is met with disdain. “Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality.” Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 *N.Y.U. L. Rev.* 197, 235 (1994).

35 See Buzinski, *supra* note 32; Chara & Pominville PSA, *supra* note 28; NBA, GLSEN and Ad Council's Official Think B4 You Speak PSA, *supra* note 15; Charles Barkley on Gay NBA Players, *supra* note 16. This is an extremely important shift as it is likely that increasingly positive attitudes towards gay athletes in professional sports, where professional athletes serve as role models for so many younger athletes, will trickle down into collegiate, high school, and amateur athletics (not to mention the greater impact on sports fans and society as a whole).

36 See Chara & Pominville PSA, *supra* note 28.

37 Complaint for Injunctive Relief & Damages Based on Violations of RLW 49.60 et seq., Breach of Contract & Tortious Conduct P4, *Apilado v. N. Am. Gay Amateur Athletic Alliance*, No. 10CV00682, 2010 WL 1654117 (W.D. Wash. Apr. 20, 2010) [hereinafter *Complaint*].

38 See *id.*

39 Id. “The suit was backed by the National Center for Lesbian Rights [(NCLR)] in San Francisco,” which “contended the rule discriminated against bisexuals by not including them in the definition of gay.” Mike Carter, *Judge Refuses To Toss Out Lawsuit over Gay Softball*, *Seattle Times*, June 1, 2011, at B1.

40 *Complaint*, *supra* note 37, P4. “Minutes of the hearing say that [[plaintiff] Charles claimed to be gay but acknowledged being married to a woman, and [plaintiff] Apilado initially said he was both gay and straight but then acknowledged being more attracted to women.” Gene Johnson, *Disqualified Players Settle with Gay Softball Group*, *Seattle Times*, Nov. 28, 2011, at B1.

41 *Complaint*, *supra* note 37, P4.

- 42 Apilado v. N. Am. Gay Amateur Athletic Alliance, 792 F. Supp. 2d 1151, 1156 (W.D. Wash. 2011).
- 43 Id. at 1158-60 (discussing a preliminary matter, the court ruled that the NAGAAA was both a “place” and “public” within the meaning of WLAD). Generally, WLAD provides “the right to be free from discrimination on the basis of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or disability in public accommodation.” Id. at 1158 (citing Wash. Rev. Code Ann. §49.60.030(1) (West 2009) (emphasis added)). Under the statute, WLAD applies only to “places of public accommodation.” Id. The court reasoned, “While it may seem counter-intuitive to call an organization a place, courts in Washington and around the country have expanded the scope of anti-discrimination laws to cover wider areas of public life.” Id. The court relied on the precedent established in *Tenino Aerie v. Grand Aerie*, which stated, “Like other states' public accommodation laws, the WLAD reaches the membership policies of organizations.” Id. (quoting *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash. 2d 224, 250 (Wash. 2002)).
- Regarding the latter question, whether the NAGAAA was a “public accommodation” or a “distinctly private” club, the court held, “There is little room for doubt that the NAGAAA qualifies as a public accommodation.” Id. The court considered such factors as charging for admission, accommodating those seeking recreation, the selling of goods, and the fact that the organization operates where the public gathers for recreation. Id. (citing Wash. Rev. Code Ann. §49.60.040(2)). The court found that the NAGAAA met at least one necessary criterion and that the alternative reasons offered by the NAGAAA for its exemption from the traditional definition as a distinctly private club were unpersuasive. Id. at 1158-60.
- 44 Id. at 1160-63. The court later resolved this question definitively. See *Apilado v. N. Am. Gay Amateur Athletic Alliance*, C10-0682-JCC, 2011 WL 5563206, at *1 (W.D. Wash. Nov. 10, 2011). This decision is discussed *infra* Part III.
- 45 *Apilado*, 792 F. Supp. 2d at 1155 (“Penalties for violation of this rule include permanent suspension of the heterosexual player, disqualification and forfeiture of the offending team's games, one year's suspension of the team's manager, and a minimum \$100 fine imposed against the team's association.”).
- 46 Id.
- 47 Id.
- 48 Id.
- 49 Id. at 1155-56.
- 50 Id. at 1160.
- 51 Id.
- 52 530 U.S. 640, 656 (2000) (“Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale [an openly homosexual male whose membership in the Boy Scouts was revoked based on his sexual orientation] would significantly affect its expression, we inquire whether the application of New Jersey's public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association. We conclude that it does.”).
- 53 468 U.S. 609 (1984) (O'Connor, J., concurring). The court in *Apilado* characterized O'Connor's “definition of expressive activity” articulated in *Jaycees* as “broad.” *Apilado*, 792 F. Supp. 2d at 1161 (“Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.” (quoting *Jaycees*, 468 U.S. at 636)).
- 54 *Apilado*, 792 F. Supp. 2d at 1161.
- 55 It is worth noting that this particular expression of the NAGAAA's purported mission could easily be construed as articulating a vision and goal of acceptance of all members, regardless of sexual preference, and runs directly counter to rule 7.05. See *id.* This point was employed by the plaintiffs in making their argument that the defendant failed to satisfy the second prong of the court's constitutional inquiry. See *id.* at 1162. The court held that the plaintiffs “misunderstand the expressive purpose of NAGAAA.” Id. at 1163. Again relying on what is wholly conclusory language in *Dale*, the court dodged the plaintiffs' argument that the NAGAAA's mission statement and rule 7.05 are self-contradicting by stating, “[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent.” Id. at 1162 (quoting *Dale*, 530 U.S. at 651).

- 56 Id. at 1161.
- 57 Id.
- 58 Id. at 1162 (citing *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006)).
- 59 Id. at 1163. Whether or not this will continue to be the case for the next generation of gay athletes is a subject of debate. See *supra* Part III.
- 60 *Apilado*, 792 F. Supp. 2d at 1162.
- 61 Id.
- 62 Id. (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626-27 (1984)).
- 63 Id. at 1162-63 (quoting *Jaycees*, 468 U.S. at 628).
- 64 Id. at 1163.
- 65 Id.
- 66 Id.
- 67 Id.
- 68 Id.
- 69 Id.
- 70 Id.
- 71 Id. (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000)).
- 72 Id. The court glosses over what is certainly a valid point for the plaintiffs by mischaracterizing their claim. Id. It is not the state's interest in allowing heterosexuals to play gay softball that is arguably compelling; it is the state's interest in eradicating a particular form of discrimination--in this case, discrimination by an organization whose mission statement purports that it promotes amateur sports competition (particularly softball) for all persons, regardless of sexual orientation or preference, who nonetheless excludes participants based on just that--a very rigid definition of sexual orientation and sexual preference.
- 73 Id. at 1156. In the second part of its opinion, the court granted the NAGAAA's motion for summary judgment regarding the plaintiffs' claim for injunctive relief to enjoin the enforcement of rule 7.05, finding that the “[p]laintiffs' injuries stem not from the NAGAAA's written policy itself, but from the manner in which it was applied [to them, through the conduct of the protest committee].” Id. at 1165. The injuries were not a result of the committee interviewing them *per se*, but from “asking personal and intrusive questions in front of approximately twenty-five delegates and observers.” Id. at 1166. The court concluded that the plaintiffs failed to demonstrate the “clear harm and imminent danger” necessary to warrant injunctive relief. Id.
- 74 *Apilado v. N. Am. Gay Amateur Athletic Alliance*, C10-0682-JCC, 2011 WL 5563206 (W.D. Wash. Nov. 10, 2011).
- 75 Id. at *1.
- 76 Id. (emphasis omitted) (internal quotation marks omitted). The court highlighted, “The importance of this statement of NAGAAA's expressive purpose is that it provides a basis for excluding not only straight players, but also ‘closeted’ players who choose not to publicly identify as LGBT.” Id. at *2.
- 77 Id. at *2.
- 78 Id. This articulation by the court is somewhat troubling. While the court claims to have refused to opine on the precise nature of sexual identity, its decision to accept the NAGAAA's bright line definitions of gay and straight for purposes of determining its membership supports a rigid and formulaic approach to sexuality that excludes a whole subset of persons who (1) consciously choose not to align

with either one of two dichotomistic formulations of sexual identity, (2)do not align with being either gay or straight because they are attracted to members of both sexes, or (3)have not yet elected to declare openly or internally their sexual orientation or preference, e.g., remain in the closet.

79 Id.

80 Id.

81 Id.

82 1.Id. (citing Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987) (“In this case, however, the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes.”)).

83 Id.

84 Id. The court highlighted the testimony of two NAGAAA board members (clearly interested parties) in addition to the testimony of the Assistant Commissioner of the Memphis Softball League, to support the NAGAAA's contention that forced inclusion would detract from its ultimate goals. Id. This testimony was based on issues that the NAGAAA allegedly faced in its formative years, when participation was open without restriction. Id. These officials claimed that there was a “loss of a sense of community” and that what they perceived to be predominantly straight teams were winning the GSWS. Id. The court ignores that the NAGAAA has been in existence since 1977, see NAGAAASoftball.org, <http://www.nagaaasoftball.org> (last visited Feb. 5, 2013), and that the number of athletes who were willing to come out as gay when the league was formed was arguably much smaller than it is today. The court failed to consider that the rationale offered by these officials is no longer justified over thirty years later.

85 Apilado, 2011 WL 5563206, at *3.

86 Id. It is unclear whether the court chose to articulate the plaintiffs' claim as purely generalized or if the plaintiffs failed to argue that there is a specific state interest at issue: protection against discrimination based on sexual orientation, as articulated in WLAD, in this case, in the form of exclusion of those whose sexual identity is not strictly “gay” within the binary definitions of gay and straight adopted by the NAGAAA. See id.

87 Id.

88 Id. at *4.

89 Johnson, supra note 40 (“Since the lawsuit was filed, NAGAAA has added language to its rules clarifying that bisexual and transgender players are fully welcomed participants in its events. As part of the settlement, the organization said disqualifying [the plaintiffs' team] was not consistent with its goal of welcoming bisexual players.”). Ultimately, the NAGAAA “regret[ed] the impacts the 2008 protest hearing had on plaintiffs and their team.” Id. NCLR, however, was not satisfied, desiring that the NAGAAA “delete its roster limits on straight players altogether, on the grounds that it encompasses gay players who are in the closet or who choose not to put a label on their sexuality.” Id.

90 Apilado v. N. Am. Gay Amateur Athletic Alliance, 792 F. Supp. 2d 1151, 1163 (W.D. Wash. 2011).

91 I am also a member of Boston's gay flag football league and understand the importance of having allied team members, both for the sake of good competition and its role in breaking down stereotypes. In this league, there is no cap on straight players, and this works to break down stereotypes both within the league itself and in the greater community. Some of the strongest players in our league identify as gay, and this fact, as recognized and understood by both gay and straight athletes alike, is critical in dismantling the stereotypes surrounding gay men in athletics. For more about Boston's flag football league's objectives, see About, FLAG Flag Football, <http://flagflagfootball.com/about/> (last visited Feb. 5, 2013).

92 The Brief History of Gay Athletes, supra note 3.

93 Sheridan, supra note 65.

94 Zeigler, supra note 11.

- 95 Charles Barkley on Gay NBA Players, *supra* note 16; Buzinski, *supra* note 33.
- 96 Eric Anderson, Openly Gay Athletes: Contesting Hegemonic Masculinity in a Homophobic Environment, 16 *Gender & Soc'y* 860 (2002).
- 97 *Id.* at 860. Anderson also reported, “Sports attempt to tolerate gay male athletes when they contribute to the overarching ethos of sport-- winning--but try to taint the creation of a gay identity within sport that would see homosexuality and athleticism as compatible.” *Id.* Both the NHL PSA and many professionals’ welcoming comments regarding gay athletes, discussed *supra* Part II, by focusing on ability only, in some sense tolerate the gay athlete’s contribution to winning while ignoring the gay athlete’s sexuality; thus, there is certainly some validity to Anderson’s argument that gay athletes are tolerated to the extent that they contribute to the ethos of sport but are still rejected as to the full extent of their identities, which includes their sexual orientation. *Id.* Yet I see the progression towards tolerance of gay athletes in professional sports, with its primary focus on an athlete’s ability, as a movement that has the potential to highlight the compatibility of “gay” and “athlete” by welcoming a closeted athlete to come out while he is an active player engaged in his life career: professional sports.
- 98 In 2010, Oneonta College senior lacrosse captain Andrew McIntosh announced in an online essay that he was gay. Katie Thomas, *College Team Teaches a Lesson in Acceptance*, N.Y. Times (May 8, 2010), <http://www.nytimes.com/2010/05/09/sports/09oneonta.html?pagewanted=all>. McIntosh claims that he “was embraced with open arms.” *Id.* He recalled that teammates approached him with hugs and handshakes and told him they admired the guts that it takes for someone to come out as an athlete. *Id.* Over the past decade, despite contrary belief, there have been no male athletes dismissed from their teams for coming out. *Id.* McIntosh was informed by his coach after coming out to him that, even if his roster consisted of 30 players and 15 of them did not want to play because McIntosh was gay, he would tell all 15 of them to leave the team. *Id.* See also Part II of this Article discussing the acceptance of Brendan Burke by the men’s ice hockey team at Miami University. What is even more remarkable in Brendan’s case is that he was not a participating athlete on the team, which may contradict somewhat Anderson’s findings from a decade ago that gay men are accepted in sports only to the extent that they contribute to the ethos of winning. See Anderson, *supra* note 96, at 860. Note that Anderson found that the gay athletes he interviewed for his research were “generally surprised by how well they were treated” and “frequently credited their coaches and teammates as being open minded and accepting” but that Anderson ultimately hypothesized that these athletes “may have overstated this acceptance because they were treated better than they had expected to be.” *Id.* at 873. Anderson found that most of his interviewees revealed less positive experiences once they were probed for further information and that ultimately, heterosexual athletes “resisted the intrusion of openly gay athletes through the creation of a culture of silence around gay identities.” *Id.* at 867-68, 874.
- 99 Elizabeth S. Cavalier, *Men at Sport: Gay Men’s Experiences in the Sport Workplace*, 58 *J. Homosexuality* 626 (2011). Note that this research examined the experiences of and culture surrounding gay male employees working in athletics and not active athletes. *Id.* The ten gay men in the sample represented five different leagues, including the NFL, NHL, MLB, MLS, and NCAA (specifically, three different NCAA Division I men’s sports), and two club sports. *Id.* at 634.
- 100 *Id.* at 643.
- 101 *Id.* at 634.
- 102 *Id.*
- 103 See Johnson, *supra* note 40. The NCLR was not satisfied with the terms of the settlement in *Apilado*, desiring that the NAGAAA “delete its roster limits on straight players altogether, on the grounds that it encompasses gay players who are in the closet or who choose not to put a label on their sexuality.” *Id.* Again, the NAGAAA amended rule 7.05 to include bisexual and transgender athletes but of course, this is only remedial if an athlete openly identifies as such. See Elizabeth M. Glazer, *Sexual Reorientation*, 100 *Geo. L.J.* 997 (2012). This amendment to rule 7.05 failed to cure the inherent problem with strict identity categories by simply replacing two distinct sexuality types with four. As it stands, rule 7.05 remains ignorant of a fluid understanding of sexuality. *Id.*
- 104 *Apilado v. N. Am. Gay Amateur Athletic Alliance*, C10-0682-JCC, 2011 WL 5563206, at *1 (W.D. Wash. Nov. 10, 2011).
- 105 *Id.* at *2.
- 106 For an argument that the law’s definition of sexual orientation is inadequate and should be altered to account for identity categories beyond “extreme orientations” such as “homosexuality and heterosexuality” to account for “sexual orientation as it is actually lived,”

see Glazer, *supra* note 103, at 1002-03. Glazer also draws on Apilado in her analysis, arguing, “By broadening the law's definition of sexual orientation, Team D2 players Steven Apilado, LaRon Charles, and Jon Russ could successfully argue that the NAGAAA's prohibition on having more than two heterosexual team members definitively did not apply to them.” *Id.* at 1057.

107 Sheridan, *supra* note 5.

108 Anderson, *supra* note 96, at 861.

109 *Id.* at 873.

110 As Anderson concluded, there is evidence that this can be done in the realm of collegiate and high school athletics. *Id.* In fact, there are numerous recent stories of college athletes coming out to find themselves on what proved to be very accepting athletic teams. See Thomas, *supra* note 98.

111 “[T]he gay man is uniquely situated to undermine masculine orthodoxy because of his unique ability to invisibly gain access to masculine privilege before coming out as gay.” Anderson, *supra* note 96, at 861 (“Thus, gay male athletes--who are seen as a paradox because they comply with the gendered script of being a man through the physicality involved in sports but violate another masculine script through the existence of same-sex desires--may threaten sport as a prime site of hegemonic masculinity and masculine privilege.”).

112 There is evidence, in addition to Anderson's research, to suggest that this phenomenon has been occurring at the high school or collegiate level for some time. See Jim Buzinski, *Researching the Gay Athlete*, *Outsports.com* (Dec. 11, 2001), <http://www.outsports.com/difference/bryant.htm>. The author of the study discussed in the aforementioned article, Mike Bryant, stated that the statistic that surprised him the most in researching the gay athlete was that “75% of those surveyed said that in high school they were either the best player on their team or better than average.” *Id.* This statistic supports that there are a number of gay athletes who have the potential to compete in amateur leagues at the highest level and are ideal candidates for breaking down the “weak gay athlete” stereotype, given the opportunity and the requisite audience.

113 *Apilado v. N. Am. Gay Amateur Athletic Alliance*, C10-0682-JCC, 2011 WL 5563206, at *1 (W.D. Wash. Nov. 10, 2011) (internal quotation marks omitted).

114 *Apilado*, 2011 WL 5563206.

115 *Apilado v. N. Am. Gay Amateur Athletic Alliance*, 792 F. Supp. 2d 1151, 1161 (W.D. Wash. 2011) (emphasis added).

20 SPLAWJ 21