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## Red Card: Using the National Football League’s “Rooney Rule” to Eject Race Discrimination from English Professional Soccer’s Managerial and Executive Hiring Practices

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### Cover Page Footnote

Law Clerk, Farrell Fritz, P.C.; J.D., Fordham University School of Law, 2012; B.S., Sports Management, New York University, 2009. Special thanks to Professor Tanya Hernandez of Fordham University School of Law for her guidance and assistance with this Note.

# Red Card: Using the National Football League’s “Rooney Rule” to Eject Race Discrimination from English Professional Soccer’s Managerial and Executive Hiring Practices

Jeremy Corapi\*

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Sport has the power to change the world. It has the power to inspire. It has the power to unite people in a way that little else has.

—Nelson Mandela<sup>1</sup>

## INTRODUCTION

Throughout modern history, professional and amateur athletics have provided cultures an important platform for various civil rights movements and a vehicle for achieving social equality. Several examples—from Jackie Robinson's shattering of Major League Baseball's ("MLB") color barrier in 1947,<sup>2</sup> to female Billie Jean King's 1973 victory over Men's Wimbledon champion Bobby Riggs,<sup>3</sup> to the racially integrated South African national rugby team's post-apartheid World Cup victory in 1995<sup>4</sup>—demonstrate how sports can help transform cultures and eradicate many different types of social discrimination.

Contrary to the days of Jackie Robinson, today most of Western society is no longer flooded with formal rules and policies that promote discrimination.<sup>5</sup> Nevertheless, while formalized and overt discrimination has been successfully combated, the effects of past discrimination and the persistence of less obvious forms of discrimination are still evident in many spheres of Western

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<sup>1</sup> Quoted in Rob Hughes, *In Host's Success, Change Triumphs*, N.Y. TIMES, July 11, 2010, <http://www.nytimes.com/2010/07/12/sports/soccer/12iht-wcsoccer.html?Pagewanted=all>.

<sup>2</sup> See Joanna Shepherd Bailey & George B. Shepherd, *Baseball's Accidental Racism: The Draft, African-American Players, and the Law*, 44 CONN. L. REV. 197, 199 (2011).

<sup>3</sup> See Miriam A. Cherry, *Exercising the Right to Public Accommodations: The Debate Over Single-Sex Health Clubs*, 52 ME. L. REV. 97, 113 (2000).

<sup>4</sup> See Mark Givesser, *South Africa's World Cup Moment*, N.Y. TIMES, June 7, 2010, <http://www.nytimes.com/2010/06/08/opinion/08iht-edgevisser.html?pagewanted=all>.

<sup>5</sup> See Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in Collegiate Athletics*, 22 FORDHAM URB. L.J. 615, 641 (1995) [hereinafter Davis, *The Myth of the Superspade*]; see also *Cameron Hosts Anti-Racism Summit*, ESPN STAR (Feb. 22, 2012), <http://www.espnstar.com/football/news/detail/item757418/Cameron-hosts-anti-racism-summit>.

society.<sup>6</sup> This becomes apparent when analyzing management position demographics within the United States workforce. As of the beginning of 2011, 87.6% of United States management occupations were held by white people.<sup>7</sup> Conversely, of these same types of occupations, black or African-American people and Hispanic or Latino people held only 6.4% and 7.6%, respectively.<sup>8</sup> These numbers become even more alarming when the demographic analysis is broken down into chief executive and general manager positions.<sup>9</sup>

A similar problem is apparent in the professional sporting world, even though professional sports leagues are now often thought to be a “paragon of an integrated society.”<sup>10</sup> Despite the fact that on the playing field many professional sports leagues are racially and ethnically diverse, professional sports leagues’ management composition tells a different story. For example, there are thirty teams in MLB and each team has twenty-five players on its roster.<sup>11</sup> At the start of the 2011 MLB season, the total number of minority players<sup>12</sup> in MLB was 38.3%.<sup>13</sup> The opening day rosters of the combined thirty MLB teams were 61.5% White, 27% Latino, 8.5% African-American, 2.1% Asian,

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<sup>6</sup> See Davis, *The Myth of the Superspade*, *supra* note 5, at 642.

<sup>7</sup> BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2010 16 (2011), *available at* <http://www.bls.gov/cps/cpsrace2010.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (calculating that as of August 2011, U.S. chief executives were 93% White, 2.8% Black, and 4.8% Latino and that U.S. general and operations managers were 89.2% White, 5.8% Black, and 5.9% Latino).

<sup>10</sup> Brian W. Collins, *Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule*, 82 N.Y.U. L. REV. 870, 873 (2007).

<sup>11</sup> Patrick S. Baldwin, Note, *Keeping Them Down on the Farm: The Possibility of a Class Action by Former Minor League Baseball Players Against Major League Baseball for Allowing Steroid Abuse*, 43 GA. L. REV. 1195, 1199 n.10 (2010).

<sup>12</sup> In the context of this Note, the phrase “minority” means those that are of a race other than Caucasian.

<sup>13</sup> RICHARD LAPCHICK ET AL., THE INSTITUTE FOR DIVERSITY AND ETHNICS IN SPORTS, THE 2011 RACIAL AND GENDER REPORT CARD: MAJOR LEAGUE BASEBALL 1, 3 (2011), *available at* [http://tidesport.org/RGRC/2011/2011\\_MLB\\_RGRC\\_FINAL.pdf](http://tidesport.org/RGRC/2011/2011_MLB_RGRC_FINAL.pdf) [hereinafter LAPCHICK ET AL., MLB RACIAL AND GENDER REPORT CARD].

0.4% Native American or Native Alaskan, and 0.3% Native Hawaiian or Pacific Islander.<sup>14</sup>

During this same time period, however, of the staff in MLB's Central Office, only 22.5% of the employees were minorities at the director and managerial level.<sup>15</sup> Additionally, at the start of the 2011 MLB season "there was no person of color as either CEO or team President of an MLB team" and there were just four minority general managers.<sup>16</sup> Finally, while minorities occupy a combined 42% of the coaching positions in Major and Minor League Baseball, of the thirty MLB teams only six had minority head coaches at the start of the 2011 season.<sup>17</sup>

This phenomenon is not limited to the United States and its professional sports leagues, but can also be seen in Great Britain. The two best professional soccer leagues in Great Britain are England's Premier League and England's Football League.<sup>18</sup> There are ninety-two clubs in the two leagues combined.<sup>19</sup> Most of the clubs have players of all different races and ethnicities and the two leagues host several anti-discrimination events each year.<sup>20</sup> In fact, as of the beginning of 2007 approximately a quarter of all "league club"<sup>21</sup> players were black.<sup>22</sup> Nevertheless, during this

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See id.* at 4.

<sup>17</sup> *Id.* Notwithstanding these disparities, Dr. Richard Lapchick's 2011 report appropriately gave the MLB a Grade A for its current racial diversity in the workplace given the fact that these employment statistics marked significant relative improvement in MLB's overall past hiring practices and their correlation with the rest of the American workforce. *Id.* at 1.

<sup>18</sup> *See* Stephen F. Ross & Stefan Szymanski, *Open Competition in League Sports*, 2002 WIS. L. REV. 625, 636 (2002).

<sup>19</sup> *See* Lucy Tobin, *Why Aren't There More Black Football Managers?*, GUARDIAN (Mar. 28, 2011, 10:45 AM), <http://www.guardian.co.uk/education/2011/mar/28/black-football-managers-institutional-racism>. The Premier League contains twenty clubs and is the best professional English soccer league. *See id.* The Football League is divided into three differently ranked divisions with twenty-four clubs in each division. *See id.* In order of highest divisional ranking they are as follows: The Champions Leagues; League One; and League Two. *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> The ninety-two clubs in the Premier League and Football League are commonly referred to collectively as the "league clubs." *Id.*

<sup>22</sup> *Id.*

same time period, “only two out of 92 league clubs had black managers.”<sup>23</sup>

Not blind to their own employment statistics and the public relations dilemma that information like this causes, several professional sports leagues in both the United States and Great Britain have created marketing and press-generating initiatives aimed at promoting human equality both on and off the field.<sup>24</sup> Yet relatively few United States or British professional sports leagues have implemented substantive league rules or mandates to address the racial and ethnic disparity that exists in the hiring of league management and head coaches.<sup>25</sup> To be sure, the effectiveness and legality of this approach to creating employment equality has been widely debated by scholars and industry leaders on both sides of the Atlantic.<sup>26</sup> However, when the National Football League (“NFL”) implemented the “Rooney Rule,” it demonstrated the tremendously positive influence that league employment mandates can have on establishing racial equality in the hiring of head coaches and executives in professional sports.<sup>27</sup>

Implemented by the NFL in 2002, the Rooney Rule requires that all of the NFL’s thirty-two teams interview at least one racial minority candidate for head coaching and senior football

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<sup>23</sup> *Id.* In English soccer, a manager is generally considered equivalent to an NFL head coach.

<sup>24</sup> *See, e.g., id.*; RICHARD LAPCHICK ET AL., THE INSTITUTE FOR DIVERSITY AND ETHNICITY IN SPORTS, THE 2011 RACIAL AND GENDER REPORT CARD: NATIONAL FOOTBALL LEAGUE 5 (2011), available at [http://tidesport.org/RGRC/2011/RGRC\\_NFL\\_2011\\_FINAL.pdf](http://tidesport.org/RGRC/2011/RGRC_NFL_2011_FINAL.pdf) [hereinafter LAPCHICK ET AL., NFL RACIAL AND GENDER REPORT CARD]; LAPCHICK ET AL., MLB RACIAL AND GENDER REPORT CARD, *supra* note 13, at 2.

<sup>25</sup> *See* Leon Mann, *Adopting the Rooney Rule in English Football*, BBC SPORTS (Sept. 11, 2011, 2:43 PM), <http://www.bbc.co.uk/sport/0/football/14856861>; DOUGLAS C. PROXMIRE, AM. CONSTITUTION SOC’Y FOR LAW AND POLICY, COACHING DIVERSITY: THE ROONEY RULE, ITS APPLICATION AND IDEAS FOR EXPANSION 7–8 (2008).

<sup>26</sup> *See, e.g.,* Collins, *supra* note 10, at 887 (“[S]ince the Rooney Rule’s design is relatively unprecedented it is important to explore whether or not it is even legal. . . .”); Hannah Gordon, *The Robinson Rule: Models for Addressing Race Discrimination in the Hiring of NCAA Head Football Coaches*, 15 SPORTS LAW. J. 1, 2–17 (2008) (discussing the justification for the Rooney Rule under a legal, regulatory, and non-legal basis); Mann, *supra* note 25.

<sup>27</sup> *See* N. Jeremi Duru, *The Fritz Pollard Alliance, The Rooney Rule, and The Quest to “Level the Playing Field” in the National Football League*, 7 VA. SPORTS & ENT. L.J. 179, 197 (2008) [hereinafter Duru, *The Fritz Pollard Alliance*].



operations positions before filling a vacancy in such a position.<sup>28</sup> Failure to comply with the rule results in a stiff monetary penalty.<sup>29</sup> Since the rule's implementation, the number of racial minority NFL head coaches has quadrupled from just two in 2002 to an all-time high of eight in 2011.<sup>30</sup> Importantly, the rule has affected not only head coach but also team executive hiring. Since the Rooney Rule's introduction, the number of general managers who belong to a racial minority has gone from one to five.<sup>31</sup>

Despite the success of the Rooney Rule in the NFL and both domestic and international calls for the leadership of English professional soccer to take similar action, so far no comparable rule has been implemented.<sup>32</sup> This paper advocates for the two best British professional soccer leagues, the Premier League and the Football League, to adopt a policy akin to the NFL's Rooney Rule and, unlike other past commentaries on this topic, also proposes a detailed version of the rule that could effectively operate within both existing British employment discrimination law and English professional soccer's business model. As it was in the NFL's case, implementation of such a rule would likely be a significant step toward achieving racial equality in English professional soccer league managerial and executive employment opportunities.

Part I of this Note will discuss the history of race relations in the NFL, focusing on the Rooney Rule's origins. It will then summarize the substantive United States law that pertains to the Rooney Rule and explain how the Rooney Rule fits within the greater legal framework of United States employment discrimination law. This section concludes by discussing the Rooney Rule's effectiveness, highlighting the ongoing debate over the necessity of the Rooney Rule's continued use in the United

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<sup>28</sup> See *id.* at 189. The Rooney Rule was extended to cover senior football operations positions in 2009. See *NFL Expands "Rooney Rule" From Coaches to Senior Posts*, CBS SPORTS (Jan. 15, 2009), <http://www.cbssports.com/nfl/story/11859077/rss>.

<sup>29</sup> See PROXMIRE, *supra* note 25, at 4-5.

<sup>30</sup> See LAPCHICK ET AL., NFL RACIAL AND GENDER REPORT CARD, *supra* note 24, at 8. As of September 2011, there were seven African-American NFL head coaches and one Latino NFL head coach. *Id.*

<sup>31</sup> See *id.* at 10.

<sup>32</sup> See Mann, *supra* note 25.

States. Part II of this Note will then analyze the current racial inequality in English professional soccer's managerial and executive ranks, underscoring its similarities to the pre-Rooney Rule NFL. This section also highlights how this problem fits within the greater British employment discrimination law context. The discussion will then turn towards the ongoing British debate regarding the potential utilization of the Rooney Rule in English professional soccer. Last, Part III argues for English professional soccer's adoption of a version of the Rooney Rule. This proposal takes into account the United Kingdom's relevant legal landscape, English professional soccer's league and organizational structure, and various social attitudes toward the Rooney Rule and affirmative action.

### I. INSIDE THE NFL RACE RELATIONS HUDDLE

Professional sports are often characterized as a “microcosm of society.”<sup>33</sup> To a large extent this is true in that “individual attitudes, values, and beliefs in the broader society become an integral part of sporting practices.”<sup>34</sup> Consequently, professional sports regularly mimic societal norms with respect to human interaction. A short history of race relations in the NFL and an account of the Rooney Rule's origins will both serve to illustrate this point.

#### A. *Integration on the NFL Playing Field*

Much like the United States' race relations history, the history of race relations within the NFL is a tumultuous one. In 1919, the Akron Pros—a football team in the American Professional Football Association (“APFA”)—were led by a black running back, Fritz Pollard.<sup>35</sup> Pollard was a standout player in the APFA, which renamed itself the NFL in 1922.<sup>36</sup> In 1921, Pollard also

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<sup>33</sup> Timothy Davis, *Race and Sports in America: A Historical Overview*, 7 VA. SPORTS & ENT. L.J. 291, 291 (2008) [hereinafter Davis, *Race and Sports in America*].

<sup>34</sup> *Id.* at 291–92.

<sup>35</sup> See Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 181.

<sup>36</sup> See *United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1343 (2d Cir. 1988) (referencing the APFA's renaming of itself).

took over the head coaching duties of the Akron Pros, becoming the league's first black head coach.<sup>37</sup> However, throughout much of the 1920s, African-Americans continued to participate in NFL football solely as players.<sup>38</sup>

Unfortunately, as the professional game grew in popularity throughout "White America," the number of African-Americans playing in the NFL shrank to zero in 1933.<sup>39</sup> The following year, the NFL officially banned all African-Americans from the league.<sup>40</sup> It is hard to pinpoint any reason other than racism that the NFL decided to "bleach itself white."<sup>41</sup> It is worth noting, however, that in an effort to formalize the league, the NFL restructured itself into two divisions of five teams each and added a season-ending title game in 1933.<sup>42</sup> This ultimately led to more media attention and presumably a concern that a prevalence of African-American athletes would turn off white patrons.<sup>43</sup>

The ban on people of color in the NFL lasted twelve years, finally ending in 1946 when the Los Angeles Rams signed UCLA players Kenny Washington and Woody Strode to NFL contracts.<sup>44</sup> Unsurprisingly, this corresponds directly with the end of World War II, a time in which a sizable portion of America was

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<sup>37</sup> Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 181.

<sup>38</sup> See Bram A. Maravent, *Is the Rooney Rule Affirmative Action? Analyzing the NFL's Mandate to its Clubs Regarding Coaching and Front Office Hires*, 13 *SPORTS LAW. J.* 233, 236 (2006) (Fritz Pollard was the only African-American to be a head coach in the NFL until 1989).

<sup>39</sup> Charles Kenyatta Ross, *OUTSIDE THE LINES: AFRICAN AMERICANS AND THE INTEGRATION OF THE NATIONAL FOOTBALL LEAGUE* 46–47 (New York University Press, 1999) (noting how professional football saw a significant rise in fan support during the 1920's and how the NFL subsequently reorganized in 1933, where upon all black players were removed from the league).

<sup>40</sup> See N. Jeremi Duru, *Fielding a Team for the Fans: The Societal Consequences and Title VII Implications of Race-Considered Roster Construction in Professional Sport*, 84 *WASH. U. L. REV.* 375, 383 (2006) [hereinafter Duru, *Fielding a Team for the Fans*].

<sup>41</sup> Alexander Wolff, *The NFL's Jackie Robinson*, *SPORTS ILLUSTRATED* (Oct. 12, 2009), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1161017/1/index.htm>.

<sup>42</sup> *See id.*

<sup>43</sup> *See id.*

<sup>44</sup> *See Duru, Fielding a Team for the Fans, supra* note 40, at 383.

rethinking race and gender relations given the significant contributions that minorities made to the United States war effort.<sup>45</sup>

As the United States Civil Rights Movement took hold across the country, by 1963 every NFL roster included at least one African-American player.<sup>46</sup> By 1970, African-Americans made up about 30% of the NFL's players.<sup>47</sup> Since then, this number has consistently risen, to the point where today African-Americans make up 67% of the NFL's players and the NFL is annually recognized as having achieved exemplar racial diversity on the playing field.<sup>48</sup>

Still, while the overall racial diversity of the NFL has increased, a troubling trend developed among the NFL's players of color. The positions Kenny Washington and Woody Strode played, wide receiver and running back, are "the paradigmatic football 'workhorse positions'—positions commonly viewed as demanding more physical prowess than intellectual ability."<sup>49</sup> As African-Americans continued to enter the NFL from 1946 onward, they disproportionately played these types of positions.<sup>50</sup> Conversely, the quarterback position, often viewed as a position that requires high intelligence, remained essentially an all-white position for quite some time.<sup>51</sup>

Today, things have finally improved. This has been due in large part to the increased rate at which racial minorities are playing the quarterback position at the collegiate level and the success they have had there.<sup>52</sup> For example, since 2000, three

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<sup>45</sup> See Douglas S. Massey, *The Past and Future of American Civil Rights*, 140 DAEDALUS 37, 41–42 (2011).

<sup>46</sup> Ross, *supra* note 39, at 156.

<sup>47</sup> *Id.* at 157.

<sup>48</sup> See LAPCHICK ET AL., NFL RACIAL AND GENDER REPORT CARD, *supra* note 24, at 3.

<sup>49</sup> Duru, *The Fritz Pollard Alliance*, *supra* note 27 at 182.

<sup>50</sup> *Id.*

<sup>51</sup> Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 182.

<sup>52</sup> See Darren Everson & Ben Cohen, *The Year of the Black Quarterback*, WALL ST. J., Dec. 30, 2010, <http://online.wsj.com/article/SB10001424052970203525404576049970496106128.html>.

African-American quarterbacks have won the Heisman Trophy,<sup>53</sup> helping to dispel any bigoted notions that minorities are not “intelligent” enough to play the quarterback position.<sup>54</sup> Moreover, since 1992, thirteen minority quarterbacks have been selected in the first round of the NFL draft, while several others were picked in the second and third rounds.<sup>55</sup> The effect of this has been that as of the start of the 2012 NFL season, minority individuals held six of the NFL’s starting quarterback positions (or approximately 20% of the NFL’s starting quarterback positions).<sup>56</sup>

### *B. Race Discrimination in NFL Head Coach and Management Hiring*

While NFL minority players undoubtedly faced barriers to employment equality, the barriers facing minority NFL coaches and executives were far more onerous, even during times in which race relations improved in the United States.<sup>57</sup> As Temple University Law School Professor N. Jeremi Duru explains:

The presumption of intellectual inferiority but physical superiority obviously hampers the black candidate seeking a quarterback position, for which both physical and intellectual ability are deemed necessary. The presumption, however, completely handicaps the black candidate pursuing a coaching

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<sup>53</sup> The Heisman Trophy is awarded each year to the best overall college football player from the past season. See *Brief History of the Heisman Memorial Trophy*, HEISMAN TROPHY, [http://www.heisman.com/history/trophy\\_history.php](http://www.heisman.com/history/trophy_history.php) (last visited Oct. 11, 2012).

<sup>54</sup> See *Heisman Winners*, HEISMAN TROPHY, <http://www.heisman.com/index.php/heismanWinners#winner-year> (last visited Mar 4, 2012) (Troy Smith, Cam Newton, and Robert Griffin III).

<sup>55</sup> See *NFL Draft History*, NFL.COM, <http://www.nfl.com/draft/history/fulldraft?type=position> (Robert Griffin III (2012), Cam Newton (2011), Josh Freeman (2009), Mark Sanchez (2009), JaMarcus Russell (2007), Vince Young (2006), Jason Campbell (2005), Byron Leftwich (2003), Michael Vick (2001)); Peter Lawrence-Riddell, *Ten Years of First-Round Quarterbacks*, ESPN.COM, (Apr. 17, 2003), <http://sports.espn.go.com/nfldraft/story?id=1539344> (demonstrating the black NFL first-round draft picks from 1992–2001: Daunte Culpepper (1999), Akili Smith (1999), Donovan McNabb (1999), Steve McNair (1995)).

<sup>56</sup> See, e.g., John Clayton, *NFL Starting Quarterback Rankings*, ESPN.COM (Aug. 23, 2012), [http://espn.go.com/nfl/preview12/story/\\_id/8276502/nfl-quarterback-rankings-john-clayton-reveals-2012-hierarchy-signal-callers-part-1](http://espn.go.com/nfl/preview12/story/_id/8276502/nfl-quarterback-rankings-john-clayton-reveals-2012-hierarchy-signal-callers-part-1).

<sup>57</sup> See Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 184.

position, a position for which physical ability is irrelevant and intellectual ability—the candidate’s presumed weakness—is paramount. . . . Indeed, between 1946, when Strode and Washington re-integrated the NFL, and the beginning of the 1989 season, every head coach in the NFL was white.<sup>58</sup>

This is in stark contrast to the sharp increase in the number of players of color that entered the league during this same time period which, as discussed above, went “from zero to making up 67 percent” of the total number of players in the NFL.<sup>59</sup>

Finally, in 1989 the Los Angeles Raiders broke this pattern and hired Art Shell, an African-American, to be the first minority head coach in the NFL since the 1946 re-integration.<sup>60</sup> While Shell had a successful coaching career—perhaps most notably, he was awarded coach of the year in 1990—his accomplishments did little to improve the “plight of colored NFL coaches and management.”<sup>61</sup> In fact, from 1986 through 2002, only five other minorities were hired as head coaches in the NFL.<sup>62</sup>

### C. *The Rooney Rule: Its Origins*

Following the 2001 season, many began to question NFL teams’ hiring practices with respect to minority coaches. It was anomalous that in a league where more than 60% of players were of color, only 6% of the head coaches were of color.<sup>63</sup> Skeptical that such a discrepancy was coincidental, in 2002 civil rights attorneys Johnnie L. Cochran, Jr. and Cyrus Mehri hired University of Pennsylvania labor economist Dr. Janice Madden to analyze the performance of the five full-time black NFL head coaches from 1989 to 2001 and compare it to all the other white NFL head coaches that had coached during this same time

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 185.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See id.* at 186 (citing Johnnie L. Cochran, Jr. & Cyrus Mehri, BLACK COACHES IN THE NFL: SUPERIOR PERFORMANCE, INFERIOR OPPORTUNITIES 1, at ii (2002) [hereinafter Cochran & Mehri Report]).

<sup>63</sup> *See id.* Only two out of the thirty-two NFL teams had head coaches of color to start the 2002 NFL season. *Id.*

period.<sup>64</sup> The results were conclusive and confirmed Cochran's and Mehri's suspicions. Dr. Madden's research indicated that by any statistical measure, black head coaches as a group outperformed their white counterparts and yet individually each still had to perform better than white coaches in order to obtain and retain a job as a head coach in the NFL.<sup>65</sup>

As a result of Dr. Madden's research, Cochran and Mehri went on to promulgate what would be the seminal report in convincing the NFL that it needed to affirmatively do something to address the racial inequality that inundated the head coach hiring practices of NFL teams.<sup>66</sup> The report was prepared by Mehri's law firm, Mehri & Skalet, and it detailed the inequitable hiring opportunities that existed for black coaches despite, as Dr. Madden's research clearly showed, their superior coaching performance compared to white head coaches.<sup>67</sup>

Importantly, at no point in the report did Cochran and Mehri claim that minority coaches were inherently better at coaching than white coaches.<sup>68</sup> Rather, they concluded that since black NFL coaches had to work so much harder than white NFL coaches just to be considered for NFL head coaching vacancies, the black coaches were better prepared to actually be head coaches once they were finally given the opportunity.<sup>69</sup> The strong statistical evidence that black coaches were being held to higher employment

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<sup>64</sup> See *id.*

<sup>65</sup> *Id.* Madden's research found that "black [head] coaches averaged 1.1 more wins per season than white [head] coaches" and "led their teams to the playoffs 67% of the time." Cochran & Mehri Report, *supra* note 62, at ii. White coaches, on the other hand, only led their teams to the playoffs 39% of the time. *Id.* Additionally, "black [head] coaches averaged 2.7 more wins than the white coaches in their first seasons." *Id.* Accordingly, black [head] coaches "were far more likely [in these seasons] to advance their teams to the playoffs than were white [head] coaches." Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 187. Finally, and perhaps most importantly, "[i]n their last seasons before being fired, black [head] coaches outperformed their white counterparts. Black [head] coaches won an average of 1.3 more games in their terminal years than white [head] coaches, and while twenty percent (20%) of the black coaches who were fired led their teams to the playoffs in the year of their firing, only eight percent (8%) of white coaches did the same." *Id.* (footnotes omitted).

<sup>66</sup> See Cochran & Mehri Report, *supra* note 62.

<sup>67</sup> See *id.* at i n.1, ii.

<sup>68</sup> Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 187.

<sup>69</sup> *Id.*

standards than white coaches allowed Cochran and Mehri to persuasively demonstrate in their report that NFL teams were discriminatory in their hiring practices.<sup>70</sup> Ultimately, faced with a credible report that demonstrated that coaches of color were having more success as NFL head coaches than white coaches, yet were receiving far fewer opportunities to become and remain head coaches, the NFL knew that it had to take action.<sup>71</sup> Thus, following the report's publication in September 2002 and the consequent threats of a lawsuit, the NFL promptly had to determine how to proceed so as to avoid protracted litigation and further embarrassment.<sup>72</sup>

Chaired by Pittsburgh Steelers co-owner Daniel Rooney, the NFL put together a panel known as the Committee on Work Place Diversity (the "Committee").<sup>73</sup> The Committee was tasked with reviewing Cochran and Mehri's report and determining the type of remedial action that the NFL should take in response to it.<sup>74</sup> The Committee would then make a final recommendation to all of the NFL team owners, detailing how the NFL should proceed.<sup>75</sup>

Importantly, Cochran's and Mehri's report advocated a proactive plan requiring NFL teams to conduct meaningful head coaching job interviews with racial minority coaching candidates.<sup>76</sup> The report expressed a belief that the racial bias occurring in NFL head coach hiring, "whether conscious or unconscious, was steering teams away from minority head coaching candidates" and that a rule mandating fair interviewing procedures was the best way to effectuate a substantial change.<sup>77</sup> Thus, Cochran and Mehri argued that each NFL team seeking to fill a head coaching vacancy should be required to interview at least one racial minority candidate before making a final hiring decision.<sup>78</sup> To best prevent sham interviews, the report also suggested that the interviewers

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<sup>70</sup> *Id.* at 187–88.

<sup>71</sup> *See* Collins, *supra* note 10, at 886.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *See* Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 188.

<sup>75</sup> *Id.* at 189.

<sup>76</sup> *Id.*

<sup>77</sup> *See id.*

<sup>78</sup> *Id.*



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should be team officials that have primary decision making authority when it comes to hiring.<sup>79</sup>

After a few months of deliberation, the Committee issued its recommendations to the rest of the NFL team owners, and in December 2002, the NFL announced its mandatory interview rule.<sup>80</sup> In accordance with the findings of Cochran and Mehri's report, the Committee's final proposal did not require that NFL teams hire minority individuals to be head coaches.<sup>81</sup> Rather, and most crucially, the Committee's final proposal required that any NFL team seeking to hire a head coach must interview at least one racial minority applicant for the position.<sup>82</sup> Any team that failed to do so would be held in violation of this mandate and subjected to penalties at the Commissioner's discretion.<sup>83</sup> The proposed rule was dubbed the "Rooney Rule" after the Committee's chair, Daniel Rooney.<sup>84</sup>

Shortly thereafter, the Committee's proposal was approved by the NFL team owners and was to become binding on all NFL teams the following year.<sup>85</sup> With that, the Rooney Rule was born.

*D. The Rooney Rule: Its Implementation and Impact*

Unfortunately, while the Rooney Rule was initially hailed as a victory for employment equality in the NFL, many industry insiders and scholars were convinced that this rule would do little more than serve as a facade for continued discriminatory hiring practices and sham interviewing.<sup>86</sup> Indeed, as of 2003, when the Rooney Rule was first implemented, there were only two NFL head coaches of color in the league and few people were convinced that a team's violation of the Rooney Rule would result in a penalty severe enough to influence hiring practices going

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 188.

<sup>83</sup> *See, e.g., id.* at 194 (noting that in 2003, the then commissioner of the NFL, Paul Tagliabue, responded to the violation of the Rooney rule by the Lions head coach, Marty Mornhinweg, by issuing a severe punishment instead of choosing inaction).

<sup>84</sup> *Id.* at 189.

<sup>85</sup> *Id.*

<sup>86</sup> *See id.* at 190.

forward.<sup>87</sup> This view, however, radically changed when the Detroit Lions fired their head coach Marty Mornhinweg in 2003 and subsequently violated the Rooney Rule when conducting the search for his successor.<sup>88</sup> The violation resulted in public ridicule and a hefty \$200,000 league fine imposed directly on the Detroit Lions' General Manager Matt Millen<sup>89</sup>—the first penalty ever issued against an NFL team under the Rooney Rule.<sup>90</sup>

From 2001 through 2006, the number of NFL head coaches of color increased from two to seven, and since 2007 there have consistently been at least six racial minority head coaches in the NFL.<sup>91</sup> Moreover, as of the start of the 2011 NFL season, 25% of all NFL head coaches were people of color.<sup>92</sup> While this increase might not be purely attributable to the Rooney Rule's implementation, the rule has undoubtedly played a key role in helping to improve diversity among the NFL head coaching ranks.<sup>93</sup>

Importantly, the Rooney Rule's success has also led to its expanded use in the NFL and to calls for its implementation in collegiate level sports.<sup>94</sup> In 2009, NFL team owners voted to extend the Rooney Rule to cover senior front office vacancies.<sup>95</sup> Current NFL Commissioner Roger Goodell explained:

The recommendation . . . recognizes that this process has worked well in the context of head coaches and that clubs have deservedly received considerable positive recognition for their efforts in this respect. The more thorough the search, the

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<sup>87</sup> *Id.* at 193.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 194.

<sup>90</sup> *See id.* at 193–94.

<sup>91</sup> *See* LAPCHICK ET AL., NFL RACIAL AND GENDER REPORT CARD, *supra* note 24, at 8.

<sup>92</sup> *See id.*

<sup>93</sup> *See* Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 197.

<sup>94</sup> *See id.* (describing how the National Collegiate Athletic Association implemented a version of the Rooney Rule to help establish equal employment opportunities for minority football head coaching candidates at the collegiate level).

<sup>95</sup> Carl Horowitz, *The "Rooney Rule": Pro Football's Affirmative Action Deception*, NAT'L LEGAL & POL'Y CENTER (July 17, 2009, 4:49 PM), <http://nlpc.org/stories/2009/07/17/rooney-rule-pro-footballs-affirmative-action-deception>.

more likely clubs are to find the right candidates and to be able to groom future leaders from within their organizations.<sup>96</sup>

The application of the Rooney Rule to front office executive vacancies has further helped facilitate employment equality in the NFL. Notably, eight out of the last eleven Super Bowl teams have featured either a head coach or general manager of color.<sup>97</sup> Moreover, since the rule's original implementation in 2003, the number of racial minority NFL general managers has increased from one to five.<sup>98</sup>

*E. The Legal X's and O's of the Rooney Rule in the United States*

To properly understand not only the Rooney Rule's utility, but also the controversy surrounding it in the United States, it is necessary to engage in what scholar Vivian Grosswald Curran calls "cultural immersion."<sup>99</sup> By approaching the Rooney Rule from both a historical and legal perspective, it is much easier to understand the important role that the Rooney Rule plays in the NFL and, more broadly, in the United States workplace.

Title VII of the 1964 Civil Rights Act creates a statutory prohibition against employment discrimination and expands upon the civil rights protections offered by the United States Constitution's Fifth and Fourteenth Amendments.<sup>100</sup> Critically, while the Constitution's Fifth and Fourteenth Amendments only prohibit discrimination by public employers, Title VII extends this prohibition to discrimination by private employers.<sup>101</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> See LAPCHICK ET AL., NFL RACIAL AND GENDER REPORT CARD, *supra* note 24, at 3 (identifying the head coaches or general managers of color of the last eleven Super Bowl teams as Tony Dungy, Lovie Smith, Mike Tomlin, Jim Caldwell, Jerry Reese and Rod Graves).

<sup>98</sup> See Mann, *supra* note 25.

<sup>99</sup> COMPARATIVE LAW: AN INTRODUCTION, COMPARATIVE LAW SERIES 49–50 (Vivian Grosswald Curran ed., 2002).

<sup>100</sup> See George Rutherglen, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 6 (Foundation Press, 3d ed. 2010).

<sup>101</sup> See *id.*

More specifically, “Title VII of the Act prohibits employer discrimination against employees and potential employees.”<sup>102</sup> Prohibited types of discrimination include discrimination on the:

basis of race, color, religion, sex or national origin “with respect to . . . compensation, terms, conditions, or privileges of employment . . .” Moreover, [under Title VII] an employer may not use race, color, religion, sex, or national origin in a way that adversely affects an employee’s status or deprives an employee or potential employee of an employment opportunity. Thus, the purpose of Title VII is to “remove . . . artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”<sup>103</sup>

Title VII prohibits both disparate treatment and disparate impact discrimination.<sup>104</sup> Disparate treatment occurs when an employer intentionally treats either an individual employee or class of employees “less favorably than others because of their race, color, religion, sex, or national origin.”<sup>105</sup> In all cases, the plaintiff must show discriminatory motive, although motive can be inferred from the situation.<sup>106</sup>

For an individual claim of disparate treatment to be successful under Title VII, the plaintiff must prove that he was treated differently by the employer because of his status as one of the Title VII protected categories.<sup>107</sup> For a claim of systemic disparate treatment to be successful, the plaintiff must prove that he was

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<sup>102</sup> See Roy S. Hochbaum, “*And It Only Took Them 307 Years*”: *Ruminations on Legal and Non-Legal Approaches to Diversifying Head Coaching in College Football*, 17 VILL. SPORTS & ENT. L.J. 161, 186–87 (2010).

<sup>103</sup> *Id.* at 187 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

<sup>104</sup> See Hannah Arterian Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1954 After Beazer and Burdine*, 23 B.C. L. REV. 419, 419 (1982).

<sup>105</sup> Hochbaum, *supra* note 102, at 187.

<sup>106</sup> *Id.* at 187–88.

<sup>107</sup> *Id.* at 188.

among a class of workers that were treated differently from another class based on a Title VII protected status.<sup>108</sup>

In *McDonnell Douglas Corp. v. Green*, the United States Supreme Court articulated the test for making a successful individual disparate treatment claim against an employer under Title VII.<sup>109</sup> The Court explained that where individuals allege adverse employment action “because of” their membership in a Title VII protected group, the test to be applied is a burden-shifting analysis.<sup>110</sup> Under this test the plaintiff must make a prima facie showing of discrimination.<sup>111</sup> To make this prima facie case the plaintiff must show: 1) that he was a member of the Title VII protected group; 2) that the plaintiff applied for and qualified for the job; 3) that despite qualification, he was rejected; 4) that after rejection the position remained open and the employer continued to seek applicants with those same qualifications; and 5) based on an amendment to Title VII in the 1991 Civil Rights Act which occurred after the *McDonnell Douglas* case, that prohibited discrimination was a “motivating factor.”<sup>112</sup>

If the plaintiff can make out a prima facie showing, the burden then shifts to the defendant employer to present evidence that the alleged discrimination had a “legitimate, nondiscriminatory reason.”<sup>113</sup> If it can do this, the burden shifts back to the plaintiff to show that the defendant’s proffered reason is simply a pretext for intentional discrimination based on a Title VII protected class.<sup>114</sup> If the defendant employer does not offer a legitimate non-discriminatory reason for rejecting the plaintiff, the trier of fact may infer that the defendant employer unlawfully discriminated against the plaintiff.<sup>115</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>110</sup> *Id.* at 801–02.

<sup>111</sup> *Id.* at 802.

<sup>112</sup> *See id.*; *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071 (1991).

<sup>113</sup> *McDonnell Douglas Corp.*, 411 U.S. at 802.

<sup>114</sup> *Id.* at 804.

<sup>115</sup> *See St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

As previously stated, in addition to plaintiff claims based on an individual disparate treatment theory, a plaintiff may also assert a valid claim under Title VII based on a systemic disparate treatment theory.<sup>116</sup> If an employer maintains a policy that requires it to treat employees of a certain Title VII protected class differently than others, a systemic disparate treatment claim can be established by an employee if he is a member of that protected class.<sup>117</sup> Under this disparate treatment theory, a burden shifting analysis is still used.<sup>118</sup>

In a systemic disparate treatment case, the plaintiff still must make out a prima facie case of employment discrimination to shift the burden to the employer.<sup>119</sup> However, the plaintiffs in these cases can use statistics to replace or bolster anecdotal evidence of the employer's discrimination.<sup>120</sup> If there is evidence of a pattern of exclusion or disparity in the composition of the employer's workforce as compared to the relevant labor market, prohibited employment discrimination can be inferred.<sup>121</sup> As is the case in individual disparate treatment claims, should the plaintiff be able to make out a prima facie discrimination case, the burden will shift to the employer to proffer a legitimate nondiscriminatory reason for the alleged employment discrimination.<sup>122</sup> If statistics were relied on by the plaintiff, however, in making its rebuttal the defendant employer can try to demonstrate that: 1) the wrong choice of relevant labor market was used for statistical comparison; 2) the wrong choice of individuals for statistical comparison were used; 3) the disparity is not sufficiently statistically significant; or 4) the disparity was caused by neutral

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<sup>116</sup> See Rutherglen, *supra* note 100, at 58–60.

<sup>117</sup> See Hochbaum, *supra* note 102 at 188.

<sup>118</sup> *Id.* (discussing the burden shifting analysis created for disparate treatment cases in *McDonnell Douglas Corp.*, 411 U.S. 792 (1973)).

<sup>119</sup> *See id.*

<sup>120</sup> *Id.* at 190.

<sup>121</sup> See Information on Impact 41 C.F.R. § 60–3.4 (2012).

<sup>122</sup> See Rutherglen, *supra* note 100, at 71.

factors.<sup>123</sup> In the absence of a meritorious defense rebuttal, employment discrimination will likely be inferred.<sup>124</sup>

Finally, in addition to a disparate treatment theory, an employee may also assert a valid Title VII claim based on a disparate impact theory.<sup>125</sup> “Disparate impact ‘involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another.’”<sup>126</sup> In *Griggs v. Duke Power Co.*, the United States Supreme Court recognized a disparate impact employment discrimination claim for the first time.<sup>127</sup> The Court found that “practices, procedure, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”<sup>128</sup> Thus, Title VII protects employees from discriminatory employment practices, even when the practices are unintentionally discriminatory and are solely the result of unconscious employer biases.<sup>129</sup>

Under *Griggs*, a burden shifting analysis is used to determine if a meritorious disparate impact claim has been made.<sup>130</sup> For a plaintiff employee to be successful, the employee must first make out a prima facie case by showing that the defendant employer used an employment practice that caused a disparate impact on a Title VII protected group that the employee is a part of.<sup>131</sup>

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<sup>123</sup> See generally *id.* at 58–71 (discussing the use of statistical evidence in employment discrimination cases).

<sup>124</sup> *Id.*

<sup>125</sup> Hochbaum, *supra* note 102, at 187.

<sup>126</sup> *Id.* at 192.

<sup>127</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 428 (1971)

<sup>128</sup> *Id.* at 430. In *Griggs*, the Court invalidated defendant employer’s high school diploma requirement for certain blue-collar employment positions where defendant could not demonstrate a link between receiving a high school diploma and job performance. *Id.* at 431. According to a 1960 census statistic, 34% of white males in the state had completed high school while only 12% of African-American males had done so. *Id.* at n.6. In effect, the diploma requirement screened out vastly more blacks than it did whites even though there was no intent to discriminate. See *id.* at 431.

<sup>129</sup> “Unconscious bias” refers to automatic or implicit stereotypes that are applied to certain groups of individuals. See Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 482 (2005).

<sup>130</sup> See *Griggs*, 401 U.S. at 432.

<sup>131</sup> See *id.* at 431.

Importantly, the employee need not prove employer intent to cause a disparate impact.<sup>132</sup> Rather, the employee need only demonstrate a significant statistical disparity or proof of harmful effects on the protected group based on a specific employer practice or policy.<sup>133</sup>

If the employee plaintiff can make out this prima facie case of disparate impact, then the burden shifts to the defendant employer to attempt to rebut the claim by showing that the contested practice is based on a “business necessity” or is “related to job performance.”<sup>134</sup> If the defendant employer meets its burden, the burden shifts back to the plaintiff employee to prove that there are alternative practices that are feasible and efficient and that will satisfy the employer’s business interests without undesirable adverse impact.<sup>135</sup> Here, the employee is essentially showing that the employer’s business justification is just a “pretext for [prohibited] discrimination.”<sup>136</sup> If the employee can do this, prohibited discrimination will likely be inferred.<sup>137</sup>

#### F. Title VII and the Rooney Rule

The protections of Title VII led directly to the Rooney Rule’s creation.<sup>138</sup> Following Cochran and Mehri’s 2002 report, it was clear that the NFL had an employment discrimination problem with regard to the hiring of head coaches of color.<sup>139</sup> And while the employment discrimination was likely unintentional and the result of unconscious racial biases, it was evident that significant racial inequality existed within the NFL’s head coaching ranks.<sup>140</sup>

Armed with their 2002 report and keenly aware of Title VII’s protections, Cochran and Mehri, on behalf of a group of NFL coaches of color, publicly threatened to sue the NFL for employment discrimination.<sup>141</sup> Because such a claim viably could

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<sup>132</sup> See Rutherglen, *supra* note 100, at 71.

<sup>133</sup> See Hochbaum, *supra* note 102, at 192–93.

<sup>134</sup> See Rutherglen, *supra* note 100, at 71 (construing *Griggs*, 401 U.S. 424).

<sup>135</sup> *Id.* at 71, 78 (construing *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989)).

<sup>136</sup> *Id.* at 71.

<sup>137</sup> See *id.*

<sup>138</sup> See Collins, *supra* note 10, at 887–88.

<sup>139</sup> See *id.* at 885–86.

<sup>140</sup> See Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 189.

<sup>141</sup> See Collins, *supra* note 10, at 885.



have been brought as a Title VII class claim, Cochran and Mehri would have had a strong case.<sup>142</sup> They would have been able to rely heavily on their report's impressive statistical analysis to make a prima facie case of employment discrimination, and because the report's statistical analysis was so thorough and virtually irrefutable, the NFL would have had a difficult time rebutting the claim that its hiring practices were anything but illegally discriminatory.<sup>143</sup>

Thus, the NFL—realizing it could lose a publicly damaging employment discrimination lawsuit—chose to take affirmative remedial action to improve its head coach hiring practices.<sup>144</sup> This ultimately resulted in the Rooney Rule's creation and implementation.<sup>145</sup>

#### *G. Affirmative Action in the United States Private Employment Context and the Rooney Rule*

As the preceding section indicates, United States private employers are aware of the fact “that they could be held liable under Title VII without intentionally discriminating against minorities. As a result, ‘many private employers implemented affirmative action programs to avoid future Title VII liability.’”<sup>146</sup> Indeed, this is exactly what the NFL did when it implemented the Rooney Rule.<sup>147</sup>

Affirmative action programs are positive measures that employers adopt to remedy and prevent discrimination against

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<sup>142</sup> See *id.* at 885–86.

<sup>143</sup> See Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 188.

<sup>144</sup> See Collins, *supra* note 10, at 886. It is worth noting that in the 2011 United States Supreme Court decision *Wal-Mart v. Dukes*, the Court actually denied class certification to a large group of female plaintiffs that, based largely on factual statistical data, alleged that Wal-Mart was engaging in systemic employment discrimination against women. See generally 131 S. Ct. 2541 (2011). Nevertheless, in 2002 (nine years before the *Wal-Mart* decision), the NFL was wisely unwilling to risk going to trial against Cochran and Mehri given then-existing United States employment discrimination law and Supreme Court precedent. See Collins, *supra* note 10, at 887–88.

<sup>145</sup> See Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 189.

<sup>146</sup> See Collins, *supra* note 10, at 887–88 (emphasis omitted) (quoting Michael K. Braswell et al., *Affirmative Action: An Assessment of Its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 371 (1993)).

<sup>147</sup> *Id.*

employees or applicants for employment.<sup>148</sup> These programs often require the promotion of employees or the interviewing of job candidates or hiring of employees based on their status as members of a Title VII protected class.<sup>149</sup> In the United States, affirmative action has frequently been used to remedy past acts of intentional workplace discrimination, though it can also be used to remedy past acts of unintentional workplace discrimination based on unconscious biases.<sup>150</sup> In this regard, affirmative action is associated with the “remedial perspective” on discrimination, which attempts to “extend the laws against employment discrimination to intervene in labor markets to foster a broad conception of equality,” thereby helping to combat the effects of past discrimination.<sup>151</sup>

Despite the noble intentions of affirmative action doctrine, anything that is branded or characterized as an affirmative action policy is almost always met with some resistance in the United States.<sup>152</sup> The controversy over affirmative action in the United States stems primarily from the notion that while Title VII aims specifically at ending employment discrimination based on a protected category, affirmative action plans by their very nature not only encourage but require employment decisions to be made based on an employee’s or a potential employee’s status as part of a protected class.<sup>153</sup>

To elaborate on the genesis of this controversy, “Title VII was aimed specifically at ending workplace discrimination” against racial minorities.<sup>154</sup> However, in *McDonald v. Santa Fe Trail Transportation Co.*, the Supreme Court subsequently interpreted Title VII to apply not only to racial minorities, but to Caucasians as well.<sup>155</sup> As a result, Caucasians who felt that they were unfairly disadvantaged by employer affirmative action programs “began

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<sup>148</sup> See Rutherglen, *supra* note 100, at 25.

<sup>149</sup> See Collins, *supra* note 10, at 889.

<sup>150</sup> See Rutherglen, *supra* note 100, at 25.

<sup>151</sup> See *id.*

<sup>152</sup> See, e.g., Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 297–98, n.1 (1990).

<sup>153</sup> See Rutherglen, *supra* note 100, at 25.

<sup>154</sup> Collins, *supra* note 10, at 890.

<sup>155</sup> See 427 U.S. 273 (1976).

claiming that employers violated Title VII by considering race when making employment decisions.”<sup>156</sup>

As Professor Thomas Ross explains, the psychology behind these reverse discrimination claims can be deemed the “plight of the ‘innocent white victim.’”<sup>157</sup> Under this perception of affirmative action, it is presumed that the white job applicant or employee is not guilty of a past discriminatory act that has denied the minority job applicant or employee an employment opportunity.<sup>158</sup> However, in order to remedy past employment discrimination against the protected class to which the minority job applicant or employee belongs, affirmative action subordinates the white job applicant or employee to the minority job applicant or employee in consideration of another employment opportunity.<sup>159</sup> This, it is argued, is unfair and results in “innocent” white victims.<sup>160</sup>

As Ross points out, the “rhetoric of innocence” is likely a misguided stance on affirmative action programs in the United States.<sup>161</sup> Nevertheless, during the 1970s private employers faced serious threats of Title VII lawsuits from unanticipated white plaintiff employees.<sup>162</sup> Thus, in the absence of congressional legislation pertaining to this phenomenon, it was left for the United States Supreme Court to decide what was and was not a valid affirmative action program in the United States private employment context.<sup>163</sup>

In *United Steelworkers v. Weber* and *Johnson v. Transportation Agency*, the Supreme Court created the framework for analyzing the validity of private employer affirmative action plans challenged under Title VII.<sup>164</sup>

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<sup>156</sup> Collins, *supra* note 10, at 890.

<sup>157</sup> Ross, *supra* note 152, at 300.

<sup>158</sup> *Id.* at 300–01.

<sup>159</sup> *See id.* at 301.

<sup>160</sup> *Id.*

<sup>161</sup> *See id.* at 315.

<sup>162</sup> *See* Collins, *supra* note 10, at 890.

<sup>163</sup> *See id.*

<sup>164</sup> *Id.* at 890–91 (construing *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transp. Agency*, 480 U.S. 616 (1987)).

*Weber* was the first Title VII reverse discrimination case to reach the Supreme Court.<sup>165</sup> In this case, Weber, a white employee, sued his employer under Title VII after he was denied admission to his employer's job training program.<sup>166</sup> The source of Weber's complaint arose when African-Americans with less seniority had been accepted to the program due to a provision in the employer's collective bargaining agreement establishing a preference for black employees.<sup>167</sup> "Weber argued successfully in the lower courts that [this affirmative action] plan was illegal because Title VII banned any race-based preference including those used as part of affirmative action plans."<sup>168</sup>

The Supreme Court disagreed and ruled against Weber.<sup>169</sup> While acknowledging that Title VII protects minorities as well as Caucasians from discrimination, the Supreme Court held that Title VII must be read in its legislative and historical context.<sup>170</sup> The Court found that "Congress intended Title VII to serve as a broad remedial tool to tear down social and economic barriers that kept many African-Americans poor and unemployed."<sup>171</sup> The Court also explained that the legislative history revealed that "Congress aimed to encourage voluntary private efforts 'to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'"<sup>172</sup> With this legislative and historical backdrop, the Supreme Court reasoned that Weber's employer's affirmative action program was valid and "that Title VII cannot be interpreted as a complete prohibition against 'private, voluntary, race-conscious affirmative action plans.'"<sup>173</sup>

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<sup>165</sup> *Id.* at 891 (discussing *Weber*, 443 U.S. 193).

<sup>166</sup> *Weber*, 443 U.S. at 199–200.

<sup>167</sup> *Id.* at 193.

<sup>168</sup> Collins, *supra* note 10, at 891.

<sup>169</sup> *Weber*, 443 U.S. at 200–02.

<sup>170</sup> See Rutherglen, *supra* note 100, at 95–96.

<sup>171</sup> Collins, *supra* note 10, at 891.

<sup>172</sup> *Id.* (quoting *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)).

<sup>173</sup> *Id.* (quoting *Weber*, 443 U.S. at 208). Notably, in *Weber*, the Supreme Court only reached the question of the legality of affirmative action plans in the private employment context. This case did not address the power of the federal government to establish employment preferences based on a Title VII protected trait. See Rutherglen, *supra* note 100, at 95.

While the *Weber* Court did not announce a definitive line for what constitutes a valid private employer affirmative action plan, the *Weber* Court focused on two characteristics of *Weber*'s employer's plan that made it valid under Title VII: 1) it was designed to "break down old patterns of racial segregation" and erase "manifest racial imbalance" in the workplace; and 2) it did not "unnecessarily trammel" the interests of white employees.<sup>174</sup>

Subsequently, in *Johnson v. Transportation Agency*, the Supreme Court announced the current standard for analyzing the validity of private employer affirmative action plans under Title VII.<sup>175</sup> In *Johnson*, while the Court adhered to the decision and reasoning used in *Weber*, it modified its analysis in an important way.<sup>176</sup> The Court explained that in addition to the two-part *Weber* inquiry, an affirmative action plan will be upheld "only if it were flexibly applied according to the proportions of the favored group . . . who possessed the qualifications for the job."<sup>177</sup>

As was intended by the Rooney Rule's drafters, the Rooney Rule fits squarely within the Supreme Court's *Weber-Johnson* framework, an important conclusion for both the "image-conscious NFL" and the employees that this rule affects.<sup>178</sup>

#### *H. Avoiding the Blitz on the Rooney Rule in the United States*

Today, despite the Rooney Rule's successes, there are still those who advocate for the rule's discontinuance in the United States.<sup>179</sup> Essentially, American viewpoints regarding the Rooney Rule's continued use fall into three categories. First, there are those who think that the Rooney Rule has worn out its utility. Second, there are those who think that the Rooney Rule has always been flawed and never should have been implemented to begin

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<sup>174</sup> Rutherglen, *supra* note 100, at 96 (quoting *Weber*, 443 U.S. at 208).

<sup>175</sup> Collins, *supra* note 10, at 892 (referring to *Johnson v. Transp. Agency*, 480 U.S. 616, 625 (1987)).

<sup>176</sup> See Rutherglen, *supra* note 99, at 97.

<sup>177</sup> See *id.*

<sup>178</sup> Collins, *supra* note 10, at 900.

<sup>179</sup> See, e.g., Daymon Johnson, *The Rooney Rule: Why It's Outdated and Unnecessary in Today's NFL*, BLEACHER REPORT (Jan. 13, 2011), <http://bleacherreport.com/articles/570877-the-rooney-rule-why-its-outdated-and-unnecessary-in-todays-nfl> (arguing that the Rooney Rule is no longer needed).

with. Finally, there are those who support the Rooney Rule's continued use.

With regard to the first viewpoint, these advocates claim that while the Rooney Rule served a useful purpose, it is no longer needed given the marked improvement in racial minority head coach and executive hiring.<sup>180</sup> Indeed, not only outsiders think this, but also at least one minority NFL assistant coach. Recently, in response to a question about the Rooney Rule's continued use, one black assistant coach was quoted as saying, "I never thought I'd say this in my lifetime . . . but the playing field is getting even faster than I thought was possible. We're getting to an equal point very quickly. I didn't think we'd be here for another 20 years."<sup>181</sup>

Those who believe that the Rooney Rule is no longer needed often cite several reasons for their optimistic view that the Rooney Rule can be repealed without adverse consequence. First, people of this view cite the fact that racial minority coaches are now more likely to be rehired as NFL head coaches, even after being previously terminated as a head coach by a NFL team.<sup>182</sup> Second, many supporters of this view are of the belief that NFL team owners are more likely than ever before to hire a minority head coach because of the success that minority head coaches have had in recent years.<sup>183</sup> It is no secret that NFL team owners want to see their teams win. Owners have now seen the success that head coaches of color such as Mike Tomlin, Tony Dungy, and Lovie Smith have had, and thus there is a growing confidence that other team owners will try to replicate this hiring practice rather than operating under the misguided belief that minority coaches are inferior in coaching ability to white coaches.<sup>184</sup> Finally, and perhaps the most salient point cited in support of the Rooney Rule's repeal, is that NFL team ownership is growing younger.<sup>185</sup>

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<sup>180</sup> *Id.*

<sup>181</sup> Mike Freeman, *With So Much Progress, Is Rooney Rule Still Necessary?*, CBS SPORTS.COM (Jan. 27, 2009), <http://www.cbssports.com/nfl/story/11306795>.

<sup>182</sup> *Id.* (noting that African-American coaches like Dennis Green and Herm Edwards were rehired by other clubs).

<sup>183</sup> *See id.* (stating that the success of African-American head coaches Dungy and Smith assisted in eradicating fears about hiring African-American coaches).

<sup>184</sup> *See id.*

<sup>185</sup> *Id.*

Younger NFL team owners, having grown up in an age where discrimination and racism are considered socially unacceptable, are more likely to inherently employ fair hiring practices than NFL owners who owned teams during the height of United States segregation through the late twentieth century.<sup>186</sup> This theory rests upon the widely held belief that, as previously stated, “individual attitudes, values, and beliefs in the broader society become an integral part of sporting practices.”<sup>187</sup>

In addition to those who believe that the Rooney Rule no longer serves a useful purpose, there remain others who think that the Rooney Rule has always been flawed and never should have been implemented in the first place.<sup>188</sup> As is the case with most affirmative action plans in the United States, there is a significant segment insisting that any rule that requires decision making based on race, regardless of the rule’s purpose, does more to impede equality than create it.<sup>189</sup> The Rooney Rule is no different.<sup>190</sup> Those that subscribe to this view argue that it is unjust not only to NFL team owners to require them to account for race when determining head coaching and executive candidates, but also to the racial minority head coaching and executive candidates themselves.<sup>191</sup>

The perceived injustice stems from a belief that if a team knows who it wants to hire as a head coach or executive, then it should not have to go through the process of interviewing other head coach and executive candidates.<sup>192</sup> When it is forced to do so by rule, the only results are sham interviews, which, it is argued,

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<sup>186</sup> *Id.*

<sup>187</sup> Davis, *Race and Sports in America: An Historical Overview*, *supra* note 33, at 291–92 (quoting George H. Sage, INTRODUCTION TO DIVERSITY AND SOCIAL JUSTICE IN COLLEGE SPORTS 5 (D. Brooke & R. Althouse eds., 2007)).

<sup>188</sup> *See, e.g.*, Johnson, *supra* note 179 (explaining the Rooney Rule forces NFL owners to interview people that may not be qualified).

<sup>189</sup> *See id.*

<sup>190</sup> *See id.*

<sup>191</sup> *See* Ryan Isley, “Rooney Rule” Claims Another Victim in Perry Fewell, CLEVELAND.COM (Jan. 14, 2011, 12:21 PM), [http://www.cleveland.com/dsn/index.ssf/2011/01/rooney\\_rule\\_claims\\_another\\_victim\\_in\\_perry\\_fewell.html](http://www.cleveland.com/dsn/index.ssf/2011/01/rooney_rule_claims_another_victim_in_perry_fewell.html) (discussing how the rule has resulted in “teams bring[ing] in [minority] coaches that they know they have absolutely no intention of hiring just to meet the league’s requirement”).

<sup>192</sup> Hochbaum, *supra* note 102, at 184.

are demeaning and a waste of time for racial minority head coaching and executive candidates.<sup>193</sup>

Finally, there are those who believe that the Rooney Rule still serves a useful purpose and plays an integral part in creating and maintaining equal employment opportunities for racial minority NFL head coaches and executives.<sup>194</sup> Those sharing this view explain that even though the NFL has evolved and improved its hiring practices over the last ten years, this development alone does not mean there is no longer a need for the Rooney Rule.<sup>195</sup> As the Pittsburgh Steelers' team President Art Rooney II recently explained:

I know people have wondered whether some of the interviews have been genuine or not. . . . But the rule is still helping people get interviews. I hope there comes a time when we don't need it, but I'm not sure we're there yet. Certainly, a lot of progress has been made and it's working. I don't see any need to change it at this point.<sup>196</sup>

Similarly, those supporting this view also argue that while the Rooney Rule may have its flaws, it still does far more good than harm.<sup>197</sup> Indeed, many commentators suggest that, contrary to arguments espoused by those who have objected to the Rooney Rule's use since its inception, a face-to-face interview that does not result in a hiring still begets meaningful discussion and fosters consideration that ultimately contributes to increased diversity.<sup>198</sup> Moreover, as the Pittsburgh Steelers African-American head coach Mike Tomlin correctly points out, the Rooney Rule helps bring to

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<sup>193</sup> *Id.*

<sup>194</sup> *See id.* at 184–85.

<sup>195</sup> Clifton Brown, *So Far, NFL's Rooney Rule is Working*, SPORTING NEWS (Jan. 17, 2011, 8:24 AM), <http://aol.sportingnews.com/nfl/story/2011-01-17/so-far-nfls-rooney-rule-is-working>.

<sup>196</sup> *Id.*

<sup>197</sup> *See, e.g.*, Hochbaum, *supra* note 102, at 185.

<sup>198</sup> *See, e.g., id.* *See also* Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 195 (explaining that those minority head coaching candidates that do get interviews, but do not get hired initially, are still more likely to get a head coaching job in the future based on having had the opportunity to have the initial interview and demonstrating that they are qualified head coaching candidates).



public light a dialogue regarding how to improve race relations in the workplace.<sup>199</sup> Tomlin explains:

I've always had a great deal of belief in my abilities, and I thought that if I continued to work and do good things, that eventually I would get my opportunity—Rooney Rule or no. But I definitely see the usefulness of such a rule, and if nothing else, it keeps some debatable things in the public light, which is good.<sup>200</sup>

Because the NFL is one of the most high-profile employers in the United States—in addition to being the most popular United States professional sport<sup>201</sup>—the NFL's discussion of race relations in its workplace helps generate a broader dialogue about the continued need to improve race relations in the United States, both in the workplace and more generally. In turn, this dialogue helps lead to actual improvements in United States race relations.

### *I. The Rooney Rule and the United States Today*

Today, the United States is no longer a country where intentional and overt racism is accepted in the private employment context.<sup>202</sup> Nevertheless, unconscious biases still play a large part in how United States private employers make employment decisions.<sup>203</sup> The NFL's history makes clear that United States professional sports leagues are not impervious to this phenomenon.<sup>204</sup>

While many in the United States are skeptical of affirmative action programs and question their legality, unconscious bias leads to unintentional discrimination, which is not easily recognizable.<sup>205</sup>

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<sup>199</sup> See Freeman, *supra* note 181.

<sup>200</sup> *Id.*

<sup>201</sup> See *While Gap Narrows, Professional Football Retains Lead over Baseball as Favorite Sport*, HARRIS INTERACTIVE (Jan. 20, 2011), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/675/ctl/ReadCustom%20Default/Default.aspx>.

<sup>202</sup> See Lee, *supra* note 129, at 482.

<sup>203</sup> See *id.*

<sup>204</sup> See Collins, *supra* note 10, at 873–75.

<sup>205</sup> See *id.* at 912.

As a result, it will not disappear unless specifically and affirmatively addressed.<sup>206</sup> The Rooney Rule, like other affirmative action programs used by United States private employers, compels corporate decision-makers to confront their own unconscious biases by requiring meaningful interview opportunities and dialogue with racial minority head coaching and executive candidates.<sup>207</sup> This in turn helps eradicate employment inequality in both the NFL and the United States at large.

While the Rooney Rule may not be the perfect remedy for tackling discriminatory hiring practices in the NFL, without it unintentional discrimination would likely continue, as team owners would persist in relying on unconscious biases when choosing head coaching and executive candidates.<sup>208</sup> The fact that the Rooney Rule and other affirmative action plans are regularly used in the United States private employment context today indicates how far the country has come in trying to achieve employment equality and also how difficult it is to erase the vestiges of past discrimination.<sup>209</sup> Although there is still room for significant improvement with respect to United States private employer hiring practices, affirmative action programs such as the Rooney Rule have undoubtedly advanced racial equality in both the NFL and the United States workplace.

## II. THE OTHER FOOTBALL<sup>210</sup>: THE CONFLICT OVER THE ROONEY RULE'S USE IN ENGLISH PROFESSIONAL SOCCER

In order to understand why implementation of a version of the Rooney Rule would likely be effective in combating racial disparity in the hiring of managers and executives of color in English professional soccer, it is necessary to highlight how the NFL's version of the Rooney Rule would fit within the larger British employment discrimination law discourse. This requires an analysis of the employment discrimination history that English

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<sup>206</sup> *See id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> In England, the term "football" is used instead of "soccer."

professional soccer shares with the NFL and its relationship to Title VII-analogous British employment discrimination law and policy.

A. *English Professional Soccer: Racism and Employment Discrimination Against Racial Minority Managers and Executives*

While both the NFL and English professional soccer have had to deal with player race issues, racial minority player employment discrimination has never really been a sizable problem for English professional soccer.<sup>211</sup> Nevertheless, the two entities have startlingly similar employment discrimination histories as it pertains to the hiring of head coaches and executives of color.

In English professional soccer, although the number of ethnic and racial minority English professional soccer players has steadily increased over the years, the number of managers and executives of color has not.<sup>212</sup> In fact, while today more than a quarter of the players in the Premier League and the Football League are of a racial minority, there were only two club managers of color employed by the ninety-two combined Premier League and the Football League clubs to start the 2011 season.<sup>213</sup>

As was the case in the NFL, this current employment discrimination problem can likely be attributed to English professional soccer's predominantly white management and its unconscious racial biases and unintentionally discriminatory hiring practices.<sup>214</sup>

In her discussion of a recent Staffordshire University English soccer fan survey regarding racism in English professional soccer, British newspaper columnist Lucy Tobin explains:

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<sup>211</sup> See generally Ian Cook, A Sociological Study of Race and Managerial Positions in English Professional Football (April 2009) (unpublished MSc dissertation, University of Leicester) (on file with Football Unites, Racism Divides), available at <http://www.furd.org/resources/Race%20and%20Managerial%20Positions.pdf> (studying the existence of underlying racial tension in English Professional Football that had not been previously acknowledged).

<sup>212</sup> See Tobin, *supra* note 19.

<sup>213</sup> See Mann, *supra* note 25.

<sup>214</sup> See Tobin, *supra* note 19.

The academics report that fans believe “institutional racism”—where people do not consciously discriminate against minorities, but fail to challenge old assumptions and stereotypes, meaning a pattern of operations continues—is relevant in football management. One survey respondent said: “People appoint people like themselves. White chairmen appoint white, male managers. The cycle is not easily broken.” Dismissing the idea that black managers will come through as the higher numbers of black players mature, another said: “Football boards have very few ethnic minorities on them—that’s more likely to be the issue than the players or backroom staff. It’s an old boys’ club that is unlikely to bring in people from outside their peer group.”<sup>215</sup>

Exacerbating this problem, as Professor N. Jeremi Duru points out in his discussion of the past plight of NFL head coaching candidates of color, is the fact that it is difficult for racial minority managerial candidates to overcome an implicit notion of inferior coaching ability.<sup>216</sup> While minority soccer players during the 1970s and 1980s dispelled any idea of inferior soccer playing ability simply by “showing off their skills” in a few games, managerial skill is not so evident.<sup>217</sup> Rather, it needs an opportunity and chance to develop.<sup>218</sup>

In the English professional soccer context, however, this opportunity has long evaded the vast majority of racial minority managerial and executive candidates because of white management’s biased hiring preferences and its past practices.<sup>219</sup> For example, the Premier League’s predominantly white

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<sup>215</sup> *Id.*

<sup>216</sup> See Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 184.

<sup>217</sup> Tobin, *supra* note 19. Interestingly, and much like in the NFL, however, there is evidence that during the 1980s black English professional soccer players were significantly underrepresented at positions that require greater decision-making ability rather than speed (i.e., center midfielder and center striker). See Cook, *supra* note 211, at 19. Today, this is no longer a problem in English professional soccer. See *id.*

<sup>218</sup> See Tobin, *supra* note 19

<sup>219</sup> *Id.*

management mandated that to be a Premier League club managerial candidate, an individual applicant needs to have a UEFA-A<sup>220</sup> coaching badge and Pro License.<sup>221</sup> Even if the individual applicant has previously played English professional soccer, it is very difficult to obtain these qualifications without also having had past managerial experience with an English professional soccer club.<sup>222</sup>

Obviously, this rule serves to ensure managerial competence, but for a long time it also had the devastating side effect of preventing most racial minorities from ever getting an opportunity to manage at English professional soccer's elite levels.<sup>223</sup> Because white Premier League club chairmen demonstrated a preference for hiring white managerial candidates as Premier League club managers, most individuals of color typically did not get the managerial experience needed to obtain the prerequisite UEFA coaching badge and Pro license.<sup>224</sup> Consequently, these minority applicants were kept out of the running for Premier League club managerial consideration.

Despite the fact that as of 2010 the number of racial minority managerial candidates that achieved these qualifications had risen to 25%, there still has not been an uptick in the actual number of racial minority managers.<sup>225</sup> Indeed, the number of racial minority managers has actually fallen from only six in 2003 to, as previously stated, merely two in 2011.<sup>226</sup> This has been explained as a by-product of the same type of pre-Rooney Rule syndrome in the NFL that flared up whenever a team was looking to fill a head coaching vacancy. As one black former league club manager

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<sup>220</sup> UEFA is the acronym used for the Union of European Football Associations. It is the administrative body for association football in Europe. *See Overview*, UEFA.COM, <http://www.uefa.com/uefa/aboutuefa/organisation/history/index.html> (last visited Nov. 21, 2012).

<sup>221</sup> *See Cook, supra* note 211, at 21.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 21, 66.

<sup>224</sup> *See id.* at 74.

<sup>225</sup> Anna Kessel, *Lack of Black Football Managers is a Problem That Won't Go Away*, THE GUARDIAN, Oct. 30, 2010, <http://www.guardian.co.uk/football/2010/oct/31/black-football-managers>.

<sup>226</sup> *Id.*

stated, “[w]hen a manger [sic] loses his job, within hours someone already on the management merry-go-round is installed as favourite without considering the merits of an outsider.”<sup>227</sup> Given this practice and that racial minority managerial candidates have proven to be the “outsiders,” it is evident that English professional soccer has essentially created a cyclical hiring system that effectively prohibits the possibility that a significant number of racial minority managers will ever manage different league clubs at the same time.

Perhaps most disappointing about this entire situation is that English professional soccer and the British government have known about this problem for years and yet have not taken enough action to remedy it.<sup>228</sup> Indeed, in 1998 the Football Task Force brought this issue to the attention of the British Minister for Sport so that it could be addressed, and several related reports and studies have been subsequently conducted, all of them highlighting the glaring absence of managers and executives of color in English professional soccer.<sup>229</sup> Nevertheless, tremendous racial disparity in English professional soccer’s managerial and executive ranks still exists.

*B. “Positive Action” Versus “Positive Discrimination” in British Employment Discrimination Law*

Similarly to the United States’ Title VII protected classes, Britain also has legislatively established classes against which an

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<sup>227</sup> See Tobin, *supra* note 19; see, e.g., Cook, *supra* note 211, at 27 (explaining that following black manager John Barnes’ firing from the Celtic soccer club in 2000, he was not able to gain another managerial role until 2008, when he was hired by the Jamaican national team).

<sup>228</sup> See FOOTBALL TASK FORCE, ELIMINATING RACISM FROM FOOTBALL: A REPORT BY THE FOOTBALL TASK FORCE (1998), available at <http://www.furd.org/resources/ftfracism.pdf> (submitted to the British Minister for Sport) (explaining how racism in English Professional Soccer has been a “fringe issue,” and that while some action has been taken to resolve it, the issue remains and must be addressed in a more intensive fashion).

<sup>229</sup> See *id.*; see also Tobin, *supra* note 19 (“[A]cademics at Staffordshire University who have undertaken major research into the subject, report a string call among black and minority ethnic (BME) football fans for the introduction of positive discrimination.”).

employer cannot discriminate.<sup>230</sup> Britain's Equality Act of 2010, which amended its Equality Act of 2006, provides that it shall be illegal for any employer to discriminate against any individual based on "age, disability, gender reassignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief [(including lack of belief)], sex, [or] sexual orientation."<sup>231</sup> Unlike the United States, however, under British law voluntary private employer affirmative action plans (or voluntary private employer "positive action" plans as they are known in Great Britain)<sup>232</sup> were for many years only permissible in a few specific employment settings.<sup>233</sup> Differing from the United States Supreme Court's affirmative action rulings in *Weber* and *Johnson*, the British legislature was for the most part unwilling to allow employer discrimination based on an individual's or a group's protected class status, regardless of the employer's benign reason for the discrimination.<sup>234</sup>

In 2010 this all changed. In light of the growing concern over the employment disparity between some majority and minority groups in certain areas of the British workforce, Britain's legislature fundamentally altered its laws with respect to voluntary private employer positive action plans.<sup>235</sup> The legislature passed the Equality Act of 2010 (the "Equality Act") under which voluntary private employer positive action plans are now generally

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<sup>230</sup> Compare Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1964), with Equality Act, 2010, c. 15, § 4 (U.K.).

<sup>231</sup> Equality Act, 2010, c. 15, § 4.

<sup>232</sup> *Id.* c. 15, § 158.

<sup>233</sup> See DR. RAVINDER SINGH DHAMI ET AL., DEVELOPING POSITIVE ACTION POLICIES: LEARNING FROM THE EXPERIENCES OF EUROPE AND NORTH AMERICA 20 (Dept. of Work and Pensions ed., 2006) (noting the evolution of The Race Relations Act 1976 to cover more employment settings, with the original Act only covering "employment, education, training, [and] housing").

<sup>234</sup> See e.g., Leland Ware, *A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain*, 36 GA. J. INT'L & COMP. L. 89, 152 (2007) (providing an example of a typical case in which the British legislature acknowledged that "institutional racism does not state a cause of action under the Race Relations Act").

<sup>235</sup> See Christopher Hope & Tom Ross, *Britain Embraces 'Positive Action' to Abolish Workplace Discrimination*, TELEGRAPH (Dec. 2, 2010, 9:15 PM), <http://www.telegraph.co.uk/news/uknews/8177872/Britain-embraces-positive-action-to-abolish-workplace-discrimination.html>.

permitted so long as they meet certain statutorily prescribed criteria.<sup>236</sup> The criteria are set forth in the Equality Act's positive action provisions—sections 158 and 159—and became effective in April 2011.<sup>237</sup>

Section 159 of the Equality Act permits voluntary private employer positive action plans aimed specifically at promoting or recruiting protected class members.<sup>238</sup> This was something that was previously prohibited under British law.<sup>239</sup> Taken as a whole, section 159 of the Equality Act “permits an employer to take a protected characteristic into consideration when deciding whom to recruit or promote, where people having the protected characteristic are at a disadvantage or are underrepresented” in the workplace.<sup>240</sup> “Any action taken [by the employer under this section] must be a proportionate means of addressing such disadvantage or underrepresentation.”<sup>241</sup>

Moreover, the employer may only engage in this practice when the employment candidate whose protected characteristic is being considered is as qualified for the position as all of the other employment candidates.<sup>242</sup> Whether a candidate is qualified is “not a matter only of academic qualification, but rather a judgement [sic] based on the criteria the employer uses to establish who is best for the job.”<sup>243</sup> This could include criteria such as “suitability, competence, and professional performance.”<sup>244</sup> As an illustration of the type of conduct that is permissible under section 159, the Equality Act's explanatory note for section 159 provides the following example:

[a] police service which employs disproportionately low numbers of people from an ethnic minority background identifies a number of candidates who

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<sup>236</sup> See Equality Act, 2010, c. 15, §§ 158–59.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* c. 2 § 159.

<sup>239</sup> See Equality Act, 2010, c. 15, § 159, Explanatory Notes, available at <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/11/2/2>.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*



are as qualified as each other for recruitment to a post, including a candidate from an underrepresented ethnic minority background. It would not be unlawful to give preferential treatment to that candidate, provided the comparative merits of the other candidates were also taken into consideration.<sup>245</sup>

Significantly, the Equality Act still does not allow for what British law calls “positive discrimination.”<sup>246</sup> Positive discrimination means automatically favoring a candidate, regardless of merit, solely because he or she has a particular protected characteristic.<sup>247</sup> The explanatory note to section 159 of the Equality Act makes clear that such employer discrimination is still prohibited when it states that this “section does not allow employers to have a policy or practice of automatically treating people who share a protected characteristic more favourably than those who do not have it.”<sup>248</sup> As an illustration of the type of conduct that is impermissible under section 159, the Equality Act’s explanatory note for section 159 provides the example of “[a]n employer offer[ing] a job to a woman on the basis that women are underrepresented in the company’s workforce when there was a male candidate who was more qualified.”<sup>249</sup>

It is also noteworthy that the Equality Act’s positive action provisions are in accordance with European Union law.<sup>250</sup> As EU law is supreme over the laws of each of the EU’s member states in areas in which the EU has the capacity to legislate, any member state that promulgates a law in one of these areas that is contrary to EU law will not only have its law reviewed, but will also likely

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<sup>245</sup> *Id.*

<sup>246</sup> See Louisa Peacock, *Equality Act Explained: Positive Discrimination Versus Positive Action*, TELEGRAPH (Dec. 2, 2010, 5:48 PM), <http://www.telegraph.co.uk/finance/jobs/8177447/Equality-Act-explained-positive-discrimination-versus-positive-action.html>.

<sup>247</sup> *Id.*

<sup>248</sup> See Equality Act, 2010, Explanatory Notes, *supra* note 239.

<sup>249</sup> *Id.*

<sup>250</sup> See Jarrett Haskovec, *A Beast of a Burden? The New EU Burden-Of-Proof Arrangement in Cases of Employment Discrimination Compared to Existing U.S. Law*, 14 TRANSNAT’L L. & CONTEMP. PROBS. 1069, 1083 (2005).

have its law struck down.<sup>251</sup> As the United Kingdom is an EU member state and the EU has the power to legislate over European employment matters, the Equality Act and its positive action provisions are subject to EU legal scrutiny.<sup>252</sup>

European Union law does, however, allow for “positive action” by EU member states.<sup>253</sup> In fact, EU directives state that EU member states may maintain or adopt “specific measures to prevent or compensate for disadvantages linked to any prohibited ground for discriminating.”<sup>254</sup> Consequently, the Equality Act’s positive action provisions are consistent with EU law, and therefore, are valid under existing EU law.

*C. Section 159 of the Equality Act is a Catalyst for the Rooney Rule’s Implementation in English Professional Soccer*

The British legislature’s expansion of British employment discrimination law to allow for private employer positive action programs in the employee recruitment and promotion context is consistent with the British government’s overall efforts over the last decade to afford greater anti-discrimination law protection to minority employees.<sup>255</sup> It has also helped to remedy past acts of both intentional and unintentional employment discrimination in a wide variety of British workplaces.<sup>256</sup> One of these workplaces is undoubtedly English professional soccer’s.<sup>257</sup>

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<sup>251</sup> See *id.* at 1084.

<sup>252</sup> See Annette M. Schuller, Paul G. Thompson & David B. Wilson, *Doing Business in the European Union: An Overview of Common Legal Issues*, 31 COLO. LAW. 9, 9 n.2, 10 (2002) (stating that EU law is “legally binding on the EU Member States”).

<sup>253</sup> See Haskovec, *supra* note 250, at 1083.

<sup>254</sup> *Id.* at 1083–84 (citing Council Directive 00/43, art. 5, 2000 O.J. (L 180) (EC); Council Directive 00/78, art. 7, 2000 O.J. (L 303) (EC); Council Directive 02/73, art. 1(7), 2002 O.J. (L 269) (EC)).

<sup>255</sup> See Ware, *supra* note 234, at 141 (stating that British antidiscrimination laws have been considerably expanded over the last decade).

<sup>256</sup> *Id.*

<sup>257</sup> See *Cameron Hosts Anti-Racism Summit*, *supra* note 5 (stating that “more black and minority ethnic people were needed as top-level managers and coaches”); see also *Government and Football Bodies Unite to Tackle Discrimination*, NUMBER 10, THE OFFICIAL SITE OF THE BRITISH PRIME MINISTER’S OFFICE (Feb. 22, 2012), <http://www.number10.gov.uk/news/tackle-football-discrimination> (averring that a new “facility will be used to help increase the number of qualified coaches in the country . . .

With regard to English professional soccer, the recent enactment and validity of section 159 of the Equality Act greatly enhances the likelihood that a version of the Rooney Rule can be implemented in English professional soccer. To elaborate, the Rooney Rule is a private employer mandate intended to address clear racial minority disadvantage and underrepresentation in the workplace.<sup>258</sup> In the English professional soccer employment context such a rule would require that through interviews, league clubs recruit racial minority managerial and executive candidates as a way of creating employment equality within these positions. This is exactly what section 159 is intended to permit and what was unlawful in Great Britain until the Equality Act's positive action provisions became effective in April 2011.<sup>259</sup>

Moreover, while the Rooney Rule's implementation in English professional soccer would certainly be a drastic measure, it cannot legitimately be claimed that such action would be disproportionate in response to the current racial inequality that exists in English professional soccer's managerial and executive ranks. Indeed, as previously mentioned, only two out of ninety-two league clubs employed managers of color at the start of 2011.<sup>260</sup>

Finally, and perhaps most importantly, English professional soccer could craft a version of the Rooney Rule that does not run afoul of Britain's positive discrimination prohibition. The NFL's version of the Rooney Rule does not require NFL teams to take candidate merit into account when determining who to interview for Rooney Rule compliance purposes.<sup>261</sup> While NFL teams typically do pay attention to candidate merit when complying with the Rooney Rule, there is ultimately no requirement that they do so.<sup>262</sup> Rather, it mandates an unconditional racial minority

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encourage more people from Black and Minority Ethnic (BME) backgrounds to gain the necessary credentials for coaching and managerial positions at the top of the game").

<sup>258</sup> See Collins, *supra* note 10, at 888.

<sup>259</sup> See Equality Act, 2010, c. 2, § 159 (U.K.).

<sup>260</sup> See *id.*

<sup>261</sup> Maravent, *supra* note 38, at 264 (stating that compliance with the Rooney Rule "simply calls for interviewing a minority candidate" and nothing else).

<sup>262</sup> See, e.g., Associated Press, *Tomlin Proof NFL's Rooney Rule is Working as Intended*, PITTSBURGH TRIBUNE-REVIEW (Jan. 22, 2007), [http://www.pittsburghlive.com/x/pittsburghtrib/sports/steelers/s\\_489701.html#ixzz1qeDXDYWx](http://www.pittsburghlive.com/x/pittsburghtrib/sports/steelers/s_489701.html#ixzz1qeDXDYWx) (noting that minority

interview quota where at least one racial minority head coaching or executive candidate must be interviewed, even if all of these minority candidates lack qualification when compared to the other existing head coaching or executive candidates.<sup>263</sup> The result of this is that Britain's positive discrimination prohibition would likely prevent English professional soccer from implementing an exact replica of the NFL's version of the Rooney Rule.<sup>264</sup> As previously discussed, this is because an employer mandate that allows an employer to favor an employment candidate based on a "protected trait" and without regard to candidate merit, even as it pertains to employment interviewing, is explicitly prohibited under section 159 of the Equality Act.<sup>265</sup>

Nevertheless, section 159 of the Equality Act still permits English professional soccer league clubs to positively factor in a managerial or executive candidate's minority race when determining which candidates to recruit for an open managerial or executive position.<sup>266</sup> As previously stated, such protected trait consideration would be permissible under the Equality Act so long as the racial minority candidate is as qualified as all of the other candidates vying for the open managerial or executive position and is from an underrepresented minority employee group.<sup>267</sup> Thus, English professional soccer could still legally adopt a version of the Rooney Rule. However, such a mandate would have to account for this important difference in British employment law.

*D. Britain Acknowledges Interest in the Rooney Rule's Application to English Professional Soccer*

After years of procrastination, it appears that English professional soccer is finally warming to the idea of taking

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coaching candidate Mike Tomlin was selected because of "motivation, enthusiasm and organizational skills," evidencing that NFL teams do consider the candidate's merit when complying with the Rooney Rule).

<sup>263</sup> Maravent, *supra* note 38, at 248–49.

<sup>264</sup> See Nicola Tager, *No Room for Rooney*, SPORT BUSINESS (Sept. 9, 2011, 4:49 PM), <http://www.sportbusiness.com/blog/no-room-for-rooney-184280>.

<sup>265</sup> See Equality Act, 2010, c. 2, § 159 (U.K.).

<sup>266</sup> See Equality Act, 2010, Explanatory Notes, *supra* note 2369.

<sup>267</sup> *Id.*

significant action to help achieve racial equality in English professional soccer's managerial and executive ranks.<sup>268</sup>

Following intensified domestic and international pressure to tackle racial disparity in the hiring of English professional soccer club managers and executives, English professional soccer's leaders publicly noted in September 2011 that they were intrigued by the NFL's Rooney Rule and what it might be able to do for English professional soccer's employment discrimination problem.<sup>269</sup> Interestingly, this declaration was coupled with a presentation to these same leaders by Rooney Rule co-creator, attorney Cyrus Mehri.<sup>270</sup> During his presentation, Mehri outlined how the Rooney Rule could help address the lack of black and ethnic minority managers and executives in English professional soccer.<sup>271</sup>

Notably, following the presentation, Mehri expressed optimism that a version of the Rooney Rule could be adopted by English professional soccer.<sup>272</sup> He explained, "I'm very confident that when they study this issue they're going to reach the same conclusion that the bosses in the NFL reached, which was it may not be perfect but there is no better solution and we have to address this issue."<sup>273</sup>

Consistent with his prediction, since Mehri's September 2011 presentation, several key individuals from English professional soccer's management, including Football League chairman Greg Clarke, have spoken out in support of the Rooney Rule's implementation.<sup>274</sup> Clarke has publicly backed the future implementation of a version of the Rooney Rule in the Football

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<sup>268</sup> See, e.g., David Anderson, *We Will Have Rooney Rule in England Says League Chairman*, MIRROR FOOTBALL (Sept. 14, 2011, 9:00 PM), <http://www.mirrorfootball.co.uk/news/Football-League-chairman-Greg-Clarke-backs-Mirror-Open-Goal-campaign-more-black-managers-article799223.html>.

<sup>269</sup> Jack Bell, *British Soccer Officials Intrigued by NFL's Rooney Rule*, N.Y. TIMES, Sept. 29, 2011, <http://goal.blogs.nytimes.com/2011/09/29/in-britain-n-f-l-s-rooney-rule-is-seen-as-model-for-hiring-minority-coaches>.

<sup>270</sup> See Mann, *supra* note 25.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> See Anderson, *supra* note 268.

League.<sup>275</sup> Moreover, Professional Footballers' Association ("PFA")<sup>276</sup> chief Gordon Taylor has also spoken out in support of the implementation of a version of the Rooney Rule in English professional soccer.<sup>277</sup> In fact, Taylor has been one of the biggest supporters of the Rooney Rule's implementation, calling for a "consensus" from all of English professional soccer to adopt the Rooney Rule.<sup>278</sup>

Furthermore, in addition to those working in English professional soccer, important British institutions outside the sport have also taken positions that support the rationale behind the Rooney Rule's implementation. While the British government has not officially said that it supports the Rooney Rule's implementation, Prime Minister David Cameron has repeatedly stated that more racial and ethnic minorities are needed in managerial positions in English professional soccer.<sup>279</sup> Consistent with these sentiments, British Culture Secretary Jeremy Hunt recently announced that the British government is contributing £3 million to the Football Association's National Football Centre.<sup>280</sup> This money will be used in part to help fund specific initiatives aimed at encouraging people of minority background to gain the necessary credentials to become managers in English professional soccer.<sup>281</sup>

To date, however, no version of the Rooney Rule has been adopted by either the Premier League or the Football League as both organizations are in the process of determining whether the Rooney Rule is a legally and commercially viable solution to its

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<sup>275</sup> *Id.*

<sup>276</sup> The Professional Footballers' Association is the players union for professional soccer players in England and Wales. James G. Irving, *Red Card: The Battle of European Football's Transfer System*, 56 U. MIAMI L. REV. 667, 670, 679 (2002).

<sup>277</sup> See Harry Harris, *PFA Chief Wants "Consensus" on Rooney Rule*, ESPN FC (Sept. 9, 2011), [http://soccernet.espn.go.com/news/story/\\_/id/954300/pfa-chief-wants-?cc=5901](http://soccernet.espn.go.com/news/story/_/id/954300/pfa-chief-wants-?cc=5901).

<sup>278</sup> *Id.*

<sup>279</sup> See *Cameron Hosts Anti-Racism Summit*, *supra* note 5.

<sup>280</sup> See *Government and Football Bodies Unite to Tackle Discrimination*, NUMBER 10, THE OFFICIAL SITE OF THE BRITISH PRIME MINISTER'S OFFICE (Feb. 22, 2012), <http://www.number10.gov.uk/news/tackle-football-discrimination/>.

<sup>281</sup> *Id.*

employment discrimination problem.<sup>282</sup> In fact, Premier League chief executive Richard Scudamore recently spoke out against the Rooney Rule's implementation in English professional soccer, doubting its feasibility.<sup>283</sup> In a November 2011 interview with British radio station Talksport, Scudamore explained, "[w]e have to make sure the grassroots system in place means there are no barriers or difficulties for coaches coming through. But I only work for the Premier League and, when there are only 20 jobs, you cannot imagine filling quotas. It's impossible."<sup>284</sup> Scudamore went on to justify his position by saying that he "believe[s] in affirmative action" but that "[i]n America it is a different sport and a different country" and that "if people are good enough, then they will get chances."<sup>285</sup> Scudamore's statements were particularly disappointing in light of the fact that Scudamore wields considerable influence over Premier League governance and employment matters. Furthermore, some other industry insiders and legal experts have raised questions about the legality of implementing a version of the Rooney Rule in English professional soccer.<sup>286</sup> As employment solicitor Nicola Tager of British media and entertainment law firm Harbottle & Lewis explains:

The PFA's commitment to exploring ways in which it can achieve a greater number of black managers in football is entirely legitimate and laudable. . . . However, in so far as the PFA hopes to introduce a comparable [Rooney Rule] requirement in the UK—namely that a certain minimum number of black candidates must be interviewed for each managerial role that becomes available—such a

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<sup>282</sup> See generally Anderson, *supra* note 268 (stating that as of September 2011, leaders of English soccer organizations, including the Football League and the Premier League, were still in the process of considering an English version of the Rooney Rule).

<sup>283</sup> Richard Scudamore Rules Out Premier League "Rooney Rule" and 39th Game, *GUARDIAN* (Nov. 25, 2011, 11:15 PM), <http://www.guardian.co.uk/football/2011/nov/25/richard-scudamore-rooney-rule-39-game?newsfeed=true>.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> See Tager, *supra* note 264.

quota is arguably unlawful under the UK Equality Act 2010.<sup>287</sup>

While concerns like solicitor Tager's are legitimate, the remainder of this Note will focus on quelling any fear that English professional soccer's implementation of a version of the Rooney Rule would be legally or commercially unfeasible and provide a specific way in which the Rooney Rule can be crafted so that it complies with both English professional soccer's legal and business needs.

### III. THE GAME PLAN: IMPLEMENTING THE ROONEY RULE IN ENGLISH PROFESSIONAL SOCCER

This last section analyzes the overall viability and utility of implementing a version of the Rooney Rule in English professional soccer. Ultimately, it advocates for its adoption by both the Premier League and the Football League and sets forth a detailed version of the rule that English professional soccer could effectively implement. As seen in the NFL's case, the Rooney Rule compels all of the NFL teams' predominantly white decision-makers to confront their own unconscious racial biases by requiring meaningful interview opportunities and dialogue with racial minority head coaching and executive candidates.<sup>288</sup> This in turn has helped to significantly mitigate unintentional employment discrimination against these parties in the NFL workplace.<sup>289</sup> Given the Rooney Rule's success in the NFL and the comparable employment discrimination problem that English professional soccer is now facing, English professional soccer should not hesitate in implementing a version of the Rooney Rule.

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<sup>287</sup> *Id.*

<sup>288</sup> See Collins, *supra* note 10, at 912.

<sup>289</sup> See e.g., LAPCHICK ET AL., NFL RACIAL AND GENDER REPORT CARD, *supra* note 24, at 8 (stating that as of September 2011, there were seven African-American NFL head coaches and one Latino NFL head coach.).



A. *Crafting the Rooney Rule so that it Complies with Section 159 of the Equality Act and Still Maintains its Force*

As previously stated, section 159 of the Equality Act permits English professional soccer league clubs to positively factor in a managerial or an executive candidate's minority race when determining which candidates to recruit for an open managerial or executive position.<sup>290</sup> Such protected trait consideration would be permissible under the Equality Act so long as the racial minority candidate is from an underrepresented minority group in the employer's workforce and is as qualified as all of the other candidates vying for the open managerial or executive position.<sup>291</sup>

In practice, this means establishing a Rooney Rule mandate that whenever a league club has a job vacancy at the managerial or executive level and there is at least one racial minority candidate that is as qualified to fill the vacancy as all of the other candidates, the club's decision-makers must interview at least one of these qualified minority candidates before filling the vacancy.<sup>292</sup> If the club determines in good faith that no such qualified racial minority candidate exists, this mandate would not apply to the club and the club need not interview a racial minority candidate.<sup>293</sup> As has proved effective in the NFL, each club's managerial hiring process and decision would be reviewed by the League Chairman's office<sup>294</sup> so as to ensure that discriminatory hiring practices are not being employed. Moreover, violation of this mandate would result in stiff league-imposed sanctions at the chairman's discretion.

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<sup>290</sup> See Equality Act, 2010, Explanatory Notes, *supra* note 239.

<sup>291</sup> *Id.*

<sup>292</sup> See Graeme Bailey, *Call for "Rooney Rule"*, SKY SPORTS (Sept. 8, 2011, 11:35 AM), <http://www1.skysports.com/football/news/12028/7160085/Call-for-Rooney-Rule->.

<sup>293</sup> *Id.* (explaining that the English professional soccer version of the Rooney Rule should not necessarily always require a black or racial minority candidate interview; rather, whether such interview is required should depend on the caliber and qualifications of the minority candidate).

<sup>294</sup> In English professional soccer, the League Chairman is the equivalent of the NFL Commissioner. Compare THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, PREMIER LEAGUE HANDBOOK SEASON 2012/13 III, VI (2012) (describing the League Chairman's responsibilities), with NATIONAL FOOTBALL LEAGUE, THE CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE, art. VIII (2006) (describing the role of the Commissioner).

Such a version of the Rooney Rule neatly complies with both section 159 of the Equality Act and the British prohibition against positive discrimination because it allows for a league club's evaluation of each managerial candidate's merit before obliging a league club to have to interview a racial minority managerial or executive candidate.<sup>295</sup> It also provides for what would be an effective measure in helping to achieve racial equality at the managerial and executive levels of English professional soccer.

While such a version of the Rooney Rule would have a less compulsive effect on league clubs than the NFL's current version of the Rooney Rule, the rule's positive impact on English professional soccer's hiring practices still would likely be significant. As discussed above, this is because even under the NFL's current version of the Rooney Rule only those racial minority candidates who are qualified to fill head coaching or executive job vacancies typically get interviews.<sup>296</sup> In essence, English professional soccer's version of the Rooney Rule would be a mandate of this practice, and as the NFL's case demonstrates, this practice has proven quite successful in remedying racially inequitable team hiring practices at both the head coaching and executive positions.<sup>297</sup>

Furthermore, although candidate qualification is initially left to each soccer club's own discretion, this is unlikely to create a loophole that clubs would or could exploit to avoid English professional soccer's Rooney Rule mandate. First, as was the case in the NFL, unconscious rather than conscious racial bias is likely the predominant cause of the racially discriminatory managerial and executive hiring practices that have developed in English professional soccer.<sup>298</sup> As a result, clubs are unlikely to engage in intentional shirking of the proposed Rooney Rule mandate (for example, they will not intentionally conduct racial minority sham interviews to keep English professional soccer's managerial and executive ranks white).

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<sup>295</sup> See Equality Act, 2010, Explanatory Notes, *supra* note 239.

<sup>296</sup> See Associated Press, *supra* note 262 (noting how the NFL's Pittsburgh Steelers conducted interviews in 2007 from a list of qualified candidates).

<sup>297</sup> See Mann, *supra* note 25.

<sup>298</sup> See Tobin, *supra* note 19.

Second, and of tantamount importance, the proposed rule forces white decision-makers to confront their own unconscious racial biases rather than allow them to make hiring decisions based on past practice and implicit racial predispositions that would otherwise circumvent the purpose of the proposed version of the Rooney Rule mandate.<sup>299</sup> By subjecting all team managerial and executive hiring processes to League Chairman review and potentially stiff fines and public humiliation, the proposed version of the Rooney Rule forces such team decision-makers to abandon the status quo and engage in legitimate, racially diverse searches for managerial and executive candidates.<sup>300</sup>

As is evident from the Rooney Rule's nine-year existence in the NFL, league mandated racial minority interviews can help lead to dramatic improvement in the racial composition of team head coaching and management.<sup>301</sup> While the NFL's version of the Rooney Rule must be tweaked for English professional soccer to adopt it, these adjustments would have a negligible effect on the rule's overall positive impact.<sup>302</sup> Therefore, not only can English professional soccer implement a version of the Rooney Rule, but it can be employed in a way that helps bring about meaningful change in English professional soccer's managerial and executive ranks.

*B. Strategic Business Implementation of the Rooney Rule in English Professional Soccer*

In addition to proposing a legally viable version of the Rooney Rule that maintains its bite, this proposed version of the Rooney Rule also takes into account English professional soccer's business model and business needs.

First, as was the case in the NFL, English professional soccer's version of the Rooney Rule should be initially implemented only

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<sup>299</sup> See Collins, *supra* note 10, at 872.

<sup>300</sup> See PROXMIRE, *supra* note 25, at 4 (describing the fines and public shaming that the NFL imposed on one team for failing to observe the Rooney Rule).

<sup>301</sup> See Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 197.

<sup>302</sup> See *supra* notes 296–299 and accompanying text.

as a managerial hiring mandate.<sup>303</sup> This will provide league clubs with an opportunity to adjust their hiring practices to the new rule and help minimize any potential club backlash against the rule's implementation.<sup>304</sup> Moreover, the NFL's team owners only approved adoption of the Rooney Rule mandate for front office executive hiring after it was evident that the Rooney Rule mandate was an effective mechanism at achieving racial equality in NFL head coaching.<sup>305</sup> The same rollout should be applied in English professional soccer, as league clubs will be more receptive to expanding the rule to executive hiring once there is some evidence that the mandate works in the coaching ranks.

Second, this version of the Rooney Rule should originally be implemented in the Premier League and the Football League. Not only is this where employment inequality is most noticeable in English professional soccer's managerial and executive ranks, but as Cyrus Mehri explains, adopting such a rule in the Premier League and the Football League "shows leadership worldwide."<sup>306</sup> By demonstrating leadership at the top of English professional soccer as it pertains to this issue, it will signify to all other professional soccer leagues, both in Britain and abroad, that it is time to fully tackle race discrimination and managerial and executive employment inequality in professional soccer.

In addition to corporate social responsibility and its positive trickle-down effect on other professional soccer leagues, implementation of this version of the Rooney Rule at the elite levels of English professional soccer is also "good business."<sup>307</sup>

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<sup>303</sup> See William C. Rhoden, *Working With the N.F.L. on Diversity*, N.Y. TIMES, Dec. 24, 2009, at B10.

<sup>304</sup> See Anderson, *supra* note 268 (explaining that the essential differences between English professional soccer and the NFL, such as how the leagues typically hire and fire, need to be taken into account before implementation).

<sup>305</sup> See Rhoden, *supra* note 303 (noting it was the Rule's success with management hiring that compelled the NFL to extend the rule to front office positions).

<sup>306</sup> Mann, *supra* note 25. See, e.g., Alistair Magowan, *English Football not Ready for "Rooney Rule" for Black Managers*, BBC SPORT (Aug. 3, 2012), available at <http://www.bbc.co.uk/sport/0/football/19418328> (noting that within the ninety-two football clubs, only three managers are black).

<sup>307</sup> See Charles Guice, *Why English Football Will Adopt the Rooney Rule*, THE POLITICS OF FOOTBALL (Oct. 11, 2011), available at <http://sites.duke.edu/wcwp/2011/10/11/why-english-football-will-adopt-the-nfls-rooney-rule/>. See generally DR. GEOFF WALTERS &

Because the Premier League and the Football League have become a combined £7.7 billion international enterprise that contributes substantially to the British economy, the two leagues must maintain their growing global appeal.<sup>308</sup> Adopting this version of the Rooney Rule clearly aids in this goal as it demonstrates to the game's expanding base of racially and ethnically diverse sponsors and fans a commitment to achieving workplace diversity.<sup>309</sup>

Finally, this proposed version of the Rooney Rule in English professional soccer should be understood as a temporary measure.<sup>310</sup> As previously discussed, even those that are in favor of the Rooney Rule's continued use in the NFL believe that it will not be a permanent measure.<sup>311</sup> Rather, the Rooney Rule should only be implemented for as long as it takes to attain racial equality in managerial and executive employment.<sup>312</sup> While this is a potentially indefinite time period, the Rooney Rule is intended to be a proportionate remedy to employment discrimination.<sup>313</sup> Once the employment discrimination is eradicated, so too is the need for the Rooney Rule.

*C. Avoiding Resistance to the Rooney Rule's Implementation in English Professional Soccer*

While this proposed version of the Rooney Rule fits effectively within Britain's positive action legal framework and English professional soccer's business structure, it is important to highlight that the proposed version of the Rooney Rule is also crafted in a way that can avoid much of the anti-affirmative action and anti-

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RICHARD TACON, BIRKBECK SPORT BUSINESS CENTER, CORPORATE SOCIAL RESPONSIBILITY IN EUROPEAN FOOTBALL 7 (Apr. 2011) (describing corporate social responsibility as "responsibilities that a business has beyond profit maximization").

<sup>308</sup> *Id.*

<sup>309</sup> See e.g., Daniela M. de la Piedra, *Diversity Initiatives in the Workplace: The Importance of Furthering the Efforts of Title VII*, 4 MOD. AM. 43, at \*3 (2008) (explaining that clients and customers can also play a role in developing and enforcing diversity initiatives, which then helps the initiative achieve results).

<sup>310</sup> See Bailey, *supra* note 292.

<sup>311</sup> See, e.g., *id.* (noting that Rooney himself hopes the rule will not be needed for much longer).

<sup>312</sup> *Id.* (explaining that the point of the Rooney Rule is "not to impose a draconian measure, but to change the thinking of those in power").

<sup>313</sup> *Id.*

Rooney Rule dialogue that has plagued the Rooney Rule's existence in the United States.<sup>314</sup> This is important because, as Professor Thomas Ross points out, such dialogue detracts from the larger discussion of how to continuously improve race relations not only in the workplace, but also in all aspects of society.<sup>315</sup>

Unsurprisingly, initial calls for the Rooney Rule's implementation in English professional soccer yielded unreceptive responses from some key white English professional soccer constituencies. This is most notably evidenced by Premier League chief executive Richard Scudamore's public dismissal of the Rooney Rule in November 2011.<sup>316</sup>

As described above, comments like Scudamore's are likely symptomatic of the larger problem of unconscious bias in English professional soccer. However, they also highlight the impulsive negative reaction that many have had to the NFL's version of the Rooney Rule.

Because the NFL's version of the Rooney Rule mandates an unconditional racial minority interview quota, it is often argued to be an incredibly burdensome and unfair affirmative action mandate.<sup>317</sup> Yet in reality, compliance with the NFL's version of the Rooney Rule barely requires any additional effort by a team employer, and as discussed above, it has proven highly effective since its inception in helping to combat unconscious bias and racial inequality in the NFL's workplace.<sup>318</sup> As Professor Ross explains, by getting stuck on this misguided debate about whether affirmative action plans such as the Rooney Rule are fair in the absence of a fuller picture of how racial privilege benefits the "innocent," we miss the key point about whether the plan is actually effective in combating unconscious bias and whether it is ultimately helping to achieve improved race relations.<sup>319</sup>

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<sup>314</sup> See *infra* note 321 and accompanying text.

<sup>315</sup> See Ross, *supra* note 152, at 315–16.

<sup>316</sup> Richard Scudamore Rules Out Premier League "Rooney Rule" and 39th game, *supra* note 283.

<sup>317</sup> See, e.g., Johnson, *supra* note 179 (arguing that it is unfair to make NFL owners interview candidates that may not be qualified).

<sup>318</sup> See Collins, *supra* note 10, at 912.

<sup>319</sup> See Ross, *supra* note 152, at 315–16.

In this regard, the crucial utility of this Note's proposed version of the Rooney Rule is that it does away with the NFL's unconditional racial minority interview quota and puts an emphasis on each candidate's merit before requiring a mandatory minority candidate interview. By having the proposed mandate focus on candidate merit, it removes the ability to persuasively and obstructively argue that the Rooney Rule is unfair to teams and non-minority employment candidates, or that it often results in sham interviews. This in turn puts the spotlight back on the real problem of addressing unconscious bias in the upper levels of English professional soccer's workplace, which consequently would be a vital step in helping to achieve racial equality in English professional soccer's managerial and executive ranks.

Importantly, soccer clubs are also incentivized to interview a qualified racial minority managerial or executive candidate because such an individual could end up being the best available person to fill a soccer club's managerial or executive vacancy. Thus, to mandate that English professional soccer clubs do this (as this proposed rule would) does little more than require an employer to engage in an employment practice that it should already be carrying out in the first place. In other words, this proposed version of the Rooney Rule not only helps to address unconscious bias in the workplace, but from a business perspective it consequently helps clubs to obtain the most talented employees. This is something that every business organization strives for, and it would be a tenuous position at best to argue that this proposed version of the Rooney Rule, as opposed to the NFL's version, would do more to hurt English professional soccer's business model than it would to help it.

As Rooney Rule co-creator Cyrus Mehri explained in a recent interview, English professional soccer can no longer sit idly by and allow unconscious racial bias to continue to affect its managerial and executive ranks.<sup>320</sup> Any version of the Rooney Rule is going to have its flaws, but for world class businesses like the Premier League and the Football League to allow this problem to persist is simply unacceptable. The proposed version of the Rooney Rule

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<sup>320</sup> See generally Mann, *supra* note 25.

addresses unconscious bias and the resultant unintentional discrimination in a way that even the most steadfast affirmative action opponents would have a difficult time credibly arguing is “unfair” or detrimental. This in turn allows for a less contentious approach to tackling the unconscious racial biases that have permeated English professional soccer and consequently, for a more effective approach to combating unintentional discrimination against racial minority managerial and executive candidates.

### CONCLUSION

In light of the foregoing, it is clear that English professional soccer should adopt a version of the Rooney Rule.

The Rooney Rule has its critics both in the United States and in Britain.<sup>321</sup> As the Rooney Rule’s own co-creator Cyrus Mehri points out, the Rooney Rule “may not be perfect.”<sup>322</sup> As this Note indicates, however, English professional soccer’s version of the Rooney Rule can be crafted in a way that avoids a lot of these ills.

While the principles that underlie the Rooney Rule’s foundation may be controversial, without the implementation of a version of the Rooney Rule, unintentional discrimination will likely continue in English professional soccer as white team decision-makers will persist in relying on unconscious biases when hiring managerial and executive level employees.<sup>323</sup> Indeed, the fact that the Rooney Rule has worked so well in helping to prevent unintentional discrimination in the NFL’s comparable employment setting is a testament to how effective a version of the Rooney Rule can be in English professional soccer.

Given English professional soccer’s prominence, adoption of a version of the Rooney Rule would also be a significant step forward in helping to break down racial barriers in greater British

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<sup>321</sup> See, e.g., *Richard Scudamore Rules Out Premier League “Rooney Rule” and 39th Game*, *supra* note 283 (stating “[i]f people are good enough, then they will get chances”); Duru, *The Fritz Pollard Alliance*, *supra* note 27, at 189 (noting most Americans’ aversion to recognize discrimination within organizations); Johnson, *supra* note 174 (arguing that forcing owners to interview ill-qualified candidates is a waste of time).

<sup>322</sup> Mann, *supra* note 25.

<sup>323</sup> *Id.*



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society.<sup>324</sup> As British Prime Minister David Cameron recently explained, English professional soccer has “a vital role to play” in the creation of social equality.<sup>325</sup> As so many young people emulate what they see on the soccer field in their everyday activities, the implementation of a version of the Rooney Rule has the potential to help transform not only the composition of English professional soccer’s managerial and executive ranks, but also the composition of the entire British workforce’s.<sup>326</sup>

In sum, it is time for English professional soccer to show that it is serious in its desire to eject racial discrimination from its clubs’ managerial and executive hiring practices. English professional soccer’s adoption of the proposed version of the Rooney Rule would be a meaningful step toward achieving this goal, and therefore, it should be implemented immediately.

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<sup>324</sup> See Mann, *supra* note 25 (explaining how the Rooney Rule is about “opening up barriers”).

<sup>325</sup> Cameron Hosts Anti-Racism Summit, *supra* note 5.

<sup>326</sup> See *id.*