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I. INTRODUCTION

Oscar Pistorius is known as the "fastest man on no legs."[1] Pistorius was born without fibula bones and consequently had both his legs amputated below the knee at the age of eleven months.[2] Despite this life-altering event, Pistorius pursued his athletic aspirations,[3] and is now a sprinter who runs with the aid of carbon fiber prosthetic limbs called "cheetahs."[4]

In 2004, Pistorius began competing with able-bodied sprinters in South African events sponsored by the International Association of Athletic Federations (IAAF).[5] Pistorius's continued demonstration of excellent athletic talent prompted the IAAF to extend him invitations to compete overseas.[6] As Pistorius's career expanded internationally, he continued to perform well at home, placing second in the 400 meter race at the South African National Championship in March 2007.[7] Although his time was not fast enough to qualify him for the individual Olympic 400 meter race, this second-place finish qualified Pistorius for the Olympic South African relay team.[8] Pistorius's aspirations were soon quashed, however, for on March 26, 2007, the IAAF amended its rules to prohibit the "use of any technical

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1. Ivo van Hilvoorde & Laurens Landeweerd, *Disability or Extraordinary Talent—Francesco Lentini (Three Legs) Versus Oscar Pistorius (No Legs)*, 2 SPORT ETHICS & PHIL. 97, 105 (2008).

2. Pistorius v. Int'l Ass'n of Athletics Fed'ns, CAS 2008/A/1480 at 2 (Ct. of Arb. for Sport May 16, 2008) (Hunter, Rivkin & Rochat, Arbs.), *available at* http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1480.pdf.

3. Pistorius has never considered himself disabled and has stated "[t]here's nothing I can't do that able-bodied athletes can do." Jeré Longman, *Debate on Amputee Sprinter: Is He Disabled or Too-Abled?*, N.Y. TIMES, May 15, 2007, at A1. Pistorius participated in water polo, rugby, wrestling, and tennis as a schoolboy. *Pistorius*, 2008/A/1480 at 2. It was only after a rugby injury that Pistorius began to sprint as part of his rehabilitation program. *Id.* He began sprinting competitively in January 2004. *Id.*

4. The Flex-Foot Cheetah® is manufactured by Össur, an Icelandic company specializing in non-invasive orthopedic devices including braces, support equipment, and prosthetic devices. *See* About Össur, http://www.ossur.com/?PageID=12570 (last visited Feb. 22, 2010). Designed to imitate a full-functioning foot/ankle joint by storing and releasing energy, the Flex-Foot Cheetah® is used by amputees who wish to sprint competitively or recreationally. Flex-Foot Cheetah® – Fast Facts, http://www.ossur.com/?PageID=13462 (last visited Feb. 22, 2010).

5. *Pistorius*, 2008/A/1480 at 2. The IAAF is the world governing body for track and field, including Olympic competition. *See* Int'l Ass'n Athletics Fed'ns Const. art. 3, §§ 1, 10 (2007) (Monaco), *available at* http://www.iaaf.org/mm/Document/imported/9585.pdf.

6. *See Pistorius*, 2008/A/1480 at 2.

7. *See* Peter Charlish & Stephen Riley, *Should Oscar Run?*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929, 930 (2008).

8. The South African relay team would compete provided it was among the sixteen fastest teams in the world. *See id.*

device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device."[9]

The IAAF subsequently withdrew Pistorius's invitation to compete in the Norwich Union Glasgow Grand Prix,[10] almost certainly because the federation believed that Pistorius's prosthetic devices violated the newly enacted rule. Months later, the IAAF changed its position, allowing Pistorius to compete pending an investigation into his eligibility.[11] The investigation[12] concluded that, based on metabolic and biomechanical

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9. Int'l Ass'n Athletics Fed'ns, Competition Rules, R. 144.2(e) (2008), *available at* http://www.iaaf.org/mm/Document/imported/42192.pdf. Some, including University of Miami Medical School Professor Robert Gailey, have questioned the IAAF's motivation for enacting the rule, suggesting that the IAAF may have had an intent to preserve the purity of Olympic sport rather than maintain a level playing field. *See* Longman, *supra* note 3, at A1. Gailey inquires whether the IAAF is "looking at not having an unfair advantage []. . . [or] discriminating . . . because they don't want to see a disabled man line up against an able-bodied man for fear that if the person who doesn't have the perfect body wins, [that may say something] about the image of man[.]" *Id.* IAAF President Lamine Diack suggests that the primary motivation in enacting the amended rule was to prevent an unfair advantage. In a 2007 Press Release, Diack states,

> I am a great admirer of the Paralympic movement, and I would like to take this opportunity to congratulate Oscar on all his achievements to date. Yet now that Oscar has improved his times to the extent that he is able to compete in open athletics competitions, the IAAF has a duty to make sure that his prosthetics [sic] are analysed carefully. We cannot permit technical aids that give one athlete an unfair advantage over another. Personally, I am very pleased that Oscar has agreed to do this research with Professor Brüggemann, as the results will have very important implications for sports science.

Press Release, Int'l Ass'n of Athletic Fed'ns, IAAF and Oscar Pistorius to Co-operate on Future Research (July 26, 2007), *available at* http://www.iaaf.org/news/kind=101/newsid=39940.html. IAAF council member Robert Hersh adds that "[the IAAF] did not legislate against [Pistorius's] specific device because [it did not] look at his specific legs." Charlish & Riley, *supra* note 7, at 930. However, the CAS Panel "considers it likely that the new Rule was introduced with Mr[.] Pistorius in mind, and that it started the process that led to IAAF declaring him ineligible to compete in IAAF-sanctioned events in January 2008." *Pistorius*, 2008/A/1480 at 7.

10. The Norwich Union Glasgow Grand Prix was scheduled for June 3, 2007. *Pistorius*, 2008/A/1480 at 3.

11. *See id.* Pistorius and the IAAF agreed to conduct a scientific investigation to determine whether his use of prosthetic limbs gave him an advantage over other runners. *See* Press Release, Int'l Ass'n of Athletic Fed'ns, *supra* note 9.

12. Professor Brüggemann of the Cologne University's Institute of Biomechanics in Germany led the investigation at the request of Dr. Elio Locatelli, who was appointed by the IAAF to evaluate whether Pistorius's prostheses violated IAAF Rule 144.2(e). *Pistorius*, 2008/A/1480 at 3–4. The investigation began with filming Pistorius in Rome on July 13, 2007 to evaluate the length of his stride in comparison with other, similar runners. *Id.* at 7. It continued with biomechanical and metabolic tests in Cologne. *Id.* at 7. During this second portion of the investigation, the IAAF directed Brüggemann to evaluate Pistorius after the acceleration phase, when Pistorius was running in a straight line. *Id.* at 7. The CAS Panel criticizes the IAAF for this direction, stating that "IAAF's officials must have known that, by excluding the start and the acceleration phase, the result would create a distorted view of Mr[.] Pistorius'[s] advantages and/or disadvantages by not considering the

evidence,[13] Pistorius's prostheses provided him an advantage over runners who did not use prosthetic limbs.[14] This conclusion led the IAAF, on January 14, 2008, to declare Pistorius ineligible to compete in IAAF-sanctioned events.[15] Pistorius promptly appealed to the Court of Arbitration for Sport,[16] which, on May 16, 2008, overturned the IAAF's original ruling on grounds of insufficient evidence of a *net* advantage over another athlete.[17] As it stands, Pistorius is eligible to compete and is currently training for the 2012 Olympic Games to be held in London.[18]

Pistorius's internationally-publicized struggle for eligibility has drawn attention to a dormant, yet dramatic controversy, one which pits sporting ideals of fair play and excellence[19] against the civil rights of athletes with

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effect of the device on the performance of Mr[.] Pistorius over the entire race." *Id.* at 7. In further support of the Panel's criticism, Professor Brüggemann testified that he believed he was not supposed to consider all of the advantages and disadvantages Pistorius experienced. *Id.* at 7. Prior to the CAS appeal, it had been suggested that a better analysis would weigh both Pistorius's individual advantages and his disadvantages to determine if a net advantage over other athletes existed. *See* Charlish & Riley, *supra* note 7, at 936. "Even if it was proven that the limbs themselves produced a real and obvious advantage, might such an advantage merely be viewed as redressing the overall performance balance, and therefore may not be viewed as an advantage over other elite athletes at his level of performance?" *Id.* For further discussion on the restorative approach of accommodating disability, see *infra* note 84. The CAS panel ultimately questioned the IAAF's method of assessment and disapproved of the way in which the IAAF handled the investigation. *See Pistorius*, 2008/A/1480 at 7–9. Specifically, that Panel found that denying Pistorius's scientist the ability to provide input and announcing results prematurely were especially reprehensible. *See id.* As a result, the CAS began a de novo review of the evidence. *See id.* at 9.

13. The IAAF council found a biomechanical advantage because "running with these prostheses requires a less-important vertical movement associated with a lesser mechanical effort to raise the body . . . ." *Pistorius*, 2008/A/1480 at 4. It found a metabolic advantage because "the energy loss resulting from the use of these prostheses is significantly lower than that resulting from a human ankle joint at a maximum sprint speed." *Id.* at 5.

14. *See* Charlish & Riley, *supra* note 7, at 937; *Pistorius*, 2008/A/1480 at 4–5.

15. *Pistorius*, 2008/A/1480 at 5.

16. IAAF Competition Rule 60.11 states that an athlete may appeal a final decision exclusively to the CAS. *Id.* at 5. According to IAAF Competition Rule 60.25, notice of appeal must be filed within thirty days of the issuance of the final decision. *Id.* Complying with this rule, Pistorius gave notice of appeal of the IAAF's January 14, 2008 decision on February 13, 2008. *Id.* While several athletes with disabilities, such as Natalie du Toit of South Africa and Natalia Partyka of Poland, have competed alongside able-bodied athletes, the CAS has only entertained one international challenge to such competition, which arose in the dispute between the IAAF and Pistorius. *See* Paul Carter, *Games Without Frontiers*, DISABILITY NOW, Aug. 2008, at 31, 31 *available at* http://www.disabilitynow.org.uk/living/features/games-without-frontiers. This is probably due to the fact that athletes other than Pistorius do not use prosthetic devices, or other technologies that may be considered performance-enhancing, *during* competition. *See id.* at 31–32.

17. *Pistorius*, 2008/A/1480 at 12.

18. *See* Joshua Robinson, *Pistorius Left Off South African Olympic Team*, N.Y. TIMES, July 19, 2008, at D1.

19. It is important to note that society has a substantial interest in preserving sporting ideals because sports contribute to the development of social skills in so many ways. Among other valuable considerations, sports provide a forum for participants to learn such concepts as respect for rules and the consequences of one's actions. Mr. Vyacheslav Fetisov, Head of the Russian

disabilities. Those opposed to Pistorius's entry into able-bodied events presume that his participation will jeopardize the fundamental principles of sports.[20] In fact, Pistorius's use of prosthetic devices has been labeled by some as a form of performance-enhancement.[21] Proponents of Pistorius's participation, however, insist that his civil liberties, and the civil liberties of all disabled athletes, are at stake.[22] At present, the net advantage test applied by the Court of Arbitration for Sport in determining athletic eligibility considers both positions, simultaneously safeguarding disability rights while preserving the integrity of sports. However, the manner in which this test is executed poses serious problems for athletes and athletic governing organizations.

With that in mind, this Comment will explain the delicate balancing act courts must perform when adjudicating disputes concerning disability accommodation in sports, and will provide suggestions for improving the

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Federation Agency for Physical Culture and Sport states,

> The respect to the referee's decision must become the first step on a long way to the respectful attitude towards the social rules and laws; the fulfillment of the sport rules and regulations must help them step by step approach the comprehension and respect of the rules of social life, the laws and the Constitution of their country.

Vyacheslav Fetisov, Head, Russian Fed'n Agency for Physical Culture and Sport, Address at the Second Conference Sport and Development: Influence of Sport on the Social and Economic Development 3 (Dec. 4–6, 2005) (transcript available at http://www.magglingen2005.org/downloads/speech_Vyacheslav%20Fetisov.pdf).

20. *See generally* notes 9–15 and accompanying text (discussing the IAAF's concerns and findings with regard to Pistorius's use of prosthetic devices).

21. *See id.*

22. It is interesting to note that sports have often been a forum in which civil rights have advanced. "Sports, like all of popular culture, become the theater where the taboos are simultaneously smashed and reinforced, where one is liberated from them while conforming to them." DAVID K. WIGGINS & PATRICK B. MILLER, THE UNLEVEL PLAYING FIELD: A DOCUMENTARY HISTORY OF THE AFRICAN AMERICAN EXPERIENCE IN SPORT 434 (2003). On April 15, 1947, African-American Jackie Robinson stepped onto the Brooklyn Dodgers baseball field and took his position at first base. ROBERT LIPSYTE & PETER LEVINE, IDOLS OF THE GAME: A SPORTING HISTORY OF THE AMERICAN CENTURY 162 (1995). The "country held its breath" because Robinson's professional debut "represented both the dream and the fear of equal opportunity . . . ." *Id.* While integration did not occur overnight, Robinson's bold efforts to play professional baseball "would change forever the complexion of the game and the attitudes of Americans." *Id.* Sports writer Roger Kahn observed that "[b]y applauding Robinson, . . . a man did not feel that he was taking a stand on school integration or on open housing . . . . [, but] [t]o disregard color, even for an instant, [represented a] step away from old prejudices, ... not a path on which many double back." *Id.* at 164–65. Robinson began the process of racial integration in professional sports, which instigated the process of racial integration off the playing field. *See* BOB ABEL & MICHAEL VALENTI, SPORTS QUOTES: THE INSIDERS' VIEW OF THE SPORTS WORLD 190 (1983). Indeed, it has been noted that "[s]ports are not an idealization of ourselves, but a reflection." WIGGINS & MILLER, *supra*, at 434. Similarly, sports may be on the brink of magnificent a transformation when it comes to disability integration.

process. To this end, Part II explores the ethical principles underlying sports, for without this foundation, one cannot understand how to maintain the integrity of a sport.[23] Next, Part III discusses the history of disability law and identifies its overarching theme as one of integration.[24] Against this background, Part IV discusses case law regarding disability accommodation and sports, and it introduces the tests applied by the United States Supreme Court and the Court of Arbitration for Sport in resolving these disputes.[25] Part V offers a critique of the tests and suggests how they may be improved.[26] Finally, Part VI concludes the comment.[27]

II. AN ETHICAL APPROACH TO EVALUATING COMPETITIVE CONDUCT IN SPORTS

Robert L. Simon, a renowned sports philosopher, states, "It is difficult to understand how we could even identify abuses in sport unless we had some grasp of the ethical principles that were being violated in the first place."[28] Accordingly, before addressing what should be considered unfair conduct in modern sports, the foundational principles of sports ethics must be discussed.[29]

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23. *See infra* notes 28–82 and accompanying text.

24. *See infra* notes 83–108 and accompanying text.

25. *See infra* notes 109–48 and accompanying text.

26. *See infra* notes 149–86 and accompanying text.

27. *See infra* notes 187–89 and accompanying text.

28. ROBERT L. SIMON, FAIR PLAY: THE ETHICS OF SPORT 67 (2d ed. 2004). Simon further states,

> [W]ithout some standards at which to aim, we would not know the proper recommendations to make for moral change.
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> . . . [H]ard cases are important because they force us to identify the relevant moral factors that bear upon them and also require us to see whether our responses to a diverse set of such cases can fit within a coherent and rationally defensible framework.

Id. Similarly, James Keating, another sports philosopher, sets forth the idea that the "nature of the activity determines the conduct and attitudes proper to it." James W. Keating, *Sportsmanship as a Moral Category*, *in* SPORTS ETHICS: AN ANTHOLOGY 63, 67 (Jan Boxill ed., 2003).

29. It is interesting to note a linguistic distinction between the terms "sport" and "athletics." The term "sport" derives from the Old French word *desporter*, meaning "to carry away from work." Keating, *supra* note 28, at 65. When defining "sport," many dictionaries reference terms such as "'diversion,' 'recreation,' and 'pastime . . . .'" *Id.* "In essence, sport is a kind of diversion which has for its direct and immediate end fun, pleasure, and delight and which is dominated by a spirit of moderation and generosity." *Id.* at 65–66. Consider the familiar saying originating with the Sportsmanship Brotherhood founded in 1926: It's "[n]ot that you won or lost—but how you played the game." *Id.* at 68. This statement is consistent with the idea of recreational sports. *Id.* However, the linguistic origins of recreational sport are fundamentally different from the root meaning of the term "athletics," which derives from the Greek words *athlein*, meaning "to contend for a prize[;]" *athlos*, meaning "contest[;]" or *athlon*, meaning a "prize awarded for the successful completion of the contest." *Id.* at 65. "Athletics . . . is essentially a competitive activity, which has for its end victory in the contest and which is characterized by a spirit of dedication, sacrifice, and intensity." *Id.* at 66. Considering this important distinction, James Keating asks,

A. Exploring the Essence of Competition

Most definitions of competition can be reduced to terms that express the purpose of competition as a pursuit of one of two objectives: victory or excellence.[30] While it can be argued that competition embraces both ideas, there can only be one true objective. Indeed, it seems that defining competition's purpose in terms of victory may implicate moral concerns, for obtaining victory necessarily requires defeating one's opponent.[31] If this is the *ultimate* aspiration, sport might be characterized as an inherently selfish venture, or a zero-sum activity.[32] However, as at least one critic asserts, such a characterization is inconsistent with modern social values, as it is morally reprehensible to pursue selfish interests at the expense of others.[33]

> Is this how one would describe the World Series, the Masters, the Davis Cup, the Rose Bowl, the Olympic Games, or a high-school basketball tournament? Do the "sport" pages of our newspapers detail the pleasant diversions and amusements of the citizenry, or are they preoccupied with national and international contests which capture the imaginations, the emotions, and the pocketbooks of millions of fans (i.e., fanatics)?

Id. at 65. According to Keating, it is due to this confusion that deciding appropriate conduct in the modern sports context has become a difficult task.

> Because the term "sport" has been loosely applied to radically different types of human behavior, because it is naïvely regarded as an apt description of (1) activity which seeks only pleasant diversion and, on the other hand, (2) the agonistic struggle to demonstrate personal or group excellence, the determination of the conduct proper to a participant in "sport" becomes a sticky business indeed.

Id. However, in lay terms, the words "sport" or "sports" generally refer to athletic competition, not activities undertaken for recreation. As a result, this Comment will use the terms "sport," "sports," "athletics," and "competition" interchangeably.

30. *See* SIMON, *supra* note 28, at 24–28.

31. Those who define the nature of competition as a pursuit of victory may describe it as "the struggle of two parties for the same valued object or objective[, which] implies that, to the extent that one of the parties is successful in the struggle, he gains exclusive or predominant possession of that object at the expense of his competitor." Keating, *supra* note 28, at 67. This is a zero-sum result, meaning two athletes cannot share in victory, unless they are teammates. *Id.* at 68.

32. If "the goal of competition is to enhance the position of one competitor at the expense of others[,]" then, "the critics argue, . . . by its very nature, competition is selfish." SIMON, *supra* note 28, at 24. In that regard, political theorist John Schaar views competition as "reduc[ing] human interaction to 'a contest in which each man competes with his fellows for scarce goods, a contest in which there is never enough for everybody, and where one man's gain is usually another's loss.'" *Id.*

33. *See id.* "Since selfish concern for oneself at the expense of others is immoral, it follows that competition is immoral as well." *Id.* Not only is the victory-based theory of competition morally objectionable, the ideas of unrestricted competition and of winning at all costs are unrealistic. *See id.* Sports are not only competitive, but also cooperative. *See id.* at 24–25. Simon points to scenarios where competitors offer assistance to one another, which directly contradicts the idea that sport is completely selfish. *See id.* Cooperation thus makes competition ethically defensible. *Id.* at 25.

Furthermore, obtaining victory does not always reflect success.[34] As Simon explains, a competitor may win against a weaker opponent and not necessarily be successful, and, conversely, a competitor may lose to a stronger opponent and feel a sense of success because he or she exhausted every physical and mental faculty in the process.[35] Finally, if victory truly is the primary goal, competitors would simply seek to face inferior opponents.[36]

Accordingly, it may be more appropriate to define competition's purpose in terms of excellence. Simon succinctly articulates this concept by identifying competition as a "mutually acceptable quest for excellence through challenge."[37] To expand on that idea, one might borrow from Aristotle's definition of excellence, which he expresses as "a quite modest set of virtues whereby humans *should strive to be the best they can be given the inheritance they receive from life and nature.*"[38] Ideally, the foregoing philosophical ideas of pursuing excellence allow a competitor to avoid becoming immersed in selfishness by placing the highest importance on improving oneself and improving one's opponents.[39] Such an approach,

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34. Moreover, it is important to note that not all victory is a reflection of excellence. In fact, victory can be obtained through cheating, which is certainly not a measurement of excellence. *See id.* at 19. Some argue that those who cheat cannot technically win because they do not play within the rules of the game, and therefore do not play the game itself. *See id.*

35. *See id.* at 27. Former president of St. John's College of Annapolis, Edwin Delattre, comments that "moments of test rather than victory or defeat are the source of the value of competition in sports." *Id.* at 26. According to Delattre, "[I]t is a far greater success in competitive athletics to have played well under pressure of a truly worthwhile opponent and lost than to have defeated a less worthy or unworthy one where no demands were made." *Id.* (quoting Edward J. Delattre, *Some Reflections on Success and Failure in Competitive Athletics*, 2 J. PHIL. SPORT 134, 134 (1975)). This statement suggests that winning is *not* the purpose of athletic competition. *See id.* at 26–27. Rather, competition's principal value lies in striving for excellence by overcoming challenges. *Id.* at 27.

36. *Id.* at 53. Social and political philosopher, Jan Boxill, states,

> Generally one prefers to lose against a strong opponent than win against no competition at all. This is evidenced by the expression "hollow victory." Certainly winning is part of the game (i.e. someone must win), but one sees an opponent not as an enemy to be defeated, but as one whose excellences challenge and make possible one's own best performance.

Jan Boxill, *Introduction: The Moral Significance of Sport*, *in* SPORTS ETHICS: AN ANTHOLOGY, *supra* note 28, at 1, 6.

37. SIMON, *supra* note 28, at 27. Some have characterized sporting principles in terms of "purity," stating that purity of sport should be maintained. However, "purity is far less meaningful than sports' relationship with *excellence*. Translated into more robust terms, sport, particularly elite sport, aims to foster and manifest excellence, by manifesting a standard that 'cannot be humanly surpassed.'" Charlish & Riley, *supra* note 7, at 954.

38. Charlish & Riley, *supra* note 7, at 954; *see also* Boxill, *supra* note 36, at 6 (stating that the point of competition is "to function at a maximum, to develop oneself to the fullest . . . .").

39. The idea of improving one's opponents contradicts the idea of victory as competition's purpose. However, it furthers the concept of competition as a mutual quest for excellence. One can only improve personal excellence by facing worthy opponents. Competition thus requires cooperation because there is an "implicit social contract" between competitors to provide each other

therefore, comports better with society's ethical ideals.[40] And in this sense, while victory is not eliminated as a component of competition, the selfishness associated with it fades into the background and victory merely becomes one of several ways to measure one's pursuit of excellence.[41]

With this in mind, often times in sports, and specifically in the disability accommodation debate, competitors feel that the pursuit of excellence is undermined when one athlete gains an unfair advantage over another. This concern is legitimate, for an unfair advantage destroys the true challenge of competition, and thereby compromises competition's entire purpose of pursuing excellence. While this Comment ultimately addresses whether disability accommodation in sports actually confers such an unfair advantage, it must first examine the most effective method of preserving the pursuit of excellence, the institution of standardized rules for each competition.

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the best challenge possible. *See* SIMON, *supra* note 28, at 27. If overcoming challenge furthers excellence, "competitors should want their opponents at their peak so they can present the best possible challenge." *Id.* at 34. Consider David Duval's comment on facing Tiger Woods: "If I come head-to-head against him at say, the U.S. Open, I want him to be playing as good as he can play because I want to beat him when he's playing his best." *Id.* at 53. Some have argued that this desire for a true opponent changes when athletes compete in professional arenas, for monetary gain.

> [T]here are added complications for the professional. Victories, superior performances, and high ratings are essential to financial success in professional athletics. Too frequent defeat will result in forced unemployment. It is easy, therefore, for a professional athlete to view his competitors with a jaundiced eye; to see them as men who seek to deprive him of his livelihood.

Keating, *supra* note 28, at 69. However, Simon asserts,

> [R]egardless of the personal goals of the competitors, . . . professional athletes are involved in the mutual quest for excellence at the highest level of attainable skill.
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> Many . . . love the challenge provided by sports and seek to constantly improve their performance. . . . Some professional star athletes, Michael Jordan and Tiger Woods being especially prominent examples, seem to play as much for the love of the challenge and the desire to compete as for the external rewards such as fame and fortune.

SIMON, *supra* note 28, at 70–71.

40. This is not to say, however, that striving for excellence necessarily occurs in every competition. As Simon states,

> Competition in sports is ethically defensible, in this view, when it is engaged in voluntarily as part of a mutual quest for excellence.
>
> This does not mean that all competition in sports is ethically defensible; actual practice may not satisfy the requirements of the mutual quest for excellence. It does say that competition in sports is ethically defensible when it does satisfy such requirements.

Id. at 27.

41. Simon classifies defeating one's opponent and winning the contest as an *internal* goal of competition, meaning that the rules prescribe this goal as the result of competitive activity. *See* SIMON, *supra* note 28, at 24. While winning may not be everything, "the outcome of the game is an especially significant indicator of how well one actually played." *Id.* at 37.

B. *Preserving Competition by Promulgating Uniform Rules Focused on a Fair Outcome*

The rules set forth by athletic governing organizations attempt to create a result that truly reflects the pursuit of excellence.[42] This is accomplished using two general types of rules: constitutive rules and regulatory rules.[43]

Constitutive rules set the framework for the particular competition, i.e., the activity and permissible moves within the activity.[44] Playing within the constitutive rules ensures that all competitors are indeed playing the same game.[45] Different competitions, however, seek to elicit different abilities,[46]

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42. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 703 (2001) (Scalia, J., dissenting) ("the very *nature* of competitive sport is the measurement, by uniform rules, of unevenly distributed excellence."). In addition to measuring excellence, rules may have the effect of curbing selfishness. *See* Keating, *supra* note 28, at 68. Because two athletes cannot share victory, unless they are teammates, rules may also have the effect of limiting the intensity with which victory is pursued. *See id.* Consistent with this idea, Keating further states that athletes should "seek[] to demonstrate . . . excellence in a contest governed by rules which acknowledge human worth and dignity." *Id.*

43. Graham McFee challenges the practice of strictly placing rules into two categories: constitutive and regulatory. *See* GRAHAM MCFEE, SPORT, RULES, AND VALUES: PHILOSOPHICAL INVESTIGATIONS INTO THE NATURE OF SPORT 43 (2004). In addition, he criticizes assigning different functions to the categorized rules, stating "the argument seem[s] merely concessive: to grant regulative force to constitutive rules. Yet the difficulty here is more profound." *Id.* McFee claims the rules themselves are not necessarily constitutive or regulatory, but are used for constitutive or regulatory purposes. *See id.* "[W]e should recognize regulative and constitutive *uses* of rules, granting that a rule may be used in a regulative way in some contexts . . . and yet may also be used constitutively . . . ." *Id.*

44. *See* Boxill, *supra* note 36, at 4; *see also* MCFEE, *supra* note 43, at 35 ("The rules of football or chess, for example, do not merely regulate playing football or chess, but . . . create the very possibility of playing such games." (quoting JOHN SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 33–34 (1969))). However, not all sports have a defined set of constitutive rules.

> One example is mountain climbing. However, besides the rules for safety, there are impositions that require bodily excellence and ingenuity, rules that require strategies for climbing to reach the top. The goal is not just to reach the top, but to climb to reach the top, and this requires adherence to rules, or laws, of nature. No artificial rules need be imposed.

Boxill, *supra* note 36, at 4.

45. Playing the same game implies that all players reach the goal in a specified way. McFee notes, "the rules of a game are inseparable from its goal. That is, the goal of golf is not simply to put the ball in the hole, but to do so in a quite specified way—by using the fewest number of strokes possible." MCFEE, *supra* note 43, at 15 (quoting William John Morgan, *The Logical Incompatibility Thesis and Rules: A Reconsideration of Formalism as an Account of Games*, *in* PHILOSOPHIC INQUIRY IN SPORT 50 (W.J. Morgan & K.V. Meier eds., 2d ed. 1995)). The "specified way" of accomplishing the directives of a sport is vital. Some argue that because "competition in sport is the attempt to secure victory within the framework set by the constitutive rules[,]" cheaters who act outside the bounds of the rules do not actually play the same game. *See* SIMON, *supra* note 28, at 19, 46. "Cheaters violate the rules by failing to make moves within the sport and therefore fail to play it. One can win the game only by playing it, and since cheaters do not play, cheaters can't win." *Id.* at 46.

46. *See* Boxill, *supra* note 36, at 4.

and thus the constitutive rules vary with each contest. Unlike regulatory rules, constitutive rules are not developed from logic,[47] but are often the product of history, tradition, and current socially acceptable principles.[48]

Regulatory rules, on the other hand, are designed to determine which actions constitute fair play,[49] and which allow competitors to achieve an unfair advantage.[50] Such regulations place similar burdens on each competitor by creating a "level playing field" at the outset,[51] and imposing

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> Constitutive rules are designed to develop and exhibit distinct sets of skills and talents. . . . These rules require calculations, decisions, strategies, and mental agility as well as the meeting of a physical challenge. Thus, when I agree to play basketball, I agree first of all to abide by the rules which define the game, and the rules of decency, safety, and fair play within it. Further, I use these rules as a disciplined means of self-expression and self-development.

Id. (emphasis added).

47. van Hilvoorde & Landeweerd, *supra* note 1, at 108–109 ("In sport there is no purely rational logic in the definition of rules, neither in classification nor categorisations, in order to make the competition as 'fair' as possible. Rules are always a combination and compromise of tradition and a sport-ethical idea of 'equality' (the 'level playing field').").

48. *See* Boxill, *supra* note 36, at 4 ("Their existence comes from their acceptance. . . . The rules of sport . . . provide a framework for creativity in accordance with aesthetic standards, requiring both mental and physical energies.").

49. Boxill characterizes regulatory rules as rules of safety, decency, and fair play. *See id.* The topic of decency is beyond the scope of this Comment. For an in depth analysis of decency, otherwise associated with sportsmanship, see generally Keating, *supra* note 28, at 63–71 (discussing the moral nature of sportsmanship). However, for purposes of this Comment, fair play and, to some extent, safety are pertinent. Yet, the concepts of decency, safety, and fair play may overlap. *See* Boxill, *supra* note 36, at 4. Boxill states, "For example, in boxing one cannot hit below the belt; in football one cannot tackle by grabbing the face mask or tackle a non-ball carrier from behind; in baseball one cannot throw at the batsman's head; in cricket one cannot continually bowl bodyline, etc." *Id.* These examples explicitly address safety and decency concerns. *Id.* The first example cited above, hitting below the belt during a boxing match, is primarily prohibited for the safety of the boxer receiving the hit. However, "[r]ules of decency[, which] reflect basic moral standards[,]" are also implicated because it would be wrong, ethically speaking, to seriously injure another competitor for a moment advantage. *See id.* Finally, "[r]ules of fair play[, which] include penalties for moves of strategy within the game[,]" are also involved. *See id.* Hitting below the belt is certainly strategic, but outside the bounds of the game. Thus, because the action is not part of the constitutive rules, a penalty is assigned, the penalty acting as the regulatory rule.

50. While there are rules designed to ensure fair play, some argue that fair play may be avoided when rules are waived.

> According to [the Professional Golf Association], "the goal of the highest-level competitive athletics is to assess and compare the performance of different competitors, a task that is meaningful only if the competitors are subject to identical substantive rules." The waiver of any possibly "outcome-affecting" rule for a contestant would violate this principle and therefore . . . fundamentally alter the nature of the highest level athletic event.

PGA Tour, Inc. v. Martin, 532 U.S. 661, 686 (2001) (citation omitted).

51. *See* Keating, *supra* note 28, at 70.

> Both contestants must be equal before the law if the test is to have any validity, if the

penalties for deviation from the rules during the competition.[52] This ensures that every competitor is measured based on athletic ability rather than external factors.[53]

By preventing an unfair advantage, the rules of each sport ensure that victory is both a reflection of a true challenge and an accurate measurement of excellence. In essence, "competitive sport is best understood . . . [as an] attempt [by athletes] to develop excellence[] [while] overcoming the obstacles allowed by the rules."[54]

C. *An Unfair Advantage: The Nemesis of Competition*

A competitor may gain an advantage in a number of ways, including through the use of performance-enhancers. While the use of performance-enhancing techniques generally carries a negative connotation,[55] some methods by which athletes increase their performance are consistent with the ethical foundation of sports. To this end, there is an important distinction between striving for excellence, which necessarily requires personal

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> victory is to have any meaning. To the extent that one party to the contest gains a special advantage, unavailable to his opponent, through an unusual interpretation, application, or circumvention of the rules, then that advantage is unfair. The well-known phrase "sense of fair play" suggests much more than an adherence to the letter of the law. It implies that the spirit too must be observed. In the athletic contest, there is a mutual recognition that the rules of the game are drawn up for the explicit purpose of aiding in the determination of an honorable victory. Any attempt to disregard or circumvent these rules must be viewed as a deliberate attempt to deprive the contest of its meaning. Fairness, then, is rooted in a type of equality before the law, which is absolutely necessary if victory in the contest is to have validity and meaning.

Id.

52. *See* SIMON, *supra* note 28, at 19, 57.

53. *See infra* Parts II.C.1–2 (discussing how external factors such as performance-enhancing substances or equipment can change the nature of the challenge from testing the competitor's athletic ability to testing the competitor's ability to respond to a drug or a piece of equipment).

54. SIMON, *supra* note 28, at 52.

55. There are several arguments against performance enhancements, both in and out of the sports context. Perhaps one of the most compelling is that, traditionally, performance enhancers are not natural. Professor Michael Shapiro of the University of Southern California has suggested that nature should be the guide when determining which forms of human enhancement are acceptable. *See* Michael H. Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, 65 S. CAL. L. REV. 11, 59 (1991). While natural physical or intellectual endowments are unearned, society views them as meritorious "while drug responsiveness is not. . . . Perhaps [this is] because we have no choice concerning the distribution of baseline-forming native endowments, which are unearned, but we do have a choice concerning the generation of enhanced endowments, which are also unearned." *Id.* at 61. In essence, this argument provides that those qualities over which one has no choice are valuable. However, people *choose* to improve themselves on a daily basis. *See infra* note 56 (discussing that self-improvement is not limited to sports, but is also sought after in daily activities). It would be ludicrous to ban all activity undertaken for self-improvement purposes. The logical conclusion is that society has a "*preference* for internally- over externally-driven changes, the former being associated with nature, and the latter with non-nature or artifice." Shapiro, *supra*, at 54 (emphasis added).

improvement,[56] and gaining an *unfair* advantage by circumventing the challenges of competition. This distinction, however, is blurred as technology enters the debate. Technology's continued development and its increasingly important role in athletics raise questions of whether certain forms of technology "fall[] under the traditional category of improving the athletic playing field[,] or if these innovations eliminate athletic talent as a prerequisite for competition and provide an unfair advantage . . . ."[57] This section explores technological enhancement in sports and analyzes various techniques as they relate to the foundations of sports ethics.

1. Performance-Enhancing Substances May Allow Athletes an Upperhand at the Cost of Undermining Competition

Taking performance-enhancing substances may internally alter the athlete and thus may compromise the challenge presented by an individual sport. In that regard, substances are the most regulated form of performance

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56. Personal improvement is not unique to sports.

> Most of us strive to be able to do things we now can't do, or to do things better—to think and work faster and more accurately, to jump higher, to use a machine gun more effectively, and so on. We rarely think that in so striving and succeeding, personal identity has been compromised or that some serious moral harm has occurred.

Shapiro, *supra* note 55, at 16 (citation omitted). Very often in this everyday quest for self-improvement, technology plays a role. For example, although some may not consider coffee a form of technology, it certainly is a stimulant. However, consumption of coffee does not carry a general negative connotation, but is universally accepted for its ability to increase awareness, and sometimes even efficiency. Indeed, people around the world consume it daily for these very purposes. *See* CORBY KUMMER, THE JOY OF COFFEE 153–55 (2003). In fact, this overall acceptance occurs despite the fact that the effects are due to the introduction of a substance into one's body, which could be viewed as "artificial." Shapiro posits that self-improvement is part of human nature, stating "[i]t is natural for us to pursue the artificial." Shapiro, *supra* note 55, at 35. There is, however, a distinction between everyday life and sports. While performance is important in life in general, competitive sports rely on participants to consistently perform at peak levels.

> [In life, t]here are no clear wins or losses and no generally accepted way of keeping score. Most of the rules are not written down. People juggle multiple goals, and duties, rather than concentrating all their efforts on improving their performance in one of their lives' many "events." We are not, for the most part, one bad performance away from being fired. We are not too old to work in our profession at thirty-five, as in the NBA, or thirty, as in professional tennis, or twenty, as in Olympic gymnastics. Most of us, most of the time, do not always try to be "the best," but instead we seek to be good enough.

Henry T. Greely, *Disabilities, Enhancements, and the Meanings of Sports*, 15 STAN. L. & POL'Y REV. 99, 132 (2004). Indeed, "from the viewpoint of athletic performance . . . the idea of normality seems irrelevant: one wants to get far beyond it." Shapiro, *supra* note 55, at 50. *But see infra* note 111 (discussing the idea that elite athletes are themselves abnormal, but that society places positive value on their particular abnormalities).

57. Erin E. Floyd, Comment, *The Modern Athlete: Natural Athletic Ability or Technology at Its Best?*, 9 VILL. SPORTS & ENT. L.J. 155, 166 (2002).

enhancers.[58] Such heavy regulation could further be attributed to the fact that drugs are easier to regulate than other forms of performance enhancement,[59] or it could also be due to society's general bias against drugs.[60]

Society's bias may be justified for several reasons. First, athletes who use performance-enhancing substances, such as anabolic steroids[61] or

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58. *See* Greely, *supra* note 56, at 128. For the most part, individual athletic governing organizations regulate performance-enhancing substances, with governments adopting the policies implemented by these private organizations. In 1999, the International Olympic Committee (IOC) created the World Anti-Doping Agency (WADA), with a goal to establish a drug-free sports culture. *See* Jarred R. Tynes, Comment, *Performance Enhancing Substances*, 27 J. LEGAL MED. 493, 506 (2006). WADA's rules, which create strict liability for substances found in an athlete's body, have since been adopted by all major international sports organizations and several governments. *See id.* The United States government has not formally adopted WADA's rules, but the United States Olympic Committee (USOC) created the United States Anti-Doping Agency (USADA) in 2000, which adopted the WADA code in 2004. *Id.* at 506–07. Although the United States government has not specifically regulated doping in domestic sports, Congress has passed several acts concerning drug use for the general population. In 1970, the Controlled Substances Act (CSA) provided criminal penalties for drug-related offenses. *See id.* at 498. In 1990, the Anabolic Steroids Control Act was enacted, specifically targeting hormonal substances related to testosterone and, under the CSA, providing for penalties for use of such substances. *See id.* at 498–99. In professional sports, the major American sports associations, such as the National Basketball Association (NBA), the National Football League (NFL), and Major League Baseball (MLB), have created rules that provide for drug testing, education, and treatment. *See* Floyd, *supra* note 57, at 159–61. In addition, the National Collegiate Athletic Association (NCAA) imposed drug testing procedures and consequences on its athletes beginning in 1973. *Id.* at 163–65. Most of these organizations cite athletes' health and fair competition as the reasons for enacting such measures. *See id.* at 159, 164.

59. *See* Greely, *supra* note 56, at 129–30. Greely suggests that because controlled drugs may be accessed only through medical providers, it is easier to enforce distribution regulations. *See id.* at 130. Greely contrasts the ability to control drug distribution with the concept of controlling workout regimens or other means of enhancing performance, stating that enforcement of such regulations would be impractical. *Id.*

60. *See* Greely, *supra* note 56, at 129–30. Greely indicates that society would probably view control of a personal workout as an invasion of privacy, whereas regulation of substances is generally considered legitimate. *See id.* Greely also points out that there are certain substances that are generally accepted as unregulated such as coffee, nicotine, and, to some extent, alcohol. *See id.*; *see also supra* note 56 (discussing how, outside of the context of athletics, enhancing one's performance through quasi-technological means is a natural and generally-accepted practice).

61. The use of anabolic steroids can cause physical and psychological harm to athletes.

> Some physiological side effects include decreased sperm production, enlargement of breast tissue, over-retention of fluid leading to hypertension or heart disease, and biochemical effects on the liver. . . .
>
> Aside from the physical effects steroids can have on the human body, steroids may also result in psychological damage. The most common psychological effect is aggression, commonly called "roid rage."

Tynes, *supra* note 58, at 495–96 (citations omitted). United States legislation has been enacted to prohibit steroid use. *See supra* note 58. Anabolic agents are also included on WADA's list of prohibited substances. *See* World Anti-Doping Agency, *The World Anti-Doping Code: The 2009 Prohibited List: International Standard* § S1 (2009), *available at* http://www.wada-ama.org/rtecontent/document/2009_Prohibited_List_ENG_Final_20_Sept_08.pdf [hereinafter *WADA Rules*].

ephedrine,[62] put their safety at risk.[63] Second, some characterize performance-enhancing substances as unnatural,[64] and a threat to the value of effort and hard work.[65] Third, if substances are unregulated, the competitive aspect of sports may coerce otherwise-unwilling athletes into partaking when they do not wish to do so.[66] Fourth, not all athletes have

62. Ephedrine can also pose serious health risks for athletes. In 2003, Steve Belcher, a pitcher for the Baltimore Orioles, suffered from heatstroke while running sprints and ultimately died from multiple organ failure. *See* Rafael Hermoso & Charlie Nobles, *Lessons Learned from Past Use of Ephedra*, N.Y. TIMES, Feb. 22, 2003, at D3. Doctors concluded that ephedrine found in Belcher's dietary supplement contributed to his death. *See id.* Commenting on the improper uses of ephedrine, Dr. Lewis Yocum states, "The biggest problem I see is close monitoring and what's in the supplement. . . . You're supposed to take one or two, and people take three or four . . . ." *Id.* Just as in Belcher's case, exceeding the correct dose of ephedrine can cause "increased blood pressure and other stresses to the circulatory system linked to heart problems and strokes." Tynes, *supra* note 58, at 497.

63. *See* Greely, *supra* note 56, at 129–30. Greely believes the safety argument to be the most persuasive. *Id.* at 130. While health risks associated with traditional performance-enhancing substances are generally known, many athletes are not deterred from using potentially life-threatening substances. A poll at the 1984 Los Angeles Olympics revealed that fifty-five percent of athletic participants "would take a drug that could kill [them] five years later if it enabled them to win a gold medal." Shapiro, *supra* note 55, at 86. In fact, the most effective way for athletes to avoid endangering their lives is through threat of adverse consequences to their careers. *See* Tynes, *supra* note 58, at 494 ("[M]any athletes are not willing to curb the use of such substances absent a threat of serious punishment issued by the body controlling their sport."). Prohibiting steroid use for the protection of athletes may seem like a noble venture, but it is met with opposition by those who consider it a form of paternalism, and a deprivation of individual liberty. *See* SIMON, *supra* note 28, at 73.

> If widespread paternalism were practiced, third parties could prohibit us from eating foods that might be harmful, playing in sports that carried even slight risk of injury, or indulging in unhealthy lifestyles. Our lives would be monitored—for our own good, of course. The difficulty is that we might not conceive of our own good in the same way as the paternalist.

Id. Simon further cites John Stuart Mill who posits that deprivation of liberty is only justifiable to prevent harm to others. *See id.* In essence, if one chooses to put himself at risk, he should be free to do so. *See id.* at 73–74.

64. See discussion *supra* note 55. This argument is interesting, because, while the dosage of some of these substances may be unnatural, the substances themselves typically come from nature. For example, anabolic steroids derive from the human hormone, testosterone. *See* SIMON, *supra* note 28, at 72.

65. While society values natural endowment, it also recognizes merit through effort. "Present understandings of sport do not include the ability of an athlete's body to respond to a drug as an element of the contest." Warren P. Fraleigh, *Performance-Enhancing Drugs in Sport: The Ethical Issue*, 11 J. PHIL. SPORT 23, 28 (1985). However, it can also be said that substances are not magical, rather that they "yield improvement only in conjunction with hard training and a demanding work ethic; they allow muscles to recover faster and so permit more intense and more frequent workouts than nonusers are able to manage." SIMON, *supra* note 28, at 84.

66. If a professional athlete's livelihood depends on competitive success, and the chances of success are increased when performance-enhancing substances are used, some argue that athletes may feel forced to use substances in order to compete. SIMON, *supra* note 28, at 75. This argument

equal access to certain substances, which alone may create an unfair advantage.[67] Fifth, even if availability were not an issue, some still believe that use of these substances would be "too easy," and thus unfair.[68] This argument is one of the most persuasive when viewed through the lens of sports ethics.[69] If competition is viewed as a mutual quest for excellence

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may be rebutted by the theory that no one is truly forced into athletic competition in the first place; rather, participation is a choice. *See id.* Simon analogizes further by indicating that such a theory as applied to students seems out of place.

> Do professors similarly "coerce" students into studying hard? Isn't it more plausible to say that although there are pressures on athletes to achieve peak physical condition, these amount to coercion no more than the pressures on law or medical students to study hard? Rather, the athletes (or the students) have reasons to try hard to achieve success; the pressures are self-imposed.

Id. Perhaps the coercion argument is not meant to affect the individual athlete's choice, but seeks to prevent the athlete from being presented with this choice at all. "[W]e need to consider whether it is morally wrong to insist that athletes risk harming themselves to compete." *Id.* at 78.

67. The expensive nature of performance-enhancing substances may lead to a situation where some athletes can afford these drugs while others cannot. *See* Greely, *supra* note 56, at 129. The resulting inequality in terms of access could be seen as providing an unfair advantage, something sport seeks to eliminate. *See supra* Part II.A. However, other forms of acceptable performance-enhancement, such as training and equipment, also have limited access due to expense and location, and are not generally viewed as providing an unfair advantage. *See* Greely, *supra* note 56, at 129. It is also interesting to note that performance-enhancing drugs may be expensive *because* they are banned. *See id.* Perhaps eliminating the ban on performance-enhancing substances in athletics would eliminate the access and unfair advantage problems as well.

68. Of course, if the use of a particular substance is banned by the rules of the competition, breaking these rules would be considered cheating. *See* SIMON, *supra* note 28, at 79. Some argue that even if permitted by the rules of the game, use of performance-enhancing substances makes success "too easy." *See* Greely, *supra* note 56, at 129. However, if this theory relies on the argument that the drug rather than the human is being tested, the same can be said of high-tech equipment, professional training, and specialized diets, all of which are considered legitimate means to improve performance. *See* SIMON, *supra* note 28, at 80.

69. Illustrating just how deeply sports ethics influence society, in his very first presidential press conference on February 9, 2009, President Obama addressed concerns on taking the "easy" path toward a goal. *See Obama's Prime-Time Press Briefing*, N.Y. TIMES, Feb. 9, 2009, http://www.nytimes.com/2009/02/09/us/politics/09text-obama.html?pagewanted=13&_r=2. When questioned about Alex Rodriguez, a Major League Baseball player who admitted using performance-enhancing drugs, President Obama expressed his hope that children would learn a valuable lesson: while circumventing a challenge may be beneficial in the short-run, the long-term effects of jeopardizing one's integrity are not worth the temporary advantage. *See id.* The pertinent portions of the transcript are as follows:

> QUESTION: Yeah, thank you, sir. What's you're [sic] reaction to Alex Rodriguez's admission that he used steroids as a member of the Texas Rangers?
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> MR. OBAMA: Yeah, I think it's depressing news on top of what's been a flurry of depressing items, when it comes to Major League Baseball.
>
> And if you're a fan of Major League Baseball, I think it—it tarnishes an entire era, to some degree. And it's unfortunate, because I think there are a lot of ballplayers who played it straight.
>
> And you know, the thing I'm probably most concerned about [is] the message that it sends to our kids.
>
> What I'm pleased about is, Major League Baseball seems to finally be taking this seriously, to recognize how big of a problem this is for the sport, and that our kids hopefully are watching and saying: You know what? There are no shortcuts; that when

through challenge, substances may circumvent the challenges, thus defying the ethic of competition itself.[70] Ultimately, the foregoing concerns lead to the conclusion that, on the whole, performance-enhancing drugs jeopardize the integrity of sports,[71] and thus should be banned.[72]

> you try to take shortcuts, you may end up tarnishing your entire career, and that your integrity's not worth it. That's the message I hope is communicated.

Id.

70. SIMON, *supra* note 28, at 83 ("If competition in sports is supposed to be a test of the athletic ability of persons, isn't the very heart of competition corrupted if results are affected by performance-enhancing drugs?"). Simon argues that the use of substances to increase performance changes the very nature of sports because "[i]nstead of meeting the challenge of the test, we change the nature of the *test takers* to minimize the challenge they face." *Id.* at 85 (emphasis added). In essence, the test would transform into a test of how efficiently one's body reacts to a substance, rather than how one reacts to the challenge. *See id.* "We want the winner to be the best athlete, not the individual whose body is best attuned to a performance-enhancing drug!" *Id.* Indeed, Shapiro conveys a similar argument:

> [I]t isn't just enhanced performance that we are after. In addition, we want athletic competition to be a test of persons. It is not only raw ability we are testing for; it is what people do with their ability that counts at least as much.... [I]f outcomes are significantly affected not by such features but instead by the capacity of the body to benefit physiologically from drugs, athletes are no longer reacting to each other as persons but rather become more like competing bodies.

Shapiro, *supra* note 55, at 60 (quoting Robert L. Simon, *Good Competition and Drug-Enhanced Performance*, 11 J. PHIL. SPORT 6, 7 (1985)). Simon compares this to specialized equipment, which threatens to replace the test of an athlete's skill with the test of equipment. *See* SIMON, *supra* note 28, at 84–85. Simon further suggests that the use of technological aids could turn competition into a test of machines rather than of man. *See id.* at 85. He questions whether this situation is a true reflection of sport. *See id.* Ultimately, he distinguishes equipment on the ground that it must still be used by persons. *Id.*

71. On the issue of the integrity of sport, Shapiro quotes Roger Gardner and George Will. Gardner states, "[G]aining enhancement (speed, endurance, strength, power, physique, etc.) through certain substances is unacceptable because it threatens a sport's integrity. The substance, in the end, is more responsible for any gained advantage than is the athlete, and hence we are no longer testing the athlete but the substance." Shapiro, *supra* note 55, at 73 (quoting Roger Gardner, *On Performance-Enhancing Substances and the Unfair Advantage Argument*, 16 J. PHIL. SPORT 59, 70 (1989)). George Will further argues, "Sport would be debased, and with it a society that takes sport seriously, if sport did not strictly forbid things that blur the distinction between the triumph of character and the triumph of pharmacology." *Id.* at 73 (quoting George F. Will, *Character Not Chemistry, Must Take the Gold*, L.A. TIMES, Sept. 29, 1988, at 7).

72. Shapiro discusses arguments that, perhaps, performance enhancement on the whole should not be banned. *See id.* at 65.

> The ideas of equality and fairness in contests thus suggest only that if [performance enhancement] is banned, the ban should be enforced. It does not show that [performance enhancement] should be banned in the first place, unless perhaps the [performance enhancement] mechanism works so differently on different persons that categorical inequality comes about, making contests pointless.

Id. Further, "[performance enhancement] might deserve support as a way of promoting equality" for those who do not receive natural endowments. *Id.* at 76. Indeed, it has been argued that sports in general may benefit from permitting performance enhancement. It may "push[] athletes to new

2. Performance-Enhancing Equipment May Represent Innovation in Sports Rather Than a Threat to Ethics

While similar arguments concerning unfairness and availability may be applicable to both drugs and the use of equipment, the stigma associated with drugs[73] typically does not attach to equipment.[74] Equipment, however, is still subject to regulation,[75] partially because technological innovations may threaten the challenge of competition much like performance-enhancing substances.[76] Some have gone so far as to refer to performance-enhancing equipment as "technological doping."[77] Consider the controversial and very public debate over Speedo's LZR Racer swimsuit leading up to the 2008 Olympic Games. The LZR, which allegedly reduces drag in the water and stabilizes a swimmer's core,[78] was ultimately permitted in the Olympics[79]

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levels." Floyd, *supra* note 57, at 174.

73. Shapiro, *supra* note 55, at 88–89 ("[S]teroid use, despite its limited effects, does seem to be taken by many as an attempt to secure unearned benefits, to get something for nothing. . . . [S]ocio-political systems [have] expectations of community intervention of certain sorts.").

74. Olympic gold medalist Donna de Varona comments that "[t]echnological advances, whether (pole vaulter) Bob Seagren's fiberglass pole or new speed skates in the Winter Games, are simply part of sport." Christine Brennan, *Sink or Swim? Not with this Suit*, USA TODAY, June 29, 2008, http://www.usatoday.com/sports/columnist/brennan/2008-06-29-swim-suits_N.htm. The sand wedge golf club reduces the challenge encountered when one's golf ball lands in a sand bunker. *See* SIMON, *supra* note 28, at 84. Yet, this is considered innovation, not an unfair advantage. *See id.*

75. Beginning in 1863, baseball bats were formally regulated, setting limits on diameter and requiring that the bats be round and made of wood. *See* MARCIA L. WALKER & TODD L. SEIDLER, SPORTS EQUIPMENT MANAGEMENT 2 (1993). Regulation of baseballs soon followed, in 1866, and was later modified in 1910 when the center of the ball was changed from rubber to cork. *Id.* See generally *id.* at 2–5 for a discussion of the development of equipment regulations.

76. Indeed, during recent United States litigation against equipment manufacturers, athletic associations have raised the argument that certain equipment may threaten the competitive challenge and thus should be regulated. *See* Floyd, *supra* note 57, at 168 (explaining the associations' position that "[i]f equipment becomes 'so sophisticated that one cannot adequately distinguish the relative skill levels of the participants in their performances, the very nature of the sport is irrevocably altered'" (quoting Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GA. L. REV. 137, 162 (1999))). Conversely, the manufacturers allege that regulation of equipment violates antitrust laws and have thus attempted to prohibit athletic associations from restricting the use of their products. *See generally* Lazaroff, *supra* (discussing the controversy between sports equipment manufacturers and sports regulatory authorities). Athletic associations have not only responded with the argument that they have the right to preserve the integrity of sport, but also that certain equipment threatens the safety of athletes. *See* Floyd, *supra* note 57, at 168.

77. Karen Crouse, *Scrutiny of a Swimsuit Rises as Records Fall*, N.Y. TIMES, Apr. 11, 2008, at D2 (quoting Italian National Team Swim Coach Alberto Castagnetti). While Castagnetti certainly has a point, it may be possible that when disability is concerned, such a classification is inappropriate. *See infra* note 84 (discussing the argument that accommodation of a disability in sports may accomplish a restorative function, rather than conferring an advantage).

78. The LZR Racer swimsuit is made from "densely woven nylon-elastane material that compresses the wearer's body into a hydrodynamic shape but is extremely light." *Making No Waves*, THE ECONOMIST, June 12, 2008. Instead of traditional seams, the LZR employs ultrasonic welding, which reduces the amount of drag the swimmer experiences in the water, up to six percent. *See id.* The polyurethane material decreases drag up to an additional twenty-four percent. *See id.* In

despite the fact that it faced resistance from those claiming it conferred an advantage upon its users.[80]

One reason advanced swimsuit technology is permissible may be that the swimsuits do not present safety concerns for athletes.[81] However, considering the element of unfair advantage, the more compelling explanation of why equipment and substances are treated differently lies in the amount of human effort required. The use of prohibited substances is generally viewed as reducing or completely bypassing the challenge presented by sports, whereas the use of equipment is not. This may be due to the fact that "[a]lthough technological improvements in equipment do yield advances in achievement, the equipment must still be used by [a] person[]."[82]

III. THE CURRENT STATE OF DISABILITY LAW: A MOVE TOWARD INTEGRATION

Thus far, certain types of performance-enhancing techniques have been discussed, some of which confer an unfair advantage on a competitor. One could argue that some disability accommodations provide a similar unfair

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addition, the suit stabilizes the swimmer's core, causing the wearer to use up to five percent less oxygen. *See id.*

79. CBC News, *FINA Approves More High-tech Swimsuits*, CBC SPORTS, June 5, 2008, http://www.cbc.ca/news/story/2008/06/04/olympics-speedo-suit.html.

80. While the data regarding drag reduction and decreased oxygen use has led some to attribute the recent surge of new world records to the LZR swimsuit, others consider the suit a permissible technological development that improves performance. Michael Phelps's coach, Bob Bowman comments, "The swimmer makes the suit, not the other way around." Keith Naughton, *Making a Splash*, NEWSWEEK, June 30, 2008, at E6. Still others are concerned that, similar to golf and tennis, the sport of swimming will become driven by equipment. "The turbulent times for swimming and the focus on technology is reminiscent of the changes in tennis and golf, when wooden rackets and old-school tennis clubs went to the back of the garage for good, replaced by their sleeker composite cousins." Lisa Dillman, *As Swim Records Fall, High-tech Suit Faces Scrutiny*, L.A. TIMES, Mar. 27, 2008, at A1.

81. Conversely, regulation of aluminum bats in American collegiate baseball has been altered not only for reasons of unfair advantage but also for the safety of the athletes. *See* Floyd, *supra* note 57, at 171–72. In fact, safety has always been a valid argument to permit technological innovations. *See id.* at 174 (discussing the permissibility of helmets in various sports). Other arguments in support of allowing equipment to be used without heavy restrictions have also been advanced. For example, the use of nitrogen tents to increase endurance has not been prohibited. Nitrogen tents increase the number of red blood cells in the body, thereby increasing the flow of oxygen to the blood and organs. *See* Greely, *supra* note 56, at 114. The argument to continue to allow nitrogen tents is furthered because not only do these tents fail to endanger athletes, but they also simulate *natural conditions* experienced in high altitude, and thus, theoretically, do not destroy the challenge. *See id.*

82. SIMON, *supra* note 28, at 85.

advantage.[83] However, for the most part, accommodations of this nature are meant to be restorative, thereby leveling the playing field for all athletes, disabled or otherwise.[84] Thus, an absolute prohibition on disability

83. *See infra* Parts IV.A–B (discussing the *Pistorius* and *Martin* cases).

84. *See* S.D. Edwards, *Should Oscar Pistorius Be Excluded From the 2008 Olympic Games?*, 2 SPORT ETHICS & PHIL. 112, 121 (2008). Edwards notes that "some commentators have argued that it is just to introduce some compensatory measure to "level out" inequalities that result from the consequences of the natural and social lotteries." *Id.* Will Kymlicka, a Canadian political philosopher, states,

> People born into a disadvantaged class or race should not be denied social benefits, but also have a claim to compensation because of that disadvantage. Why treat people born with natural handicaps any differently? Why should they not also have a claim to compensation for their disadvantage . . . in addition to their claim to non-discrimination?

Id. (quoting WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY 72–73 (1990)). Allen Buchanan and his colleagues add that "[e]qual opportunity . . . requires efforts to counteract the effects of all factors beyond an individual's control . . . ." *Id.* (quoting ALLEN BUCHANAN ET AL., FROM CHANCE TO CHOICE: GENETICS AND JUSTICE 67 (2000)). Edwards suggests a possible solution: develop handicaps to level the playing field for such athletes.

> [W]e should find differing starting lines: one for those athletes brought up in geographical regions congenial to the development of performance-enhancing capacities. They would be alongside those who benefited from "undeserved" advantages. Further up, towards the finishing line, one would expect to find another starting line, this one being for those athletes who have had to overcome undeserved disadvantages stemming from the poor deal they got from the natural lottery. Due to the disadvantages the natural lottery has bestowed on [Pistorius], and the obligation to compensate for these, it could be expected both that he would be eligible to compete in the Olympics (even with a slower qualifying time) and that he would start closer to the finish line than other athletes who have not had to overcome comparable disadvantages.

Id. at 122. Although not directly applicable to sports, in the same vein, political theorist John Rawls recommends "balanc[ing] individual liberty with an equal distribution of liberty. This should be combined with a provision of the greatest benefit for the least advantaged." van Hilvoorde & Landeweerd, *supra* note 1, at 102. As Michael Shapiro states, "To protect, restore, or create normal or natural functioning seems presumptively legitimate to most . . . ." Shapiro, *supra* note 55, at 50. In an analogous discussion on gene therapy, Shapiro states that "the idea of nature as a guiding model for right action is tempered by invoking a disorder model in which interventions into nature are permissible, desirable, or even obligatory when justified by the goal of dealing with disorder—even though disorder may be natural." *Id.* at 54. "It may be hard to distinguish between attempts to control disorder or disability and attempts to enhance or augment the normal." *Id.* at 48. Consider a medical procedure as simple as setting a fractured bone. Such an act could be viewed as restorative, in that it places a fractured bone back to into its natural position. Conversely, it could be viewed as enhancement, in that it intervenes through an unnatural process. But the setting of a fractured bone, while arguably an unnatural procedure, is accepted by society for its restorative value, for "[i]t seems unfruitful to view setting a fracture as changing the trait of having a cracked bone. Nor is it a clear case of enhancement." *Id.* at 49. Another example is an emerging and more complicated procedure called platelet-rich plasma therapy, whereby doctors "inject[] portions of a patient's own blood directly into [an] injured area . . . ." Alan Schwarz, *Patient's Own Blood Shows Promise in Healing Injuries*, SAN DIEGO UNION TRIB., Feb. 17, 2009, at A1. Several recreational and professional athletes utilize this procedure, which allows ligament and tendon fibers to regenerate, for injury treatment purposes. *See id.* Among these athletes are some of sport's most prominent figures, such as Hines Ward and Troy Polamalu of the Pittsburgh Steelers, who underwent this treatment prior to winning the 2009 Super Bowl. *See id.* Arguably, this could be considered a form of performance enhancement. However, as Dr. Allan Mishra of Stanford University Medical Center comments, "It's a better option for problems that don't have a great solution—it's nonsurgical, and uses the body's own cells to help it heal . . . ." *Id.*

accommodation is unwarranted. Rather, prior to barring an athlete with a disability from competition, an individual assessment must be conducted to carefully weigh the fundamental civil rights at issue against concerns for competitive equality. In essence, in order to justify a denial of equal access, those charged with such a task must ensure that an advantage occurs to such an extent that it becomes unfair.

In order to complete this analysis, one must reach an understanding of the development of disability legislation and the intent behind such enactments. Hence, this section briefly recounts the history of prominent disability legislation.

A. The Americans with Disabilities Act

In 1990, Congress enacted the Americans with Disabilities Act (ADA) to address the prevalent discrimination against persons with disabilities.[85] Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[86] Further, Congress noted that people with disabilities not only experience discrimination as a result of "outright intentional exclusion," but also due to a "failure to make modifications to existing facilities and practices."[87] Accordingly, the ADA reflects the

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85. *See generally* 42 U.S.C. § 12101 (2006).

86. 42 U.S.C. § 12101(a)(2). A statement from the Congressional floor debate during the ADA hearings may give insight into why such pervasive discrimination occurs:

> [O]ur society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination.

Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 409 (1991) (quoting S. COMM. ON LABOR AND HUMAN RESOURCES, REP. ON THE AMERICANS WITH DISABILITIES ACT, S. Rep. No. 101-116, at 8–9 (1989)).

87. 42 U.S.C. § 12101(a)(5). These acts of exclusion and refusal to modify policies and practices in the disability context are equivalent to the acts and treatment that spawned legislation to combat racial discrimination.

> Congress made it plain in the ADA's legislative history that it believed the evils of segregation by race to be the same as the evils of segregation by disability. Congress regarded *Brown* [*v. Board of Education*] as an equally important basis for eradicating disability segregation as it had been in striking down classifications based upon race.

Cook, *supra* note 86, at 410. In discussing how discrimination can permanently affect "hearts and minds in a way unlikely to ever be undone," the Congressional committees likened the struggles of individuals with disabilities to the hardships endured by those subject to racial discrimination. *See id.* at 410 n.120 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)). "Separate is not equal. It was not for blacks; it is not for the disabled." *Id.* at 423 (quoting *Americans with Disabilities Act:*

expectation that individuals with disabilities be fully integrated in society, stating that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity [and] full participation."[88]

While the ADA has been praised for its comprehensive nature,[89] there are exemptions for certain private organizations such as "private clubs or establishments" and "religious organizations or entities."[90] However, as the Supreme Court noted in *PGA Tour, Inc. v. Martin*, "Congress made no such exception for athletic competitions, much less did it give sports organizations *carte blanche* authority to exempt themselves from the fundamental alteration inquiry."[91] Consequently, domestically, there is no reason to believe that disability accommodation in sports should be viewed any differently than disability accommodation generally.

B. The United Nations Convention on the Rights of Persons with Disabilities

The most widely-recognized international declaration concerning disability rights is the United Nations Convention on the Rights of Persons with Disabilities (the Convention).[92] The Convention seeks to defend the fundamental human rights of those with disabilities.[93] In doing so, the

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Hearing before the S. Comm. on Labor and Human Resources and the Subcomm. on the Handicapped, 101st Cong., 1st Sess. 215 (1989) (statement of former Sen. Weicker)). Further, the Senate Report states that "'[o]ne of the most debilitating forms of discrimination is segregation imposed by others,' which 'has very serious consequences. It destroys healthy self-concepts and slowly erodes the human spirit.'" *Id.* at 410–11 (quoting S. COMM. ON LABOR AND HUMAN RESOURCES, REP. ON THE AMERICANS WITH DISABILITIES ACT, S. Rep. No. 101-116, at 6 (1989)). Committee members concluded that just as "separate but equal" violated civil rights in a racial discrimination context, so it violated civil rights in a disability discrimination context. *See id.* As a result, "[u]nder the ADA, classifications that segregate persons with disabilities are henceforth to be presumptively illegal and given the same scrutiny under the ADA as classifications based upon race are given under the [F]ourteenth [A]mendment's Equal Protection Clause and the Civil Rights Act of 1964." *Id.* at 397.

88. 42 U.S.C. § 12101(a)(7) (2006). "The law seeks to integrate disabled people into mainstream society, especially within the economic and social fabric of our nation." Paul Steven Miller, Book Review, 57 J. LEGAL EDUC. 619, 619 (2007) (reviewing RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT (2005)).

89. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001). The ADA prohibits employment discrimination based on disability, ensures that public entities provide equal access to programs and services, and mandates that private entities provide equal access to places of public accommodations. *See* 42 U.S.C. §§ 12112, 12132, 12182.

90. 42 U.S.C. § 12187.

91. *Martin*, 532 U.S. at 689 n.51.

92. *See* UN.org, UN Enable – Convention on the Rights of Persons with Disabilities, http://www.un.org/disabilities/default.asp?id=150 (last visited Feb. 16, 2010). The Convention was adopted on December 13, 2006, and opened for signature on March 30, 2007. *See id.* With the most signatures of any UN Convention in its opening day, the Convention gained eighty-two signatures and one ratification. *Id.* Forty-four signatures were obtained for the Optional Protocol. *Id.*

93. *See* Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, G.A. Res. 61/106,

Convention recognizes that discrimination "hinders . . . full and effective participation in society on an equal basis with others . . . ."[94] Integral components of the Convention thus include recognizing the valuable societal contribution of those with disabilities[95] and "mainstreaming disability issues . . . ."[96] Indeed, as it applies to athletic competition, the Convention encourages "participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels . . . ."[97] Because several countries have either chosen not to adopt the Convention or instead have adopted the Option Protocol,[98] internationally, the Convention lacks the

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U.N. Doc. A/Res/61/106, *available at* http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf. The Convention "[*r*]*eaffirm*[*s*] the universality, indivisibility, interdependence, and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination . . . ." *Id.* pmbl. (c). Further, "discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person . . . ." *Id.* pmbl. (h).

94. *Id.* pmbl. (e).

95. True to its foundational human rights principles, the Convention recognizes the individual, declaring,

> [T]he valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty . . . .

Id. pmbl. (m).

96. *Id.* pmbl. (g).

97. *Id.* art. 30.5(a).

98. For instance, in the case of Pistorius, the CAS discussed the Convention, but found it inapposite to the controversy.

> The Convention on the Rights of Persons with Disabilities and its Optional Protocol . . . was adopted on 13 December 2006 at the UN Headquarters in New York, and was opened for signature on 30 March 2007. It came into force according to its terms (Art.45), thirty days after the twentieth ratification was deposited, on 3 May 2008.
>
> Signing a Convention may create an obligation, in the periods between signing and ratification, to refrain from acts that would defeat the object and purpose of the treaty. Ratification is an action taken by States that signal an intention to undertake legal rights and obligations contained in the Convention or the Optional Protocol.

Pistorius v. Int'l Ass'n of Athletics Fed'ns, CAS 2008/A/1480 at 9, (Ct. of Arb. for Sport May 16, 2008) (Hunter, Rivkin & Rochat, Arbs.), *available at* http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1480.pdf. As it pertains to Pistorius,

> Disputes arising under the IAAF Rules shall be resolved in accordance with the provisions of the Rules. The Parties agree that the law applicable to substantive issues is the law of Monaco, as the law governing the IAAF Constitution pursuant to its Article 16.
>
> . . . .
>
> . . . None of [the aforementioned] act[s of ratification] have been taken by the Principality of Monaco, and [thus] the UN Convention has not been enacted in its Law.

Id. Furthermore, the CAS found the issue of disability discrimination to be exactly that which they

mandatory effect of legislation such as the ADA in the United States. However, it remains a sweeping declaration, which mirrors the ADA in its focus on integration.

While these two examples of disability rights legislation certainly do not reflect the views of every nation,[99] they reflect the overarching international theme of integration as it concerns disability rights. Further, it is apparent from these enactments that integration is not meant to cease when applied to athletic competition.

C. *The Only Real Limitation for Athletes with Disabilities is Exclusion from Mainstream Competition*

International and domestic policies suggest that social values have shifted from seeking to exclude or ignore those with disorders and disabilities to an attitude of integration.[100] Indeed, just as the racial civil rights movement declared that segregation was no longer an option, perhaps the disability civil rights movement is headed that direction.[101] It seems that

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were deciding in applying the net advantage test.

> [T]he Convention would not be engaged in the circumstances of this appeal. By way of example, [Convention] Article 30.5 provides that Contracting State shall encourage and promote the participation of persons with disabilities in mainstream sporting activities at all levels with a view to enabling them to participate on an equal basis to sporting activities.
>
> In other words, disability laws only require that an athlete such as Mr[.] Pistorius be permitted to compete on the same footing as others. This is precisely the issue to be decided by this Panel: that is, whether or not Mr[.] Pistorius is competing on an equal basis with other athletes not using Cheetah Flex-Foot prostheses. As counsel for the IAAF rightly mentioned, if this Panel finds that Mr[.] Pistorius' Cheetah Flex-Foot prostheses provide no advantage to Mr[.] Pistorius, he will be able to compete on an equal basis with other athletes. If the Panel concludes that Mr[.] Pistorius does gain an advantage, the Convention would not assist his case.

Id. at 9–10. Therefore, the CAS Panel declined to consider Pistorius's discrimination claim, finding it was encompassed within its net advantage analysis. *See id.* at 10.

99. For a complete discussion of international disability legislation, see Wendy Scott, *Guide to Sources in International and Comparative Disability Law*, 34 SYRACUSE J. INT'L L. & COM. 621 (2007).

100. van Hilvoorde & Landeweerd, *supra* note 1, at 103 ("The worldwide trend is on appreciating, embracing, and celebrating individual differences as opposed to glorifying the norm, the normal, and normalisation as was done in the 1900s." (quoting C. Sherill, *The Changing Terminology of "Ability" and "Disability" in the Sport Context*, *in* PARALYMPIC GAMES FROM 1960 TO 2004, at 9 (E. Kioumourtzoglou & K. Politis eds., 2004))). United States Congressional intent behind the ADA supports integration and the United Nations's intent behind the Convention calls for "mainstreaming" persons with disabilities. *See supra* note 88 and accompanying text. Congressman Miller states, "In fact . . . it has been our unwillingness to see all people with disabilities that has been the greatest barrier to full and meaningful equality. Society has made them invisible by shutting them away in segregated facilities . . . ." Cook, *supra* note 86, at 424.

101. *See supra* note 87 (discussing how Congress considers segregation of those with disabilities tantamount to racial segregation, and clearly rejects the practice in both senses).

the most effective way to stop segregation is to actively integrate.[102] There is no logical reason that sports, especially Olympic sports, should be exempt from these principles.

Consequently, while the Paralympics is a progressive step toward integration,[103] some believe that athletic opportunity for individuals with disabilities should not be limited to this forum. Rather, athletes with disabilities should have the option to participate in both the Paralympics and the Olympics.[104] Others contend that allowing athletes with disabilities to compete in the Olympics will negatively impact the Paralympics, essentially turning the Paralympics into a "B final."[105] While such an argument may have merit, proponents of the former argument point to the already-perceived (albeit distorted) status of the Paralympics as second-rate

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102. *See* Cook, *supra* note 86, at 441. According to Congressman Collins, "If we have learned any lessons in the last 30 years, it is that only by breaking down barriers between people can we dispel the negative attitudes and myths that are the main currency of oppression." *Id.*

103. The Paralympic Movement is a noble venture and a vital means of integrating individuals with disabilities into the world of sports. The International Paralympic Committee (IPC), a non-profit organization, was founded on September 22, 1989. *See* Paralympic.org, Official Website of the Paralympic Movement, IPC, http://paralympic.org/IPC (last visited Feb. 15, 2009). It is comprised of 165 National Paralympic Committees from around the world and represents a variety of sports and disabilities. *Id.* The IPC governs the Paralympic Games. *Id.*

> The word "Paralympic" derives from the Greek preposition "para" ("beside" or "alongside") and the word "Olympics" (the Paralympics being the parallel Games to the Olympics). The word Paralympic was originally a pun combining 'paraplegic' and 'Olympic,' however with the inclusion of other disability groups and the close associations with the Olympic Movement, it now represents 'parallel' and 'Olympic' to illustrate how the two movements exist side by side.

Id. The vision of the IPC is as follows: "To Enable Paralympic Athletes to Achieve Sporting Excellence and Inspire and Excite the World." Paralympic.org, Official Website of the Paralympic Movement, Vision, Mission & Values, http://paralympic.org/IPC/Vision_Mission_Values.html (last visited Feb. 15, 2009).

104. Former Olympic athlete Iwan Thomas states,

> I can totally understand [the argument that participation in the Olympics will have a negative effect on the Paralympics] . . . but the fact is that [Pistorius] needs to run against the quickest athletes he can. He's already achieved great things in the Paralympics, and he's proved that he's head and shoulders above the competition there.
>
> . . . [I]f he's going to improve and compete at the highest level, he needs to progress.

Carter, *supra* note 16, at 34.

105. Dame Tanni, a British Paralympian, has expressed such concerns, stating,

> I don't want the Paralympics to turn into a B final. . . . It comes down to how the Paralympics are portrayed. There are a pile of people out there already who think that the Paralympics is secondary. People still say, "Are you going to the main Olympics?" not "the Olympics and Paralympics."
>
> I have no issue with Oscar running at grand prix meets and so on, as Oscar will bring people into athletics. Oscar is a big story. It's just the long-term effect on the Paralympics that I have concerns about.

Id.

compared to the Olympics.[106] Further, if an accommodated athlete has an advantage over an able-bodied athlete, the same athlete may have an even greater advantage over other athletes with disabilities.[107] Perhaps the most compelling argument for integration is that, from a civil rights standpoint, prohibiting an athlete from progressing seems contrary to the victories already won for disability rights.[108] With this in mind, the following section examines how athletes with disabilities, who have overcome so much, continue to face resistance when attempting to participate in able-bodied sporting events.

IV. DISABILITY LAW APPLIED IN A SPORTS CONTEXT

While many nations have enacted disability laws, very little case law exists interpreting how these laws apply to individuals participating in sports.[109] Sports are generally independently regulated by individual athletic

106. *See* van Hilvoorde & Landeweerd, *supra* note 1, at 103 ("The change of terminology can not hide the huge difference in status attached to winning a medal as an able-bodied or a disabled athlete. This difference very clearly explains the ultimate wish for a disabled athlete to become part of the competition for elite athletes."). However, a representative of the IPC, Steffi Klein, disagrees: "The growing media and spectator interest show[] that people are interested in the [Paralympics] and get inspired by the athletes . . . . We do not see it as a B event." Carter, *supra* note 16, at 34.

107. *See* Edwards, *supra* note 84, at 123 ("If [Pistorius] has an advantage on 'able-bodied' runners, then this is surely true in relation to the Paralympics too—at least in those races in which he is the sole competitor using two blades."). The CAS concluded similarly that the Flex-Foot Cheetahs® used by Pistorius have been available for a decade, and "yet no other runner using them—either a single amputee or a double amputee—has run times fast enough to compete effectively against able-bodied runners . . . ." Pistorius v. Int'l Ass'n of Athletics Fed'ns, CAS 2008/A/1480 at 13 (Ct. of Arb. for Sport May 16, 2008) (Hunter, Rivkin & Rochat, Arbs.), *available at* http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1480.pdf.

108. As noted by Congress, many people with disabilities express "'fear and self-consciousness about their disability stemming from degrading experiences they or their friends with disabilities have experienced.'" Cook, *supra* note 86, at 411 (quoting S. COMM. ON LABOR AND HUMAN RESOURCES, REP. ON THE AMERICANS WITH DISABILITIES ACT, S. Rep. No. 101-116, 7, 11 (1989)). As a result, they "participate much less often in a host of social activities that other Americans regularly enjoy, including going to movies, plays, sports events, and going out to eat at restaurants." *Id.* (quoting *Americans with Disabilities Act: Hearing before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 66, 131 (1989)). Here, we have an athlete, Pistorius, who has not only conquered this fear in his personal life, but has forged ahead into elite athletic competitions. It seems inconsistent to relegate him back to a segregated event.

109. This may be due somewhat to the lack of appropriate technology to accommodate athletes with disabilities. As technology improves, however, the number of these cases may increase. *See* Alexis Chappell, Comment, *Running Down a Dream: Oscar Pistorius, Prosthetic Devices, and the Unknown Future of Athletes with Disabilities in the Olympic Games*, 10 N.C. J.L. & TECH. ONLINE ED. 1, at 16, 20–21 (2008), *available at* http://jolt.unc.edu/abstracts/volume-10/ncjoltonlineed/p16. According to Ivo van Hilvoorde and Laurens Landeweerd, this may also be attributed to the fact that "[t]here is no medical categorisation of disabilities that fits smoothly and logically into the context of sport." van Hilvoorde & Landeweerd, *supra* note 1, at 99. The IAAF and IOC's definitions of disability derive from those set forth by the World Health Organization (WHO). *See* Edwards, *supra* note 84, at 114. The definitions, however, are problematic and have prompted controversy.

governing associations,[110] however, these organizations have struggled to fairly determine the eligibility of the few elite athletes who have sought accommodation measures.[111] As a result, courts such as the United States

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Following the WHO's introduction of the International Classification of Impairments, Disability and Handicaps (ICIDH) in 1980, the "concept of disease and disability was heavily debated." van Hilvoorde & Landeweerd, *supra* note 1, at 99, 103. Christopher Boorse based his definition of disability on concepts of nature and normal functioning relative to nature. *See id.* at 99–100. In essence, the definition derived from the difference between health, defined as "'the ability to perform all typical physiological functions with at least typical efficiency level,'" and disease, defined as "any state that interferes with this normal functioning." *Id.* at 99 (quoting Christopher Boorse, *Health as a Theoretical Concept*, *in* 44 PHIL. SCI. 542 (1977)). Critics of this naturalist approach, including Tristam Engelhardt, posit that heath and disease cannot be solely analyzed according to biological principles. *See id.* at 100. Instead, Engelhardt opts for a normative approach to the definition of disability, considering disability a product of socio-cultural values. *See id.*

> Being disabled is not something one is by definition, but something one becomes in relation to specific environments. Disability is enacted and ordered in situated and quite specific ways. People can become disabled by the environment or by specific (lack of) technologies. A person with an average intellectual ability may "become" disabled in an environment with just highly gifted people. An elite athlete who chooses not to use performance-enhancing substances may become dis-abled in a context in which the use of doping is "normalised[.]" In these cases (and in many similar cases) one can argue that one is free to choose the "right" environment in which specific qualities can be shown and compared to "relevant others."

Id. (quoting I. Moser, *Disability and the Promises of Technology: Technology, Subjectivity and Embodiment Within an Order of the Normal*, 9 INFO. COMM. & SOC'Y 373, 374 (2006) (internal quotation marks omitted)). Some would say the debate was resolved by the introduction of the WHO's International Classification of Functioning, Disability and Health (ICF) in 2001. *See id.* at 103. The ICF presented a new model, regarding disability not as a "characteristic (that is present all the time) but a state that may be present in certain environments or resulting from specific interactions with other people." *Id.* Following Engelhardt's analysis, this terminology proposes that all people operate with abilities and disabilities, in some form. *See id.* This analysis should also be compared with another definition, set forth by Lennart Nordenfelt, stating that "if one can do everything that is important to one, then one is not disabled." Edwards, *supra* note 84, at 114. Such a definition is consistent with Pistorius's view that he is not disabled. *See supra* note 3.

110. *See supra* note 58 (discussing the role of organizations such as the IOC, WADA, USADA, NBA, NFL, MLB, and NCAA in regulating sports).

111. While van Hilvoorde and Landeweerd point to this conflict between the principles of elite sport and the rights of those with disabilities, they suggest that, viewed relative to a normal standard, most elite athletes are disabled in some form:

> What may be considered "normalisation" in the context of daily life is at least ambivalent in the context of elite sport. . . . The wish of a disabled person to become part of "normal" elite sport may be framed as a way of "inclusion" or "integration[,]"[] but this at the same time reproduces new inequalities and asymmetries between performances of able and dis-abled bodied.
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> . . . [H]owever, the ideal of the elite sportsman has all characteristics of abnormality as well. But in contrast to the disabled, the elite sportsman is not considered a political and medical burden. So on the one hand society invests quite willing in the "abnormal" super-abilities of the elite sportsman, while on the other it does this only reluctantly, and from a [sic] ethics of inclusion, with respect to the disabled. In the case of disabilities, one wants to eradicate abnormalities by equalising on the basis of "sameness[,]"[] while

Supreme Court and the Court of Arbitration for Sport have intervened, issuing influential rulings in this novel area of law.[112]

A. The Seminal United States Case: Casey Martin

In *PGA Tour, Inc. v. Martin*, the United States Supreme Court affirmed the Ninth Circuit's decision allowing professional golfer Casey Martin[113] to use a golf cart during Professional Golf Association (PGA) tournaments despite the PGA's walking requirement.[114] After determining that the ADA applied to Martin in his capacity as a participant,[115] the Court analyzed the

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> in the case of super-abilities we support abnormalities. This "selective investment in the abnormal" and the admiration for the "genetically superior" could be seen as a token of society that cannot meet up with the criteria for justice. On the other hand, sport is a competitive practice, whose internal logic consists of the display of an unequal distribution of abilities. These internal goods are considered worth striving for, for their own sake. Sport consists of an internal logic that may conflict with more societal ideals (for example concerning justice or equality). These internal goods cannot be brought in agreement with the ideal, for example, to create as many sport categories as possible with the aim of producing as many sports stars as possible. It may be that everyone has certain abilities and disabilities; we cannot however freely choose the practice in which our own specific abilities are admired by people around the world.

van Hilvoorde & Landeweerd, *supra* note 1, at 100–01 (citations omitted). This viewpoint illustrates that disability is in the "eye of the beholder." Society views certain attributes, which could be considered disabilities, as assets. This is consistent with defining disability in a normative way. *See supra* note 109 (discussing the idea that all people have disabilities and that the true definition of disability stems from whether those attributes are esteemed or despised by society).

112. *See infra* Parts IV.A–B.

113. Casey Martin is an American with a disability, within the meaning of the ADA. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 668 (2001). Martin was born with Klippel-Trenaunay-Weber Syndrome, a progressive circulatory disease that causes pain and atrophy in his right leg. *Id.* As a result, Martin cannot walk an eighteen-hole golf course. *Id.* When Martin played for Stanford University, the Pacific Ten Conference and the NCAA waived the walking requirement to accommodate him. *Id.* The PGA also waived the requirement during the first two stages of competition, but refused to continue the accommodation when Martin reached the third stage. *Id.* at 669. Subsequently, Martin filed suit for injunction, permitting him to use a cart. *Id.*

114. *Id.* at 690–691. *But cf.* Olinger v. U.S. Golf Ass'n, 205 F.3d 1001, 1005 (7th Cir. 2000) (deciding that Olinger's use of a golf cart "would fundamentally alter the nature of the competition," and providing that the United States Golf Association was not required to allow accommodation).

115. *Martin*, 532 U.S. at 681. The Court found that a golf course was a place of public accommodation within the meaning of Title III of the ADA. *Id.* at 677. A place of public accommodation is defined liberally under twelve categories, and includes places such as hotels, restaurants, banks, concert halls, convention centers, museums, libraries, social service centers, health spas, and *golf courses*. *See id.* at 676–77 & n.24; *see also* 42 U.S.C. § 12181(7)(A)–(L) (2006). The PGA argued that places of public accommodation need only be made equally accessible if the person attempting to gain access is a client or customer. *Martin*, 532 U.S. at 678. Because Martin was a professional golfer, the PGA maintained that his claim should be analyzed under Title I of the ADA, which addresses employment accommodations. *Id.* The PGA further asserted that because Martin was an independent contractor, he was not entitled to bring a claim against the PGA under Title I. *Id.* The Supreme Court rejected this argument, stating that the clause referencing clients or customers did not apply to the ADA as a whole, but only to a specific provision dealing with contractual rights. *Id.* Further, because Martin paid the PGA an entry fee for a chance to

modification request, balancing Martin's right to equal access with the PGA's right to maintain the integrity of golf.[116]

Under Title III of the ADA,[117] discrimination is defined as

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.[118]

Because the PGA conceded that Martin's use of a golf cart was both reasonable and necessary,[119] the Court focused on whether his use of the cart fundamentally altered golf as a sport.[120] The Court suggested that a sport could be fundamentally altered in two ways.[121] In the first instance, fundamental alteration occurs if the rules of a sport are changed for everyone, but in such a way that no reasonable person recognizes the sport as the same game.[122] In the second instance, fundamental alteration occurs when the rules are changed in a minor way for one individual in a manner that allows that particular individual to receive an advantage over other participants.[123] In such a case, the rules are altered in a way that does not comport with the character of the sport.[124] As Martin did not request that a

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compete, he could be classified as a customer. *Id.* at 679–80.

116. *Martin*, 532 U.S. at 682–91.

117. *See supra* note 115 (discussing why Title III is applicable in the *Martin* case).

118. 42 U.S.C. § 12182(b)(2)(A)(ii) (2006) (emphasis added).

119. *Martin*, 532 U.S. at 682. The Court distinguished Martin's situation from that of a hypothetical player with a more moderate injury, whose modification request may be reasonable, but not necessary. *See id.*

120. *See id.* at 682–91.

121. *Id.*

122. *Id.* The majority borrows this definition from the Scalia dissent, which states, "I suppose there is some point at which the rules of a well-known game are changed to such a degree that no reasonable person would call it the same game." *Id.* at 701 (Scalia, J., dissenting).

123. *Id.* at 682–83.

124. *Id.* The dissent argues that equal access does not mean an equal chance to win. *See id.* at 703 (Scalia, J., dissenting). Simon discusses a similar argument by Ronald Dworkin:

> Consider the distinction made by legal scholar Ronald Dworkin between the right to equal treatment, "which is the right to an equal distribution of some opportunity of resource or burden," and the right to treatment as an equal, which is the right "to be treated with the same respect and concern as anyone else." Unlike equal treatment, equal respect and concern do not require the identical distribution of a good, such as playing

golf cart be permitted for every participant, the Court undertook an individualized analysis of whether Martin's use of a cart in contravention of the walking requirement afforded him an unfair advantage over other competitors.[125]

First, the Court determined that the walking rule is not essential to golf.[126] Second, adopting the district court's determination, the Court declared that the purpose of the walking rule is "to subject players to fatigue[,]" which in turn potentially influences the outcome of tournaments.[127] Third, the Court analyzed whether alteration of the rule for

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> time on a basketball team. Thus, if one of my children is ill and the other isn't, treatment as an equal does not require that I divide the sick child's medicine in half. Rather, giving all the medicine to the sick child is compatible with and may even be required by equal respect and concern for both children. This suggests, as Dworkin maintains, that the right to treatment as an equal, or the right to equal respect and concern, is more fundamental ethically than the right to equal treatment. This is because factual inequalities in distribution, or what Dworkin calls unequal treatment, may or may not be defensible depending upon whether they are compatible with the showing of equal respect and concern to all affected.

SIMON, *supra* note 28, at 33 (citations omitted).

125. The dissent argues that the PGA should not be required to undergo an individualized analysis, warning that such a mandate would impose a significant burden on the PGA should others attempt such a request. *See Martin*, 532 U.S. at 702–03 (Scalia, J., dissenting). The majority sharply disagrees, stating, "nowhere . . . does Congress limit the reasonable modification requirement only to requests that are easy to evaluate." *Id.* at 691 n.53; *see also* 42 U.S.C. § 12182(b)(2)(A)(ii) (2006). Further, in the three years since Martin requested permission to use a golf cart, no one else has sued the PGA, and only two golfers have sued the United States Golf Association on the same issue. *Martin*, 532 U.S. at 691 n.53.

126. This analysis required the Court to consider the historical origins of golf. *See Martin*, 532 U.S. at 683–85.

> [T]he use of carts is not itself inconsistent with the fundamental character of the game of golf. From early on, the essence of the game has been shotmaking—using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible.

Id. at 683. Citing examples of amateur contests, the PGA's own Q-school events, and social golf, the Court determined walking was not "an indispensable feature of tournament golf." *Id.* at 685. Further, many golfers choose to walk to relieve stress. *See id.* at 687–88.

127. *See id.* at 671, 690. The Court considered testimony from some of golf's greatest players, who discussed the purpose of the walking requirement. Jack Nicklaus testified as follows:

> Q. Mr. Nicklaus, what is your understanding of the reason why in these competitive events . . . that competitors are required to walk the course?
>
> A. Well, in my opinion, physical fitness and fatigue are part of the game of golf.
>
> Q. So are you telling the court that this fatigue factor tends to accumulate over the course of the four days of the tournament?
>
> A. Oh definitely. There's no doubt.

Id. at 670 nn.14–15 (citations omitted). Ken Venturi also testified:

> Q. Does this fatigue factor that you've talked about, Mr. Venturi, affect the manner in which you—you perform as a professional out on the golf course?
>
> A. Oh, there's no doubt, again, but that, that fatigue does play a big part. It will influence your game. It will influence your shot-making. It will influence your decisions.
>
> Q. Based on your experience, do you believe that it would fundamentally alter the nature of the competition on the PGA Tour and the Nike Tour if competitors in those events

Martin frustrates that purpose, thereby fundamentally altering the nature of the golf tournament.[128] The Court agreed with the district court, which found that "the fatigue [Martin] suffers from coping with his disability is 'undeniably greater' than the fatigue his able-bodied competitors endure from walking the course."[129] As a result, Martin's use of a golf cart does not contravene the purpose of the walking requirement; namely, it does not give him a competitive advantage when taken in conjunction with his disadvantages.[130] Thus, the Court determined that allowing Martin to use a golf cart does not fundamentally alter golf as a sport and, as such, his use of a cart is permitted.[131]

The Supreme Court is not the only court to handle disputes concerning disability accommodation in sports. Seven years after *Martin* was decided, a similar international dispute arose.

B. The Leading International Case: Oscar Pistorius[132]

Oscar Pistorius's conflict with the IAAF was resolved when the Court of Arbitration for Sport (CAS)[133] tackled the critical issue of determining the

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were permitted to use golf carts?
A. Yes, absolutely.
Q. Why do you say so, sir?
A. It would—it would take away the fatigue factor in many ways. It would—it would change the game.
Q. Now, when you say that the use of carts takes away the fatigue factor, it would be an aid, et cetera, again, as I understand it, you are not testifying now about [Martin]. You are just talking in general terms?
A. Yes, sir.

Id. at 670 nn.15–16 (citations omitted).

128. *Id.* at 671.

129. *Id.* at 672. Even with the use of a golf cart, Martin walked over a mile during an eighteen-hole round of golf. *Id.* at 671–72. The Supreme Court noted that he suffered significant physical pain due to his condition. *Id.* at 672. Additionally, the Court found that the psychological stress Martin experienced outweighed that of the other competitors because every time he played, he risked serious injury. *Id.* "To perceive that the cart puts him—with his condition—at a competitive advantage is a gross distortion of reality." *Id.*

130. *Id.* at 690–91.

131. *Id.* at 690 ("A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to 'fundamentally alter' the tournament.").

132. *See supra*, Part I (discussing the background information of the *Pistorius* case).

133. In the early 1980s, the number of international sports-related disputes was rising. *See* Tribunal Arbitral du Sport – Court of Arbitration for Sport, History of the CAS – General Information, Origins, http://www.tas-cas.org/history (last visited Feb. 16, 2010). Yet, there was no independent authority specializing in sports-related disputes, which was authorized to "pronounce binding decisions." *Id.* This problem led to the formation of the CAS in 1984. *Id.* The CAS only hears commercial and disciplinary disputes between parties who have an arbitration agreement

meaning of an "advantage" over another athlete.[134] The CAS rejected the proposition that the use of *any* technical device creates a presumptive advantage over another athlete.[135]

Instead, the CAS interpreted IAAF Competition Rule 144.2(e) to require an analysis of the "overall *net* advantage over other athletes."[136] The CAS considered evidence that the original IAAF investigation did not, including tests conducted by Pistorius's own scientific experts, which showed that he "did not have a metabolic advantage" and that he fatigued normally.[137] Pistorius's tests also evaluated the amount of energy loss from the cheetah prostheses in comparison with the amount of energy loss from a human leg, which the IAAF tests did not consider.[138] Ultimately, the CAS revoked the IAAF's decision, finding insufficient evidence of a net metabolic or biomechanical advantage.[139] It declared Pistorius eligible to compete in

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specifying the CAS as the means of recourse. *See* Tribunal Arbitral du Sport – Court of Arbitration for Sport, History of the CAS – General Information, Types of Disputes Submitted to the CAS, http://www.tas-cas.org/en/infogenerales.asp/4-3-239-1011-4-1-1/5-0-1011-3-0-0/ (last visited Feb. 16, 2010).

134. Prior to analyzing the question of advantage, the CAS rejected Pistorius's claim of unlawful discrimination, finding that disability laws only require that entry into the competition, not accommodation, be provided. *See* Pistorius v. Int'l Ass'n of Athletics Fed'ns, CAS 2008/A/1480 at 9–10 (Ct. of Arb. for Sport May 16, 2008) (Hunter, Rivkin & Rochat, Arbs.), *available at* http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1480.pdf; *see also supra* note 98 (discussing the CAS's determination of the issue of discrimination in the *Pistorius* case).

135. *Pistorius*, 2008/A/1480 at 10–11.

136. *Id.* at 10 (emphasis omitted). "If the use of the device provides more disadvantages than advantages, then it cannot reasonably be said to provide an advantage over other athletes, because the user is actually at a competitive disadvantage." *Id.* at 10–11.

137. *Id.* at 12.

138. *Id.*

139. The IAAF admitted that most of the metabolic findings were inconclusive. *Id.* The Panel found the biomechanical effects to be inclusive, stating,

> [T]he scientists do not know if the fact that able-bodied runners create more vertical force than Mr. Pistorius is an advantage or disadvantage. There is at least some scientific evidence that sprinters, including 400m runners, train themselves to bounce more (ie, [sic] to use more vertical force) because it creates more speed.

Id. at 13. In addition, the Panel stated that energy lost through a human ankle may be redistributed to other body parts, but it was impractical to account for energy lost through Pistorius's prostheses because of the prostheses' "spring-like" qualities. *Id.* However, the Panel continually referred to the Flex-Foot Cheetahs® as passive devices. Hugh Herr, Associate Professor at Massachusetts Institute of Technology, also recognized this, stating, "The prosthetic [sic] he's using is completely passive—it's just a spring." Charlish & Riley, *supra* note 7, at 933 (quoting posting of Amber Smith to Health & Fitness Blog, http://blog.syracuse.com/healthfitness/2007/08/todays_athletic_prosthetics_ar.html (Aug. 7, 2007, 0:03 EST)). Hugh argues that the human foot generates its own energy upon contact with the ground, whereas a spring does not produce its own energy, but only returns a percentage of the energy put in. *Id.* In 1987, a study of a device similar to the Flex-Foot Cheetahs® showed that the prosthesis in question had an 82% spring efficiency compared with a human foot, which generated 241% spring efficiency. *Id.* This data differs from a conversation between Brüggemann and a German newspaper, in which Brüggemann stated that the Flex-Foot Cheetah® prosthesis returned 90% of impact energy compared with 60% returned by the human foot. *Id.* This vast difference in figures calls into question whether an accurate assessment is possible and is consistent

IAAF-sanctioned events.[140] Although the net advantage test is not error-free,[141] when viewed from a disability rights protection standpoint, the CAS seemingly reached the right result. With this in mind, the next section will explore whether the CAS determination preserves or destroys the essence of competition.

C. *Does Disability Accommodation Necessarily Destroy Athletic Competition?*

If the purpose of competition is the mutual quest for excellence through challenge, accommodating a legitimate disability does not automatically undermine this purpose.[142] The question of whether accommodation

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with the Panel's determination that the IAAF did not provide sufficient evidence of a distinct advantage.

140. *Pistorius*, 2008/A/1480 at 132. The CAS explicitly declared that its decision only applied to Pistorius while he was wearing the Flex-Foot Cheetah® that had been tested. *Id.* at 14. It also stated that future scientific advances may make testing more accurate, and that sufficient evidence to show that Pistorius's prostheses provided him a net advantage over other athletes may be available in the future. *Id.* Although he was eligible to compete, Athletics South Africa did not choose Pistorius to compete on the South African Olympic Relay Team because four other runners had faster times. *See, e.g.*, Robinson, *supra* note 18, at D1. Pistorius competed in the 2008 Paralympic Games, where he won Gold medals and set Paralympic World Records in the 100 meter, 200 meter, and 400 meter races. *See, e.g.*, Associated Press, *Pistorius Wins Third Gold*, N.Y. TIMES, Sept. 17, 2008, at D2.

141. *See infra* Part V.B–C (discussing the shortcomings of the net advantage test and making suggestions for improvement).

142. It is important to distinguish between accommodating a legitimate disability and simply conferring an unfair advantage upon an athlete who may not truly need accommodation. This would typically require a brief analysis of the definition of disability. However, the definitions in both the ADA and the Convention are problematic. The ADA defines a disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A) (2006). This definition has been criticized as ambiguous. For example, courts have given the phrase "substantially limits" a "greater degree of limitation than was intended by Congress" and have "express[ed] too high a standard." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(7)–(8), 122 Stat. 3553–54 (2008). Such interpretation spurred a recent Congressional amendment, directing agencies to modify their definitions of "substantially limit" to a less restrictive interpretation, although Congress neglected to define the phrase "less restrictive" and essentially left the statutory language intact. *Id.* § 2(b)(6); *see also* John W. Parry & Amy L. Allbright, *The ADA Amendments Act of 2008: Analysis and Commentary*, 32 MENTAL & PHYSICAL DISABILITY L. REP. 695, 696 (2008) ("At the same time, however, Congress has left the most significant problem with the original Act's definition in place by keeping the substantial limitation language in the 'actual' prong."). International definitions have been just as ambiguous. *See supra* note 109 (discussing debate over whether the WHO's definition of disability should be interpreted from a naturalistic or normative perspective). With the ambiguity surrounding the definition of disability, it may be difficult to determine which "disabilities" are worthy of accommodation and which are not. Theoretically, it seems that there would be a clear line between the types of enhancements considered permissible and those that are prohibited. *See supra* Part II.C. (discussing the reasons behind permitting or prohibiting performance-enhancing substances and equipment).

destroys competition must be addressed by considering the essence of competition and the particular rules of each sport, both of which are reflected in the tests set forth in the seminal cases above. The *Pistorius* case focuses on whether disability accommodation provides a net advantage over another athlete.[143] The philosophical underpinnings of this test directly relate to concerns about compromising the nature of competition. On the other hand, the *Martin* case focuses on whether disability accommodation fundamentally alters an individual sport.[144] In essence, this test determines whether disability accommodation contravenes the specific rules of the competition, and thus indirectly addresses the nature of competition.

In the case of Pistorius, the challenge is seemingly intact, and if anything, it may be even greater. In deciding that Pistorius does not have a

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However, while completely contrary to the ideals of sports ethics, it is possible that some athletes could disguise attempts to gain an unfair advantage under the umbrella of disability accommodation. The story of Kelli White (White) presents this interesting dilemma. After winning two gold medals at the IAAF-sponsored world outdoor championships in 2003, White, an American sprinter, tested positive for a substance called *modafinil*. *See* Greely, *supra* note 56, at 126–27; CBC Sports, American Sprinter Kelli White Accepts Drug Ban (May 19, 2004), http://www.cbc.ca/sports/story/2004/05/19/kelliwhite040519.html. Marketed as *Provigil*, *modafinil* increases alertness and is commonly prescribed for sleep disorders such as narcolepsy and sleep apnea. *See* Greely, *supra* note 56, at 127. It is used by athletes as a performance enhancer because it provides heightened awareness without side effects commonly associated with caffeine or amphetamines. *Id.* However, *modafinil* is a non-specified stimulant banned by WADA. *WADA Rules*, *supra* note 61, § S6(a). White, who has a family history of narcolepsy, appeared before the IAAF, claiming she received a prescription for *modafinil* for a sleeping disorder. Greely, *supra* note 56, at 126–27. White subsequently acknowledged her *modafinil* use was driven by competitive rather than health concerns, stating that other athletes were participating in doping practices. *Id.* at 127. Perfectly illustrating the concerns of the coercion argument proponents, White believed she had to subscribe to a similar regimen to remain competitive. *Id.*; *see also supra* note 66 and accompanying text (discussing that some athletes may feel forced to use performance-enhancing substances to remain competitive). As a result of her confession, the IAAF and USADA disqualified White's previous competitive race times, stripped her of her medals and $120,000 prize money, and suspended her from competition for two years. *See* Greely, *supra* note 56, at 127; CBC Sports, *supra*. White made a commitment to assist the USADA with its efforts to fight doping and has since shared her story, hoping to educate other athletes and thereby curb the doping problem. *See* Testimony of Sprinter Kelli White, House Committee on Oversight and Government Reform, http://oversight.house.gov/images/stories/documents/20050615105348-72046.pdf (last visited Feb. 16, 2010). While White now admits her use of *modafinil* was motivated by her desire to level the competitive playing field, suppose she had been legitimately suffering from narcolepsy. How would the IAAF handle such a situation? In theory, someone who suffers from a legitimate disorder should be able to correct it, whether surgically or medicinally, and should still be able to participate in sports or other activities. *See* Greely, *supra* note 56, at 126 ("People suffering from anemia as a result of chemotherapy or kidney dialysis should be able to use Epogen and (if they are able) compete; the rest of us should not."). However, opposition arises when this type of remedy does more than level the playing field, when it creates an unfair advantage. This is exactly what the CAS addressed when deciding Pistorius's fate. *See supra* note 136 and accompanying text (discussing the CAS decision to implement a *net* advantage test).

143. *See supra* notes 1–17, 133–41 and accompanying text.

144. *See supra* notes 113–31 and accompanying text.

conclusive advantage,[145] the CAS implied that Pistorius still endures the challenge presented by competitive running.[146] Moreover, Pistorius undoubtedly faces several difficulties that able-bodied competitors do not.[147]

Likewise, in the *Martin* case, the Supreme Court determined that the walking rule is designed to subject players to fatigue. Because Martin experiences such fatigue while possibly enduring even greater mental and physical stress,[148] the challenge remains undiminished.

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145. Indeed, these advantages and disadvantages were not conclusively determined by some of the top biomechanics experts in the world. *See supra* notes 12, 139 (explaining that the test results produced by Professor Brüggemann on behalf of the IAAF were inconsistent with the test results produced by Pistorius's team of scientists). Peter Charlish and Stephen Riley question whether a proper determination is possible, asking,

> [I]s it possible to quantify the disadvantages that Pistorius has suffered throughout his life and continues to suffer as a direct result of his disability? Just as Pistorius suffers no fatigue in his legs below his knees, similarly he is only able to produce propulsive effects via muscles above his knees. The likely net effect of his particular personal circumstances must be extremely difficult, if not impossible, to accurately quantify.

Charlish & Riley, *supra* note 7, at 936.

146. Pistorius v. Int'l Ass'n of Athletics Fed'ns, CAS 2008/A/1480 at 13 (Ct. of Arb. for Sport May 16, 2008) (Hunter, Rivkin & Rochat, Arbs.), *available at* http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1480.pdf. Pistorius's efforts may be overlooked when his victories are attributed to the use of prosthetic devices, rather than to his dedication. Ampie Louw, Pistorius's coach, says, "Insufficient credit is given to Pistorius's resolve in the weight room and on the track." Longman, *supra* note 3, at A1. Louw describes one of Pistorius's intense workouts as follows: "[It] requires him to run 350 meters in 42 seconds; 300 meters in 34.6 seconds; 200 meters in 22 seconds and 150 meters in 15.4 seconds." *Id.* "The kid is a born champion . . . . He doesn't settle for second best." *Id.* S.D. Edwards also points to such dedication, stating,

> [A]s well as overcoming considerable levels of prejudice and disadvantage due to his disability, [Pistorius] is as dedicated and trains as hard as any top athlete. The blades are mere means that make it possible for him to manifest his athletic prowess in his chosen events; they compensate for his lack of legs.

Edwards, *supra* note 84, at 115. For further discussion on the issue of compensation or restoration, see *supra* note 84.

147. Even Pistorius's fellow Olympic athletes recognize the obstacles he has overcome to be considered an elite athlete. Former British Olympian Iwan Thomas states, "I think [Pistorius] should be allowed to run. I don't think it's an issue . . . . I know there have been studies and stuff, but I cannot see how not having any lower legs can give him any form of advantage." Carter, *supra* note 16, at 32. Justin Gatlin, an able-bodied Olympic 100-meter sprinter, states,

> If you can reach the time legally? You should be able to run. . . . I'll race those guys. Marlon and [Pistorius] are pioneers. In a couple years you'll see Paralympians running times almost equivalent to mine. I take my hat off to them. They work twice as hard as me, and they have a lot more to worry about.

The Archrival: South African Teenager Oscar Pistorius Has Passed Shirley in the 200 Meters—and Incurred His Wrath, SPORTS ILLUSTRATED, May 23, 2005, at 58, *available at* http://vault.sportsillustrated.cnn.com/vault/article/magazine/MAG1111353/index.htm.

148. *See supra* notes 125–30 and accompanying text.

It is evident that these cases and the legal tests within them reflect both the fundamental policies underlying disability accommodation and the essential principles associated with preserving the integrity of sports. While the net advantage and fundamental alteration tests deliberately endeavor to preserve the integrity of individual sports, they do not explicitly attempt to integrate athletes with disabilities. When applied to Martin and Pistorius, however, the results have the effect of integration. Thus, the tests seemingly strike a proper balance between preserving athletic competition and promoting disability rights.

V. THE CORRECT RESULT WITH AN INEFFICIENT APPLICATION

Although the fundamental alteration and net advantage tests successfully balance the competing interests at hand and seem to reach a correct result, these tests can nevertheless be greatly improved. This section identifies the tests' various shortcomings and presents an alternative approach with a more accurate outcome.

A. The Fundamental Alteration Test: Subjective and Inconsistent[149]

The purpose of the fundamental alteration test as applied to sports[150] is to determine if the *essence* of the particular sport in question has been altered. Such an analysis first requires a court to identify the essence that should be protected.[151] This first step can present problems before a court

149. Applying the fundamental alteration test under the ADA presumes that the athlete's requested accommodations are both reasonable and necessary, and that the forum in question is a place of public accommodation. *See supra* notes 115–19. Because most legitimate athletic accommodation requests are reasonable and necessary and most athletic competitions occur in places of public accommodation, this Comment concentrates on the fundamental alteration element of the ADA, and relies on it as the true "test" to be applied in this context.

150. The fundamental alteration test is not just applied to sports, but derives specifically from the language of the ADA, which seeks to prevent discrimination in employment, places of public accommodation, government programs, and the like. *See* 42 U.S.C. §§ 12112, 12132, 12182 (2006).

> [D]iscrimination includes . . . a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. § 12182 (b)(2)(A)(ii) (emphasis added). Because, in *Martin*, the PGA conceded that Martin's accommodations were both reasonable and necessary and the Supreme Court determined that the PGA tournament constituted a place of public accommodation, it applied the fundamental alteration test. *See supra* note 115 and accompanying text.

151. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 683 (2001). The Supreme Court noted that "[a]s an initial matter . . . the use of carts [was] not itself inconsistent with the fundamental character of the game of golf." *Id.* The Court further defined the essence of golf, according to the rules, as

even begins to analyze whether the alleged violation of a particular rule undermines this essence. In the *Martin* case, the Supreme Court did not face a difficult determination because, according to the majority opinion, the essence of golf is easily determined from golf's constitutive rules.[152] The dissent, however, sarcastically criticizes this conclusion, implying that the duty to define golf should in no way rest with the courts.[153] Along the same lines of the dissent's argument, a more complicated situation would arise

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"shotmaking." *Id.*

152. The Court delved into the history of golf and the Rules of Golf, which state, "The Game of Golf consists in playing a ball from the *teeing ground* into the hole by a *stroke* or successive strokes in accordance with the rules." *Id.* at 684. The Court cited several changes in the way the clubs are transported, beginning with the addition of golf bags, moving to caddies, and finally to golf carts. *Id.* at 685. Additionally, the Court noted the positive effects of golf carts on the sport, namely that the speed of play is increased and that golf carts produce revenue for the game. *Id.* The Court determined that nothing in the original rules of golf prevented or discouraged a player from using a golf cart, and as a result, such activity should not be prohibited. *Id.*

153. Justice Scalia's dissent states,

> [W]e Justices must confront what is indeed an awesome responsibility. It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government's power "[t]o regulate Commerce with foreign Nations, and among the several States" . . . to decide What Is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot really a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a "fundamental" aspect of golf.

Martin, 532 U.S. at 700 (Scalia, J., dissenting) (citations omitted). While determining the essence of a sport may seem like a fairly easy task, the question of whether Supreme Court Justices should be given the authority to create definitions, as opposed to interpreting them, is an important one. While Justices often make complicated determinations on subject-matter for which they lack professional training, such a practice would raise concerns of how accurate the Justices' definitions might be. A similar, yet much more complicated, analogy can be drawn to issues of claim construction in patent law cases. Currently, the United States legal system allows for patent cases to be brought in federal district courts, subject to appeal with the United States Court of Appeals for the Federal Circuit, which has exclusive nationwide jurisdiction over such appeals. *See* 28 U.S.C. § 1295 (2006). According to an empirical study conducted by Kimberley Moore, an Associate Professor of Law at George Mason University School of Law, thirty-three percent of cases appealed to the Federal Circuit were subject to an improper claim construction determination at the district court level. Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1, 1–2 (2001). Moore suggests that such an error rate raises doubts about the abilities of district court judges to properly adjudicate complex patent issues. *See id.* at 3. While patent law is admittedly much more complex, similar doubts are raised concerning the accuracy of definitions as they pertain to sports. As the Seventh Circuit noted in *Olinger v. United States Golf Association*, 205 F.3d 1001 (7th Cir. 2000), "the decision on whether the rules of the game should be adjusted to accommodate [Olinger] is best left to those who hold the future of golf in trust." *Id.* at 1007.

should a sport neglect to clearly define its essence within its rules.[154] The Pistorius case presents such an obstacle.[155] The IAAF has not specifically

154. Legislatures could require each individual sport, and each league within those sports, to define the essence of the sport. However, asking athletic governing organizations to self-regulate is not an easy task. Consider the kind of pressure Congress was forced to place on Major League Baseball before the league agreed to intensify steroid regulations. Upon reviewing the league's drug policies, a House Committee found that the guidelines were extremely lenient. *See* Duff Wilson & Michael S. Schmidt, *Baseball Braces for Tough Report from Mitchell*, N.Y. TIMES, Dec. 13, 2007, at D1. "The penalty for a first offense was actually a 10-day suspension or a fine. If a player was only fined, he would not be identified." *Id.* Members of Congress were outraged as they felt that the league had misled them about the substance of the policies. *See id.* Subsequently, Bud Selig, the league's commissioner, "wrote the union to ask for a new steroids policy, 'three strikes and you're out.' It would apply a 50-game suspension for a first offense, 100 games for a second offense and a lifetime ban for a third offense." *Id.* Selig's suggestion was approved in December 2005. *See id.* Selig appointed former Congressman George Mitchell to conduct an investigation three months later. *See id.* While Major League Baseball's drug policies have certainly evolved, the process has been slow. It seems that to require each sport to undertake a similar process in creating definitions for each activity within a sport would be just as laborious, and very impractical. Further, ultimate adjudication of the constitutionality of such definitions would rest with the courts, thereby coming around full-circle. It seems if the fundamental alteration test were applied, it would save much hassle to simply allow the courts, through consideration of tradition and standards for each sport, to create definitions in the first place. *But see* discussion *supra* note 153 (discussing the problems associated with courts defining the essence of sports). This specific problem is addressed *infra* Part V.

155. The lack of a proper definition makes it difficult to determine if Pistorius is participating in the sport of running. *See* van Hilvoorde & Landeweerd, *supra* note 1, at 99, 106 ("This debate cannot, however, be detached from the more conceptual question on the definition of running, and what could still be considered a norm for (human) running."); *see also* Edwards, *supra* note 84, at 120 ("[T]he proper focus of the debate should be whether or not what [Pistorius] does counts as running. Only if it does can he legitimately compete in a running race."). Justice Scalia's dissent in *Martin* posed the idea that the rules of a sport could change so drastically that one would not recognize the activity as the same sport. *See supra* note 122 and accompanying text. van Hilvoorde and Landeweerd present an analysis similar to Scalia's concept, but framed specifically to address Pistorius's situation:

> The question is whether Pistorius is playing the *same game* as his opponents. We argue that he is not because he is showing another and extra skill, namely handling his prosthesis [sic] in an extremely talented way. Prostheses may have a considerable influence on the outcome of the game. This, however, is not an argument in itself that this competition should be excluded from the regular Olympic Games.

van Hilvoorde & Landeweerd, *supra* note 1, at 99, 108 (emphasis added). While the definition of running is ambiguous, fundamentally, Pistorius's limbs, although prosthetic, move in the same "running" motion as human limbs. Consider the following two definitions of the word "running." Richard Weil, an exercise physiologist, defines running as going "steadily by springing steps so that both feet leave the ground for an instant in each step. That's the key: both feet are in the air at once. During walking, one foot is always on the ground. Jogging is running slowly, and sprinting is running fast." Richard Weil, Running (Jogging), http://www.medicinenet.com/script/main/art.asp?articlekey=82015 (last visited Feb. 16, 2010). Accordingly, if Pistorius's prostheses are considered "feet," his actions would be running. Whether Pistorius's prosthetic devices can be defined as such remains an unanswered question. Consider the following statement by Leon Feliser, a general manager of the South African Olympic Committee: "'The rule book says a foot has to be in contact with the starting block. . . . What is the definition of a foot? Is a prosthetic device a foot, or is it an actual foot?'" Longman, *supra* note 3, at A1.

The only explicit direction from the IAAF regarding the definition of an athletic sport similar to running comes from IAAF Rule 230, which defines "race walking" as

defined running or sprinting.[156] If such a determination were presented to a court, the court would be required to engage in a subjective analysis, independently determining the essence of running.

Subjectivity exists not only in defining the sport but also in defining the advantages and disadvantages each athlete faces. The *Martin* court, while probably correct in its determination, found that Martin faces serious physical and psychological disadvantages.[157] This conclusion, however, appears to be based on judicial observations rather than scientific evidence.[158] If possible, such observations should be supported with scientific data, thereby increasing the objectivity and consistency of judicial rulings.

Because the fundamental alteration test is inherently subjective, it is also prone to producing contradictory results. Approximately one year prior to the Supreme Court's decision in *Martin*, the Seventh Circuit issued a ruling that barred professional golfer Ford Olinger (Olinger) from using a golf cart during United States Golf Association (USGA) tournaments.[159] Similar to

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> a progression of steps so taken that the walker makes contact with the ground, so that no visible (to the human eye) loss of contact occurs. The advancing leg shall be straightened (i.e. not bent at the knee) from the moment of first contact with the ground until the vertical upright position.

Int'l Ass'n Athletics Fed'ns, Competition Rules, R. 230 (2008), *available at* http://www.iaaf.org/mm/Document/imported/42192.pdf. Reverse engineering this definition might be helpful. Running could seemingly be defined as a progression of steps taken so that the *runner loses contact with the ground.* Under this definition, Pistorius would seemingly be running as well.

156. Perhaps this is because the concept of running seems very straightforward. It is possible that, similar to mountain climbing, discussed *supra* note 44, running does not have a set of distinct constitutive rules, which clearly define it. Mountain climbing isn't just about getting to the top, but about doing so by climbing and employing strategies confined by the bounds of nature, not the rules. *See supra* note 44. Running could be defined similarly, as an attempt to get to the finish line as fast as possible by using one's legs (whether human or prosthetic).

157. *See supra* note 129 and accompanying text (noting Martin's psychological stress and physical pain associated with his disability).

158. The *Martin* court simply recites observations made by the district court, without reference to any sort of testing. According to the district court judge,

> [P]laintiff is in significant pain when he walks, and even when he is getting in and out of the cart. With each step, he is at risk of fracturing his tibia and hemorrhaging. The other golfers have to endure the psychological stress of competition as part of their fatigue; Martin has the same stress plus the added stress of pain and risk of serious injury. As he put it, he would gladly trade the cart for a good leg. To perceive that the cart puts him—with his condition—at a competitive advantage is a gross distortion of reality.

Martin, 532 U.S. at 672. While there is no question that these observations are indeed true, they remain observations and, as such, do not have the force or weight of scientific data.

159. Olinger v. U.S. Golf Ass'n, 205 F.3d 1001, 1007 (7th Cir. 2000). Prior to the Supreme Court's decision in *Martin*, the Ninth Circuit issued a ruling in Martin's favor. *See Martin*, 532 U.S. at 674 ("the day after the Ninth Circuit ruled in Martin's favor, the Seventh Circuit came to a

Martin, Olinger, whose condition significantly impairs his ability to walk,[160] is considered a person with a disability under the ADA.[161] The Seventh Circuit's fundamental alteration analysis was markedly similar to the Supreme Court's analysis in *Martin*, assessing such factors as the purpose of the walking requirement and its effect on the game of golf.[162] The two cases, however, produced conclusions that could not be more opposite. The *Olinger* court considered testimony of professional golfers and the traditions of golf and concluded that "[t]he accommodation . . . while reasonable in a general sense, would alter the fundamental nature of [the U.S. Open],"[163] whereas the *Martin* court determined that, because of its peripheral nature, modifying the walking requirement would not fundamentally alter the sport of golf.[164] Such a drastic difference with such similar facts suggests that the test itself is problematic when applied in a sports context. Perhaps courts should apply a test that bases its results on more objective criteria.

B. The Net Advantage Test: An Improvement, but Difficult to Apply

The net advantage test, although flawed, provides a much more objective approach to determining whether an athlete should be accommodated. This objectivity is attributed to the fact that the net advantage test focuses on the athlete rather than the sport,[165] and the fact that it relies not on philosophical definitions, but on extensive scientific data and analyses to reach conclusions.[166] Although an argument can be made that the net advantage test also produces inconsistent results, these inconsistencies are not attributable to the test itself, but rather to the facts given in support of each argument.[167] Drastic discrepancies in factual expert

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contrary conclusion in [*Olinger*].").

160. Olinger has been diagnosed with bilateral avascular necrosis, a degenerative condition that causes him significant difficulty when walking. *See Martin*, 532 U.S. at 674 n.19.

161. *Olinger*, 205 F.3d at 1001.

162. *See id.* at 1006–07.

163. *Id.* at 1006.

164. *See supra* note 131 and accompanying text.

165. If the true aim of athletic competition is a "mutual quest for excellence through challenge," it seems appropriate to focus on whether the particular athlete continues to face the challenge, rather than to focus on whether or not the sport itself has been altered. *See* SIMON, *supra* note 28, at 27; *see also supra* note 39 and accompanying text (discussing the concept of a "mutual quest for excellence through challenge"). Additionally, the ADA, from which the fundamental alteration test is derived, calls for an individual assessment of the athlete. *See infra* note 177. Arguably, a test that encompasses an analysis of both the individual athlete and the individual sport could be devised. However, the net advantage test virtually encompasses the idea of the fundamental alteration test. By testing the individual athlete and ensuring that an unfair advantage is avoided, the net advantage test ensures that the sport is not fundamentally altered.

166. *See supra* note 136 and accompanying text (noting consideration of both biomechanical and metabolic evidence to determine whether a net advantage exists).

167. *See supra* note 139 (discussing the drastically different results reached by the IAAF's experts

findings, however, are not uncommon in legal disputes, nor are they inconsistent with a traditional adversarial legal system. As a result, such contradictory evidence does not necessitate abandonment of the net advantage test.

Although in theory the net advantage test appears to provide a much more reliable outcome, in practice, the test poses many problems for athletes with disabilities and for athletic governing organizations (AGOs). First, while the net advantage test is objectively based in science, it lacks a specific set of factors to support its standard, which may cause confusion as to what exactly should be tested.[168] The CAS noted this ambiguity when discussing the tests conducted by the IAAF's experts and Pistorius's experts.[169] However, the court failed to remedy this confusion by providing a set of factors to consider.[170] Second, the test requires a significant time commitment on the part of both the athletes and the AGOs. In addition to the normal constraints of litigation,[171] the extensive series of tests and scientific analysis may cause an athlete to miss important competitive athletic events.[172] This may indeed be the situation with regard to Pistorius, who was declared ineligible in January 2008, and received a final ruling

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and Pistorius's experts).

168. *See* Chappell, *supra* note 109, at 24 (noting the "miscommunication surrounding the factors to be tested").

169. The CAS noted the confusion experienced in testing Pistorius's prostheses:

> Professor Brüggemann made it clear that he did not believe that his mandate was to determine all of the advantages and disadvantages of running with the *Cheetah Flex-Foot* prosthesis. It was to determine whether or not it provided *an advantage* on the measures he was asked to undertake. It follows, in the view of the Panel, that the Cologne Report does not answer the question that the Panel is required to decide. This is not the fault of Professor Brüggemann, whom the panel regards as a scientist having expertise and integrity. It originates from the mission he was given by the IAAF.

Pistorius v. Int'l Ass'n of Athletics Fed'ns, CAS 2008/A/1480 at 7 (Ct. of Arb. for Sport May 16, 2008) (Hunter, Rivkin & Rochat, Arbs.), *available at* http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1480.pdf.

170. Chappell, *supra* note 109, at 26 ("The court missed an opportunity to enumerate the factors the IAAF should consider when evaluating prosthetics [sic] for eligibility under its amended rules of competition."). Even if the CAS had identified factors, its ruling would not be binding on United States courts. Nonetheless, that does not mean that United States courts cannot learn from the CAS test. In fact, because it is more accurate, perhaps United States lawmakers should consider amending the ADA to include a similar provision for competitive athletics.

171. *See* Chappell, *supra* note 109, at 22 (noting that the "need for legal representation and the costs of testing and appearing before the CAS [may] deter athletes with disabilities from seeking approval to compete in IAAF-sanctioned events").

172. While the original IAAF tests lasted only two days (November 12–13, 2007), Pistorius was required to respond to the test results within one month's time and underwent his own tests in February 2008. *Pistorius*, 2008/A/1480 at 4, 8, 12.

from the CAS in May 2008.[173] During this four-month period when he fought a draining legal battle, Pistorius missed valuable training sessions, which may have cost him a seat on the South African Olympic team.[174] Third, the financial burden of litigation[175] and extensive testing,[176] whether assigned to the athlete or the AGO, is significant. Fourth, it has been argued that AGOs do not have the resources to conduct individualized testing on every athlete with a disability who requests accommodation.[177] While these

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173. *See supra* notes 15–17 and accompanying text.

174. *See* Chappell, *supra* note 109, at 22. Peet Van Zyl, Pistorius's agent commented,

> [Pistorius] knew it was going to be tough and he gave it his best shot. One can't expect more of a guy who has had about 9 to 10 weeks to train.
>
> . . . .
>
> We had to be in court; we had to fly to Europe for tests; we had to fly to Germany for tests . . . . You can't train all the time and see your coach all the time, so of course it had a negative effect.

Robinson, *supra* note 18, at D1. Indeed, Robinson observes that "[a] year of distractions off the track might have taken a toll." *Id.* It has also been noted that "[w]hen physical training is markedly reduced or stopped for a period longer than 4 weeks, the VO_{2max} [the maximal oxygen intake] of highly trained athletes declines by 6 to 20% . . . . In addition, long term inactivity may promote a decline in cardiac dimensions and ventilator efficiency . . . ." Chappell, *supra* note 109, at 22 n.39 (quoting Iñigo Mujika & Sabino Padilla, *Detraining: Loss of Training-Induced Physiological and Performance Adaptions*, 30 SPORTS MED. 145, 145 (2000)).

175. While Pistorius was represented by Dewey & LeBoeuf LLP on a pro bono basis, other athletes may not have this luxury. *See* Chappell, *supra* note 109, at 21 & n.31. In addition to legal representation costs, court costs—such as the 500 Swiss francs required to file an appeal with the CAS and costs for expert witnesses—are cumbersome. *See id.* at 22. Finally, travel to and lodging in Lausanne, Switzerland, the location of the CAS offices, is expensive. *See id.*

176. The IAAF expended approximately €30,000 on initial testing of Pistorius and his prosthetic devices. *See id.*

177. Because the CAS holding is limited to Pistorius individually, and applies to him only when he uses the Flex-Foot Cheetah® prostheses, there is great potential for continued litigation. *See Pistorius*, 2008/A/1480 at 14. Should Pistorius desire to use other prosthetic devices, the IAAF, and potentially the CAS, would have to issue a new decision based on a new set of testing results. *See* Chappell, *supra* note 109, at 22. Additionally, other athletes who use prostheses will have to endure similar testing should the IAAF challenge their eligibility. *See id.* at 22–23. While such a burden may at first seem daunting, the Supreme Court in *Martin* addressed similar concerns posed by the PGA. *See Martin*, 532 U.S. 661, at 690–91 n.53.

> [W]e think petitioner's contention that the task of assessing requests for modifications will amount to a substantial burden is overstated. As Martin indicates, in the three years since he requested the use of a cart, no one else has sued the PGA, and only two other golfers (one of whom is Olinger) have sued the USGA for a waiver of the walking rule. In addition, we believe petitioner's point is misplaced, as nowhere in § 12182(b)(2)(A)(ii) does Congress limit the reasonable modification requirement only to requests that are *easy* to evaluate.

Id. (emphasis added). Scalia's dissent in *Martin* criticizes such an individual application, stating,

> [F]uture cases of this sort will be numerous, and a rich source of lucrative litigation. One can envision the parents of a Little League player with attention deficit disorder trying to convince a judge that their son's disability makes it at least 25% more difficult to hit a pitched ball. (If they are successful, the only thing that could prevent a court order giving the kid four strikes would be a judicial determination that, in baseball, three strikes are metaphysically necessary, which is quite absurd.)

shortcomings do not require that the net advantage test be completely rejected, together they reveal a need to further define the test's components.

C. *Remedying the Ambiguities of Advantage Testing*

As alluded to above, the principal criticism of the net advantage test is directed toward its vague approach to resolving the issue of disability accommodation in the context of sports. Specifically, one of the major flaws of the net advantage test lies in the fact that it lacks proper factors to determine whether an athlete is or is not gaining a net advantage.[178] A proper test might include a combination of factors similar to those tested by the IAAF's experts and Pistorius's experts. For example, such factors could encompass: (1) evidence of increased maneuverability, (2) the amount of metabolic energy expended, (3) the amount of oxygen consumed, (4) a comparison of energy loss through a prosthetic limb as compared to a human limb, and (5) fatigue experienced by the athlete as compared to other elite athletes.[179] While this list of factors is not exhaustive, it certainly provides more direction than the current standard.

Id. at 702–03 (Scalia, J., dissenting). The majority opinion takes issue with Scalia's critique of the individualized inquiry. In fact, the majority claims that both the express language and the underlying purpose of the ADA call for an individualized inquiry.

> Petitioner's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. As previously stated, the ADA was enacted to eliminate discrimination against "individuals" with disabilities, and to that end Title III of the Act requires without exception that any "policies, practices, or procedures" of a public accommodation be reasonably modified for disabled "individuals" as necessary to afford access unless doing so would fundamentally alter what is offered. To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.

Id. at 688 (citations omitted). *See also* H.R. REP. NO. 101-485, pt. 2, at 340 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 ("[E]ntities are required to make . . . decisions based on facts applicable to individual applicants"); Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999) ("[W]hether a person has a disability under the ADA is an individualized inquiry.").

178. Because the intersection of sports with disability rights is such a novel and undeveloped area of law, the CAS may have been reluctant to articulate a set of specific factors. Additionally, because the evidence presented by the IAAF's experts was so drastically different from the evidence presented by Pistorius's experts, the CAS was able to simply issue a ruling based on inconclusive findings, thereby avoiding the daunting task of formulating a specific test, which would undoubtedly be subject to intense scrutiny. *See supra* note 139 (discussing that the inconclusive results mandated a finding of eligibility).

179. *See* Chappell, *supra* note 109, at 26. The factors set forth in this Comment are not identical to those tested by the IAAF's and Pistorius's experts, as those factors were tailored specifically to running with prosthetic devices. Because the net advantage test should be designed to encompass

Once factors have been established, other issues with such a test may be quickly resolved through simple regulatory measures. The lack of guidance as to appropriate timing, i.e., the point in the competition process when this type of challenge to an athlete's eligibility should be asserted, could be remedied simply by scheduling the evaluation process at the outset of an athlete's career, so as not to disrupt training to the detriment of the athlete. While this may impose more burdens on AGOs because of the sheer volume of athletes who would require testing,[180] such an approach would eliminate missed opportunities and gaps in performance.[181] In any case, even if the number of athletes requiring such testing increases, the immediate encumbrance will not be so high as to create an undue burden for AGOs.[182] Further, if athletes who have already been tested and approved to compete wish to change their prosthetic devices, they may elect to do so, knowing that further testing and litigation may disrupt their careers in the future.[183] In deciding whether the athlete or the AGO should bear the cost of initial testing, drafters of such a regulatory provision should consider that a requirement for an athlete to bear costs above and beyond the equipment

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sports and disabilities other than those tested in the *Pistorius* case, to the extent possible, the ideal net advantage factors should be universally applicable. If the factors strictly mimicked those tested by the IAAF's and Pistorius's experts, significant problems would arise with cross-application among different sports. For example, suppose a prosthetic device was developed that allowed an athlete improved lateral movement. In running, this may not make a significant impact. However, in a sport such as basketball, improved lateral movement would have a dramatic effect, and could potentially produce an unfair advantage. Moreover, in a situation involving lateral movement, a factor testing vertical force, which was tested in the *Pistorius* case, may be inapposite.

180. In *Martin*, the Supreme Court did not think that so many golfers would request accommodation as to constitute an undue burden on golf associations. *See supra* note 177 and accompanying text. The language of the ADA provides,

> [A] failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, *unless* the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or *would result in an undue burden* . . . .

42 U.S.C. § 12182(b)(2)(A)(iii) (2006) (emphasis added). At least one author has speculated that the number of competitive athletes with disabilities will increase. "With more and more soldiers returning from Afghanistan and Iraq with disabling injuries and high-tech fixes, the population of disabled American athletes is growing as a faster rate than anything since the Vietnam war." Charlish & Riley, *supra* note 7, at 939 (quoting Steve Goldberg, *Do Disabled Athletes Have an Edge?*, TIME, June 8, 2007, *available at* http://www.time.com/time/world/article/0,8599,1631050,00.htm). Without more, testing should be mandatory, that is, until AGOs can demonstrate beyond speculation that an undue burden will be imposed.

181. *See supra* note 174 and accompanying text (noting that Pistorius may have missed qualifying for the 2008 Beijing Olympics due to extensive testing and litigation surrounding his dispute with the IAAF).

182. *See supra* note 180 (discussing that any entity must *demonstrate* an undue burden before being relieved of a duty to accommodate).

183. *See supra* notes 140, 177 (discussing the limitations of the CAS's holding with regard to Pistorius and the possible implications should Pistorius request to use new prostheses).

itself may constitute a form of discrimination.[184] Consequently, placing this burden on AGOs seems more appropriate.[185] In the event that an athlete contests an AGO's ruling, however, this cost of litigation should remain with the athlete until the litigation has been resolved, in which case costs and attorneys' fees should be awarded to the prevailing party.[186] Simple guidelines such as these provide athletes and AGOs with proper direction to carry out what is currently an ambiguous test.

The foregoing remedies support the underlying philosophy of the net advantage test, which seeks to balance the interests of both athletes and AGOs in promoting disability accommodation and preserving the integrity

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184. The Code of Federal Regulations prohibits surcharges imposed against persons with disabilities.

> A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

28 C.F.R. § 36.301 (2009). As the Ninth Circuit acknowledged, "surcharges against disabled people constitute facial discrimination." Dare v. California, 191 F.3d 1167, 1171 (1999). In evaluating whether a fee constitutes a surcharge, it must be determined whether such a fee is imposed to satisfy a mandate of the ADA. *See id.* If the charge is not to fulfill ADA requirements, the inquiry ends. *See id.* If the fee is intended to fulfill ADA requirements, it must be determined whether it

> constitutes a charge that nondisabled people would not incur. If nondisabled people pay the same fee for an equivalent service, the charge to disabled people would not constitute a surcharge on a "required" measure. Thus, for example, a state can charge a fee for disabled license plates so long as it charges the same fee for nondisabled license plates.

Id.

185. Chappell, *supra* note 109, at 27 ("If the IAAF thought amending its rules of competition to define devices was important, it should also bear the costs of fulfilling its duty to ensure that all competitors play by the rules."). This line of thinking is consistent with the ADA's mandate that reasonable accommodation *be provided* unless there is an imposition of an undue burden. *See supra* note 180. It is clear from the language of the ADA that the public accommodation, i.e., the entity enacting the policies, should provide (meaning "pay for") the accommodation. *See* 42 U.S.C. § 12182(b)(2)(A)(iii) (2006). Alternatively, it may seem prudent to have equipment manufacturers bear the costs of initial testing because they are profiting from sales of such equipment. One could envision testing occurring as a part of a company's research and development department. However, this would undoubtedly cause an uproar amongst the manufacturers. Considering companies have lodged objections to equipment bans, which have been imposed for safety reasons, it is likely that additional costs associated with testing would be vehemently contested. *See supra* note 76 (discussing litigation between equipment manufacturers and athletic governing organizations over proposed regulations). Further, antitrust laws may be implicated. *See id.*

186. This type of cost burden analysis conforms to standard United States litigation principles, which typically require plaintiffs to finance litigation until there is a determination of liability in the action. *See* FED. R. CIV. P. 54(d)(1)(2). Typically costs are awarded to the prevailing party, and attorneys' fees can be recovered by a request to the court in the form of a motion. *See id.*

of sport. Additionally, these suggestions contemplate a more accurate result, which ultimately benefits all interested parties.

VI. CONCLUSION

Civil rights activists continually demand recognition of basic rights to equal access, an endeavor which should not cease simply because sports are involved. If the rules must change or if society's view of acceptable sports practices must be altered, so be it.[187] For if change is not forthcoming, then it is possible that there will be no place for athletes like Oscar Pistorius. Indeed, if Pistorius is banned from able-bodied events, but is too competitive for disabled events, he is effectively left without a forum to display his athletic talent.[188] Such an injustice can hardly be acceptable, for "[t]hrough birth or circumstance, some are given certain gifts, but it's what one does with those gifts, the hours devoted to training, the desire to be the best, that is the true heart of a champion."[189] With that in mind, the judicial process owes champions like Pistorius the right to a fair and accurate determination of eligibility—a determination based on objective criteria, which not only seeks to preserve the essence of a sport, but also properly advances fundamental civil liberties in the process.

Sarah J. Wild*

187. In discussing normative arguments against performance enhancement, Michael Shapiro states, "[s]ooner or later we must ask whether the norms in question ought to be vindicated." Shapiro, *supra* note 55, at 53. It certainly would not be the first time sports have undergone a transition to further civil rights. *See supra* note 22 (discussing how the introduction of minority athletes, such as Jackie Robinson, in sports had a powerful impact on the racial civil rights movement).

188. *See supra* note 84 (discussing the possibility that if Pistorius has an advantage over able-bodied athletes, he may also have an advantage over other athletes with disabilities).

189. Erik Weihenmayer, *Oscar Pistorius*, TIME, May 12, 2008, at 64, *available at* http://www.time.com/time/specials/2007/article/0,28804,1733748_1733756_1735285,00.html.

* Juris Doctor Candidate, 2010, Pepperdine University School of Law. First and foremost, I want to dedicate this Comment to my brother, Matthew Wild, whose compelling story prompted my efforts, and whose unwavering strength and courage are truly an inspiration. I also want to express my sincere gratitude to my parents, David and Susan Wild, for their constant support, guidance, and encouragement throughout my life, law school career, and especially during the drafting of this Comment. I would also like to thank the entire Pepperdine Law Review staff for their tireless effort and dedication to the production of this Comment. Finally, special thanks to my Note and Comment Editor, Michael Isaac Miller, for guiding me during the writing process and reading countless drafts of this text; to my Literary Citation Editor, Michael Mewborne, for assisting me with consistency and form; to Steven Houchin, for constantly encouraging me to pursue my ambitions, even in the face of adversity; and to Professor Steven Schultz, for developing my writing skills and building my confidence.