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needed future work on the ethics of biometric technologies in sport and beyond. ■

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The Legality of Biometric Screening of Professional Athletes

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In their thoughtful article, “Tracking U.S. Professional Athletes: The Ethics of Biometric Technologies,” Katrina Karkazis and Jennifer Fishman do an excellent job of outlining the concerns associated with the widespread adoption of biometric technologies in professional sports. They rightfully note that in the United States the use of biometric data outside of health care and research remains largely unregulated. The authors assert that this absence of regulation creates “risks of exploitation, coercion, and employee discrimination” (Karkazis and Fishman 2017, 46).

Several aspiring professional athletes have seen their careers cut short by biometric screening. In 2013, Star Lotulelei’s status in the National Football League (NFL) draft plummeted following an irregular electrocardiogram (EKG) (Rosenthal 2013). Likewise, in 2014, Isaiah Austin withdrew from the National Basketball Association (NBA) draft after being diagnosed with Marfan syndrome (Associated Press 2014). And in 2016, three NFL hopefuls—Jaylon Smith, Myles Jack, and Reggie Ragland—all ended up second-round draft picks due to suspected medical problems (Smith 2016a; Smith 2016b).

Athletes who are already playing professionally are also vulnerable. The team doctors for the New York Giants encouraged David Wilson to retire because of his spinal stenosis, even though some experts believe that the condition does not create any heightened risk of spinal-cord injury (Schonbrun

2014). And the Chicago Bulls refused to resign Eddy Curry without a genetic test because of concerns that Curry had a potentially deadly genetic heart condition (Rice 2006).

Yet does the law offer any protection? In the course of their careful analysis, Karkazis and Fishman note that the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) should cover professional athletes but conclude that “protection from federal regulations like GINA or the ADA is, at best, uncertain and more likely insufficient” (Karkazis and Fishman 2017, 47). While we agree that uncertainties remain regarding how existing laws apply to the increasingly extensive biometric screenings faced by professional athletes, we believe that the authors are too quick to dismiss the ADA and GINA. In fact, as discussed at length in our forthcoming law review article, “Evaluating NFL Player Health and Performance: Legal and Ethical Issues,” these two laws regulate professional sports leagues’ and their teams’ access to current and prospective players’ health- and performance-related information in several important ways (Roberts et al. 2017).

The ADA seeks to address discrimination on the basis of disability. While it may seem odd to apply a law designed to promote disability rights to elite athletes who represent the pinnacle of physical ability, the statute has provisions that apply to all individuals, regardless of their

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disability status. Moreover, as noted in the examples at the beginning of this commentary, even individuals with exceptional athletic talent may have physical or mental impairments. The ADA's employment discrimination title covers employers of 15 or more employees, employment agencies, and labor organizations. As such, the law would appear to apply to professional sports teams, players' unions, and perhaps even the leagues themselves.

The most relevant ADA protections with regard to biometric screenings are its provisions dealing with medical examinations and disability-related inquiries. To start, the law prohibits all preemployment medical examinations without exception. Before extending a job offer, all an employer can do is ask a prospective employee about his or her ability to perform job-related functions. An employer can, however, condition an offer on an employee's ability to pass a medical exam, although that exam must be administered to all entering employees, its results must be kept confidential, and the employer cannot use the information it obtains to discriminate on the basis of disability. Even during employment, an employer cannot require medical examinations or make disability-related inquiries, unless they are job related and consistent with business necessity. Importantly, these provisions apply regardless of whether the employee or applicant has a legally recognized disability. Although not all the biometric technologies that Karkazis and Fishman describe may rise to the level of medical examinations regulated by the ADA, devices that monitor heart rate, breathing, blood pressure, brain activity, muscle function, hydration, and even temperature are all arguably collecting medical data.

The ADA also prohibits employers from discriminating against individuals with actual, past, or even perceived disabilities, provided the individual can perform the essential job functions with or without reasonable accommodation ("qualified individuals"). The applicability of these portions of the ADA to professional athletes is less clear. Determining whether someone can perform the essential job functions of playing professional sports is a difficult question, given the elite nature of each position and the limited number of roster spots. While professional athletes represent the "best" at their respective sports, adopting a relative—as opposed to an absolute—standard of performance could undermine the ADA's protections. Teams and leagues could attempt to defend otherwise impermissible discriminatory behavior by asserting that the athlete is not a "qualified individual." We discuss how to evaluate such a defense in greater depth in our forthcoming article.

Furthermore, the ADA expressly permits employers to discriminate on the basis of disability for health and safety reasons. However, an employer invoking that defense must show that employing the person with a disability poses an actual risk. Hence, the New York Giants would likely have faced difficulties lawfully terminating David Wilson's contract because of his spinal stenosis without objective, scientific evidence that his condition threatened his health or safety. To be clear, however, in that case, Wilson voluntarily retired in 2014.

GINA also provides protection. It prohibits discrimination on the basis of genetic information in health insurance and in employment. The statute applies to several different kinds of employers, employment agencies, labor organizations, and training programs. Like the ADA, GINA covers teams, players' unions, and possibly the leagues. The statute defines genetic information as someone's genetic test results, the genetic test results of family members, and family medical history. If genetic screening for athletes seems far-fetched, consider that in 2012 ESPN and the direct-to-consumer genetic testing company 23andMe tested 100 professional football players to see whether they were, as researchers put it, "genetic outliers" (Assael 2012). To date, genetic information is generally not considered a good predictor of athletic ability, but researchers and genetic testing companies continue to make claims to the contrary (Pitsiladis et al 2013). Accuracy concerns aside, teams and leagues may have an interest in players' genetic information as part of their biometric screenings.

GINA includes both privacy and antidiscrimination protections. With respect to privacy, the statute prohibits simply asking a current or prospective player for genetic information, whether it is a genetic test or family medical history. The law includes exceptions for inadvertent requests and acquisitions (including for commercially or publicly available documents like court records or newspapers), wellness programs, compliance with family and medical leave laws, occupational monitoring of toxic substances, and law enforcement. Had GINA been in effect when the Chicago Bulls asked Eddy Curry to take a genetic test, the team's request would likely have violated the statute. Additionally, unlike the ADA, GINA does not limit its protections to qualified individuals and does not provide a health- or safety-related exception.

Professional sports leagues and their teams are not immune from the ADA or GINA. Under American law, neither players nor their unions can prospectively bargain away statutorily guaranteed rights, and neither statute contains an exemption for professional sports. Thus, it would seem that the ADA and GINA offer professional athletes at least some meaningful legal protection related to biometric screenings.

Of course, the leagues and their teams may not always comply with the law. As we argue in our forthcoming article, in the context of the NFL, a variety of the league's and its teams' activities may run afoul of one statute or the other. For example, the NFL Combine—where prospective players are subjected to a variety of physical and medical examinations and drills—may violate the ADA's prohibition on preemployment medical examinations. Even post-offer medical examinations (as are common with free agents) may be rendered unlawful if the team or the NFL releases the player's confidential health-related information to the media or other unauthorized third parties (as teams often do to explain why no contract was signed). When a team rescinds an offer or takes other adverse action against a player, it could be

discriminating based on a legally recognized disability. Finally, requests for family medical history both during the Combine and as part of the standard NFL preseason physical violate GINA.

With respect to the biometric screening of professional athletes, our recommendations center around four C's: compliance, clarity, circumvention, and changes to existing statutory schemes. First, we encourage the leagues and their teams to take a closer look at their policies and practices to ensure they are in full compliance. When the applicability of a given law is unclear, we urge them to seek clarification. We also caution against using corporate structuring or other techniques to circumvent these legal protections. And finally, we recognize that Congress may want to revisit how the ADA and GINA apply to professional sports and change the current law.

CONFLICTS OF INTEREST

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Wearable Technologies in Collegiate Sports: The Ethics of Collecting Biometric Data From Student-Athletes

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The wearable technology market is booming and more than 400 million wearable smart devices, worth about \$34 billion, will be sold in 2020 (Lamkin 2016). Fitness, activity,

and sports trackers represent more than 60% of this market. Examples of wearable devices that collect biometric data include heart-rate and sleep monitors, as well as devices

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