

TROUBLED WATERS: DIANA NYAD AND THE BIRTH OF THE GLOBAL RULES OF MARATHON SWIMMING

*Hadar Aviram**

Introduction	31
I. Social Solidarity and the Latent Functions of Law	36
A. Durkheim and Functionalism.....	36
B. Division of Labor, Solidarity, and Social Change ..	37
C. The Ubiquitousness of Crime and the Latent Functions of Law.....	41
D. Deviance and Functionalism in Sports Literature	45
II. Background:.....	47
A. Marathon Swimming and Diana Nyad’s Cuba-to-Florida Swim	47
1. Defining Marathon Swimming.....	47
2. Ethos and Regulation in Marathon Swimming.	49
3. Spartanism.....	52
4. Self-Sufficiency	54
5. Honesty and Integrity	55
6. Humility	56
7. Minimalism	57

* Professor of Law, Harry and Lillian Hastings Research Chair, UC Hastings College of the Law. Marathon swimmer (lengthwise crossing of the Sea of Galilee [13 miles], Swim the Suck 10-mile [Tennessee River Gorge], Tampa Bay Marathon Swim [DNF – shoulder injury at mile 18], 11-mile Portland Bridge Swim, USMS 10km Championship [Applegate Lake], Three Seas in Three Days [three consecutive 10k swims], La Jolla Roughwater 5k [Gatorman], eleven successful Alcatraz crossings). I am grateful to Donal Buckley, Evan Morrison, and David Takacs for their comments, to Deanna Dyer for her meticulous research assistance, and to Chuck Marcus for his indispensable library assistance.

2014]	<i>Troubled Waters</i>	31
	B. Diana Nyad's Swim from Cuba to Florida	59
III.	Durkheim Goes Swimming:.....	66
	A. Law, Solidarity, and the Latent Functions of Deviance	66
	1. Deviance: An Opportunity to Foster Solidarity.	66
	2. Deviance Begets Rules	72
	3. Using Deviance to Clarify Norm Hierarchy	78
	4. Deviance as an Opportunity to Facilitate Change and Dialogue	83
	Conclusion and Broader Implications	86

INTRODUCTION

The quiet community of Key West buzzed with excitement and anticipation. As reports of arriving craft reached the shores, thousands of people flocked to the seaside to welcome Diana Nyad to shore.

It took a while before the sixty-four-year-old swimmer was visible to spectators. She emerged from the water after a fifty-three-hour swim, during which, according to reports,¹ she covered the 110-mile distance between Cuba and Florida.

Nyad's accompanying motorboats hung back in the water, allowing her to pass them, reach ground, and finally stand on unstable, tired legs. Supporters and crew helped fend off bystanders, so that Nyad could clear the water and stand on land untouched and unassisted by others. A big roar of cheer and applause came from the crowd, echoed by millions of similar cheers, tears, and excited leaps in front of TV and computer screens worldwide. The online SPOT tracker chart showed a finished journey, with the words "[s]he freaking made it" victoriously sprawled across Key West.²

¹ Matt Sloane et al., *Never, Ever Give Up: Diana Nyad Completes Historic Cuba-to-Florida Swim*, CNN (Sept. 3, 2013), <http://www.cnn.com/2013/09/02/world/americas/diana-nyad-cuba-florida-swim>.

² See *Swim*, NYAD XTREME DREAM 2014, <http://www.diananyad.com/swim>.

After four failed attempts, Nyad's "Xtreme Dream" had come true,³ and the world cheered for her message of willpower and determination.

However, there was one group of people who were less cheerful; ironically, this was the community who could best understand the enormity of Nyad's feat. The Marathon Swimmers Forum,⁴ an online community of open water marathoners from around the world, buzzed with skeptical and negative commentary, doubting the authenticity and continuity of the swim and expressing displeasure with some of Nyad's swim conditions – a directional "streamer," special anti-jellyfish suits, some forms of boat and crew assistance, a mask, and an unconventional feeding schedule.

Within several days, the forum would see thousands of comments, including a statistical attempt to calculate Nyad's speed and several exchanges between forum members and Nyad's crew. Marathon swimmers worldwide would write lengthy, thoughtful diatribes about the swim on their blogs. The controversy would spill over to the mainstream media,⁵ and it would culminate in a panel discussion between Nyad and several renowned marathon swimmers and race directors.⁶ However, most interestingly, the controversy would spark a lively and engaged debate within the community about the rules of the sport and give birth to the first-ever set of global rules to regulate the sport worldwide.⁷

³ See *Diana*, NYAD XTREME DREAM 2014, <http://www.diananyad.com/Diana>.

⁴ See *Marathon Swimmers Forum*, MARATHON SWIMMERS FORUM, <http://www.marathonswimmers.com/forum>.

⁵ Jennifer Kay, *Diana Nyad Defends Herself, Her Florida-Cuba Swim To Skeptics*, THE HUFFINGTON POST (Sept. 10, 2013 8:07 PM), http://www.huffingtonpost.com/2013/09/11/diana-nyad-defends-swim-skeptics_n_3903092.html.

⁶ David Adams, *Questions Linger Over U.S. Swimmer Diana Nyad's Record Swim*, REUTERS (Sept. 11, 2013), <http://www.reuters.com/article/2013/09/12/us-cuba-swim-idUSBRE98A01M20130912>. E-mail from Donal Buckley, Co-Founder, Marathon Swimmers Forum to Hadar Aviram, Professor of Law, U.C. Hastings Coll. of Law (Aug. 24, 2014, 7:58 PST) (on file with author).

⁷ See *Rules of Marathon Swimming*, MARATHON SWIMMERS FEDERATION, <http://www.marathonswimmers.org/rules>. The conversation surrounding the rules started with the Nyad controversy. Interview with Evan Morrison, moderator of the Marathon Swimming Federation website, in San Francisco, Cal. (Jan. 18, 2014).

This Article uses Diana Nyad's swim, the community's efforts at social control, and the birth of new law for the sport to examine legalism, self-regulation, and the role of deviance in sports and, possibly, in other settings. The controversy around lawmaking and enforcement provides both a unique opportunity to observe and analyze a small, close-knit community of athletes in an act of community-initiated regulation and a valuable test case for theories of functionalism and conflict as they apply to law, deviance, and social control.

Much of the literature on sports law addresses sports for which there is an existent legal or quasi-legal body and for which there is a list of existing rules and sanctions.⁸ Marathon swimming is unique in that it is not universally regulated beyond informal, basic understandings of the spirit of the sport; in addition to rules of certain regulated swim courses. Under such circumstances, and without the financial implications that follow fraud in other sports, social control of fraudulent, unsportsmanlike, or merely noncompliant behavior is problematic.

This Article examines the controversy around Nyad's swim and the resulting regulation of the sport, in the context of Emile Durkheim's theories of deviance and social solidarity. Writing in the late nineteenth and early twentieth century in Europe, in the shadow of the Industrial Revolution, Durkheim focused on the formation of social solidarity and on the role that law plays in fostering solidarity and facilitating advancement in the complexity of societies. Despite its seminal role in modern sociology in general, and in sociology of law in particular, Durkheimian sociology has fallen out of favor with many sociologists of law in the last few decades. They dispute the universality of Durkheim's analysis of simplicity and complexity and reject his functionalist, consensus-based model in favor of sociological theories more sensitive to conflict, power, and inequality.⁹

While Durkheim's theoretical approach has serious limitations, this article argues that his critics have thrown the baby out with the bathwater. While Durkheim's understandings of simplicity, complexity, division of labor, and grand-scale social

⁸ See RAY YASSER, JAMES R. MCCURDY, C. PETER GOPLERUD & MAUREEN A. WESTON, *SPORTS LAW: CASES AND MATERIALS* (7th ed. 2011).

⁹ See GEORGE RITZER & JEFF STEPNIKY, *SOCIOLOGICAL THEORY* (9th ed. 2013).

change may not transcend the particular context in which they were conceived, his work is exceptionally helpful in understanding deviance, social control, and lawmaking within close-knit communities. In the context of the marathon swimming community and its regulatory process, Durkheim's ideas about deviance and functionalism are an excellent explanatory tool.

Through a quantitative analysis of archival and media sources about the Nyad controversy and its aftermath, this Article argues that Nyad's perceived deviance from the "spirit of the sport" was far from a negative development for the marathon swimming community. Actually, the debate that followed Nyad's swim benefitted the sport in four ways. First, the skepticism about the swim by insiders of the sport (especially vis-à-vis the worldwide acceptance of the swim as legitimate) strengthened and fostered solidarity within the marathon swimming community, particularly through the stigmatization of Nyad as an outsider, deviant, and outcast of the sport. Second, the animated forum discussion provided the impetus for the creation of the Marathon Swimming Federation's Global Rules, articulating the principles of solo swims for unregulated channels. While the Federation did not intend to make the Global Rules binding, their power in a community that relies on reputation, consensus, and social legitimacy is notable. Third, the discussion of deviance and rules prompted the community to create a hierarchy of rules and to prioritize more important norms at the expense of less important ones. Finally, the act of creating the rules provoked genuine discussion about their justification, arbitrariness, and future usefulness in a way that would not have been possible without the initial act of perceived deviance. Far from arguing that crime is a positive social factor, this Article shows that, under some circumstances, the public conversation following rule-breaking and deviance can be a productive force and yield thoughtful and improved regulation.

Part I of this Article presents Emile Durkheim's functionalist sociology, focusing in particular on his writings on law and deviance. Durkheim thought that crime and deviance played an important part in every healthy society and that the societal reaction to deviance was an important factor in fostering social solidarity. These ideas, particularly the ways that identifying and

responding to deviance strengthen societies against legitimacy crises, were further developed in Kai Erikson's historical analysis of law in the Puritan colonies, Martin Killias's study of states and legitimation crises, and Malinowski's studies of tribal compliance. Part I presents the strengths and weaknesses of functionalism to explain social control and its ideal usage for understanding endurance athletic subcultures.

Part II explains the regulatory scheme for marathon swimming, which, before January 2014, was based on local governance by channel associations and race directors. It also describes Diana Nyad's four failed attempts and eventual success in swimming from Cuba to Florida. This part offers a chronology of regulation for the sport, a brief history of prior obsession with matters of regulation, integrity, and fraud, as well as a chronology of the legitimacy crisis following the last Cuba-to-Florida swim.

Part III provides a qualitative content analysis of thousands of posts that appeared in the Marathon Swimmers Forum during and following Nyad's fifth swim from Cuba to Florida, supplemented by blog posts and other sources.¹⁰ The analysis presents the paper's four major findings about the function of deviance, focusing on the role that Nyad's swim played in producing the Marathon Swimming Federation Global Rules and how the Rules themselves respond to challenges posed by the swim, particularly the sport's obsessive preoccupation with transparency, integrity, and documentation.

Finally, the Conclusion applies this case study beyond sports law, discussing its relevance in two main contexts: reputational enforcement in international law and criminal punitivism following particularly shocking, high-profile crimes. These examples show the potential and limitations of applying Durkheim's theoretical perspectives to other contexts. The paper ends with some recommendations for future research, in sports law and beyond.

¹⁰ As a methodological note, and in the interest of full disclosure, the author is a member of the Marathon Swimming Federation, is an active forum member, and posted in the Diana Nyad items a few times during the initial debates about the swim as it was taking place. However, the author pulled out of the discussion at a fairly early stage once she realized the forum's importance for socio-legal research. The author notified the forum owners that she was writing a professional article on the subject and refrained from commenting further.

I. SOCIAL SOLIDARITY AND THE LATENT FUNCTIONS OF LAW

A. Durkheim and Functionalism

Emile Durkheim's work on social solidarity and social change is considered one of the major pillars of sociology.¹¹ Its main identifying feature is its use of society—not individuals or factions or particular groups—as the basic unit of analysis. This characteristic strongly differentiates Durkheim from other major contemporary sociology figures. As Karl Marx, Antonio Gramsci, and, to some extent, Norbert Elias focused on social processes and features that create conflict, alienation, and struggles between factions of society,¹² Durkheim focused on social solidarity, the glue holding communities together.¹³ The pursuit of solidarity and cohesion is at the center of all of Durkheim's writings, occupying the same place that the political process occupies in Max Weber's work¹⁴ and that the mode of production occupies in Karl Marx's writings.¹⁵ The main questions that concerned Durkheim were what holds a society together and how does its cohesion react to social change.

Durkheim examined social solidarity through a functionalist lens. To him, a variety of social features and institutions—such as economics, labor, religion, politics, and deviance—should not be studied as stemming from the particular intentions of individual actors, but rather as features that contribute to the solidarity of the overall community.¹⁶ To use a somewhat crude biological

¹¹ See STEVEN LUKES, *EMILE DURKHEIM, HIS LIFE AND WORK: A HISTORICAL AND CRITICAL STUDY* (1985).

¹² See generally ALLEN W. WOOD, *KARL MARX* (2nd ed. 2004); RENATE HOLUB, *ANTONIO GRAMSCI: BEYOND MARXISM AND POSTMODERNISM* (Routledge 2005); DENNIS SMITH, *NORBERT ELIAS AND MODERN SOCIAL THEORY* (2001).

¹³ See generally, EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (Steven Lukes ed., W. D. Halls trans., Free Press 2014) (1893).

¹⁴ See MAX WEBER, *ON CHARISMA AND INSTITUTION BUILDING* (S. N. Eisenstadt ed., 1968); David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720 (1972).

¹⁵ See Alan Stone, *Modern Capitalism and the State: How Capitalism Rules*, 23 MONTHLY REV., May 1971, at 31 (reviewing RALPH MILIBAND, *THE STATE IN CAPITALIST SOCIETY* (1970)); Isaac Balbus, *Modern Capitalism and the State: Ruling Elite Theory vs. Marxist Class Analysis*, 23 MONTHLY REV., May 1971, at 36 (reviewing RALPH MILIBAND, *THE STATE IN CAPITALIST SOCIETY* (1970)).

¹⁶ See David Garland, *Sociological Perspectives on Punishment*, 14 CRIME & JUST. 115, 122-127 (1991).

analogy, Durkheim saw social phenomena as organs that serve the overall well-being of the social organism.¹⁷ This perspective has two central implications. First, for Durkheim, any phenomenon, including those previously thought about only in the individualistic, personal context is a “social fact” which can be understood only through empirical observation of its occurrence within the broader social context.¹⁸ The radicalism of this approach is evident in Durkheim’s early work: his doctoral dissertation examined suicide, arguably an incredibly personal and individualistic act suitable for psychological or emotional examination, as a social fact, understanding the social trends that produce more suicides in some societies than in others.¹⁹ Second, Durkheim did not characterize social facts as categorically positive or negative; rather, he assumed that their existence in society must serve some positive role in the function of society as a whole—otherwise they would not exist.²⁰

B. Division of Labor, Solidarity, and Social Change

Much of the scholarship on Durkheim’s work focuses on his 1897 masterpiece, *The Division of Labor in Society*.²¹ Writing in a period of rapid and unsettling social, economic, and political shifts, Durkheim, like many sociologists of his time, was interested in explaining change. For him, change was manifested in the type of social solidarity in a given society. Simple societies, without much division of labor, are held together by “mechanical solidarity” stemming from the sameness of their members.²² By contrast, more complex societies with more division of labor are characterized by “organic solidarity,” stemming from the mutual assistance and exchange members can provide each other.²³ The

¹⁷ See generally ROGER COTTERRELL, EMILE DURKHEIM: LAW IN A MORAL DOMAIN (1999).

¹⁸ *Id.* at 12.

¹⁹ See generally EMILE DURKHEIM, LE SUICIDE: ÉTUDE DE SOCIOLOGIE (Felix Alcan ed., 1897); PETER BERGER, INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE (Open Road Media 2011).

²⁰ See ROBERT ALUN JONES, EMILE DURKHEIM: AN INTRODUCTION TO FOUR MAJOR WORKS 60-81 (1986).

²¹ DURKHEIM, THE DIVISION OF LABOR IN SOCIETY, *supra* note 13.

²² *Id.* at 57.

²³ *Id.* at 88.

process that transforms societies from simple/mechanical to complex/organic is linear and gradual,²⁴ though the change includes a period of uncertainty and weakening of the social “glue,” which Durkheim named “anomie.”²⁵

Through Durkheim’s functionalist lens, social phenomena take different forms in simple and complex societies because they need to serve different roles in these two settings. Law, a phenomenon that Durkheim was particularly interested in, plays different roles in simple and complex societies and, therefore, also serves as a useful index of society’s needs.²⁶ In his essay, *The Two Laws of Penal Evolution*,²⁷ Durkheim predicts that a transformation in social complexity will also transform the legal regime in two ways. First, regimes relying on repressive law (focusing on punitiveness and prohibition) will give way to restitutive law (focusing on regulating exchange between members). The legal regime, thus, is useful and appropriate for the type of solidarity (mechanical/organic) that it is supposed to regulate.²⁸ Second, there will be a shift away from more severe punishment, particularly away from corporal punishment, toward punishment that targets freedom restriction.²⁹

Since Durkheim presented his theory of social change and penal evolution in a universal, generalized way, it was inevitable that socio-legal scholars would put it to an empirical test. Studies attempting to compare legal regimes of simple and complex societies have typically found that Durkheim’s generalizations do not hold. In a study of forty-eight societies, Steven Spitzer found that complex societies – which he operationalized through an index of organization, population, and other features – tended to be more punitive than simple societies.³⁰ In fact, simple societies

²⁴ Robert K. Merton, *Durkheim’s Division of Labor in Society*, 40 AM. J. OF SOC. 319, 324 (1934).

²⁵ Stephen R. Marks, *Durkheim’s Theory of Anomie*, 80 AM. J. OF SOC. 329 (1974).

²⁶ COTTERRELL, *supra* note 17, at 31.

²⁷ Emile Durkheim, *Deux lois de l’évolution pénale*, 4 ANNEE SOCIOLOGIQUE 65-95 (1900), translated in *Two Laws of Penal Evolution*, 38 U. CIN. L. REV. 32 (William Jeffrey Jr. trans., 1969).

²⁸ Edward A. Tiryakian, *Durkheim’s “Two Laws of Penal Evolution,”* 3 J. SCI. STUD. OF RELIG. 261, 263 (1963-64).

²⁹ *Id.*

³⁰ Steven Spitzer, *Punishment and Social Organization: A Study of Durkheim’s Theory of Penal Evolution*, 9 LAW & SOC’Y. REV. 613, 626-27 (1974-1975).

may have less need for those mechanisms because there is no need to impose homogeneity.³¹ Similarly, Leon Sheleff points out that contemporary societies tend to exhibit abundant regulatory law, as well as apply tort law in a punitive way, and that penal law tends to expand with the expansion of state capacity to take over the resolution of interpersonal conflicts.³²

Spitzer and Sheleff's conclusions may have stemmed not from Durkheim's mistakes, but from their misapplication of Durkheim's simple-to-complex societal categories. Durkheim's observations of social change were never intended as a factual historical survey;³³ rather, they were made in the context of the grand transformation he witnessed in nineteenth century Europe, and are more akin to the historical concept of the "social contract" than to meticulous historiography. In addition, Durkheim typified his societies according to their division of labor. Spitzer and Sheleff's operationalization of simple and complex societies use other parameters, such as technology, bureaucracy, currency, and literacy and, therefore, may not be appropriate ways to prove or disprove Durkheim's theory. Moreover, what Durkheim might have meant by "law" is equally open to interpretation. Douglas Raybeck suggests that in small-scale social units of simple societies, in which personal ties and interdependency are important features of everyday interactions between people who are familiar with each other,³⁴ people are more reluctant to label other members of the group as deviant, except in extreme circumstances.³⁵ Raybeck also suggests that such units rely heavily on informal social control, which is regarded as an effective way of avoiding and containing deviance.³⁶ In deciding how to handle the case of a deviant, small-scale social units take into account the specific characteristics of the offense and

³¹ *Id.* at 632.

³² COTTERRELL, *supra* note 17, at 85 (citing Leon Shaskolsky Sheleff, *From Restitutive Law to Repressive Law: Durkheim's "The Division of Labour in Society" Revisited*, 16 EUR. J. OF SOC. 16, 19-20 (1975)).

³³ COTTERRELL, *supra* note 17, at 86.

³⁴ See Douglas Raybeck, *Deviance, Labelling Theory and the Concept of Scale*, 33 ANTHROPOLOGICA 17, 20 (1991).

³⁵ See *id.* at 23.

³⁶ See *id.* at 20.

offender, including the social standing of the offender.³⁷ Sanctions may “range from gossip through . . . social pressure . . . to threats of embarrassment or harm”³⁸—and Durkheim may have perceived such severe informal social sanctions as “law.”

There is one intervening variable found to produce a difference in the level of legal repression across societies. In his forty-eight-society study, Spitzer found that less democratic societies, and those more hierarchical, tended to have more severe punishments.³⁹ This idea seems to have generated more empirical validation. In a study of modern societies, Martin Killias found that societies whose power structures were very centralized and which had a less egalitarian distribution tended to punish in a harsher way during times in which the legitimacy of the regime was facing challenge and opposition.⁴⁰ Killias referred to these anomic periods as “legitimation crises” and reasoned that regimes tried to assert their power and legitimacy via repressive measures against the population.⁴¹ This notion, that societies become more punitive when they face challenges to their legitimacy and are undergoing change, is also congruent with Kai Erikson’s famous study of social control in puritan societies. Erikson identified three crime waves confronted by the Massachusetts Bay Colony in the 17th Century.⁴² His study of punishment throughout the colony’s history shows that crime (and subsequent punishment) waves corresponded to serious threats to the integrity of the church; the two first waves had to do with religious groups that challenged the Puritans, and the third wave concerned the witch trials.⁴³ These were dealt with harshly and resulted in public hangings, aimed at uniting the colony against the transgressors and reinforcing the social and religious norms in the colony.

³⁷ See *id.* at 22.

³⁸ *Id.* at 23.

³⁹ See Spitzer, *supra* note 30, at 628.

⁴⁰ See Martin Killias, *Power Concentration, Legitimation Crisis and Penal Severity: A Comparative Perspective, in Punishment and Privilege* 95 (W. Byron Groves & Graeme Newman eds., 1986).

⁴¹ See *id.* at 112.

⁴² See KAI T. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* 67 (2005).

⁴³ See *id.*

To conclude, while Durkheim's theory of transformation from single to complex societies cannot be reduced to historical accuracy, empirical efforts to study changes in the character of law across societies suggest that less democratic societies facing a challenge are more likely to be more punitive than decentralized societies or societies in periods of calm and undisputed legitimacy. While these characterizations do not necessarily map onto Durkheim's division of labor theory, they do support the notion that law enforcement and social control serve a functional role in society. Their shape also tells us something valuable about the state of social solidarity in which they operate. We now turn to investigate the functional role of law and deviance more closely.

C. The Ubiquitousness of Crime and the Latent Functions of Law

One of the most radical aspects of Durkheim's functionalism is the challenge it poses to the simplistic assumption that crime is a negative phenomenon per se, which does not serve any useful social function and that eradicating it is a laudable (if not attainable) social goal. Durkheim goes far beyond the notion that obliterating crime is impossible with limited resources—he makes the argument that every society needs a certain amount of crime. When viewed through a functionalist lens, the existence of crime in every society on earth is, in itself, proof that crime must contribute something of value to society (much as in evolutionary biology). Of course, different societies have different types of crime and different penal codes, which reflects their rich moral diversity.⁴⁴ To Durkheim, no behavior is universally criminal; different societies create and construct crime by forming laws that prohibit what each of them considers a transgression. Crime is, thus, a product society generates; therefore, “we should not say that an act offends the common consciousness because it is criminal, but that it is criminal because it offends that consciousness.”⁴⁵ Durkheim illustrates this point in *The Rules of Sociological Method* with this extreme example:

⁴⁴ See COTTERRELL, *supra* note 17, at 65.

⁴⁵ *Id.* at 66 (quoting DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY*, *supra* note 13, at 40).

Imagine a community of saints in an exemplary and perfect monastery. In it, crime as such will be unknown, but faults that appear venial to the ordinary person will arouse the same scandal as does normal crime in ordinary consciences. If therefore that community has the power to judge and punish, it will term such acts criminal and deal with them as such. It is for the same reason that the honorable man judges his slightest moral failings with a severity that the mass of people reserves for acts that are truly criminal. In former times, acts of violence against the person were more frequent than they are today because respect for individual dignity was weaker. As it has increased, such crimes have become less frequent, but many acts, which offended against that sentiment, have been incorporated into the penal code, which did not previously include them.⁴⁶

According to Durkheim, therefore, “crime” exists everywhere, but the content of the category is not unified. Societies define certain behaviors as crime because they find the exertion of social control against particular transgressors a useful social function. Durkheim continues and explains the normality of crime, a certain amount of which is “necessary” for social function:

Thus, crime is necessary. It is linked to the basic conditions of social life, but on this very account is useful, for the conditions to which it is bound are themselves indispensable to the normal evolution of morality and law

Nor is this all. Beyond this indirect utility, crime itself may play a useful part in this evolution. Not only does it imply that the way to necessary changes remains open, but in certain cases it also directly prepares for these changes. Where crime exists, collective sentiments are not only in the state of plasticity necessary to assume a new form, but sometimes it even contributes to determining beforehand the shape they will take on. Indeed, how often is it only an anticipation of the morality to come, a progression toward what will be! According to Athenian law, Socrates was a criminal and his condemnation was entirely just. However, his crime – his independence of thought – was useful not only for humanity but for his country. It served to prepare a way

⁴⁶ EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 100 (W.D. Halls trans., 1982).

for a new morality and a new faith, which the Athenians then needed because the traditions by which they had hitherto lived no longer corresponded to the conditions of their existence. Socrates's case is not an isolated one, for it recurs periodically in history. The freedom of thought that we at present enjoy could never have been asserted if the rules that forbade it had not been violated before they were being solemnly abrogated. However, at the time the violation was a crime, since it was an offense against sentiments still keenly felt in the average consciousness. Yet, this crime was useful since it was the prelude to changes that were daily becoming more necessary. Liberal philosophy has had as its precursors heretics of all kinds whom the secular arm rightly punished throughout the Middle Ages and has continued to do so almost up to the present day.

From this viewpoint, the fundamental facts of criminology appear to us in an entirely new light. Contrary to current ideas, the criminal no longer appears as an utterly unsociable creature, a sort of parasitic element, a foreign, unassimilable body introduced into the bosom of society. He plays a normal role in social life. For its part, crime must no longer be conceived of as an evil that cannot be circumscribed closely enough. Far from there being cause for congratulation when it drops noticeably below the normal level, this apparent progress assuredly coincides with and is linked to some social disturbance Consequently, at the same time and as a reaction, the theory of punishment is revised or rather should be revised. If in fact crime is a sickness, punishment is the cure for it and cannot be conceived of otherwise; thus, all the discussion aroused revolves round knowing what punishment should be to fulfill its role as a remedy. However, if crime is in no pathological, the object of punishment cannot be to cure it and its true function must be sought elsewhere.⁴⁷

Crime, according to Durkheim, fulfills several valuable social roles. First, it strengthens social solidarity by uniting members of society against the deviant. Second, it is an opportunity for clarifying the rules for the benefit of potential transgressors. Third, as the Socrates example makes clear, it provides a vehicle

⁴⁷ *Id.* at 101-103.

for examining and modifying social rules, thus preventing stagnation and encouraging progress.

While this approach to the functions of social control is uncommon among legal philosophers,⁴⁸ sociologists have found the notion of labeling and stigmatizing resonant in a variety of historical and geographic contexts. For example, in Allan Lönnberg's analysis of the "Digger" Indian stereotype, he found that Native American tribespeople of Central California were equated with animality, laziness, and comicality by miners in an attempt to establish a common identity for themselves through their distinction from the Indian "other."⁴⁹ Lönnberg also found that degrading the Indians provided a way for the miners to subvert attention from the difficult atmosphere of the mines, where failure was always a possibility.⁵⁰ Similarly, in her critical analysis of abusive motherhood, Michelle Oberman found that the criminalization of certain maternal behaviors targeted primarily poor mothers and created social standards that were oblivious to the particular conditions of poor women who raised multiple children.⁵¹

Lönnberg and Oberman's work add a dimension usually absent from Durkheim's work—the importance of power and social stratification. In both cases, the power to define what is and is not considered deviance resides in the hands of privileged social members or institutions and tends to marginalize and oppress the weaker links in the social chain. Therefore, these examples are better understood through labeling theory⁵² or conflict

⁴⁸ Some notable legal philosophers include Joseph Raz and Lon Fuller. Raz addresses more obvious legal functions and does not pay attention to their role in fostering social solidarity. See generally JOSEPH RAZ, *The Functions of Law*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (2nd ed. 2009). Similarly, Fuller has gone as far as to argue that the social control function and the facilitation of human interaction function are actually complementary because they create rules of appropriate interaction. See Lon L. Fuller, *Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction*, 1975 BYU L. REV. 89 (1975).

⁴⁹ See Allan Lönnberg, *The Digger Indian Stereotype in California*, 3 J. OF CAL. & GREAT BASIN ANTHROPOLOGY 215, 216-217 (1981).

⁵⁰ See *id.* at 222.

⁵¹ See Michelle Oberman, *Judging Vanessa: Norm Setting and Deviance in the Law of Motherhood*, 15 WM. & MARY J. WOMEN & L. 337 (2009).

⁵² See generally HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963).

criminology,⁵³ both of which pay more attention to differences and struggles surrounding criminalization and social control. But while the latter perspectives have become commonplace tools in understanding crime and criminalization, their explanatory power increases when keeping in mind the legacy they owe to Durkheim's work. Despite Durkheim's focus on cohesion and consensus, his theory and conflict theories share the notion that crime serves an important social function; the difference lies in asking the question *whose* interests are served by social control. To Durkheim, the beneficiary is society as a whole; to labeling theorists and conflict criminologists, the beneficiaries are those who hold the labeling and criminalizing power.⁵⁴

The consensual aspects of Durkheim's theory are less useful due to the increasing attention of socio-legal scholars to the workings of power, inequality, and marginalization.⁵⁵ The naïveté of Durkheim's theory lies precisely in his ignoring the possibility of conflict, in his assuming that there are no conflicts, and in his arguing "crime and the shared sentiments . . . are actually symbiotic."⁵⁶ But, while models that assume simpler societies with greater solidarity are less useful to describe the conflicted, multifaceted reality of state governments, they have proven very useful in explaining deviance in sports.

D. Deviance and Functionalism in Sports Literature

In their book on deviance and social control in sports, Michael Atkinson and Kevin Young use Durkheim's theoretical framework extensively in examining different aspects of sports deviance.⁵⁷ As sociologists of deviance, they "find it particularly

⁵³ See generally WILLIAM J. CHAMBLISS, *EXPLORING CRIMINOLOGY* (1988).

⁵⁴ See DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 23-46 (1993).

⁵⁵ This is particularly true when examining punishment in the oppressive and exaggerated context of neoliberal politics. See generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2002); See also LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

⁵⁶ COTTERRELL, *supra* note 17, at 75.

⁵⁷ See MICHAEL ATKINSON & KEVIN YOUNG, *DEVIANCE AND SOCIAL CONTROL IN SPORT* 3-5 (2008).

interesting how groups of actors jointly define certain behavior as unwanted or threatening on the one hand while viewing other behavior as wanted or even socially beneficial on the other.”⁵⁸ One of their more intriguing theoretical conclusions is that some forms of deviance in sport are wanted—not in the sense of being normative or proper, but in the sense of generating a cultural response that is socially useful, such as exciting fistfights in hockey games or drug cheating when national kudos is at stake.⁵⁹ Another reason why Durkheim’s sociology of law is particularly helpful in the sports context is that, often, the cultural reaction to deviance in sports is not backed up by a formal legal response. As Michael D. Smith found in his work on the toleration of violence in sports,⁶⁰ criminal deviance can be very difficult to detect. While some forms of deviance can be abhorrent to insiders of sports, spectators, for whom deviance makes the spectacle more exciting, may perceive them more positively.⁶¹

Deviance in sports can take many forms, including outright violence, deception, doping, and violation of rules.⁶² Different types of sports differ in terms of the degree to which they are regulated. Some industries have even yielded a body of sports law since specific issues are frequently litigated under established, formal regulation. Marathon swimming is fairly unique in that its regulation occurs outside the context of the external legal regime, in the context of a close-knit community of athletes with a shared ethos and values, which makes it a particularly engaging setting for a study of deviance and social control. We now turn to an examination of solidarity and social control in the marathon swimming community.

⁵⁸ *Id.* at 6.

⁵⁹ *See id.* at 6-7.

⁶⁰ MICHAEL D. SMITH, VIOLENCE AND SPORT (1983).

⁶¹ ATKINSON & YOUNG, *supra* note 57, at 8.

⁶² Deviance in sports can sometimes be motivated by overconformity. *See* Robert Hughes & Jay Coakley, *Positive Deviance Among Athletes: The Implications of Sports Conformity to the Sport Ethic*, 8 SOC. OF SPORT J. 307 (1991).

II. BACKGROUND:

A. *Marathon Swimming and Diana Nyad's Cuba-to-Florida Swim*

1. Defining Marathon Swimming

Sociologist and channel swimmer Karen Throsby defines marathon swimming as swimming “a long way, and for a long time, in an open body of water, according to standardized rules and conduct.” To fully understand the importance of these rules, and the cultural baggage they carry, some familiarity with the sport is required.

Marathon swims take place in oceans, lakes, rivers, and other settings, and include channel crossings, island circumnavigations, swimming the course of a river, or swimming loops in any body of water. By contrast, to marathon running, there are no standardized distances for marathon swimming.⁶³ It has become customary to refer to any swim at a distance of at least 10 kilometers (6.2 miles) as a “marathon swim.”⁶⁴ Many marathon swimmers, however, tend to train for, and swim, considerably longer courses, which require careful planning, allowances for weather and conditions, and the assistance and support of a motorboat or kayak crew.

While people have swum long distances in open water throughout history, the pioneer of the sport is often considered Captain Matthew Webb, the first man to swim (breaststroke) the 21 miles across the English Channel in 1875. Gertrude Ederle, who swam the channel using the front crawl (colloquially referred to as freestyle), shattered Webb's record in 1926.

Marathon swimming requires special attention to safety and health. Long swims require constant feedings, and most swimmers feed at least once an hour. The feedings are typically handled from a boat or a kayak, and the bottle or other food is thrown into the water using poles or strings. Experienced marathon swimmers minimize the time required for their feeds.

⁶³ See *Marathon Swims*, WORLD PROFESSIONAL MARATHON SWIMMING FEDERATION, <http://worldprofessionalmarathonswimmingfederation.com/events/marathon-swims/>.

⁶⁴ See *id.*

Usually, feedings contain complex carbohydrates—many swimmers use maltodextrin—mixed in a diluted liquid. The repetitive motion involved in many hours of swimming—a typical event requires a serious commitment to heavy training yardage in the pool and in open water—puts the athletes at risk of shoulder problems, leg cramps, and other physical injuries.

Even a well-trained, healthy athlete with a sound nutrition plan may encounter a host of environmental and external conditions over which he or she has little or no control. A common challenge is water temperature. Swimmers in the Irish Sea, the English Channel, many Pacific beaches, and other locations have to acclimate to cold temperatures, and some open water swimmers even specialize in ice swimming or cold-water swimming. Since athletes wear no protective gear beyond textile swimsuits, hypothermia is one of the major health risks of the sport.

Another challenge unique to open water swimming is navigation, or as it is known in the sport, “sighting.” In the absence of the black line at the bottom of the pool, swimmers develop appropriate techniques to lift their eyes from the water and assess their position relative to buildings, mountains, and other landmarks. When swimming in the heart of the ocean, marathon swimmers sight on the motorboat or kayak that accompanies them. Mistakes in sighting, as well as sea currents, may cause a marathon swimmer to swim a longer distance than the aerial line between the entry and exit points, but upon completion of the event, the distance declared is always the aerial distance.

In addition to currents and temperature, swimmers may encounter many other challenges that include polluted water, gas fumes from the accompanying motor boat, incoming marine traffic, and a host of marine creatures, ranging from a rare encounter with sharks to the much more common encounters with jellyfish and plankton.

The variety of external challenges facing swimmers means that the success of athletic feats is not guaranteed and is never solely, or even primarily, dependent upon factors within the athlete’s control. It is not uncommon to withdraw from a swim or to be ordered on the boat by external observers concerned about the swimmers’ health. Longer swims in colder, more turbulent

waters are more difficult to complete, and “DNFs” (“did not finish” entries) are not considered a badge of dishonor.

Famous swims are sometimes grouped for special sets of feats. The Triple Crown of Open Water Swimming consists of successful crossings of the English Channel and the Catalina Channel, both 21 miles long, as well as the 28-mile long circumnavigation of Manhattan Island. To-date, only a handful of marathon swimmers have succeeded in completing the Oceans Seven, which includes successful crossings of the Irish Channel (between Ireland and Scotland), Cook Strait (Between the North and South islands of New Zealand), the Molokai Channel (Between Moloka'i and O'ahu), the Tsugaru Channel, the Strait of Gibraltar, the English Channel, and the Catalina Channel.

2. Ethos and Regulation in Marathon Swimming

In his analysis of dispute resolution in international sports competitions,⁶⁵ James Nafziger draws on the case of a pool swimmer suspected of doping and the contrasting, albeit mutually acknowledging, decisions in different regulating fora.⁶⁶ Nafziger provides a schema of administrative decision-makers in matters of sports discipline and regulation, ranging from national governing bodies, through international federations, national Olympic committees, the International Olympic Committee, the Court of Arbitration for Sport, and finally, national courts of law.⁶⁷ Such governing bodies are usually reluctant to hear international sports disputes, and with good reason.⁶⁸ No such hierarchy governs the sport of marathon swimming. Beyond FINA⁶⁹ and Olympic committees' enforcement of the FINA regulation of the 10km open water marathon swim at the Olympics and World Championships,⁷⁰ the vast majority of open water marathon races are not subject to quasi-judicial regulative institutions. The World

⁶⁵ James A.R. Nafziger, *Dispute Resolution in the Arena of International Sports Competition*, 50 AM. J. COMP. L. SUPP. 21 (2002).

⁶⁶ *Id.* at 162-164.

⁶⁷ *Id.* at 169-170.

⁶⁸ James A.R. Nafziger, *Globalizing Sports Law*, 9 MARQ. SPORTS L. J. 225, 231 (1998-1999) (Nafziger advocates for reliance on arbitration as a good alternative.).

⁶⁹ Federation Internationale de Natation Amateur.

⁷⁰ *Rules and Regulations: FINA 10km Marathon Swimming World Cup 2014-2017*, FINA (Dec. 2012), <http://www.fina.org/H2O/docs/events/10km2014/rules.pdf>.

Open Water Swimming Association (“WOWSA”)⁷¹ maintains various informational databases about the sport and hosts a yearly awards nomination. There is a yearly convention⁷² and a yearly Hall of Fame.⁷³ When marathon swimmers balked at USMS’s conditions to insure races—including lane lines in open water, eliminating the challenges of sighting—WOWSA stepped in and became the main insurer of open water marathon events.⁷⁴ WOWSA does not officially regulate the entire sport however, and the actual rules governing swims remain open-ended and up for debate.

The regulation of the sport is geographically fragmented. Channel associations, which have rules that cover attire, contact with the boat, pace swimming, and other aspects of the swim, only govern certain established courses, such as the English Channel,⁷⁵ the Catalina Channel,⁷⁶ and the Santa Barbara Channel.⁷⁷ Steven Munatones lists dozens of governing bodies and associations, many of them regional.⁷⁸ This, in itself, is not unique; all sports share the problem of multiple associations, sometimes leading to appeals and struggles of jurisdictions. This regulatory structure evokes what Ken Foster refers to as “global sports law,” or *lex sportiva*, which describes the principles that emerge from the rules and regulations of international sporting federations as a private contractual order.⁷⁹ While, as Foster points out, “global sports law” essentially avoids formal rules of law by leaving regulation to private agencies, it has some regulatory power in that it promotes the general ethical principles of the sport—

⁷¹ See WORLD OPEN WATERS SWIMMING ASSOCIATION, <http://www.worldopenwaterswimmingassociation.com/>.

⁷² See *Global Open Water Swimming Conference*, THE DAILY NEWS OF OPEN WATER SWIMMING (Apr. 15, 2014), <http://dailynews.openwaterswimming.com/2014/04/the-2014-global-open-water-swimming.html>.

⁷³ See INTERNATIONAL MARATHON SWIMMING HALL OF FAME, <http://imshof.org/>.

⁷⁴ See *Insurance for Race Directors, Associations and Clubs*, WOWSA, <http://www.worldopenwaterswimmingassociation.com/insurance-2/events/>.

⁷⁵ See THE CHANNEL SWIMMING ASSOCIATION, <http://channelswimmingassociation.com/>; See also CHANNEL SWIMMING AND PILOTING FEDERATION, <http://cspf.co.uk/>.

⁷⁶ See CATALINA CHANNEL SWIMMING FEDERATION, <http://swimcatalina.com/>.

⁷⁷ See SANTA BARBARA CHANNEL SWIMMING ASSOCIATION, <http://www.santabarbarachannelswim.org/>.

⁷⁸ STEVEN MUNATONES, OPEN WATER SWIMMING 3 (Human Kinetics 2011).

⁷⁹ Ken Foster, *Is There a Global Sports Law?*, 2 ENT. & SPORTS L. J. 1, 2-3 (2003).

uncertainty of outcome, honesty and integrity, sportsmanship, and the character of the sport. Moreover, it empowers federations and organizations to create their own law.⁸⁰

Many marathon swimmers undertake pioneering solo swims in unregulated bodies of water, in which case they are not officially required to subscribe to any association rules.⁸¹ This complicates the reach of *lex sportiva* in marathon swimming. Under these circumstances, and in the absence of formal regulation, many marathon swimmers voluntarily adopt a version of the English Channel rules as their personal swim rules, even though the two English Channel Associations, the CSA and the CS&PF, only govern swims between Dover and Calais. Swimming all of one's swims under English Channel rules is a vehicle to obtain recognition, legitimacy and respect within the community of marathoners.

The EC rules derive their influential, trans-jurisdictional power from their traditional role in the development of the sport. Not only do the rules embody the ethos of marathon swimming (which will be described in detail below), but they have also had a seminal role in shaping and creating this particular ethos. Some selections from the Channel rules illustrate this point. According to the 2010 Channel Swimming Association Ltd. Handbook,

No person in an attempt to swim the Channel shall use or be assisted by an artificial aid of any kind, but is permitted to grease the body before the swim, use goggles, wear one cap and one costume. A "Standard Swim Costume" (for both sexes) shall be of a material not offering Thermal Protection or Buoyancy and shall be Sleeveless and Legless. "Sleeveless" shall mean the Costume must not extend beyond the end of the shoulder and onto the Upper Arm; "Legless" shall mean the costume must not extend onto the Upper Leg below the level of the Crotch.⁸²

⁸⁰ *Id.* at 6-7.

⁸¹ In theory, a swimmer can also swim a regulated channel unsanctioned, and there are documented cases of swimmers completing English and Catalina channel crossings not under the auspices of the relevant association. The swimming community strongly discourages these swims, and those attempting them find difficulty in recruiting boats and crewmembers.

⁸² MUNATONES, *supra* note 78.

Another fundamental aspect of English Channel rules governs the swimmer's contact with the accompanying craft. Swimmers who conform to English Channel rules do not touch the boat, ground, or any other person, during their time in the water. Crewmembers administer feedings accordingly, using ropes and poles. Swimmers must apply their own products, such as sunscreen, anti-chafing salves, and the like. English Channel rules allow pace swimmers to accompany and encourage the solo crosser, but only for one hour at a time, and not continuously. Touching the boat, or another person, ends the swim.

Specific established bodies of water have created exceptions to English Channel rules. Swimmers in the Irish Channel, for example, may spend up to ten minutes on the boat when a shark is in sight.⁸³ Stage swims, such as the eight-day Hudson River swim, are conducted in stages, so that swimmers exit the water at the end of each day's portion and re-enter the water the following day.⁸⁴ Swim relays, as opposed to solo ventures, have their own rules as to the exchanges in the water.⁸⁵ Although there is some debate, it is generally accepted that the pioneering swimmer of a new course gets to set the rules of that particular course, which in some cases might mean anti-jellyfish suits, shark cages, and the like.

Whether a swimmer conducts his swim under the auspices of an established channel or not, marathon swimmers subscribe to a strong ethos of informal social control over their swims; the main tenets of which are spartanism, humility, honesty, and minimalism.

3. Spartanism

The ethos of marathon swimming places a high premium on spartanism, machismo, and toughness. Preparation for a typical marathon swim involves a very high volume of training, both in

⁸³ See *North (Irish) Channel: Swimmer and Pilot Rules and Regulations*, IRISH LONG DISTANCE SWIMMING ASSOCIATION, <http://www.ildsa.info/index.php/swim-the-north-channel/swim-regulations>.

⁸⁴ See *About*, 8 BRIDGES HUDSON RIVER SWIM, <http://www.8bridges.org/>.

⁸⁵ See *MSF Rules of Marathon Swimming Announced*, THE DAILY NEWS OF OPEN WATER SWIMMING (Jan. 6, 2014), <http://dailynews.openwaterswimming.com/2014/01/msf-rules-of-marathon-swimming-announced.html>.

the pool and in open water. Many channel associations require “qualifying swims” of many hours in cold temperatures before approving a swimmer’s application, but swimmers typically undertake similar volumes independently. Marathon swimmer Andrew Malinak recently published a blog titled *Take It Too Far*, which illustrates this point:

This swim is going to be hard. (You knew that, right?) Make your training harder. Train longer. Train faster. Train colder. Train farther. Train before dawn. Train through sunset, through dusk, and into the dark. Just you and the inky abyss.

Study everything. Study past successes and failures, both others’ and your own. Study the tides. Study the course. Study the coasts and the towns along them. Learn physics, biomechanics, nutrition, chemistry. Learn to stay organized. Read everything you can. Never read motivational posters; they are the worst. Don’t blindly trust the experts, check their assumptions. Become the expert, check your own assumptions.

Make mistakes and learn from them. Ignore the tides and get stuck in a current. Drink too much the night before. Skip breakfast. Lose goggles. Forget your suit. Now make those same mistakes again. Understand what part everything plays, and know what to do when mistakes inevitably happen.

Now make your training even harder. Make it too hard. Too long. Too fast. Too cold. Too far. You don’t know what any of those things are! Stop whining, shut up, and swim.

Swim all the time. Swim through Love. Swim through Loss. Swim through all emotions that come in between. Never ask if swimming is the cause or the cure. It is probably both, but knowing that won’t help anything. Swim as your life crumbles around you. Swim while you rebuild it. Never stop swimming.

You knew this was going to be hard, right? Accept it. This will be lonely and alienating. Your only friends will be swimmers, and even they won’t understand you. This is a path that few have taken, or ever will. Don’t expect many companions. Treasure those who join you.

Happy endings are never guaranteed. Accept that things are not always in your control. Train yourself to

appreciate small victories. Everything brings a chance to improve, to learn, to succeed. At best, your training will be adequate and your swim will seem easy. Don't dwell on the other possibilities.

If this doesn't work: make your training harder. This will not be easy. But you knew that, didn't you.⁸⁶

Marathon swimmers have much respect for fellow swimmers who completed courses under particularly brutal conditions and little patience for what they deem unmerited complaints about harsh conditions. The centrality of water temperature in the marathon swimming experience leads marathon swimmers to view the usage of neoprene wetsuits, frequently used by triathletes in the first leg of a multi-sport event, with contempt. As Throsby found, marathoners routinely direct jabs and putdowns at triathletes, despite the fact that, many of the marathoners themselves crossover between distance swimming and triathlons throughout their sporting careers.⁸⁷

4. Self-Sufficiency

Related to spartanism is the cardinal importance of achieving the athletic feat by oneself, without receiving assistance. Marathon swimmers routinely seek advice and assistance when planning or training for a swim, and some even rely on fellow athletes to provide boat crew support, but the swimmer ultimately must complete the swim under his or her own power. Any intentional assistance from the boat crew is strictly forbidden and ends the swim. While solo swims frequently allow "pace swimmers"—fellow swimmers who join the soloist in the water for a while to buoy his/her spirits and encourage him/her to continue—pacing is severely limited in time, and the pacer may not swim ahead of the soloist. Irish marathoner Donal Buckley summarizes the importance of this principle of independence and self-sufficiency:

No precept is more sacred to marathon swimmers than the forbidding of a deliberate touch between swimmer and

⁸⁶ See Andrew Malinak, *Take It Too Far*, ANDREW SWIMS (June 20, 2014), <http://andrewswims.com/take-it-too-far/>.

⁸⁷ KAREN THROSBY, *IMMERSION* (Manchester University Press, forthcoming 2016).

anything else: boats, people or equipment other than feed supplies. That is the way we disqualify ourselves or how we signify that a swim is over. Until you have been there, until it has been you or until you have seen a swimmer agonize for long minutes in the water, knowing there is no hope of continuing, but knowing they or you have to reach out and touch the boat, you cannot understand this.

It is a really, really, really big deal for us.

Everything about swimming reduces to those moments. It is difficult to explain how it feels to try to push a swimmer beyond any possibility of continuing a swim, beyond what you want to push them, so they will know afterwards they did everything. It is different from pushing yourself. You almost hate yourself for pushing them. Therefore, the swimmer will have no doubts that when they reached out to touch the boat, it was the right and final act. When you dismiss or willfully [sic] and repeatedly ignore these essential facts, disregard this decisive moment and subsequently lie about it, you guarantee the animosity of the marathon swimming community.⁸⁸

5. Honesty and Integrity

Buckley's words relate to a third principle central to the sport: honesty and integrity on the part of the athletes. Because of the time and space they occupy, as well as their monotony, marathon sports events do not make good spectator sports; the swimmer and his or her crew are the sole witnesses of a typical long swim. A common joke among marathoners is a competition as to who had less people welcome him or her to shore at the completion of a swim.⁸⁹ In recent years, and with the availability of GPS technology, swimmers have been increasingly using SPOT tracker devices on their accompanying boats, which allow fans and other athletes to follow their progress in the water.⁹⁰ Nonetheless,

⁸⁸ See Donal Buckley, *The Diana Nyad Controversy, A Personal Reflection – Part 5 - Probity & Integrity*, LONE SWIMMER (Oct. 8, 2013), <http://lonewimmer.com/2013/10/08/the-diana-nyad-controversy-a-personal-reflection-part-5-probity-integrity/>.

⁸⁹ See *Driven: The Marathon Swimming Documentary*, <http://driven.vhx.tv/>.

⁹⁰ Athletes frequently use GPS wristwatches in training, but the devices can be cumbersome when athletes wear them at the actual event, and sometimes raise controversies; See FIND ME SPOT,

the GPS cannot provide full information as to what occurred at any moment of any particular swim, which is why the sport places particular emphasis on accurate reportage.

Big solo swims frequently require, in addition to a crew of feeders, pacers, and handlers, at least one objective observer⁹¹ whose role is to supervise and ensure the swimmer's compliance with the rules of the swim.⁹² The observer also has the authority to put the swim to an end, for either a violation of the rules or when there is serious concern for a swimmer's health.

6. Humility

The unpredictable nature of marathon swims, as well as the swimmer's dependence on the environment and external conditions, fosters a culture of humility and under-claiming among athletes. While it is usually disappointing for a swimmer to not complete a swim due to an injury, hypothermia, or adverse condition, it is not considered shameful, nor a disappointment.⁹³ Many well-respected, successful Triple Crowners proudly admit prior DNFs,⁹⁴ and several swimmers who attempted to swim from Cuba to Florida, like Penny Palfrey⁹⁵ and Chloe McCardel,⁹⁶ have retained an impressive and respectable reputation in the sport.

<http://www.findmespot.com/en/index.php?cid=217&gclid=CKn6uKeFqr8CFYhafgodCKsA7A>.

⁹¹ MUNATONES, *supra* note 78, at 164.

⁹² The observers typically submit a written log that the swimmer may provide to whomever has questions or doubts about the accomplished feat. *See How To: Generic Marathon Swim Observer's Report*, LONE SWIMMER (Aug. 13, 2013), <http://lonesswimmer.com/2013/08/13/how-to-generic-marathon-swim-observers-report/>.

⁹³ *See Tell Us About Your DNF and the Lessons You Learned from It*, MARATHON SWIMMERS FORUM, <http://marathonswimmers.org/forum/discussion/883/tell-us-about-your-dnf-the-lessons-you-learned-from-it->.

⁹⁴ For example, Triple Crown and race director Ron Collins proudly displayed on his Facebook profile a photo of his successful 2013 Catalina Channel swim next to a photo from his failed 2010 attempt, during which he became hypothermic.

⁹⁵ Associated Press, *Penny Palfrey Quits Attempted Solo Swim From Cuba To Florida Keys*, THE HUFFINGTON POST (July 1, 2012), http://www.huffingtonpost.com/2012/07/01/penny-palfrey-swim-cuba-florida-keys_n_1640970.html.

⁹⁶ Matt Knox, *Australian Chloe McCardel Ends Cuba-to-Florida Swim After 'Debilitating' Jellyfish Stings*, ABC NEWS (June 13, 2013), <http://abcnews.go.com/US/australian-chloe-mccardel-ends-cuba-florida-swim-debilitating/story?id=19388065>.

As mentioned earlier, currents and errors in sighting or navigation cause the overall mileage of open water swims to be considerably longer than the aerial distance between the entry and exit points. Nonetheless, traditionally, swimmers only report the aerial distance at the end of a successful swim, not laying claim to the extra miles they swam.

There is also a culture of strong distaste for over-claiming world records, an ethos of respect for prior and future swimmers, and a strong norm favoring assistance by experienced swimmers to swimmers planning to swim the same course, even if the new challengers pose a risk to an existing record or achievement.

7. Minimalism

In her forthcoming book about channel swimming, Throsby argues that marathon swimmers ascribe immense importance to the traditionalism of the sport, taking pride in the fact that the rules of the sport have not changed since Webb's successful English Channel crossing in 1875. The two governing bodies of the English Channel, the CSA and the CS&PF, both cite Webb on their websites as the inspiration for the sport. Throsby cites swimmer Evan Morrison, who in an online post explains the importance of tradition (along with changing conditions and the possibility of failure) to the uniqueness of the sport:

The tradition: The knowledge that when we enter the water to begin a long swim, we're using the same simple technology (textile suit, cap, goggles) as those who came before us, as far back as the 19th century. What other sports can boast as level a playing field over time?⁹⁷

What counts as "traditional," however, is quite foggy and fodder for much debate and argument in the sport. As Throsby points out, Webb, who swam the channel breaststroke, in fact wore neither cap nor goggles for his English Channel swim. The early version of swimming goggles only emerged as a necessary development stemming from the invention of the front crawl (the fastest of the four sanctioned strokes and frequently swum as "freestyle"), which required immersing the face in the water

⁹⁷ THROSBY, *supra* note 87.

during the stroke cycle. Moreover, Throsby also cites other aspects of marathon swimming which have undergone changes since Webb's time: more sophisticated accompanying craft (motorboats and kayaks), navigational instruments, GPS monitors, and advanced nutrition. These innovations mean that there is room for debate and interpretation as to which rules and conditions are true to the traditional spirit of the sport. There are some particular inventions that receive special contempt, such as the aforementioned wetsuits, which violate not only the ethos of minimalism but also those of spartanism and self-sufficiency. The combination of these three principles lead marathon swimmers to reject items, such as personal music players and metronomes, that endurance athletes commonly use in other sports.

Finally, in considering the social control applied to athletes who violate the ethos or regulations of the swim, it is important to keep in mind two important characteristics of the marathon swimming community, the first of which is its insularity. Marathon swimming is a fairly small and familiar sport, to the point that beginner marathoners can meet legends of the sport and Guinness record holders online and know them personally. The distances covered, as well as the racing locations, prevent marathon swimming from being attractive, mass spectator sports. Also, the sport typically attracts little publicity on mainstream sports channels.⁹⁸ The implication is that internal debates about the rules and regulations of the sport take place within the community and are largely irrelevant to the mainstream audience who may not understand them. The second feature is the lack of a well-oiled funding mechanism, explainable by the lack of appeal for spectators. While many marathon swimmers receive limited sponsorships from various companies, or use their swims for charity fundraisers, most marathon swimmers are amateurs who spend a great deal of time and resources on travel, training, and the like. That there is little to no financial reward to marathon swimming also means that the penalties for violating the rules or spirit of the sport cannot be financial. The community, therefore, regulates itself entirely on a reputational basis, relying on respect,

⁹⁸ The La Jolla Rough Water Swim bills itself as the exception to this rule, stating that its circular course and unique vantage points allow spectators to see the entire race. See LA JOLLA ROUGH WATER SWIM, <http://www.ljrws.com>.

legitimacy, shaming, and other forms of informal social control to impose its norms. We now turn to examine the way in which these ethical tenets, fragmented regulation, and informal social control operated against a specific perceived deviant.

B. Diana Nyad's Swim from Cuba to Florida

The nautical course from Havana to Key West covers 102 aerial miles⁹⁹ of Atlantic Ocean waters at a tepid temperature.¹⁰⁰ The water is full of marine creatures, from jellyfish¹⁰¹ to sharks.¹⁰² On the afternoon of July 11, 1978, a year after the Kennedy-era travel restrictions to Cuba were lifted, 64-year-old Walter Poenisch undertook a Swim for Peace, swimming without a shark cage but with fins (forbidden by modern marathon swimming rules) under the auspices of the International Federation of Professional Ocean Swimmers and Divers.¹⁰³ Battling strong currents and painful jellyfish stings, Poenisch completed the course in 34 hours and 15 minutes.¹⁰⁴

A few short weeks after Poenisch's swim, 28-year-old Diana Nyad first attempted the swim, using a protective shark cage (also forbidden by modern marathon swimming rules).¹⁰⁵ She withdrew after a 76-mile swim due to strong winds and swells that pushed her off-course.¹⁰⁶

⁹⁹ As measured online using GOOGLE MAPS, <http://www.maps.google.com>.

¹⁰⁰ For Havan Sea Tempature, see HAVAN SEA TEMPATURE, <http://www.seatemperature.org/central-america/cuba/havana.htm>.

¹⁰¹ See, e.g., "Debilitating" Jellyfish Sting Ends Chloe McCardel's Cuba-to-Florida Swim, SWIMMING WORLD MAGAZINE (June 12, 2013), <http://www.swimmingworldmagazine.com/lane9/news/openwater/34694.asp>.

¹⁰² David Shiftman, *Swimming with Sharks: Was Diana Nyad Really at Risk of Being Bitten During Her Historic Swim?*, SLATE.COM (Sept. 4, 2013), http://www.slate.com/articles/health_and_science/science/2013/09/diana_nyad_shark_swim_how_dangerous_are_the_sharks_between_cuba_and_florida.html.

¹⁰³ *Log of Walter Poenisch's "Swim for Peace" * Cuba to U.S.A. 1978*, OPEN WATER SWIMMING (July 1978), <http://openwaterswimming.eu/files/Observer-report-Walter-Poenisch-Cuba-USA.pdf>.

¹⁰⁴ *Affidavit of James M. Mims, President of The International Federation of Professional Ocean Swimmers and Divers*, OPEN WATER SWIMMING (1983), <http://openwaterswimming.eu/files/Observer-Int-%20Fed-Prof-Ocean-Swimmers-and-Divers.pdf>.

¹⁰⁵ A shark cage is a metal box large enough to fit a fully extended swimmer, whose bars or mesh do not allow sharks in.

¹⁰⁶ *Diana Nyad's First Try to Swim from Cuba to Florida*, NBC NEWS (Sept. 3, 2013), <http://www.nbcnews.com/video/nightly-news/52913017#52913017>.

In 1997, 22-year-old Susan Maroney completed the swim from Cuba to Florida, swimming for 24.5 hours in a shark cage.¹⁰⁷

Years after Maroney's achievement, Nyad returned to the sport after a lengthy retirement, making two attempts in 2011. Both attempts were made without a shark cage and both eventually failed due to harsh conditions, injury, and jellyfish stings that exacerbated her asthma. In 2012, Nyad trained for a third attempt under her newly-established Xtreme Dream brand, which, as Karen Throsby reports in her forthcoming book, received substantial press attention.¹⁰⁸ Throsby pointed out that the ambitious swim was a hugely expensive operation—the New York Times estimated a cost of \$500,000 for the July 2011 attempt—and Nyad offset the expense by signing up commercial sponsors, engaging in public speaking, and selling merchandise bearing the Xtreme Dream logo.¹⁰⁹ This attempt and a subsequent attempt in 2012 both failed due to conditions and jellyfish stings.

While Nyad's unsuccessful attempts received sympathy from mainstream media, primarily on account of her age and her empowering messaging,¹¹⁰ they consistently drew dismissive commentary from the marathon swimming community. The debates on the forums, documented by Throsby,¹¹¹ focused on posts on Nyad's blog, which reported a variety of technological innovations for the swim. These innovations included: a warm-water dripping device to be worn around the neck (for hypothermia prevention); constant efforts to manufacture and perfect a suit and mask for protection from jellyfish stings (of particular importance to Nyad, who is asthmatic); and a "directional streamer", shining a red light on the bottom of the water to create a "lane line" and make sighting easier for Nyad. The controversies about these devices, which erupted before the swim itself, highlight the different approaches to the sport—the spirit of adventure and pioneering, which would be more relaxed

¹⁰⁷ *Australian Is the First Woman To Swim From Cuba to Florida*, THE NEW YORK TIMES (May 13, 1997), <http://www.nytimes.com/1997/05/13/us/australian-is-the-first-woman-to-swim-from-cuba-to-florida.html>.

¹⁰⁸ THROSBY, *supra* note 87.

¹⁰⁹ *Id.*

¹¹⁰ See CNN Wire Staff, *Nyad Quits Swim After Storm, Jellyfish Stings*, CNN (August 22, 2012, 9:52 AM), <http://www.cnn.com/2012/08/21/health/diana-nyad-swim/>.

¹¹¹ THROSBY, *supra* note 96.

about rules as long as the devices used support the dream, versus the commitment to tradition and legitimacy from the community, which highlights transparency, integrity, and adherence to an agreed-upon set of rules. Nyad's comments, quoted by Throsby, are clearly an indication of the former approach. "But many of us in this sport are entering new territory in these swims that have never been done. While respecting the clear rules of no unnatural flotation, no help in forward speed, many of us are innovating as much as we are plain swimming."¹¹²

By contrast, Throsby quotes forum commentators as ridiculing such technological inventions, aligning themselves with the latter approach, and their commitment to ideas of spartanism, tradition, and self-sufficiency:

"I await the introduction of inflatable arm bands to Channel swimming with great excitement While you're at it, why not just put in a mini Jacuzzi off the side of the boat If someone lets in hot water necklaces, someone else will let in the Jacuzzi and then we have a corrupted sport with no real accomplishment / honor / valor associated with it."¹¹³

During the swim attempts themselves, forum critique focused on what were perceived as more serious violations of the traditional rules of the sport: footage showing Nyad holding on to the pilot boat during a feed, which would end a swim under English Channel rules, and some vagueness about a period of time Nyad spent on the boat hiding from a tropical squall.

Nyad proceeded to train and prepare for a fifth attempt. The Article's chronology of this attempt, and the events that followed, are based in large part on reports on Nyad's website and on mainstream media news and relies on a timeline provided in marathon swimmer Evan Morrison's Freshwater Swimmer Blog.¹¹⁴

The swim started on August 31, 2013, at 8:59 am EDT, when she entered the water just west of Havana, Cuba. Her crew posted

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Diana Nyad, *Nyad Agonistes: The Anatomy of a Social Media Campaign*, FARTHER, COLDER, ROUGHER (Oct. 9, 2013), <http://marathonswimmers.org/blog/2013/10/nyad-agonistes-anatomy-social-media-campaign-1/>.

periodic reports on her website, diananyad.com, showing her swimming strong. Her SPOT tracker was consistently updated. At Hour 33, a video of her shows her swimming strong at a point at which her GPS data reported her speed as more than five miles per hour. At 11:00 pm, Nyad's crew reported that "winds suddenly rose to 23 knots," and the team "went into squall protocol."¹¹⁵ Shortly after that, at 11:38 pm, CNN reported that Nyad "has broken swimmer Penny Palfrey's 2012 distance record in the Cuba to Florida swim."¹¹⁶ On September 2, at 1:27 am, Nyad's crew reported that they were "free of the storm." At that time, Nyad's GPS data showed her as swimming more than four miles per hour.¹¹⁷

The next report from Nyad's crew was posted at 7:15 am, reporting that she had not stopped to take in any food or drinks since before midnight "in the hopes that swimming would keep her warm."¹¹⁸ From then on, positive reports from Nyad's crew were posted on the blog, and Nyad's approach to shore was documented. The rate of her advancement slowed down considerably from the speed of the previous night. Two miles from shore, Nyad stopped in the water to deliver a speech of thanks to her crew.¹¹⁹ At 1:53 pm, she cleared the water in Key West. Before a cheering crowd, she walked into the embrace of her handler, Bonnie, 53 hours after departing from Havana.¹²⁰ All major news

¹¹⁵ See Candace Hogan, *Update 11pm September 1, 2013: Swim Time: 38:00*, NYAD XTREME DREAM (Sept. 2, 2013, 12:29 AM), <http://www.diananyad.com/blog/update-3800-swim-time>.

¹¹⁶ CNN Staff, *Diana Nyad's Cuba to Florida Swim Breaks One Record*, CNN (Sep. 1, 2013, 11:38 PM), <http://www.cnn.com/2013/09/01/world/americas/diana-nyad-cuba-florida-swim/index.html>.

¹¹⁷ See Candace Hogan, *Status Update: 1:27am September 2, 2013*, NYAD XTREME DREAM (Sept. 2, 2013, 12:29 AM), <http://www.diananyad.com/blog/update-127am-090213> (The speed reports are notable because Nyad, like this piece's author, is a fairly slow open water marathoner, averaging, without current assistance, less than two miles per hour.).

¹¹⁸ See Candace Hogan, *Doctor's Report 715am - 730am*, NYAD XTREME DREAM, (Sept. 2, 2013, 12:29 AM), <http://www.diananyad.com/blog/doctor-report-715am>.

¹¹⁹ *SUCCESS! 64-Year-Old Diana Nyad Completes Cuba to Florida Swim on Fifth Try*, SWIMMING WORLD MAGAZINE (Sept. 2, 2013, 10:53 AM), <http://www.swimmingworldmagazine.com/news/success-64-year-old-diana-nyad-completes-cuba-to-florida-swim-on-fifth-try/>.

¹²⁰ Ed Pilkington, *Diana Nyad Becomes First to Swim from Cuba to Florida Without Shark Cage*, THE GUARDIAN (Sept. 2, 2013), <http://www.theguardian.com/world/2013/sep/02/diana-nyad-swim-cuba-florida1>.

networks reported that Nyad swam 53 hours nonstop from Cuba to Florida.¹²¹

During the swim, the Marathon Swimmers Forum was buzzing with commentary. The first commenting thread established was titled “Here We Go Again...” and consisted mostly of cynical posts mocking the swim. As a response, some commentators more favorable to the swim started a supportive thread titled “Diana Nyad’s Epic Swim.” After the completion of the swim, when the forum moderators suggested a fact-driven approach rather than cynicism, all discussion was funneled into a third, presumably objective thread titled “110 Miles, 53 Hours: Questions for Diana Nyad.” This thread consisted, for the most part, of posts by skeptical marathon swimmers raising various discrepancies and problems with the swim and later of debates between Nyad’s crewmembers and the forum members.

Initially, the community’s commentary on the swim focused on the technical innovations Nyad used, such as her special anti-jellyfish suit and mask as well as the “squall protocol” and other assistance received from crewmembers. Commenters focused on footage from previous swims, showing Nyad holding on to the boat and depicting crewmembers helping her in and out of suits in the water. However, the community’s attention quickly turned to the most significant set of concerns, Nyad’s speed in the water. Known to be a relatively slow swimmer, with an average pool speed of less than two miles per hour, Nyad’s report of swimming between four and five miles per hour raised commentators’ eyebrows in suspicion.¹²² The combination of this mysterious speed, the confounding report from the crew that Nyad had not taken in food during the night, and her previous tainted reputation based on

¹²¹ Lizette Alvarez, *Sharks Absent, Swimmer, 64, Strokes From Cuba to Florida*, N.Y. TIMES, (Sept. 2, 2013), http://www.nytimes.com/2013/09/03/sports/nyad-completes-cuba-to-florida-swim.html?_r=1&. See also Matt Slone, ‘Never, Ever Give Up:’ Diana Nyad Completes Historic Cuba-to-Florida Swim, CNN (Sept. 3, 2013), <http://www.cnn.com/2013/09/02/world/americas/diana-nyad-cuba-florida-swim/index.html>.

¹²² Evan Morrison, *Nyad Agonistes: The Anatomy of a Social Media Campaign*, FARTHER, COLDER, ROUGHER (Oct. 9, 2013), <http://marathonswimmers.org/blog/2013/10/nyad-agonistes-anatomy-social-media-campaign-1/>.

footage of contact with the boat led many leading commentators to doubt the authenticity of the swim.

The suspicious and deriding commentary continued many days after the completion of the swim. At one point, swimmer Andrew Malinak produced a statistical analysis of Nyad's swim speed according to her GPS tracker, confirming the community's suspicions.¹²³ While some acknowledged it was entirely possible that Nyad was fortunate in catching a favorable current, they expected her crew to confirm this hypothesis with data from the boat. Evan Morrison, administrator of the forum, repeatedly used the sentence, "extraordinary claims require extraordinary evidence."¹²⁴

The increasing doubts about the authenticity of Nyad's swim eventually reached the mainstream media.¹²⁵ Initially, bloggers and commentators who were outsiders to the sport were upset by the community's negative reaction, which they ascribed to jealousy and pettiness.¹²⁶ Eventually, the media coverage of the controversy led to a confrontation between Nyad and several well-

¹²³ Malinaka, Comment to, *110 Miles, 53 Hours: Questions for Diana Nyad*, MARATHON SWIMMERS FORUM (Sept. 2013), http://marathonswimmers.org/forum/discussion/606/110-miles-53-hours-questions-for-diana-nyad/p1#Comment_7756.

¹²⁴ See Morrison, *supra* note 122.

¹²⁵ Jennifer Kay, *Diana Nyad's Skeptics Question Integrity of Swim, Use of Mask, Possible Assistance by Boat*, HUFFINGTON POST (Sept. 8, 2013), http://www.huffingtonpost.com/2013/09/08/diana-nyad-swim-rules-boat-mask_n_3890216.html. See also Daily Mail Reporter, *Did US Grandmother Diana Nyad Really Do It? Doubters Snipe at Swim from Cuba to Florida*, MAIL ONLINE (Sept. 8, 2013), <http://www.dailymail.co.uk/news/article-2415576/Diana-Nyad-Skeptics-question-US-grandmother-Diana-Nyad-swam-Cuba-Florida-help-team-boat-her.html> (last visited Oct. 13, 2014); Associated Press, *Diana Nyad Team Becoming Sensitive to Skeptics*, CBS NEWS (Sept. 8, 2013), <http://www.cbsnews.com/news/diana-nyad-team-becoming-sensitive-to-skeptics/>.

¹²⁶ Jennifer Jarvis, *Haters Gonna Hate*, RUNNINGMOM4'S BLOG (Nov. 21, 2013), <http://runningmom4.com/?s=haters+gonna+hate>. See also Jennifer Kay, *Nyad's Team Responds to Skeptics Doubting Her Swim*, SPEARBOARD.COM (Sept. 8, 2013), <http://www.spearboard.com/showthread.php?t=166007>; Eric Zorn, *Nyad Comes Ashore and Bah!-portunity Knocks*, CHICAGO TRIBUNE (Sept. 4, 2013), http://blogs.chicagotribune.com/news_columnists_ezorn/2013/09/nyad-comes-ashore-and-bah-portunity-knocks.html; Mike Lewis, *Opinion: Nyad's Legit*, SWIM SWAM (Sept. 9, 2013), <http://swimswam.com/opinion-nyads-legit/>.

known marathon swimmers and race directors who expressed skepticism about the swim.¹²⁷

A few months after the swim, the managers of the forum rebranded it as the Marathon Swimming Federation, creating the first-ever set of Global Rules for the sport. The impetus for this move was, in large part, the aftermath of the Nyad controversy and debate, which according to Evan Morrison, exposed “a big lacuna in the sport”—namely, the absence of universal regulation.¹²⁸

We now turn to an in-depth analysis of the community’s reaction to Nyad’s swim and of the creation of the Global Rules, which is based on qualitative analysis of all posts in the Marathon Swimming Forum, media and blog reports, and interviews with sports insiders. As the analysis demonstrates, and in accordance with Durkheim’s functionalist theory of the role of defiance in fostering social solidarity, Nyad’s swim and her perceived deviance from the ethos of the sport provided an important opportunity, and an invaluable service, to the marathon swimming community. Not only did swimmers of various abilities and geographical locations develop a sense of solidarity and common values around their mutual skepticism of Nyad’s claims, but the community also used the swim and Nyad’s perceived deviance as a springboard for debate about the need for rules, the relevance of traditional rules, and the hierarchy of importance among rules.

¹²⁷ Colleen Curry, *Diana Nyad to Confront Cuba Swim Skeptics*, ABC NEWS (Sept 9, 2013), <http://abcnews.go.com/blogs/headlines/2013/09/diana-nyad-to-confront-cuba-swim-skeptics/>; Elliot Hannon, *Did Diana Nyad Get a Lift During Her 100-Plus Mile Swim? Critics Question the Data*, SLATE.COM (Sept 9, 2013), http://www.slate.com/blogs/the_slatest/2013/09/09/diana_nyad_set_to_meet_with_skeptics_about_her_marathon_swim.html; e-mail from Donal Buckley, *supra* note 6.

¹²⁸ Interview with Evan Morrison, moderator of the Marathon Swimming Federation website, in S.F., Cal. (Jan. 18, 2014).

III. DURKHEIM GOES SWIMMING:

A. *Law, Solidarity, and the Latent Functions of Deviance*

1. Deviance: An Opportunity to Foster Solidarity

In his social network analysis of the athletic subculture, Howard Nixon argues that athletic communities are particularly fertile grounds for a mentality of conformity because of their commitment to the sport, which includes an extraordinary willingness to endure injury and pain.¹²⁹ Athletes, argued Nixon, consistently receive messages from their community of reference, which he termed “sportsnet”, or sporting subculture, about the need to be stoic and Spartan about pain. The result is strong commitment to compliance with rules, especially rules that encourage endurance and Spartanism.¹³⁰ Moreover, Nixon noted that the commitment to endurance, echoed by one’s subculture, becomes a means of exerting social control against potentially threatening or troublesome members.¹³¹ Athletes ascribe immense importance to conformity of rules, because the acceptance of hardship and risk become an important component of their identity.¹³² Indeed, Tim Delaney and Tim Madigan discuss the ways in which participation in sports creates an essential “athlete” identity and how strong socialization into one’s sports group can become a person’s primary way of identifying, known in sociology as his or her master status.¹³³

The marathon swimming community is a prime example of this tendency toward strong compliance with the ethos of the sport, particularly acceptance of pain and risk, because of the characteristics described above. Their reaction mirrors the demonizing, criminalizing approaches against categories of criminals reviled by the media, such as drug users¹³⁴ and sex

¹²⁹ Howard L. Nixon II, *A Social Network Analysis of Influences on Athletes to Play with Pain and Injuries*, 16 J. OF SPORT AND SOC. ISSUES 127 (1992).

¹³⁰ *Id.* at 128.

¹³¹ *Id.* at 129-130.

¹³² *Id.* at 130.

¹³³ TIM DELANEY & TIM MADIGAN, *THE SOCIOLOGY OF SPORTS: AN INTRODUCTION* 77-78 (2009).

¹³⁴ TROY DUSTER, *THE LEGISLATION OF MORALITY: LAW, DRUGS, AND MORAL JUDGMENT* (1970); ERIC SCHLOSSER, *REEFER MADNESS* (2003).

offenders.¹³⁵ The community is relatively small and close-knit, and due to the relative obscurity of the sport and its lack of funding and spectator appeal, and fairly insulated, in terms of its internal behavior and social processes, from the broader non-swimming community. In that respect, despite the fact that the marathon swimmers who participate in discussions about the sport live in a modern world, unlike the “simple” societies that Spitzer and Sheleff imagined, and are geographically far away from each other, they retain important features of Durkheim’s mechanical solidarity: a similarity in interests and in function, a relatively small population, and social closeness.

In accordance with this ethos of conformity and social control, the initial tone of the discussion threads about the swim was jocular and mocking.¹³⁶ Many of the early posts received a relatively large number of “likes”; these were mostly attached to posts disparaging the swim than to posts supporting it, though gradually an opposition to the jocular tone yielded a counter-reaction in the form of a “cheering section” item¹³⁷. The message in the disparaging posts was mainly an effort to set Nyad apart from the community as a deviant, a proclamation that Nyad was an outsider.¹³⁸ Notably, Nyad has been unfavorably compared to, and clearly distinguished from, other Cuba-to-Florida swimmers like Penny Palfrey and Chloe McCardel, both of whom are considered well-respected “insiders” in the community whose honesty and accurate reporting was never in question.

The stigmatization and characterization of Nyad as a deviant outsider relied not only on the technical details of the swim, but rather on her notorious reputation for non-authenticity and unsportsmanlike behavior. Several events from Nyad’s distant, and not-so-distant, past were repeatedly mentioned. At a later phase, posters resuscitated Walter Poenisch’s swim from the late

¹³⁵ CHRYSANTHI LEON, *SEX FIENDS, PERVERTS, AND PEDOPHILES: UNDERSTANDING SEX CRIME POLICY IN AMERICA* (2011).

¹³⁶ *Here We Go Again...*, MARATHON SWIMMERS FORUM, <http://marathonswimmers.org/forum/discussion/601/>.

¹³⁷ *Diana Nyad’s Epic Swim*, MARATHON SWIMMERS FORUM, <http://marathonswimmers.org/forum/discussion/603/>.

¹³⁸ *See, e.g., 110 Miles, 53 Hours: Questions for Diana Nyad*, MARATHON SWIMMERS FORUM, http://marathonswimmers.org/forum/discussion/606/110-miles-53-hours-questions-for-diana-nyad/p10#Comment_8573.

1978, giving him a collective posthumous embrace.¹³⁹ As mentioned above, Poenisch's swim was also assisted; he swam with fins.¹⁴⁰ However, as commentators pointed out, Poenisch clearly and openly set the rules for his effort.¹⁴¹ This commentary on Poenisch's swim served two rhetorical purposes. First, retelling the 30-year rivalry between him and a young Nyad, who made disparaging remarks about his swim, was a way to highlight Nyad's unsportsmanlike behavior.¹⁴² The irony was not lost on community members. Nyad, who had once disparaged and doubted another swimmer, would now meet her comeuppance as her own effort was disparaged and doubted as well (indeed, after Poenisch sued the International Swimming Hall of Fame for defamation, Nyad retracted her disparaging comments in 1983; and later, when her own swim was doubted, she issued a late apology.)¹⁴³ Secondly, the resuscitation of the swim sent the message that the community values tradition, recordkeeping, and respect for the achievement of past generations of athletes, perceiving the disrespect as an affront to the proper social order.

The first comment in the "Here We Go Again" thread, by Niek, read:

"Reasons to abandon the attempt:
 O -A jellyfish sting on her tongue
 O -A tropical thunderstorm sinks one of her 47 boats.
 O -She awakes from her Xtreme Dream
 O -All of the above

¹³⁹ *Walter Poenisch: Lost At Sea. The First Person to Swim from Cuba to Florida!*, MARATHON SWIMMERS FORUM (Oct. 2013), <http://marathonswimmers.org/forum/discussion/641/walter-poenisch-lost-at-sea-the-first-person-to-swim-from-cuba-to-florida/p1>.

¹⁴⁰ See Niek, Comment to *Walter Poenisch: Lost At Sea. The First Person to Swim from Cuba to Florida!*, MARATHON SWIMMERS FORUM (Oct. 2013), <http://marathonswimmers.org/forum/discussion/641/walter-poenisch-lost-at-sea-the-first-person-to-swim-from-cuba-to-florida/p1>.

¹⁴¹ See Leonard_Jansen, Comment to *Walter Poenisch: Lost At Sea. The First Person to Swim from Cuba to Florida!*, MARATHON SWIMMERS FORUM (Oct. 2013), <http://marathonswimmers.org/forum/discussion/641/walter-poenisch-lost-at-sea-the-first-person-to-swim-from-cuba-to-florida/p1>.

¹⁴² Vvise, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

¹⁴³ Sharon Terlep, *Diana Nyad's Great Regret*, WALL ST. J. (Nov. 14, 2013), <http://www.wsj.com/articles/SB10001424052702303559504579198073878055530>.

O -Nothing happens and Diana stops because she gets bored”¹⁴⁴

Several cynical posts followed, lampooning Nyad’s perceived dishonesty and her self-promotion efforts. Gradually, the critique became more serious. Suzie Dods raised the issue of personal reputation:

Popping my head above the parapet here. Whatever your thoughts on DN, and I am not a fan of her (or anyone’s) hoopla I think one of the problems is her ‘boy who cried wolf’ from her previous attempts will color any outcome. There has been a dearth of video this time, no official observer’s report (that I am aware of) among other things. You can not fault her bloody minded perseverance and here’s the kicker.. IF she inspires others in whatever endeavor they are seeking... Where’s the wrong in that? We all swim for different reasons. Her reasons may not be yours or mine, or follow any recognized set of rules.... But aren’t rules arbitrary and malleable?¹⁴⁵

Some community members, however, were still supportive of Nyad. Mandai commented:

Whilst there are many things that could have been done better/differently, the bottom line for me is that it was simply a great achievement, also taking her previous attempts into account. Steve [Munatones] wrote two good articles about it today in the [Daily News of Open Water Swimming] and I’m very much with him on both. If 107m or 52h+ of swimming isn’t good enough for giving her credit I don’t know what could be.¹⁴⁶

Even Niek, one of the fiercest critics of the swim, remarked during its progress: “With all my criticism I always said: If she makes it. It still will be an achievement. So Diana congratulations on your achievement.”¹⁴⁷

¹⁴⁴ Niek, Comment to *Here We Go Again...*, *supra* note 136.

¹⁴⁵ Suziedods, Comment to *Here We Go Again...*, *supra* note 136.

¹⁴⁶ Mandai, Comment to *Diana Nyad’s Epic Swim*, *supra* note 137.

¹⁴⁷ Niek, Comment to *Diana Nyad’s Epic Swim*, *supra* note 137.
<http://marathonswimmers.org/forum/discussion/603/diana-nyad-s-epic-swim/p1>.

The swimmers who were initially supportive of Nyad started their own thread, consisting mostly of congratulations and encouragement. After a few more posts in both threads, Morrison and Buckley consolidated the discussion in a third thread, “110 Miles, 53 Hours: Questions for Diana Nyad.”¹⁴⁸ While discussion in the new thread was still peppered with occasional jokes and jabs at Nyad, their tenor gradually turned more serious. Fairly early on, Haydn posted:

I don't like this thread. Knowing the majority of MSF members opinions on Diana have been negative due to her either breaking establish EC rules and developing or inventing her own rules , why didn't an observer from MSF or CSA ask be invited along? Was there nobody on Diana's crew that MSF would believe? It is very clear if her swim is judged under EC rules, then it was a failure. But she still swam a fantastic swim. (better than if it were a wetsuit and fins swim). However, because of the extreme value of this swim (which should go down in history as one of the greatest ever swims), I would expect it to have the greatest degree of transparency, especially to avoid 'fraud' type remarks. I guess in a few days, Diana can be interviewed to clarify exactly how she conducted her swim.¹⁴⁹

Indeed, the thread gradually lost its acerbic tone and became more matter-of-factly, with forum members increasingly realizing that they were facing a watershed moment for the sport, whose implications would reach far beyond an affirmation of their solidarity and common values. However, references to Nyad as an outsider aimed at reinforcing social solidarity continued to pop up in the new thread. The reputational ousting of Nyad relied, for the most part, on two characterizations. Several posters, such as JCMalick, focused on Nyad's deviance due to her unsportsmanlike behavior toward former Cuba-to-Florida contenders:

I've tried to stay as neutral as possible on this topic as I strongly believe that the core of open water swimming comes from the passion from jumping in and having the time of your

¹⁴⁸ *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

¹⁴⁹ Haydn, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

life and helping to inspire others in the process. Penny Palfrey has long been a living legend in my book ever since I started marathon swimming and I have the utmost respect for Chloe McCardel because of the respect she gives this sport/community; as a whole, I believe we all are very encouraging in the marathon swimming world and deep down we all want to see our sport open doors and attract others to be inspired and want to experience a newfound joy themselves. To publicly slander your competitors is utter distaste (as seen in the Seattle Times article above and first brought to my attention by Chloe's FB post) and a little of my stock in Diana Nyad has just dropped. Call me a traitor (as a fellow American) if I support the endeavors of everyone in the marathon swimming community regardless of race, religion, or nationality! Live your dream but don't try to deflate those of others in the process!¹⁵⁰

JCMalick's comment explicitly references the strong solidarity and mutual assistance that characterizes the community, highlighting the deviant aspect of Nyad, who chose to distance herself from her colleagues and predecessors. Another commentator, JBirrrd, explicitly mentions the size of the community and the need for members to account for their conformity to the ethos:

As you all probably saw, I am now one of the ones who question certain aspects of her swim. There are simply things that do not make sense to me. Woodkayaker [Nyad's crewmember – H.A.]– We realize you can only respond to questions related to your responsibilities as a member of Diana's team. Is there anyone reading this who has access to others who were present during Diana's crossing? FB friend? Relative? Friend of a friend? We are a small community and somebody must know someone. And should we get others on here who can speak to what they saw, please we need to let them talk. We have a pretty comprehensive list of questions to be addressed. Follow-up questions and comments should be respectful. Listen. Process what you hear. More info—better.

¹⁵⁰ JCMalick, Comment to *Diana Nyad's Epic Swim*, supra note 137.

When the talk turns ugly, people shut down, and really, can you blame them?¹⁵¹

Like JCMalick's comment, JBirrrd's comment is an excellent example of an expression of group solidarity. First, she speaks directly as a member of a collective: the "we" of marathon swimmers, confronting the deviant "she". She alludes to an ethical obligation of Nyad's, namely, that she owes the collective information and details about the swim. Nyad's lack of transparency is, again, analogized to a crime, and the social reaction to it is cast as punishment.

2. Deviance Begets Rules

In addition to providing an opportunity for strengthening community solidarity, the discussion of Nyad's swim provided an opportunity to reinforce the importance of the rules of the sport and their relation to its ethos.

It is important to understand why a reinforcement of the rules was necessary for marathon swimmers. The regulation of extreme endurance sports is a special case, and external regulating agencies tend to focus on safety and risk as the primary consideration. Ball-King, Watt, and Ball, who examine the regulation of the adventure sport scene in the UK, believe that external regulators tend to borrow their concept of risk from the context of the workplace, where risk is paramount, to the realm of pleasure activities, where sometimes the risk involved in physical challenge is precisely the reason the activity is undertaken.¹⁵² Indeed, in some sportive endeavors, like Parkour, practitioners deliberately eschew safety rules and gear, but the values behind the activity—freedom, functionality, and the like—are reinforced by the culture.¹⁵³ Similarly, the marathon swimming community's informal social control focuses on the ethos and integrity of the sport, assuming that people will acknowledge risk – such as ending a swim on account of a tropical squall – but accept the consequences and the respect that comes with honest disclosure.

¹⁵¹ JBirrrd, Comment to *Diana Nyad's Epic Swim*, *supra* note 137.

¹⁵² Laurence Ball-King, John Watt, & David J. Ball, *The Rise and Fall of a Regulator: Adventure Sports in the United Kingdom*, 33 RISK ANALYSIS 15, 19 (2013).

¹⁵³ ATKINSON & YOUNG, *supra* note 57, at 61-62.

The Nyad-related discussion on the forums focused on explaining the ethos and rendering it into simply framed rules that need to be followed so that the spirit of the sport may be preserved.

This reminder was timely. Between the 1950s and 1970s, marathon swimming enjoyed a heyday of popularity, glamorized through the movies of Esther Williams¹⁵⁴ and the well-advertised swims of Florence Chadwick.¹⁵⁵ Manuals and books of open water swimming from this era, which include a great deal of historiography and memoir materials, reveal a strong prevalent understanding of the rules, accompanied by a nonchalance about them. When retelling her 1965 open water swim experience, a trans-Golden Gate swim, champion marathoner Penny Dean says matter-of-factly that when she felt cold she touched the boat to end the swim and was promptly disqualified from continuing.¹⁵⁶ Any discussion of rules or ethos is absent from the rest of her memoir. Notably, Dean's manual for open water swimmers only discusses rules in the competition context, where she informs her readers of the rule against kicking other swimmers, points out that the rule is hardly enforced and that swimmers need to learn to handle violence from other competitors, and offers some advice about retaliation when necessary.¹⁵⁷ Dean makes no mention of integrity, lack of help from outsiders, or not touching the boat—perhaps because she assumes that her readers acknowledge these values and do not need to be reminded. Two other open water manuals – Steven Munatones's *Open Water Swimming*¹⁵⁸ and Lynne Cox's recently published *Open Water Swimming Manual*¹⁵⁹ – do not comprehensively discuss the ethos or the rules of the sport. Lynn Sherr's *Swim: Why We Love the Water* discusses the exhilaration and joy of the sport but not its ethical tenets.¹⁶⁰ Most interestingly, Conrad Wennerberg's historiography of the sport

¹⁵⁴ DANGEROUS WHEN WET (MGM 1953).

¹⁵⁵ *Florence Chadwick*, ENCYCLOPEDIA BRITANNICA (Dec. 8, 2013), <http://www.britannica.com/EBchecked/topic/104229/Florence-Chadwick>.

¹⁵⁶ PENNY LEE DEAN, JUST TRY ONE MORE (2013).

¹⁵⁷ PENNY LEE DEAN, OPEN WATER SWIMMING: A COMPLETE GUIDE FOR DISTANCE SWIMMERS AND TRIATHELETES (1998).

¹⁵⁸ MUNATONES, *supra* note 78.

¹⁵⁹ LYNNE COX, OPEN WATER SWIMMING MANUAL: AN EXPERT'S SURVIVAL GUIDE FOR TRIATHLETES AND OPEN WATER SWIMMERS (2013).

¹⁶⁰ LYNN SHERR, SWIM: WHY WE LOVE THE WATER (2012).

recounts the details of many famous historical “golden age” open water swims, with no discussion of the rules.¹⁶¹ Wennerberg provides fascinating photographic footage of many great swimmers, including legendary Egyptian marathoner Abdul Latif Abou Heif.¹⁶² In one of these photos, Abou Heif is shown exiting Lake Michigan after a long swim, supported by his wife and a friend with his legs still in the water.¹⁶³ It is clearly understood that he has just completed an awe-inspiring feat, and that niceties like clearing the water fully before the official finish are of no consequence.

The combined conclusion from these manuals and memoirs is that explicit, strict rules matter more for shorter races (even though they cannot always be properly enforced) and that marathoners are assumed to be complying with the spirit of the sport without the imposition of minutiae. Even within the context of solo swims, existing regulation prior to Nyad’s swim was, as mentioned above, localized—regulated channels and established races included rules, which were variations on the English Channel rules, but unregulated channels were left to the discretion of the swimmer.

Nyad’s swim created a community need to reinforce the ethos via clearer norms, as Evan Morrison referred to it, to close the “loophole” of unregulated swims. The immensity of Nyad’s achievement, if recognized, and the knowledge chasm between insiders and outsiders in the sport, meant that the stakes were now high enough to threaten the purist approach that was at the core of the sport. Commentators on the Marathon Swimming forums, both Nyad supporters and detractors, stressed the importance of integrity and adherence to rules, reinforcing them for the future. Loneswimmer highlights the importance of

¹⁶¹ CONRAD WENNERBERG, *WIND, WAVES, AND SUNBURN: A BRIEF HISTORY OF MARATHON SWIMMING* (1997).

¹⁶² See OPENWATERPEDIA, http://openwaterpedia.com/index.php?title=Abdul_Latif_Abou_Heif&oldid=301418; Evochamp, *Abouheif the Nile Crocodile*, YOUTUBE (May 20, 2009), <http://www.youtube.com/watch?v=IPnMarGWQRg&NR=1>. In Egypt and Syria, open water marathoners are revered as famous athletes; streets are named after them. See LYNNE COX, *SWIMMING TO ANTARCTICA: TALES OF A LONG DISTANCE SWIMMER* (2009); DAVID EGGERS, *ZEITOUN* (2010).

¹⁶³ WENNERBERG, *supra* note 161.

transparency by stressing what he refers to as the “two golden rules”:

1. The swimmer/organisation must fully disclose all the rules and criteria of the swim beforehand.
2. If the swim is to be recognised somehow, then the swim must have fully Independent Observation for Verification that the swim meets these stated rules and the participants must be fully cognizant of all the rules, especially those which relate to Invalidation of a swim.¹⁶⁴

One of Nyad’s crewmembers comments about her adherence to the rules:

There seems to be a lot of people here on this forum that are hoping that Diana did something to compromise this incredible feat that she has achieved. I am not really very sorry to be the one to disappoint you all, but she did NOT do ANYTHING to compromise her record. . . . At NO TIME DURING THE SWIM, did Diana EVER get support from her mothership (Voyager), her handlers, her medical team, her shark divers, her kayaks or kayakers. . . You can speculate all you want, but the fact is, Diana OWNS this incredible record, whether you want to accept the facts, or not. Rather than picking apart her performance, and trying your damndest to find fault with her, as fellow swimmers, you should be CELEBRATING what she has accomplished. Quite honestly, if I was a fellow long distance swimmer, I would be embarrassed to read what fellow swimmers have been saying here.¹⁶⁵

In response, IronMike asks for verification:

You must understand that some of us (many of us?) are, in fact, excited about what she apparently did. However, as with anything this extraordinary, we’d like some questions answered. The more members of her crew, like you (thanks again), who come forward with observations, video, photos, showing that she actually did this, the better. With respect to

¹⁶⁴ Loneswimmer, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

¹⁶⁵ Woodkayaker, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

the observers, do you mean the WOWSA? Or is there another organization out there (that I can't find) named the Open Water Swimming Association? I can't find anything on WOWSA's site about Hinkle or McVeigh.¹⁶⁶

Evmu tries to frame the competition or claim for record:

"What is the record that is being claimed? I've seen it reported that Diana broke Penny Palfrey's Cayman Islands record for longest-distance solo, unassisted, open ocean swim... but I'm not sure how these two swims are comparable, as one is current-assisted and the other is not."¹⁶⁷

Another member of Nyad's crew suggests that the insistence of minutiae stems from personal jealousy:

"Diana has done a wonderful thing for endurance sport. You guys are really coming off like a bunch of curmudgeons. I think Diana Nyad is a courageous and dedicated athlete and her single-minded determination to conquer this Cuba-Florida swim is really inspiring. Let's see some of you going out to beat her time!"¹⁶⁸

IronMike replies:

"@goldfishgoddess, that's exactly the point. Some of us (not me) want to replicate this. But for that to happen, we have to know EXACTLY WHAT WAS DONE. Until we have complete transparency, how will we ever know what the next person has to do? For example, say another person attempts it and completes it in 56 hours, but does it without the jelly suit, or the streamer, or the jelly make-up? Does s/he now own the record, because s/he did it in a more restrictive way?"¹⁶⁹

That this insistence on minutiae was a clear departure from the previous practices of the community was not lost on various

¹⁶⁶ IronMike, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

¹⁶⁷ Evmu Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

¹⁶⁸ Goldfishgoddess, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

¹⁶⁹ IronMike, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

parties in the conversation. Steven Munatones commented later, to an older-generation swimmer whose record had been broken, that he needed to report on the rules for his swim because these had become “a big deal now in the marathon swimming community.”¹⁷⁰ Similarly, forum member *dc_in_sf* explains both the importance of rules and the need not to fetishize them:

“Personally (as a hurler on the ditch) I think the EC rules on physical contact are a little draconian - the fact that you can theoretically swim the entire width of the channel and then be disqualified because you stumble clearing that final 6 inches of water and some random third party assists you up, frankly doesn’t pass the sniff test for being reasonable (someone more versed in EC lore can let me know if this has ever happened).

That said I understand why the rules are that way; they remove the source of need for discretion (and thus variability) in the role of the observer, and in most cases such rules would not be the difference between the ability to complete a successful crossing or not.

For these crazy extreme events it really doesn’t seem unreasonable in any way shape or form to me, unless you fetishize the EC rules, to allow the medical support folk to conduct their exams with physical contact.”¹⁷¹

Several months after Nyad’s swim, several marathoners, including the administrators of the Forum, closed the “regulatory loophole.” The administrators published a set of global rules for the sport,¹⁷² which albeit lacking the finance and sanction mechanisms of other sports, derived power from many endorsements from other swimmers.¹⁷³ Nyad’s deviance was the prompt for this effort at regulation, and is especially evident in the authors’ choice to start off by defining a “marathon swim” in terms that clarify where Nyad was out of line:

¹⁷⁰ Email from Steven Munatones, Admin., Daily News of Open Water Swimming, to Bill Welzien, Race Director, (Jan. 17, 2014, 7:05 AM) (copy on file with author).

¹⁷¹ *Dc_in_sf*, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

¹⁷² *Rules of Marathon Swimming*, *supra* note 7.

¹⁷³ *MSF Rules – Endorsements*, MARATHON SWIMMERS FEDERATION (2014), <http://www.marathonswimmers.org/rules/endorsements/>. [Website no longer available]

A nonstop open-water swim, undertaken according to standardized rules, and requiring at least several hours of sustained effort to complete. Ten kilometers without significant assistance from currents is the minimum distance considered to be a marathon swim.¹⁷⁴

The definition is followed by the clarification:

Nonstop

Remaining in the water for the entire duration of the swim from start to finish without intentional physical contact with escort vessels, support personnel, or other objects (fixed or floating).

Unassisted

Without artificial assistance to performance, other than the standard equipment of the sport. Any swim using nonstandard performance-enhancing equipment, or otherwise violating the rules of unassisted marathon swimming, is considered an Assisted Swim.¹⁷⁵

The rules also stress the importance of having objective observers on board and offer guidelines as to the number of observers. This is achieved by not only paying special consideration to very long swims but also to high profile or unprecedented swims, both of which are probably covered in the context of Nyad's swim. As an almost textbook example of Durkheim's theory of social solidarity, deviance was an opportunity to clarify the rules and eliminate confusion both by insisting on edicts that had been forgotten and by awarding the generally agreed upon rules of the sport a more binding role and giving them a global status.

3. Using Deviance to Clarify Norm Hierarchy

The discussion of Nyad's swim encompassed several aspects of perceived deviance: disparaging behavior toward other swimmers of the same course, lack of transparency about the rules before the swim, suspect authenticity, failure to provide records,

¹⁷⁴ *Rules of Marathon Swimming*, *supra* note 7.

¹⁷⁵ *Id.*

nontraditional attire and gear, and unpermitted assistance from staff. While each of these received critique on the discussion boards, there seems to be a gradual shift in conversation topics. Earlier posts focused, for the most part, on the technological innovations involved in Nyad's effort and in the media coverage. However, as the mockery died down and more serious discussion followed, commentators began cataloguing Nyad's perceived deviance into serious and less serious violations. Bruck comments:

If Diana Nyad swam from Cuba to Florida unassisted, with the jelly costume and face mask being the only deviation from traditional channel rules, then it should be celebrated as one of the world's greatest endurance feats. I don't think a little skepticism about the current swim is unfair or mean, given the dubious circumstances and reporting of her previous swims. Assuming she finishes, I hope she and her team will make completely clear what, exactly, has been accomplished. Did she swim the whole way? Did she ever rest on the boat? Was she ever towed by the boat? How does she account for the unusually fast progress she made, seemingly far in excess of her personal swim speed?

Then the marathon swimming community can evaluate the claims and the evidence, and decide whether we believe her.¹⁷⁶

By focusing on the issue of transparency and integrity, and willing to accept technological innovations to an extent, the skeptics created a bridge of solidarity with swimmers who were supportive of Nyad's swim. One commenter points out what stands out for him:

I am in awe of what Diana has achieved! I have had a look on her website & I can't find any set of rules. I really want her to address this issue, what she has done is huge but I want to fully know what she has actually achieved. Unfortunately she stand[s] on her own reputation. The suspicion is prompted by Nyad's team's comment that she did not take in any feedings: And this was deep into the swim. No food, no electrolytes, no water? They report that she did this because she wanted to

¹⁷⁶ Bruck, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

keep moving to prevent getting cold(er). At least for me, not feeding for 7 1/2 hours after I had swam more than 24 hours would just lead me to getting colder. Of all of the things I've read this is the one that stands out the most. The only time I go without eating and drinking for 7 1/2 is when I am sleeping. But if she pulled it off, kudos to her.¹⁷⁷

Concerns about the swim's authenticity led swimmer Andrew Malinak to calculate Nyad's speed during the swim based on the reports of her GPS and distances taken from Google Earth, and concludes that it is impossible to ascertain whether she cheated or not:

What do I get out of this? Certainly not proof of anything. But it does ruin the fun I was having watching this drama play out. Again, I'm NOT saying that this is what Nyad did, but merely pointing out that her feat seems plausible based on some basic math. Assuming an average 0.49kt current heading in the general direction of ENE over the course of her swim doesn't sound unreasonable. I don't know...it just isn't so obvious to me anymore that this is controversial.¹⁷⁸

The focus, therefore, turned to the question of disclosure and transparency. The suspicions about the swim's authenticity cannot be directly verified, but the opacity regarding the rules and the process means they cannot be put to rest. As Jbirrd commented:

Diana is a seasoned swimmer. She knew that this historic swim would be publicized world-wide and scrutinized by others in the open water community. And yet she chose a support team and observers who obviously did not know how implausible it would sound to post some of the updates they did. C'mon. Maybe that stuff would go right over a non-swimmers' head, but anyone with minimal open water experience should be at least a little bit skeptical. The general public wants to believe this phenomenal success story of

¹⁷⁷ Mrfinbarr, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

¹⁷⁸ Malinak, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

perseverance and overcoming enormous odds. The media is all too happy to package this feel-good story of the year and deliver it to the world. But one woman's dream should not supersede the dreams of others. Be assured I will not be attempting this swim ever, but out of respect to those who have or will in the future, Diana and her team need to clarify exactly how this amazing feat was accomplished. I am patiently waiting for the never give up your dreams media blitz to end. Then I am confident that somebody in the mainstream media will start asking the tough questions and the facts will surface. Patience....¹⁷⁹

MvG explains why the lack of transparency is a more serious violation than the technological innovations:

That is why DN's various anti-jellyfish measures don't bother me, as these box jellyfish stings can be life threatening, unlike in the EC and the North Channel, where Lion's Manes jellyfish stings are, as I can say from experience since last Summer, extremely painful and annoying, but not (as far as I know) potentially lethal. I honestly don't care if a crew member has rubbed anti-jelly cream on her face during the swim, as it doesn't make the swim in the least bit less impressive in my view. Having said that, there needs to be more clarity than there has been on other rules that might help speed and/or endurance such as touching the boat, and getting on and off the boat in case of (thunder) storms, and a number of other questions raised on this forum, which are legitimate and are asked by somebody with a big heart for the sport and its practitioners. I just hope that DN and her PR team are smart and will soon come forward and make sure these boxes are ticked too. The one thing I, and I think almost anybody else, would consider outright cheating is being towed by the boat. (Which is also why we don't like shark cages, which were not meant to cheat but which do have a big impact on speed.) But I cannot imagine she would do that, or that an entire team of 35 people would acquiesce and remain silent on

¹⁷⁹ Jbirrrd, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

that. Anybody claiming such a thing will have to come with evidence, not insinuations.¹⁸⁰

Haydn comments:

“Everything I have read regarding Captain Webbs swim, suggest he was lead out of the water or clambering through the shallows into a cart with a rug around his shoulders. That would disqualify us. But who cares?.....Diana’s little ways to make her swim successful will have broken EC rules but they don’t bother me. It’s the swimming bit that counts and I recognise the absolute need for a stinger suit.”¹⁸¹

Evmo, the forum manager, restates the new focus: the problem is not lack of purity in itself, but rather lack of integrity.

It is frustrating that this misunderstanding continues to persist. If you read the discussions carefully, you’ll notice that the concern is NOT with her swim costume & other minor deviations from Channel Rules. The concern is **whether she actually did the swim** as claimed - nonstop and unassisted. Did she get on the boat, or was she towed by it? How is it biologically possible to go 7.5 hours without feeding **or drinking**, after she’s already been “swimming” for more than 35 hours, and reported to be “throwing up everything she eats”?¹⁸²

These priorities—integrity and transparency over the minutiae of equipment — are reflected in the final regulatory framework, sending a strong message to the community about what counts as a major “felony” and what is a mere “misdemeanor.” The rules authorize a variety of assistive devices, which are classified based on the extent to which they contribute to speed or buoyancy. Any of these is approved to use as long as the swimmer honestly reports their use and classifies their swim as “assisted.” Notably, some of the devices mentioned, such as the

¹⁸⁰ MvG, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

¹⁸¹ Haydn, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

¹⁸² Evmo, Comment to *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

“directional streamer” that Nyad used during her swim—were not in existence before her attempt, and were added to the rules in response to her deviance. Consistent with the emphasis on process and with the hierarchy of rules—integrity and honesty first, details second—swimmers need to honestly report using such devices, so that their efforts can be assessed and appreciated properly by the community. But while none of the devices used by Nyad is outright banned by the rules, some of her suspected behavior is categorically banned: touching the boat or getting on it is strictly forbidden by the rules. This hierarchy in importance of rules, and in severity of violations, is reflected in the Global Rules adopted in the aftermath of Nyad’s swim.

4. Deviance as an Opportunity to Facilitate Change and Dialogue

Following the publication of the rules, a debate developed regarding their jurisdiction and power. Raising this issue, Lakespray comments:

Diana Nyad’s swim is truly epic and getting excellent publicity for our crazy little sport . . . I wonder, did Captain Webb have a sanctioning body? or because he was first did that set the traditions for the sanctioning organizations that followed? All in her blog and the various news outlets have been quite **transparent** on the equipment she used and her process. Since she is the first without a shark cage, maybe it will be her traditions the yet to be born “The Straits of Florida Swimming Association” will follow.¹⁸³

Indeed, the newly adopted rules make no claim to supersede any official governing or sanctioning body. Speaking for the creators of the rules, Donal Buckley (loneswimmer), emphasized that their regulatory creation was not backed up by any official recognition or enforcement mechanism:

This is not about recognising swims. The MSF is not an observing, piloting, crewing, verification or ratification body. A swim recognised by an official organisation such as CS&PF stands. The only place where we have used our own criteria in

¹⁸³ Lakespray, Comment to *Diana Nyad’s Epic Swim*, *supra* note 137.

this fashion are that swims considered assisted may not be nominated for the annual MSF awards.¹⁸⁴

Despite this important disclaimer, forum swimmers would have a strong incentive to conform to a set of rules that would potentially yield legitimacy and respect from their peers. Therefore, the future adherents to the rules naturally had concerns about their flexibility and the extent to which they could be modified. The Rules specifically make allowances for unforeseen or unique circumstances. On one hand, predicting the need for change, the website is designed with the ability to track historical versions of the rules,¹⁸⁵ and it already includes a regulatory supplement.¹⁸⁶ As to specific adaptations chosen by individual swimmers, the rules merely ask that the swimmer and her team adhere to “the spirit of marathon swimming,” said to have guided the creation of the rules, and defined as follows:

Marathon swimmers embrace the challenge of crossing wild, open bodies of water with minimal assistance beyond their own innate physical strength and mental fortitude. There are ways to make the sport easier, but marathon swimmers consciously eschew them. Marathon swimmers take pride that their achievements can be meaningfully compared to the achievements of previous generations, because the standard equipment of the sport has not changed significantly since 1875.¹⁸⁷

The tension between the rules’ flexibility and the sport’s fondness for traditionalism yielded several interesting discussions in the aftermath of the rules’ publication. While using assistive equipment would not officially disqualify a swimmer as far as the Federation is concerned, the informal social control exerted by the rules led to interesting, and often very technical, discussions

¹⁸⁴ Loneswimmer, Comment to *The MSF Rules of Marathon Swimming*, MARATHON SWIMMERS FORUM (Jan. 6, 2014), http://www.marathonswimmers.org/forum/discussion/731/the-msf-rules-of-marathon-swimming/p1#Comment_10577.

¹⁸⁵ *MSF Rules – Version 1.0*, MARATHON SWIMMERS FEDERATION (Feb. 3, 2014), <http://www.marathonswimmers.org/rules/version-history/1.0/>.

¹⁸⁶ *Rules of Marathon Swimming – Supplement*, MARATHON SWIMMERS FEDERATION (Jan. 6, 2014) <http://www.marathonswimmers.org/rules/supplement/>.

¹⁸⁷ *Here We Go Again...*, *supra* note 136.

regarding particular tenets. One example was the heated debate about the rules' prohibition of wristwatches during a swim.¹⁸⁸ Swimmers debated whether it was worthwhile to create a regulatory prophylactic for future technologies, with some members expressing concern about the usage of watches that would transmit information and others arguing that regulation should develop with technology.¹⁸⁹ Also discussed was the concern that the prohibition was arbitrary; the rules do not forbid swimmers for asking their support crew to tell them the time.¹⁹⁰ Finally, several swimmers asked whether the information (or encouragement) that a wristwatch could provide should qualify as "assistance."¹⁹¹ The extent to which a future swimmer declaring the plan to wear a wristwatch would be censored would probably depend on the swimmer's reputation and on other information surrounding the swim.¹⁹²

It is important to note that the informal social control exerted by the community does not extend to some special cases, in which the community, for obvious reasons, refrains from critique. One special set involves swimmers with disabilities. Craig Dietz, a Pittsburgh attorney, swims open water races despite having no arms or legs.¹⁹³ Craig has a monofin attached to his torso and swims the course by dolphining on his back.¹⁹⁴

Another example is that of a person engaged in a specific project, often of a charitable or world-improving nature, who clearly declares the rules and limitations of the swim. Christopher Swain, for example, has swum, in stages, the entire course of the Hudson River to raise environmental awareness.¹⁹⁵ During his enterprise, Swain stayed with various communities along the river

¹⁸⁸ *Do You Wear a Wristwatch in a Marathon Swim?*, MARATHON SWIMMERS FORUM (Mar. 27, 2014), <http://www.marathonswimmers.org/forum/discussion/732/do-you-wear-a-wristwatch-in-marathon-swims>.

¹⁸⁹ *See supra* note 175.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ CRAIG DIETZ SPEAKS, <http://www.craigdietzspeaks.com/> (last visited Sep. 18, 2014).

¹⁹⁴ *Id.*

¹⁹⁵ SWIM FOR THE RIVER (Bullfrog Films 2006). *See also Person of the Week: Christopher Swain*, ABC NEWS (Nov. 19, 2004), <http://abcnews.go.com/WNT/PersonOfWeek/story?id=266717&page=1>.

course, educating them about river pollution and environmental activism.¹⁹⁶ Swain swam the entire course wearing a wetsuit and fins. These devices clearly count as “assistive” under the Global Rules and, even before the creation of the rules, would ordinarily raise negative commentary. However, Swain’s transparency, coupled with his enthusiasm and laudable goal, have spared him the vitriol and critique that was addressed at Nyad, partly because the swim was perceived as having been carried solely for her self-aggrandizement.¹⁹⁷

CONCLUSION AND BROADER IMPLICATIONS

Several threads emerge from the analysis of the community’s discussion of Nyad’s swim and the resulting articulation of the Global Rules. First, despite the negative feelings that arose within the community regarding Nyad’s perceived deviance, it is fairly clear that the occurrence of the event itself did a great service to the sport. Not in the sense that it created publicity for heroic (and largely obscure) undertakings, but in the sense that it provided the community with the opportunity to redefine its values, strengthen the solidarity between its members, and to rethink its rules. Moreover, the discussion resulted in global regulation of the sport. This notion, that deviance/crime creates added value to the regulatory/legal framework of a community, is important to consider and may have important implications beyond the sporting community.

In *The Rules of Sociological Method*, Durkheim does not distinguish between different types of deviance. To the contrary—he states that every society has a certain level of deviance, be it minor or severe, because deviance is necessary to achieve these processes. However, Durkheim’s theory does not predict which forms of deviance will trigger social control, sanctioning, community oppression, and a show of solidarity. It seems that the marathon-swimming example can generate some hypotheses in this regard. What made Nyad’s swim into such a controversial community issue was the combination of two factors: the

¹⁹⁶ *Person of the Week: Christopher Swain*, *supra* note 195.

¹⁹⁷ See, e.g., Brin Riley, *Just Keep Swimming?*, ENVIRONMENT AND MEDIA (Dec. 2, 2012), <http://www.environmentandmedia.com/swimming-2/>.

extraordinariness of her claimed achievement and her history of negative reputation. The first of these factors is easily reconcilable with Durkheim's theory, as well as with Killias's concept of legitimation crises.¹⁹⁸ It makes sense that the community will react more strongly when the stakes are higher. The potential for mainstream recognition and publicity for the sport made it an important, watershed moment for the community to establish its identity. The second factor, however, exposes one of the gaps in Durkheim's theory. Because of his focus on social solidarity, Durkheim avoided discussing power differentials. Subsequent work by conflict criminologists, however, consistently focused on the different legal and social reactions to deviance by more and less powerful members of society, arguing that criminal law tends to target people who possess less social capital and are therefore less able to resist the criminal label.¹⁹⁹ In this particular case, Nyad's ostracism by the community made it easy for the community to reach a fairly fast consensus about the condemnation of her swim, and it remains an open question whether a similar claim, similarly undocumented, made by a swimmer with impeccable reputation, would have received the same amount of censure and generate the same regulatory frenzy.

Another issue that remains in question is whether the community's negative reaction to Nyad's swim, beyond sparking the discussion, had any effect on Nyad herself. In this respect, it is important to keep in mind that any disparagement of Nyad and any shadows cast upon her achievement, occurred in the reputational level only and within the confines of the swimming community. To the outside world, the important lessons to be learned from Nyad's swim had nothing to do with the values and process of community insiders but rather with her inspirational message to outsiders: outstanding feats can be performed at any age, and it takes a team to create extraordinary achievements. Nyad broadcasts these messages in her motivational speaking,²⁰⁰

¹⁹⁸ See *supra* notes 40-41 and accompanying text.

¹⁹⁹ See *supra* notes 52-53.

²⁰⁰ *Diana Nyad Extreme Swimming with the World's Most Dangerous Jellyfish*, TED (2011), https://www.ted.com/talks/diana_nyad_extreme_swimming_with_the_world_s_most_dangerous_jellyfish. See also *Diana Nyad: Never, Ever Give Up*, TED (2013), http://www.ted.com/talks/diana_nyad_never_ever_give_up.

film documentation,²⁰¹ and newspaper interviews.²⁰² Nyad's public brand, her sponsorships, and public speaking career would hardly be affected by censure from sports insiders, and her shaming within the community would hardly matter in the context of her interactions with the general public. On January 27, Nyad answered questions from fans on the social networking service Reddit. One fan inquired, "What would you say to the people who claim that you faked or cheated on your swim from Cuba to Florida?" Nyad replied:

As for the critics, shortly after the swim last Labor Day there were some legitimate people from the legitimate marathon swimming community who had every right to vet my accomplishment. Any world class record should be researched and questioned. My team and I answered in a three-hour, 33 minute phone call with those people, every question small and large they had. Our navigator, John Bartlett, took them through mile by mile all the winds, all the currents, every inch of that swim from the Cuba shore to the Florida Shore. My head handler, Bonnie Stoll, explained to them how we fed, how we protected ourselves against the deadly box Jellyfish, how our shark team kept me safe. In the end, we proved without a shadow of a doubt that I swam without any assistance whatsoever from shore to shore. Now, the [I]nternet is a big wide world and there are still people, I supposed, out there with their opinions questioning validity of the swim. But trust me, in the circles where it matters, and of course the 44 people on my team who witnessed and were part of this history, know the truth. We had reverence for this record and we did it fair and square.²⁰³

This answer is, of course, widely regarded as unsatisfying by the members of the Marathon Swimming Federation, who think of themselves as being "in the circles where it matters," and who dispute Nyad's claims that all doubts regarding her swim have

²⁰¹ THE OTHER SHORE (Showtime 2013).

²⁰² See *supra* note 1.

²⁰³ Diana Nyad, *I Am the World Record Swimmer Diana Nyad, Ask Me Anything!*, REDDIT (Jan. 27, 2014), http://www.reddit.com/r/IAmA/comments/1w4qka/i_am_the_world_record_swimmer_diana_nyad_ask_me/.

been settled.²⁰⁴ It also points out to the weakness of the solidarity-based informal social control exerted by the community.

Whatever reputational damage Nyad might have suffered within the community, the general public perception of her effort is colored by the broader context of athletic culture. In their analysis of sports deviance, Robert Hughes and Jay Coakley argue that, in many instances, corruption in sports is not due to nonconformity, but rather to excessive over-conformity to sports norms, primarily endurance and performance. As examples, they provide the abuse of performance-enhancing drugs, which they ascribe not to a violation of the ethic but to the power of the ethic itself in transforming conforming behaviors that push people to seek distinction and recognition, sacrifice for the game, and other over-conformist behaviors.²⁰⁵ This “winning at all costs,” and “winning is everything,” approach is not the be-all, end-all for insiders in the sport. Admittedly, marathon swimmers value perseverance, push the limits of pain, and treat losses as part of the experience of learning how to win.²⁰⁶ Indeed, a new thread on the forum is dedicated to members’ experiences of DNF (did not finish) and what lessons they learned from those.²⁰⁷ However, the adherence to ethics and process means that swimmers who quit their swim honorably or who completed a swim under modified rules with assistance (fins, neoprene, etc.) having declared their departure ahead of time, were more worthy of respect than members who seemed to have committed “positive deviance” and strayed from accepted mores to make their swim seem more impressive.²⁰⁸

For sports outsiders, however, Nyad’s effort is the stuff of legends, satisfying the quest for heroes and inspirational stories that glorify winners and medals and make rules appear annoying and problematic. Edward Cartwright’s work suggests that high levels of competition yield more temptation for dishonesty,²⁰⁹ and

²⁰⁴ *110 Miles, 53 Hours: Questions for Diana Nyad*, *supra* note 138.

²⁰⁵ Robert Hughes & Jay Coakley, *Positive Deviance Among Athletes: The Implications of Overconformity to the Sports Ethic*, 8 SOC. OF SPORTS J. 307, 309 (1991).

²⁰⁶ *Id.* at 309.

²⁰⁷ *Tell Us About Your DNF and the Lessons You Learned from It*, *supra* note 93.

²⁰⁸ *Id.*

²⁰⁹ Edward Cartwright & Matheus L.C. Menezes, *Cheating to Win: Dishonesty and the Intensity of Competition*, 122 ECON. LETTERS 55 (2014).

incentives to win are richly available in sports culture. One prime example, which occurred shortly before Nyad's swim and was surely in the public's mind as the authenticity of her swim was questioned, was the dramatic downfall of endurance cyclist Lance Armstrong, whose seven Tour de France gold medals were stripped away from him by the United States Anti-Doping Agency (USADA) after the adjudicating body of the sport found evidence that he had been doping for a long period of time and colluding with colleagues in the sport to cover his violations²¹⁰.

In Armstrong's case, the adjudicating body had an immense amount of official authority, banning him from participation in sports and seriously crippling his financial empire.²¹¹ It may well be that the gap between insider and outsider perceptions of deviance and violations in marathon swimming will decrease if the sport receives the same amount of celebrity, funding, and media attention that endurance cycling receives from the general public. A higher media profile and higher stakes might create more pressure to make the Global Rules official and to create regulatory sanctions beyond mere reputational damage.

Nonetheless, we must not hasten to underestimate the importance of informal sanctions. As Coombs and Holladay argue in their analysis of the Livestrong forum posts during the doping crisis, stakeholders and insiders can be valuable indications of how a crisis is managed.²¹² As Rebecca Trump shows, Armstrong stood to suffer (and eventually did suffer) serious financial implications outside the sport, because consumers are not forgiving of a brand transgression if the transgression is

²¹⁰ Todd Essig, *The Lance Armstrong Doping Story Is A Teachable Moment, Not A Tragedy*, FORBES (Jun. 14, 2012), <http://www.forbes.com/sites/toddesig/2012/06/14/the-lance-armstrong-doping-story-is-a-teachable-moment-not-a-tragedy/>.

²¹¹ RICK MAESE, *USADA STRIPS LANCE ARMSTRONG'S TITLES, BANS HIM FROM CYCLING*, Wash. Post (AUG. 24, 2012), http://www.washingtonpost.com/sports/usada-strips-lance-armstrongs-titles-bans-him-from-cycling/2012/08/24/d6f7d382-ee04-11e1-afd6-f55f84bc0c41_story.html. SEE ALSO RUPAL PAREKH, *THE IMPLOSION OF LANCE ARMSTRONG'S AND COUNTING*, Advertising Age (OCT. 19, 2012), [HTTP://ADAGE.COM/ARTICLE/NEWS/IMPLOSION-LANCE-ARMSTRONG-S-ENDORSEMENT-EMPIRE/237854/](http://adage.com/article/news/implosion-lance-armstrong-s-endorsement-empire/237854/).

²¹² W. Timothy Coombs & Sherry Jean Holladay, *How Publics React to Crisis Communication Efforts: Comparing Crisis Response Reactions Across Sub-Arenas*, 18 J. OF COMM'N. MGMT. 40 (2014).

personally relevant to them or of an ethical nature.²¹³ Other writings and commentators on the subjects confirm that most of the public conversation about Armstrong's downfall occurred on an ethical level.²¹⁴ These analyses may mean that, despite the culture of achievement, the mainstream public is sensitive to ethical issues, and would be amenable to assessing Nyad's efforts on these grounds if the debate had received a higher media profile.

The implications of deviance, solidarity and social control go well beyond the mere case study of marathon swimming and even beyond the athletic setting in general. Several historical examples of criminalization involved the demonization of categories of people, such as immigrants or racial minorities, and tying these categories to crime. The history of drug criminalization in the United States, for example, involved xenophobia, racial panics, and concerns about immigrants taking over the domestic labor force, which led to the strategic association of Chinese immigrants with opium,²¹⁵ Latino immigrants with marijuana,²¹⁶ and, much later, African-Americans with crack cocaine.²¹⁷ These symbolic campaigns, while launched in pluralist societies, are an example of criminalization as a tool for fostering solidarity, which is more difficult to wield on a national level than in a close-knit athletic community but powerful all the same.

An especially interesting application of Durkheim's theory of deviance is the field of customary international law. As Harold Koh points out, much of international law relies, in the absence of

²¹³ Rebecca Trump, *Connected Consumers' Responses to Negative Brand Actions: The Roles of Transgression Self-Relevance and Domain*, 67 J. OF BUS. RESEARCH. 1824 (2014). For a philosophical analysis of Armstrong's misdeeds, see Alan Belk, *Lance Armstrong and the Scarlet C*, 13 THINK 49 (2014). For more on the "brand" aspects of the Armstrong scandal, see Marion Hambrick, Evan Frederick & Jimmy Sanderson, *From Yellow to Blue: Exploring Lance Armstrong's Image Repair Strategies Across Traditional and Social Media*, COMM'N. & SPORT (2013).

²¹⁴ See generally RICHARD POPLAK, BRAKING BAD: CHASING LANCE ARMSTRONG AND THE CANCER OF CORRUPTION (2013). Interestingly, prior to her contested swim, Diana Nyad actually commented in the Huffington Post on Armstrong's confession to Oprah Winfrey, accusing him not so much for his deceit, but for not living up to the image of a cancer-fighting Greek God and for appearing cold and unapologetic about ruining other athletes' careers.

²¹⁵ PATRICIA ADLER & PETER ADLER, CONSTRUCTIONS OF DEVIANCE: SOCIAL POWER, CONTEXT AND INTERACTION 155 (1994).

²¹⁶ SCHLOSSER, *supra* note 134.

²¹⁷ See generally MICHELLE LLEXANDER, THE NEW JIM CROW (2010).

effective enforcement mechanisms, on reputational devices.²¹⁸ In the context of international prosecutions for mass atrocities, prosecutors may decide on one charge over the other—for example, genocide over war crimes, even though the latter is more difficult to prove—because of the symbolic meaning of the conviction.²¹⁹ Naturally, the size of the international community, the complexity of international relations, the extreme severity of mass atrocities, and the high stakes involved in international denouncement require explanations and analyses much less simplistic than Durkheim’s normality of deviance. But the writings on reputation and symbolism in that context suggest that even a theory that works best in explaining the socio-legal dynamics in close-knit communities may offer some insights about the way in which societies realize the opportunities of deviance and capitalize on them for symbolic, ethical and solidarity purposes.

During the course of my work on this Article, I personally experienced the effects of regulation and social control within marathon swimming in a way that created a fitting epilogue for the Article. On December 21, 2013, as the discussions on the forum were taking place and shortly before the publication of the MSF rules, I crossed the Sea of Galilee lengthwise, north to south, from Annon Beach to Tzemach Beach. The swim was 13 miles long, was conducted in 64-degree water, and lasted 9:30 hours. The Sea of Galilee was (and still is) an unregulated channel. In the absence of global regulations, I announced ahead of time on my fundraising webpage that my swim would conform to English Channel rules: I would swim in regulation swimsuit, avoid any supportive contact with the boat or crew, and enjoy the company of pace swimmers for an hour at a time.²²⁰ A week before my swim, Israel saw the worst snowstorm it has seen in more than a

²¹⁸ Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

²¹⁹ JOHN HAGAN & WENONA RYMOND-RICHMOND, *DARFUR AND THE CRIME OF GENOCIDE* (2009). See also Hadar Aviram, *Mass Atrocity and Criminology*, 13 THEORETICAL CRIMINOLOGY 487 (2009).

²²⁰ *Hadar Crosses the Sea of Galilee for Dignity and Pride*, YOUCARING, <http://www.youcaring.com/crossingforyouth>.

century.²²¹ After the storm calmed down, melted snow from the mountains dropped the lake temperature to 64 degrees Fahrenheit, making the swim more challenging than I had expected, especially since I did not spend much of my training time on cold-water acclimation. Several local friends tried to persuade me to change the swim's rules and swim in a wetsuit. At this point, however, the community's negative response to Nyad's swim was in full force. Wishing to have my achievement acknowledged and respected by my athlete peers, and fearing condemnation if I changed the originally advertised rules for the swim, I stuck to the original plan and conducted the crossing under EC rules.²²²

A few weeks after completing the swim, I was interviewed for the Daily News of Open Water Swimming.²²³ Steven Munatones, an authority on open water swimming, informed me that Bill Welzien, a pastor, marathon swimmer, and race director from Florida, had swum the same course in September 2009.²²⁴ Bill's course, as reported, was very similar to mine, and the eventual coverage on the Daily News, written after a consultation with Evan Morrison, included a remark according to which Bill's swim was not considered a standard crossing under the MSF rules because he was helped by a friend after he stood in the shallow water at the very end of this 10:25 swim, giving me the "firsts" credit as well as the unofficial world record.²²⁵ I found that the

²²¹ *Massive Snowstorm Shuts Down Jerusalem*, HAARETZ (Dec. 14, 2013), <http://www.haaretz.com/news/national/1.563468>; Sharon Udasin, *Recovery Efforts Underway as Worst Snowstorm in Decades Dwindles*, THE JERUSALEM POST (Dec. 15, 2013), <http://www.jpost.com/National-News/Recovery-efforts-underway-as-worst-snowstorm-in-decades-dwindles-334992>.

²²² Hadar Aviram, *Lengthwise Crossing of the Sea of Galilee: Race Report*, HUMU-SAPIENS BLOG (Dec. 21, 2013), <http://humu-sapiens.blogspot.com/2013/12/lengthwise-crossing-of-sea-of-galilee.html>. See also Oren Hershlag, *Hadar Aviram Who Crossed the Kinneret on Saturday Without a Suit: The Cold Was Killing Me and My Lower Back Hurt Very Much*, SHVOONG MAGAZINE (Dec. 23, 2013), <http://shvoong.co.il/he-IL/104/17499/>.

²²³ MUNATONES, *supra* note 78. *Hadar Aviram Across the Sea of Galilee*, THE DAILY NEWS OF OPEN WATER SWIMMING (Jan. 17, 2014), <http://dailynews.openwaterswimming.com/2014/01/hadar-aviram-across-sea-of-galilee.html>.

²²⁴ *Bill Welzien's Race Report*, KEY WEST SOUTHERNMOST RUNNERS (Sept. 2009), <http://www.southernmostrunners.com/KW-Swim/GalileeSwim-9-3-09.pdf>.

²²⁵ THE DAILY NEWS OF OPEN WATER SWIMMING, *supra* note 223.

remark did not sit well with me, and on my blog, I gave Bill full credit for his crossing.²²⁶ It was a humbling encounter with the rigidity of law and the potential of juridifying the sport to blemish what I consider a triumph of human physical and mental endurance power.

The legal takeaway from Diana Nyad's swim and its aftermath is therefore a complicated message. On one hand, it is a celebration of the ability of communities to use deviance as a springboard for fostering solidarity and for examining their existing change. On the other hand, it is a warning sign against overjuridification and unnecessary regulation, which in other social contexts, such as domestic and international criminal justice, could have a dangerous ostracizing and stigmatizing effect. It is my hope that, as in all human enterprises, social reactions to deviance will provide food for thought, discussion, and modification, rather than insistence on minutiae and unnecessary overregulation.

²²⁶ Hadar Aviram, *More Galilee Notoriety, and a Hat Tip to Bill Welzien – First Solo Crosser of the Sea of Galilee*, HUMU-SAPIENS BLOG (Jan. 17, 2014), <http://humu-sapiens.blogspot.com/2014/01/more-galilee-notoriety-and-hat-tip-to.html>.