

# TEACHING SPORTS AND THE LAW: THE RELEVANCE OF RACE

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The first principle of sport sociology is that sport inevitably recapitulates the character, structure, and dynamics of human and institutional relationships within and between societies and the ideological values and sentiments that rationalize and justify those relationships. No realm of institutionally interdependent relationships better illustrates this principle than that which has emerged at the interface of sport and law. Often ostensibly far removed from specific locus and focus of many of the legal actions in question, sport, nonetheless, has been both judged progressively ahead and sent reeling in reaction by forces of law over the last six decades. It was simply inevitable, given sport's status as an integrated institutional component of society, that laws, regulatory edicts, and executive orders, which so profoundly affected American life in general over this period, would have no less profound an impact within sport. And nowhere has this impact been more evident than in the sphere of interracial relations.<sup>1</sup>

In the foregoing statement, Dr. Edwards joins other scholars in arguing that sport both reflects and contributes to values existing within American culture. Sport is said to represent a microcosm of American society and as such constitutes an excellent forum within which to examine important societal issues.<sup>2</sup> As Dr. Edwards suggests, exploring the impact of law on interracial relations in sport enriches our understanding of the legal forces affecting racial relations in the larger social sphere.<sup>3</sup>

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1. Harry Edwards, *The End of the "Golden Age" of Black Sports Participation?*, 38 S. Tex. L. Rev. 1007 (1997).

2. See D. Stanley Eitzen & George H. Sage, *Sociology of North American Sport* 17 (5th ed. 1993); Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. Tex. L. Rev. 1115 (1997).

3. In this regard, Professor Edwards argues that legal developments such as the desegregation orders issued by Presidents Roosevelt and Truman, the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and the Civil Rights Act of 1964

The study of race and racial discrimination is relevant to the sports law curriculum for reasons that extend beyond specific judicial decisions and legislation directly impacting interracial relations in sport. The law is not immune to the social context in which legislation is promulgated and judicial decisions are rendered.<sup>4</sup> Consequently, injecting issues of race, gender, or other subjective concerns into classroom discussion provides an opportunity for students to gain a more complete appreciation of the factors that influence legal controversies in the sports setting.<sup>5</sup> Because race and other social norms help shape the contours and operation of institutions within the law, excluding questions of race from the sports law curriculum contributes to inaccuracy.<sup>6</sup> In addition, the integration of issues of race and racial discrimination into the sports law curriculum offers students an opportunity to develop critical analytical skills. In this regard, discussions of race may motivate students to embrace a critical perspective that will lead them “to question the normative content and effect of the law” during law school and their subsequent legal careers.<sup>7</sup> Incorporating such issues into the law curriculum is a vehicle for “challeng[ing] students . . . to appreciate the interrelation of law with social, cultural, [and] political . . . norms, and, ultimately, to inspire students to catch the vision of law’s power for shaping institutions,

significantly influenced the desegregation of major league professional sports and college sports. Edwards, *supra* note 1, at 1010-1014. See also Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 *Fordham Urb. L.J.* 615, 636-37 (1995) (discussing same).

4. See Friedrich Kessler et al., *Contracts: Cases and Materials* 1-2 (3d ed. 1986) (noting the extent to which understanding law, and in particular contract law, requires viewing “legal doctrine, rules, principles, and standards as reflecting the value system of the culture in which the legal system is embedded”); Kellye Y. Testy, *An Unlikely Resurrection*, 90 *Nw. U. L. Rev.* 219, 228 (1995) (“[L]aw in general...reflects the value system of the culture in which the legal system is embedded. The tensions and ambivalence of society are played out in law.”).

5. See Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 *New Eng. L. Rev.* 889, 893-94 (1997) (noting that students’ analyses of cases or problems would be incomplete without consideration of all factors, including race, that influence the application of contract rules).

6. See Lisa Chiyemi Ikemoto, *Some Tips on How to Endanger the White Male Privilege in Law Teaching*, 19 *W. New Eng. L. Rev.* 79, 83 (1997).

7. *Id.* See also Cheryl B. Preston, *Joining Traditional Values and Feminist Legal Scholarship*, 43 *J. Legal Educ.* 511, 522-23 (1993) (noting that the broad range of roles students will assume in the community after they depart law school underscores the relevance of a course that critically examines gender and other social issues).

values, and societies.”<sup>8</sup> Even though a thorough consideration of racial issues seems crucial to a full examination of sport and the law, racism in the context of college sport has only recently begun to be addressed. As one author noted, “[W]e seemed to think we could ignore or get away from one of the most tumultuous issues of our time.”<sup>9</sup> The centrality of race in college sport is not novel: “[W]hen examining the components of organized American sport, sociologists typically speak of the long-standing and pervasive presence of racism in college athletics.”<sup>10</sup> Avoiding discussions of racial issues that arise in the sports law context deprives students of the opportunity to openly address fundamental concerns that otherwise simmer beneath the surface.<sup>11</sup> Given the prevalence of race in sport, not to raise questions of race in the sports law course is misleading and disingenuous.<sup>12</sup> As noted above, legal controversies should be viewed in the context of the applicable legal norms and the “modalities of perception”<sup>13</sup> that influence the behavior of parties and the resolution of legal disputes. As one commentator warns: “To inject issues of race and disparity when they bear no relation to a controversy may be deleteriously inflammatory; yet to ignore them when they may be pivotal would be intellectually and academically indecorous.”<sup>14</sup>

Questions of race remain central to the key controversies currently confronting the sports community. Consequently, professors who wish to enhance classroom analysis of sports law issues should include

8. Preston, *supra* note 7, at 522-3.

9. Richard Lapchick, Finally, a Small Step in the Right Direction, *The Sporting News*, Jan. 31, 1994, at 8. See also Davis, *supra* note 3, at 619 (noting that “[n]otwithstanding what appears to be a presumption, legal scholars have devoted scant discourse to the legal ramifications of such racism”).

10. Davis, *supra* note 3, at 619.

11. See Preston, *supra* note 7, at 525 (noting how teaching a class on feminist legal theory provides a forum within which students can “address issues of importance that they are acutely aware of and concerned about before they enter the law building and that will arise again and again in interactions inside and outside of the classroom”).

Discussing race issues in sport also allows students to reexamine beliefs that racial discrimination is absent from sports. “Unlike blacks, many white Americans refuse to acknowledge race as a factor that influences sport. The popular belief of athletics as a venue that provides a level playing field where athletic attainment prevails over bigoted, discriminatory attitudes and conduct contributes to this notion.” Davis, *supra* note 3, at 621-22.

12. Morant, *supra* note 5, at 893-94 (commenting on the consequences of the failure to raise questions of race in contracts classes).

13. *Id.* at 897.

14. *Id.* at 938-39.

material that explores the racial dimensions of relevant substantive topics. For instance, in analyzing the application of anti-discrimination statutes, regulations, and judicial decisions to the sports world, a teacher may reach beyond a discussion of the historic treatment of minorities in professional and collegiate sport to explore the effectiveness of the law in addressing problems of a modern, more subtle form of racism.<sup>15</sup>

Several concerns inhibit the willingness of some law teachers to introduce conversations concerning race into the law curriculum. One worry is that discussions of race and racial discrimination will lead to “inflammatory reaction” and “rancorous discourse.”<sup>16</sup> More specifically, law teachers fear a loss of control in the classroom as a result of such debate. Others feel that they lack the substantive expertise to adequately lead discussions revolving around the issue of race. For some, reluctance is premised on the belief that discussing such sensitive issues overly complicates matters and departs from the primary mission of imparting the law.<sup>17</sup>

Notwithstanding these legitimate concerns, there are three factors that may lessen the anxiety of the sports law teacher who is considering incorporating discussions of race into the curriculum. First, sports law

15. Topics of discussion could include the under-representation of African-Americans and other minorities in coaching and management positions in professional football, basketball and baseball; the barriers to minority ownership of professional sports franchises; the problems of minority access to professional sports such as golf and hockey; the proportional over-representation of African-American student-athletes in revenue producing intercollegiate sports and under-representation of African-American student-athletes in non-revenue producing intercollegiate sports; the disparate impact of NCAA rules and regulations (particularly those involving initial eligibility and non-compensation) on African-American student-athletes; the racial implications of lower graduation rates for African-American student-athletes; the racial implications of educational malpractice allegations on behalf of African-American student-athletes; league or team discipline of athletes and team representatives who make racial slurs and possible consequences for free speech; institutional responsibility for and responses to racial harassment by fans against athletes; the racial implications of team mascots and logos that depict ethnic groups; or the slow acceptance of sports law as an academic discipline as a reflection of possible racial and gender bias.

Many of these issues are identified in the leading sports law textbooks. See, e.g., Paul C. Weiler & Gary R. Roberts, *Sports and the Law: Text, Cases, and Problems* 71-86, 681-88 (2d ed. 1998); Michael J. Cozzillio & Mark S. Levinstein, *Sports Law: Cases and Materials* 807-08, 830-52, 865-70 (1997). See generally Davis, *supra* note 3; Kenneth L. Shropshire, In *Black and White: Race and Sports in America* (1996).

16. Morant, *supra* note 5, at 893.

17. *Id.*

is an emerging area of the law. It is an amalgamation of legal concepts in search of an independent identity as a substantive area.<sup>18</sup> As such, missing is the doctrinal rigidity that creates barriers to the introduction of race into the curriculum of entrenched substantive areas. As noted by one scholar in assessing the need to raise issues of race in the study of contract law, the conceptual inflexibility of doctrines like the bargain principle, which emphasizes the objective establishment of assent, contributes to the reluctance to include discussions of race and gender in analyzing contracts problems.<sup>19</sup>

Second, the leading sports law textbooks provide a readily available source of information that can help prepare a professor to discuss matters of race. For example, the Weiler and Roberts casebook includes a section that identifies many of the primary issues regarding race and racial discrimination in professional and intercollegiate athletics.<sup>20</sup> Similarly, the Cozzillio and Levinstein text contains cases, law review excerpts and textual discussion of matters ranging from racial stereotyping to racial discrimination in hiring coaches to the racial implications of ethnic mascots.<sup>21</sup> These materials offer a backdrop for discussions of race that can be supplemented further with law review articles, book chapters and cases.

Finally, in addition to providing a source of information and a framework for discussion, the inclusion of discussions of race in these casebooks can help professors communicate the more expansive concept that race is one of the integral social variables influencing the comprehensive study of sport and sports law. For example, Cozzillio and Levinstein acknowledge the central role of race in sport and include relevant materials with the two-fold goal of exposing students to "the malaise that afflicts the sports industry insofar as discrimination is concerned [and] . . . heighten[ing] consciousness in this area."<sup>22</sup> By stressing that the study of race in sport is far from extraordinary, these authors have opened the door to the incorporation of a broad range of sociological, economic and other interdisciplinary materials into the

18. See Kenneth L. Shropshire, Introduction: Sports Law?, 35 Am. Bus. L. J. 181, 182 (1998).

19. Morant, *supra* note 5, at 893. See also Dorothy A. Brown, Split Personalities: Tax Law and Critical Race Theory, 19 W. New Eng. L. Rev. 89, 90-91 (1997) (commenting on the difficulties involved in identifying racial issues in tax law, an area that is presumably neutral and objective).

20. See Weiler & Roberts, *supra* note 15, at 71-86, 681-88.

21. See Cozzillio & Levinstein, *supra* note 15, at 807-08, 830-52, 865-70.

22. *Id.* at 808.

standard curriculum as a means of understanding the impact of the law on sports. Adopting this perspective helps to legitimize the injection of race into the sports law curriculum and eases concerns that studying race departs from the mission of imparting the law.

Although these sports law casebooks have significantly aided teachers in exploring the intersection of race and sports law in the classroom, scholarly output addressing the issue has not been so readily available. Though significant scholarship regarding race and racial discrimination exists in other disciplines, prior to the 1990s scholars of sports law tended to shy away from discussions of race. As a result, little legal scholarship was available for law professors to consult in enhancing classroom discussion of race and sport. Fortunately, the past several years have witnessed a significant increase in the number of law review articles that address issues concerning race and sport. Certain of these materials are identified in the bibliography below.

Despite the increased availability of resource materials, work remains to be done in this area. In particular, past discussions of racism in sport have focused on problems encountered by African-American male athletes to the exclusion of women. Despite excellent recent publications by Marilyn Yarbrough<sup>23</sup> and Alfred Mathewson<sup>24</sup> that examine the intersection of race and gender, scholarship in this area remains underdeveloped. In addition, as has historically been true in other areas of law, the examination of racism in sport has focused primarily on the relationship between whites and African-Americans to the exclusion of other minorities.<sup>25</sup> These boundaries need to be expanded to explore, for example, the racial dynamics of the relative absence of non-African-American minority athletes in sports like hockey and golf, the impact of this under-representation on opportunities for such minorities in sports management, and the racial dimensions of sports organizations' recruiting activities outside the United States.

23. Marilyn V. Yarbrough, *A Sporting Chance: The Intersection of Race and Gender*, 38 S. Tex. L. Rev. 1029 (1997); Marilyn V. Yarbrough, *If You Let Me Play Sports*, 6 Marq. Sports L.J. 229 (1996).

24. Alfred Dennis Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 Marq. Sports L.J. 239 (1996).

25. Morant, *supra* note 5, at 936. Morant comments: "While the plight of African Americans within the bargaining sphere may be distinctive, it is certainly not solitary. Discussions of disparity may include a plethora of individuals who, from a variety of perspectives, battle stereotype and prejudice to gain equal opportunities in many venues." *Id.*

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