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Foreward to Sports Law as a Reflection of Society's Laws and Values

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FOREWORD

MATTHEW J. MITTEN*

Sports constitute an important cultural phenomena and play a pervasive role in our society. Virtually every American has viewed or participated in some form of competitive sport during the course of their lives. Millions of people annually attend sporting events and millions more avidly keep abreast of the day's sports events, which are the subject of extensive coverage by print, television, and radio media. Our favorite players, teams, and events provide an important source of identification for us.

Former United States Supreme Court Justice Earl Warren stated, "I always turn to the sports page first. The sports page records people's accomplishments; the front page, nothing but man's failure."¹ The sports field provides the setting for many triumphs and some of the proudest accomplishments of both men and women. Sports simultaneously embodies and encourages the development of many positive societal values. Sports participation demonstrates that success requires discipline, commitment, motivation, and hard work. Moreover, it requires and encourages teamwork and cooperation, and provides an opportunity to perform to the best of one's ability, develop a sense of fair play, and enhance physical fitness.

On the other hand, sports, like the rest of society, has a negative side—reflecting values that adversely impact American culture. There is often an over-emphasis on winning in sports and the single-minded pursuit of its accompanying economic rewards. In some instances, powerful groups within sports have acted to further their own objectives and have exploited others by neither engaging in teamwork nor playing fairly. Inconsistent with sport's inherent positive values, some people have been the victims of blatant or subtle discrimination, limiting their opportunities to participate in athletics or its governing structure.

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1. See ALEC LEWIS, *THE QUOTABLE QUOTATIONS BOOK* 262 (1980).

Although sports has a special place in our culture, it mirrors society's values.² There is a reciprocal relationship between sports and societal values. Sports incorporates society's existing values and reinforces these values on the playing field, in its rules, and through its established institutions. Sports also exports its principles and the lessons learned from participating in athletics and its governance to society in general.

Our laws, which are significantly influenced by value and policy considerations, play an important role in the regulation of society and its sport constituent. General private and public law principles are often applied to regulate amateur and professional sports. Sometimes these laws have been applied appropriately to further society's positive values while, at other times, they have been construed to reflect or further society's negative values. In some instances, certain aspects of sports or those involved in the sports industry have received preferential legal treatment, or conversely, have been denied adequate legal protection.

Despite its significant cultural role in society, sports has historically not been the subject of serious academic study. Thus, an important opportunity presents itself. The objective of this symposium is to provide a forum for discussion of various legal, philosophical, and sociological issues concerning the regulation of sports and to suggest reforms that are necessary to advance positive values within sports and society. It is particularly appropriate to explore the topic of *Sports Law as a Reflection of Society's Laws and Values* during 1997, which is the 50th anniversary of Jackie Robinson's integration of major league baseball, and the 25th anniversary of the congressional enactment of Title IX of the Educational Amendments of 1972.³

The morning session of the symposium addressed racial and gender discrimination in athletics. Dr. Harry Edwards, the foremost expert on sociology and sport, began by tracing the parallels between the racial desegregation of American society and sports, and the adverse effects of well-intentioned anti-discrimination laws on African-American institutional and social structures. He points out that integration in sports and society has been "mostly one-way and individual

2. See generally D. STANLEY EITZEN & GEORGE H. SAGE, *SOCIOLOGY OF NORTH AMERICAN SPORT* 43-55 (6th ed. 1997) (examining the reciprocal relationship between sports and societal values); DREW A. HYLAND, *PHILOSOPHY OF SPORT* 1-32 (1990) (recognizing that values in sports are, in part, a reflection of society's values).

3. Pub. L. No. 92-318, §§ 901-09, 86 Stat. 373-95 (codified as amended at 20 U.S.C. § 1681 et seq. (1988)).

in focus, as opposed to two-way and institutional,"⁴ meaning that some African-Americans have obtained access to previously all-white settings, but there has been little integration of whites into previously all African-American social structures. This one-way integration has enabled successful African-Americans, including superstar athletes, to pursue the American dream by living on the periphery of white society and distancing themselves from the traditional African-American community, thereby eroding African-American socio-cultural integrity and institutional viability, including African-American sports institutions and programs.

Without the guidance of mentors and the positive role models formerly provided by upper class African-American society (many of whose members have gravitated towards mainstream white society), many African-American youths single-mindedly pursue sports fame and fortune, rather than focusing on academic and non-athletic endeavors, which provide a more realistic means of socio-economic advancement. The vast majority of them will face bitter disappointment as they encounter the harsh reality that very few have the unique athletic ability to succeed at the professional level, which provides a gateway to upward social mobility. The products of a white-governed plantation system designed to economically exploit their athletic talents without providing a means of social mobility outside of sports, African-American youths often have no alternative but to return to an environment of crime, drugs, random violence, and gangs. This setting has virtually destroyed the cultural and institutional infrastructure supporting athlete development and the fostering of positive social values in many African-American communities.

Dr. Edwards observes that crime, gang membership, drugs, student drop out rates, and death are decimating the athletic resources of many African-American communities. He forecasts that African-American human resource deficits in other areas creates a vicious cycle of social unrest in African-American communities. He argues that full utilization of our human resources and true racial integration in society will require the re-building and maintenance of traditional African-American community institutions to incite, nurture, and sustain African-American aspirations of excellence, competence, and achievement in all aspects of life, not merely sports.

Professor Marilyn Yarbrough identifies the plight of African-American women, a group that has historically been denied equal op-

4. Dr. Harry Edwards, *The End of the "Golden Age" of Black Sports Participation?*, 38 S. TEX. L. REV. 1007, 1015 (1997).

portunities in employment and athletic participation because of inadequate legal protection. She argues that, in construing anti-discrimination laws, courts have failed to recognize that African-American women may encounter both race and gender discrimination, which creates a burden on them that is different from that experienced by either African-American men or white women. This approach results in “jurisprudential invisibility of African-American women”⁵ because they are required to show discrimination based on either race or gender, which they often are unable to prove. As an illustration, she points to the efforts of educational institutions to comply with Title IX by increasing athletic participation opportunities for women by adding “country club” (golf, tennis, swimming) and “prep school” (lacrosse, field hockey) sports as well as “walk-on” sports to attract students already enrolled at the school. Because educationally and economically disadvantaged women (categories which include a significant percentage of African-American women) have not traditionally participated in these sports, African-American women effectively are denied the opportunity to participate in sports within their interests and abilities. The existing legal framework will not remedy this discrimination if it merely looks at this issue from the perspective of women in general without specifically considering its effects on African-American women.

Professor Yarbrough observes that the traditional differing levels of judicial scrutiny based solely upon the classification of affected persons or interests does not further equal opportunities for African-American women. She proposes a new standard to be applied under the Equal Protection Clause and Title IX that balances the classification, the importance of the benefit or right affected, and the significance of the government’s or educational institution’s interest in justifying the alleged discrimination.

In response, Professor Paul McGreal asserts that the traditional classification-based standard adequately protects African-American women’s interests, and that her proposed balancing test does not effectively determine whether any discrimination has occurred. He suggests that the concept of “intentional discrimination” be expanded to encompass the discriminator’s adoption of an exclusively dominant perspective (that of white women) without consideration of a minority perspective (that of African-American women) within the broader group (all women).

5. Marilyn V. Yarbrough, *A Sporting Chance: The Intersection of Race and Gender*, 38 S. TEX. L. REV. 1029, 1033 (1997).

Professor Kenneth Shropshire reiterates that racial desegregation in sports does not equate with full integration into all aspects of American society by observing that opportunities for African-Americans to play Major League Baseball caused the demise of the Negro Leagues. Prior to the desegregation of baseball, the Negro Leagues were an example of a thriving black business enterprise and an important part of the African-American community and infrastructure. The African-American owners of Negro League teams rarely received any payment for either the value or costs of developing their baseball players who were signed by Major League Baseball teams. Rather than sharing the economic revenues generated by integrated teams with Major League Baseball team owners, the Negro League team owners saw their businesses die as their stock of players was depleted without compensation.

Although African-Americans collectively constitute a majority of the players in Major League Baseball, the National Basketball League, and the National Football League, African-Americans still do not own a controlling interest in any league franchises fifty years after Jackie Robinson's integration of baseball. Professor Shropshire characterizes this as an indication of "the segregated vestiges of Jim Crow"⁶ and notes that this mirrors the current absence of opportunity for African-Americans to participate in the highest and most controlling levels of society. Rather than proposing a legal remedy, Professor Shropshire urges sports league leaders and athletes to advance the social and financial benefits of racial diversity by creating opportunities for African-Americans to achieve positions of power in sports franchises. To fully achieve these benefits, it is equally important to establish an environment that enables African-Americans to be successful in all black or predominately black enterprises and institutions like the Negro Leagues.

Professor Rodney Smith, citing evidence that women have a strong interest in playing organized football, proposes achieving Title IX gender equity by adding women's intercollegiate football. The addition of this sport would create a significant number of athletic participation opportunities for women and help eliminate myths regarding the athleticism of the so-called "weaker sex." Adding football may be more responsive to women's overall athletic interests and enable athletic participation by a wider range of women than "country club" or "prep school" sports. Professor Smith notes that doing so

6. Kenneth L. Shropshire, *Where Have You Gone Jackie Robinson?: Integration in America in the 21st Century*, 38 S. TEX. L. REV. 1043, 1047 (1997).

also may minimize the need to cut men's sports at the intercollegiate level which has occurred in an effort to equalize the overall athletics participation opportunities for men and women.

The afternoon session of the symposium covered a diverse range of topics addressing economic factors affecting sports and how they reflect societal values. Professor Peter Goplerud advocates that market-based stipends subject to a salary cap should be paid to men participating in Division I intercollegiate football and basketball programs and to a sufficient number of women intercollegiate athletes to satisfy Title IX gender equity requirements. He also asserts that scholarship athletes in non-revenue sports should be allowed to be employed during the academic year, even at on campus jobs, without any cap on their permitted earnings by NCAA regulations.

Intercollegiate athletics programs are a "big business," generating \$1.8 billion in revenues for Division I schools in 1995-96. In the guise of preserving "amateurism," NCAA regulations currently prohibit intercollegiate athletes from receiving any compensation for playing intercollegiate sports above the value of their scholarship and the actual costs of college attendance. Because the athletes are primarily responsible for generating substantial revenues for their universities, Professor Goplerud argues they should be entitled to a stipend which, when coupled with a salary cap, is a less restrictive, and less exploitive means of promoting intercollegiate athletics while maintaining a competitive balance. He contends that the "stipend would not change the competition on the field, only the nature of the competition for players."⁷

William Rhoden, a sportswriter for the New York Times, notes that "the business of sport often overwhelms whatever idealism and principles you bring to it"⁸ and has caused the "despiritualization of sport."⁹ He cites examples of athletes acting as pariahs and of agents engaging in illegal and unethical conduct as illustrations of the breakdown of morality in sports. Viewing the proper role of sports as a ritual with potentially redeeming and revitalizing spiritual characteristics, he calls for a revival and/or recreation of the athlete as a heroic figure in our society. Rather than focusing on the frenzied pursuit of economic gain for themselves and their clients, Mr. Rhoden urges

7. C. Peter Goplerud, *Pay For Play For College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081, 1093 (1997).

8. William Rhoden, *A Message to Agents*, 38 S. TEX. L. REV. 1107, 1111 (1997).

9. *Id.* at 1112.

sports agents to establish a vision and game plan to help athletes achieve this intrinsic objective.

Professor Timothy Davis observes that similar values underlie both mainstream contract ideology and sports. Both contract law and sports have the same fundamental dichotomy, namely "the conflict between values associated with competition, individualism and the unrelenting pursuit of self-interest and those associated with moral responsibility and interdependence."¹⁰ He provides examples of judicial application of the bargain principle of contract and its accompanying values in deciding contractual disputes in sports as well as illustrations of courts' resolution of sports contract litigation requiring a balancing of competing values. Regarding contract litigation between student-athletes and their universities, Professor Davis points out the judicial tendency to give preeminence to the values of freedom of contract and marketplace economics by refusing to imply additional terms into the parties' express contract. By denying the relational nature between these parties and the reality that student-athlete/university contracts are standard form agreements not subject to negotiation, courts enable universities to academically and economically exploit student-athletes through contract law.

Professor Daniel Lathrope cites evidence that the economic benefits realized by a community hosting a professional sports team do not justify the multi-million dollar stadium-related subsidies currently provided by federal, state, and local taxpayers. Even if construction of a new sports facility generates some local economic activity, it creates very little new national economic activity or public benefits justifying federal subsidization. The owners of a professional team and its players are the primary beneficiaries of the revenues produced by a new publicly-subsidized sports facility. Professor Lathrope argues that this "subsidy is an example of an open-ended corporate welfare program supported by all taxpayers, including those with no access to professional sports entertainment."¹¹ He asserts that the federal tax subsidy for professional sports facilities through tax-exempt bond financing should be eliminated or at least reduced because "it is achieved by teams through coercive bargaining with cities and is both inequitable and not economically justified."¹²

10. Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. TEX. L. REV. 1115, 1129 (1997).

11. Daniel J. Lathrope, *Federal Tax Policy, Tax Subsidies, and the Financing of Professional Sports Facilities*, 38 S. TEX. L. REV. 1147, 1161 (1997).

12. *Id.* at 1165.

As the organizer and moderator of this symposium, I am grateful to the participants and many other people for enabling this dialogue about sports and its interrelationship with society's laws and values to take place. We have certainly raised more questions than provided definitive answers in addressing this topic. Hopefully this symposium will generate greater awareness of these issues and stimulate others to engage in scholarly examination of them in order to further the development of positive values in sports and society.