



# SPORT AND THE LAW

**HISTORICAL AND CULTURAL INTERSECTIONS**

**Edited by Samuel O. Regalado and Sarah K. Fields**

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*Samuel O. Regalado*  
*and*  
*Sarah K. Fields*

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*For Professor LeRoy Ashby*

*Excellent scholar, inspiring teacher, and proponent for justice.*

*Thank you for your wisdom and sound guidance.*

## Series Editor's Preface

Sport is an extraordinarily important phenomenon that pervades the lives of many people and has enormous impact on society in an assortment of different ways. At its most fundamental level, sport has the power to bring people great joy and satisfy their competitive urges while at once allowing them to form bonds and a sense of community with others from diverse backgrounds and interests and various walks of life. Sport also makes clear, especially at the highest levels of competition, the lengths that people will go to achieve victory as well as how closely connected it is to business, education, politics, economics, religion, law, family, law, family, and other societal institutions. Sport is, moreover, partly about identity development and how individuals and groups, irrespective of race, gender, ethnicity or socioeconomic class, have sought to elevate their status and realize material success and social mobility.

*Sport, Culture, and Society* seeks to promote a greater understanding of the aforementioned issues and many others. Recognizing sport's powerful influence and ability to change people's lives in significant and important ways, the series focuses on topics ranging from urbanization and community development to biography and intercollegiate athletics. It includes both monographs and anthologies that are characterized by excellent scholarship, accessibility to a wide audience, and interesting and thoughtful design and interpretations. Singular features of the series are authors and editors representing a variety of disciplinary areas and who adopt different methodological approaches. The series also includes works by individuals at various stages of their careers, both sport studies scholars of outstanding talent just beginning to make their mark on the field and more experienced scholars of sport with established reputations.

*Sport and the Law* includes ten essays written by noted academicians from history, law, and American studies. Edited by Samuel O. Regalado and Sarah K. Fields, two well-known historians of sport with extensive publication records, the book assesses in much detail a number of prominent court cases involving sport and its participants in the post-World War II period. Acknowledging there were a number of important legal decisions regarding sport and its participants prior to this time, Regalado and Fields chose instead to solicit essays concerned with court cases following the "great conflict" since that period has seen a remarkable growth in sport and its close

interconnection with such important issues as race, gender, transnationalism, and cold war politics. The result is a fascinating yet easily accessible book that will be of interest to those interested in specific sports-law cases, the historical and social context in which they were adjudicated, and their ultimate legacy to sport and America more generally. Equally important is how the collection of essays uncovers the stories of brave athletes who fought to extend their human rights and the individuals who either supported or opposed those efforts.

DAVID K. WIGGINS

## Acknowledgments

I owe my deepest gratitude to Sarah Fields, my friend and colleague, whose professionalism and good cheer helped us endure the many bumps that editors experience in the course of anthology projects. Working with a nationally recognized legal scholar such as she has been one of the most rewarding experiences in my career. The editors at the University of Arkansas Press, Larry Malley, then director of the Press, and David K. Wiggins, the sport history series editor, are also deserving of kudos for taking on our idea and lending constant support and helpful suggestions throughout the entire process. As well, it should be noted that the North American Society for Sport History (NASSH) was an ideal venue that not only brought me together with Sarah and David, but also with many of those who wrote essays for this book. Contributors Richard Crepeau, Ron Briley, Thomas Hunt, Steven Gietschier, Dan Nathan, and Jan Todd are not only respected scholars, but also cherished friends whose help and advice has greatly contributed to my career. Furthermore, outside of the NASSH circle, Arturo Marcano and David Fidler, whose scholarly work and humanitarian legal efforts on behalf of young Latino baseball prospects is commendable, demonstrated great patience and commitment to our anthology. As such, I send my two friends many thanks. Anne DeMartini is another who stayed with us from the beginning, and it is to our good fortune that she did in that her work is a significant contribution to the anthology. Along with the aforementioned people, I received constant backing, as I always do, from my colleagues at the Department of History, California State University, Stanislaus.

SAM REGALADO

I, too, want to thank all of our amazing contributors in addition to our colleagues at NASSH who commented on many of these papers and ideas; all are great scholars and good friends. I share Sam's appreciation for the University of Arkansas Press and the support of then publisher Larry Malley and series editor Dave Wiggins. We are also grateful for the careful editing by Debbie Upton. For me this project spanned two different institutions, and I am grateful for the assistance that came from both places. At the Ohio State University, my colleagues in the former Sport Humanities Program, particularly Mel Adelman and the graduate students, as well as the faculty in the Kinesiology program heard me talk through this project for years. At the

University of Colorado Denver, my new colleagues in the Communication Department were understanding and supportive as we finished this up soon after my arrival. They also directed me to the Auraria Campus Library, where the remarkable research librarians helped me collect last-minute obscure sources. Thanks as well to Dawn Comstock, who has listened patiently to the ebbs and flows of my enthusiasm over the years and has offered helpful advice and support. This anthology, however, would never have existed without Sam Regalado. When we first met years ago at a NASSH conference, I knew I had found a kindred spirit who got as excited about the intersection of sport and legal history as I did. I am deeply grateful to have had the pleasure of working with him and of being his friend.

SARAH FIELDS



## CHAPTER ONE

# Introduction

In May 1987, during a commemorative speech on the bicentennial of the United States Constitution, associate Supreme Court justice Thurgood Marshall observed, "that the true miracle was not the birth of the Constitution, but its life." He argued that the amendments added in quest of the Constitution's promise has been, in fact, proof of the document's continued heartbeat through the centuries.<sup>1</sup> Additionally, civil war, territorial expansion, evolution of commerce, and a quest for civil liberties and rights, in one manner or another, all contributed to the nation's changing legal profile as Americans strove to achieve the constitutional ideals they held sacred in their democracy.

Within this American democracy, sport, too, played a vital role in the construction of what Marshall called the Constitution's "promising evolution through 200 years of history." As recreation matured beyond that of a simple leisure activity and into a huge commercial institution, athletics and standout athletes were lifted onto a pedestal that magnified a romanticized vision of the nation. In reality, however, sport also mirrored the problems that, too often, blocked the path to true equality on many fronts. With the Constitution well past 150 years in existence by the middle of the twentieth century, Americans still wrestled with the albatross of race and gender discrimination that had plagued the nation since its origins, as well as new legal challenges on such topics as collective bargaining, corporate collusion, and international human rights, among others. For many, by the end of World War II, the promise of a fair shake and opportunity seemed, at the very least, quite unpromising.

In step with Marshall's vision of a "living" document, sport and jurisprudence provided a unique alliance as a participant in the evolutionary process of constitutional law. As seen in US Supreme Court landmark cases, lower-level decisions, events, activism, and commercial practices, sport as a distinct feature in the legal arena helped to change public policies and the often-discriminatory means by which they were practiced. Moreover, legal decisions that involved athletics and their participants contributed to new observations and questions in redefining constitutional interpretations. After 1945, sport and the law were not mutually exclusive, but a joint and

powerful tool that helped to raise awareness of societal shortcomings and to advance the quest of reaching the American ideals of equality and justice.

*Sport and the Law: Historical and Cultural Intersections* is a collection of essays that capture the personalities and events brought together in different lawsuits. The book provides a significant means to observe and analyze how sport and the law helped to create change in American society, but also examines how sport and the law factored into the larger human saga and the manner in which people tackled the issues of their day. The focus on post-World War II cases is the result of the increased dynamics in the relationship between American society and sport. To be sure, there did exist some significant legal cases prior to this period. However, after 1945, with a larger middle class and an explosion of mass media, sport, as never before, grew increasingly tied to such divisive issues as the civil rights movement, the Cold War, Vietnam, feminism, and transnationalism. Moreover with participants and consumers on the rise, the national media exhibited its immense presence and disseminated information on a grand scale. Ultimately, judicial decisions that involved sport or sports figures took on a new level of significance that, beyond the athletic arenas and playing fields, impacted the lives of all in the changing profile of the nation that emerged after World War II.

Essays by scholars in American Studies, History, and Law, are divided into three sections: "The Burger Supreme Court and Sports," "Antitrust Law and Sports," and "The Impact of Sport on Law," which explore some of the cases in which sport and law intersect and the impact the cases had on American society. Note, however, that many of these essays transcend the theme of the section in which they have been placed; almost every essay, in fact, could be placed in multiple sections. For example, the topic of antitrust law appears in Sarah K. Fields's analysis of *Haywood v. NBA* (1971) and Richard C. Crepeau's work on *Flood v. Kuhn* (1972), but these essays are located in "The Burger Supreme Court and Sports," along with Samuel O. Regalado's "*Clay, aka Ali v. U.S.* (1971): Muhammad Ali, Precedent, and the Burger Court" and Steven P. Gietschier's "How the Burger Court Came to Be" largely because all three legal cases were decided by the Supreme Court under Chief Justice Warren Burger.

The section on "Antitrust Law and Sports" includes an essay by Ron Briley examining the Danny Gardella lower-level 1948 court case regarding free agency and baseball and Thomas M. Hunt and Janice S. Todd's examination of *Franz v. United States Powerlifting*, exploring how the lifters' antitrust challenge against a single governing body actually fragmented the sport. Both of these studies are significant in the world of antitrust and sport even though none was adjudicated at the Supreme Court level.

Although all the essays could fit into the third section on “The Impact of Law on Sports,” those in this section focus on legal issues, which have immediate implications for the present-day human rights issues. Anne L. DeMartini’s analysis of Renée Richards’s 1976 lawsuit against the US Tennis Association and its due process ramifications is now timely because of the increasing public discussion of the rights of transgender and transsexual athletes. Human rights issues, found in another essay by Arturo J. Marcano and David P. Fidler, were also the embodiment of transnational business tactics by which Major League Baseball treated its Caribbean recruits as commerce while it danced around reform measures that called into question its dubious behavior with under-aged prospects. Finally, similar calls for reform in the quest for fairness are found in the case of Ed O’Bannon, discussed by Daniel A. Nathan. O’Bannon’s lawsuit attempts to regain control of his own image for commercial purposes. Nathan maintains that the lawsuit has lent itself to the larger argument over the validity of the National Collegiate Athletic Association’s definition of amateurism. In critically placing the relationship of athletics and jurisprudence in a historical context, *Sport and the Law* argues that lawsuits and sport helped to shape what Justice Marshall described as the Constitution’s continued “evolution.”

*Sport and the Law* is intended for both an educated lay and scholarly audience as well as for college programs of study in law, sport, American studies, and history. Although the essays themselves are examples of detailed and thoughtful scholarship, they are written in an accessible, jargon-free manner that assumes no prior knowledge of legal, historical, or jurisprudential theory on the part of the reader. While other books have focused on the effect of law and case law on the field of sport, very few, if any, have placed the sports case law into a detailed historical and cultural context that breathes life to the legal decisions, those that had a profound impact on American sport, law, and society. Each chapter introduces the reader to the legal case or topic in clear detail and explains the legal context of the topic, and then each chapter explores how the topic fits into the broader American social fabric and the multilayered implications of the case. Further, each chapter considers how the specific sports law case did or did not impact the broader legal issues; for example, the Muhammad Ali chapter considers how the case brought into focus the parameters on defining conscientious objector cases, which better protected the rights of petitioners. In all, *Sport and the Law: Historical and Cultural Intersections* provides for the reader the opportunity to see immediately the interconnecting threads that weave the law and American sport and society together.

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# SECTION I

## THE BURGER SUPREME COURT AND SPORT

The Burger Court was a Supreme Court of transition in a time of turmoil, and the Court itself was changing. This change was noteworthy during the Court terms of 1971 and 1972 when the three cases in this section were decided. In 1971, when the *Clay v. United States* and *Haywood v. NBA* decisions were rendered, Warren Burger was the chief justice and the associate justices were William Brennan, Hugo Black, Harry Blackmun, William O. Douglas, John Harlan II, Thurgood Marshall (who did not participate in *Clay* because he had been solicitor general when the case began), Potter Stewart, and Byron White. By the 1972 term, William Rehnquist had replaced Harlan and Lewis Powell had replaced Black. Powell, however, recused himself from *Flood v. Kuhn* because he owned stock in Anheuser-Busch, which owned the St. Louis Cardinals.

The Burger Court as a whole was a transition from trending liberal to trending conservative. The previous chief justice, Earl Warren, had led a Court from 1953 until 1969, which was generally viewed as liberal. The Warren Court was noted for landmark decisions like *Brown v. Board of Education*, one that ended racial segregation in schools, and *Miranda v. Arizona*, a decision that required police to inform arrestees immediately of their Constitutional rights. The new president Richard M. Nixon appointed Warren Burger chief justice in 1969 after Warren's retirement largely because Nixon believed Burger to be a very different jurist than Warren. The Warren Court did not rely on strict construction of the Constitution; that Court had often relied on ethical principles in deciding cases rather than upon narrow interpretations of the law. In his campaign, Nixon had promised to move the Court to the right and to appoint strict constructionists to the bench. Burger was one of the most important of these appointments.

Despite Nixon's expectations, however, the Burger Court did not make a quantum shift and become overtly conservative—that would occur more dramatically after 1986 when another Nixon appointment, William Rehnquist, moved from associate justice to chief justice. The Burger Court legacy included *Roe v. Wade*, which prohibited states from making abortions illegal, and *Swann v. Charlotte-Mecklenburg Board of Education*, which allowed busing to reduce racial segregation in public schools.

The political and social strife in the early Burger Court period was the nation's chaotic landscape with issues of war, race, and age constantly contested. Sport lurked persistently at the edges of many of these dynamic issues. President Nixon's arrival in the Oval Office resulted in an expansion of the Vietnam War and thus an expansion in the vociferousness of its opponents. One of the more dramatic tensions in those protests came in 1970 when Ohio National Guardsmen fired into a crowd of protesting students at Kent State University, killing four. In the midst of the social battle over the war and in part because of the incongruousness of drafting men too young to vote into the military, the Twenty-Sixth Amendment to the US Constitution granting eighteen-year-olds the right to vote was adopted in July 1971. More positively, Nixon during this time was also engaged in developing a relationship with China, part of which was cemented by so-called ping-pong diplomacy with the exchange of table tennis players.

Sport and politics vividly came together in this era at the 1972 Olympics in Munich, Germany. During the second week of the games, terrorists with Black September invaded the Olympic village and took eleven Israeli athletes and coaches hostage, demanding the release of various Palestinian prisoners being held captive in Israel. Two hostages were killed in the initial takeover; the remaining hostages died during an attempted ambush at the Munich airport by the German police. David Berger, born in Cleveland, Ohio, and who had immigrated to Israel after graduate school, was one of the hostages. President Nixon dispatched an air force jet to return his body to Cleveland for internment. Americans learned of the tragic end to the standoff when sports reporter Jim McKay told the nation "they're all gone."<sup>1</sup> Reflecting the contentious world outside of the Supreme Court, the Burger Court decided three cases involving race, youth, war, and freedom.

## CHAPTER TWO

# Clay, aka Ali v. U.S. (1971)

MUHAMMAD ALI, PRECEDENT, AND THE BURGER COURT

*Samuel O. Regalado*

By all appearances, April 28, 1967, was not a normal day at the United States Armed Forces Examining and Entrance Station on San Jacinto Street in Houston, Texas. Though protestors to the war in Vietnam stood outside to express their disenchantment with the draft, to the staff working there, this did not seem out of the norm. But on this day, Muhammad Ali, the heavy-weight boxing champion of the world, appeared on the sidewalk on his way for apparent induction into the military. "Don't go! Don't go!" chanted some from the gathering crowd.<sup>1</sup> Other protestors shouted, "Draft beer—not Ali!" H. Rap Brown, there for the Student Nonviolent Coordinating Committee, led the cheers and exchanged the black power-raised first sign with the champ.<sup>2</sup>

Ali did not disappoint his supporters. After he entered the building, he calmly followed the instructions given to him that included a physical examination and the filing of applications. By that afternoon, all that remained was for the new recruit to board a bus for formal entry into the armed services. However, when the officer in charge twice barked out the name "Cassius Clay," Ali stood still. Officials led him away and advised the champ that should he continue to balk, a federal prison sentence was his likely end. Aware of his circumstances, Ali wrote a statement: "I refuse to be inducted into the armed forces of the United States because I claim to be exempt as a minister of the religion of Islam."<sup>3</sup>

With these words, Muhammad Ali took the initial legal steps on a path that, four years later, eventually landed at the feet of United States Supreme



Court. Though he faced tremendous odds, the heavyweight champ who was a black Muslim confronted the United States Government with the type of resolve that he always carried into the ring. His claim rested entirely on the grounds that he was a conscientious objector to war. As a result, Ali became a lightning rod during one of the most contentious periods in United States history. Furthermore, by the time his case reached the court of Warren Burger, the very meaning of the term "conscientious objector" had, by virtue of legal precedent, been redefined. Thus, although Ali had gained global recognition for his achievements in boxing and his outspoken comments on race in America, at issue in *Clay, aka Ali v. U.S.* was neither sports nor race, but a matter of law and how it was defined.<sup>4</sup> At the outset of this odyssey the news of Ali's actions in Houston predictably triggered harsh reaction.

Ali's religious convictions and celebrity standing mattered little to his critics. For instance, on the very day that he left the armed forces station in Houston, one flag-waving woman in his path yelled, "You're headin' straight for jail! You get down on your knees and beg forgiveness from God! My son's in Vietnam and you are no better than he is. I hope that you rot in jail."<sup>5</sup> In reality, Ali, who had by then taken a public position against the Vietnam War, saw criticism against him on the rise for several months prior to his date in Houston. Thus, the pro-war protestor he encountered at the induction center was only the latest in a growing avalanche of feelings against him.

A year and a half earlier, Ali's position first appeared on the national media radar screen when he blurted to a reporter that "I ain't got no quarrel with them Vietcong."<sup>6</sup> His perspective, then, was initially driven by his attitudes on race. But as he traveled throughout the country and fielded questions, he learned that the complicated nature of the war was one of much greater depth. As such, throughout 1966, he strove to better understand the many fronts of the Vietnam War and, in doing so, stiffened his political stance against the conflict. United States policymakers, he concluded, acted duplicitously in their attempts to impart democracy in a foreign land while race relations in his own country were tenuous, at best. Moreover, as the intensity of the war and the casualty figures increased, he viewed the war as being immoral. As he toured the country with this message, critics mounted their own campaign against him.

Old-school sportswriters, who saw the Joe Louis prototype as the model for appropriate black behavior for athletes at the level of a heavyweight champion, led the charge. Mocking Ali by describing him only by his birth name, Red Smith wrote, "Cassius makes himself as sorry a spectacle as those unwashed punks who picket and demonstrate against the war."<sup>7</sup> As popular opinion increased against him, even his own attorneys wilted over the pros-