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Cooper, Jonathan ORCID logoORCID: <https://orcid.org/0000-0003-1121-1308> (2022) The jurisprudence of sport: sports and games as legal systems. *Journal of the Philosophy of Sport*, 49 (3). pp. 414-419. doi:10.1080/00948705.2022.2105705

Official URL: <https://doi.org/10.1080/00948705.2022.2105705>

DOI: <http://dx.doi.org/10.1080/00948705.2022.2105705>

EPrint URI: <https://eprints.glos.ac.uk/id/eprint/11521>

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Book Review

The Jurisprudence of Sport: Sports and Games as Legal Systems, Mitchell N Berman and Richard D. Friedman, St Paul, USA, West Academic Publishing, 2021, 601 pp., \$149 (softbound), \$111.75 (ebook), ISBN9781684678907

The central premise of the book draws on the familiar observation that sport and state based legal systems are both rule governed practices that share a great deal in common: as the authors put it, “sports and games are, in a clear and recognizable sense, legal systems”. With that premise in mind, the book aims to both put some flesh on the bones (by suggesting examples and putting forward relevant comparisons) and, more interestingly, to prompt the reader to consider whether there is anything that each can take from the other. However, the authors also make interesting comparisons between sports and provide introductions to theoretical and philosophical concepts to help underpin and justify comparisons and to assist the reader in thinking about the aims and purposes or creating and interpreting rules in any context. As a result, the book is an excellent resource for law students and law tutors (and not just those interested in sport) who should be able to latch on to the well-chosen examples and extracts to develop understanding of key legal concepts and skills and also underlying ethical and philosophical concepts that are equally relevant to law and sport. Of particular note are the recurring themes of definition and interpretation, the purpose and nature of sanctions, the difference between rules and standards, the use of discretion and the rationale for choosing standards of proof. Whilst the book is primarily aimed at a legal audience, it should prove of interest for philosophers of sport as an opportunity to reflect on how different sports and legal systems deal with some of the ethical problems that arise. It also provides a source of sporting examples from which to draw interesting ethical dilemmas to engage students with.

Of course, the authors are not the first to identify parallels between sport and the law, but what this book does well is to provide a wealth of examples, extracts, problem scenarios and questions which are used effectively to engage the reader and deepen thought and debate. It is also fair to say that

this book falls into a space between typical sports law and sports ethics textbooks. In these regards, the book is a welcome addition.

The book is very much a comparative study of what is, rather than what 'ought', and as a result the authors offer few solutions for the myriad questions that they raise. Nevertheless, the book is an engaging read. There are, of course, some caveats. First, the book has a heavy US focus. This is not a problem in itself, but does make some of the baseball/NFL examples (of which there are many) and references to the US legal system a little harder to access if you unfamiliar with the intricacies of US sports or the US legal system. Second, although the book's stated aim is simply to compare separate 'legal systems', the overlap between sporting rules systems and external law is often overlooked and, as such, feels like the elephant in the room. For example, there is no real consideration of the relevance of human rights norms (or constitutional rules) on non-discrimination and how that might impact on an internal sporting legal system. Finally, there are places where the comparisons between sporting rule systems and the general law seem a little thin (some of which have been touched on below) and this slightly affects the cohesion of the book as a whole.

Structurally, the book is divided into 5 parts. Part 1 concerns the nature of sports and games, the goals to be achieved in crafting the rules and the tools rule creators have at their disposal.

Part 1 begins with a classic discussion about the meaning of sport and provides a good example of the approach to come. It engages in an accessible debate and, at the same time, manages to introduce philosophical considerations around the usefulness and purpose of definitionsⁱ and the importance of reflective equilibrium to legal reasoning.¹ Chapter 2 focusses on the question of whether games have fundamental essences and, importantly, who should determine this. There is a focus on *PGA Tour v Martin* (2001), which highlighted a fascinating divergence of views within the US Supreme court about whether it was appropriate for the court to determine the essence of golf. Given that the book returns regularly to concerns about the central values of sports, perhaps a little more could have been offered

with regards to a theoretical grounding for determining such values. Chapter 3 considers the aims and restraints in creating and enhancing sports. There is some inevitable (and recognised) subjectivity in focussing on some of the aims. Whilst this is understandable, the exploration of those selected occasionally feels incomplete (such as the definition of 'challenge', which seems to largely ignore the value of competition).ⁱⁱ When it comes to the influence of tradition and history, there is a thought-provoking introduction to cognitive biases, as well as the concept of bounded rationality. In this respect, there is also an insight into the approach that rule makers of golf would appear to take to the relevance of empirical evidence in decision making (very little, seemingly). Chapter 4 examines the ways in which rule makers influence behaviour and introduces the distinction between formal, sanction backed rules, power conferring rules and informal norms, and considers why different approaches might be taken. The discussion around the informal norms in sport highlights some particularly interesting questions about the extent to which players should be left to enforce playing culture norms concerning violence and retaliation.

Part 2 focusses on the structure of sporting competitions. This starts with the basis for determining winners and comparisons between the objective and subjective scoring systems used by different sports. One of the most interesting observations relates to justifications for unit scoring systems in sport and how that compares to the US electoral system, a comparison that does not put the US electoral system in a favourable light. The inherent difficulties with subjective scoring in sports is recognised, and ice-skating is used as an example of the pressures to adopt a more objective framework as a sport grows and develops. In the context of sports political elections and judicial decisions, there are also some insights into the difficulties of translating individual voting preferences into group ones (and how they might be overcome). In doing so the authors introduce the 'Condorcet paradox' and Arrow's Impossibility Theorem.

Chapter 6 looks at the consequences of rule-breaking. The difference between sanctions and 'prices' is introduced, a distinction which, the authors suggest, can be used by rule makers to reflect individual

playing cultures and values and provide a more nuanced approach to rule making. Not surprisingly, there is some discussion around strategic fouling, which leads on to a brief introduction to the concepts of formalism, conventionalism and internalism and their relevance to interpreting and applying rules. The chapter moves on to explore concerns about over-penalisation and the conflict between individual justice, administrative costs and the longer-term interests of a society. We are also introduced to several theoretical issues around causation, intent and fault and to consider their role in determining approaches to sanctions.

Chapter 7 considers justifications for rules limiting participation and starts to examine the difficult balance between inclusion and fairness. Of particular contemporary interest is the issue of sex segregation and there is a succinct summary of some of the issues surrounding athletes with DSDs, with a focus on Caster Semenya and the DSD Regulations in Athletics. Although questions over the scientific evidence provided as a justification for the regulations are highlighted, there is, perhaps, an opportunity missed to compare the use of empirical evidence in other law-making contexts. Unfortunately, the varying approaches to transgender issues in sport are not really considered. Given the currency of the topic, this is a shame.

Chapter 8 turns to the issue of performance enhancement. The section on technological advancement provides some interesting comparisons between sports and raises questions about the reactive approach of SGBs, the importance of identifying the essential values of particular sports and the argument for standardisation of equipment. *Pistorius v IAAF (CAS, 2008)* provides a lens through which to consider the issue of biomechanical enhancement. It would be helpful in a later edition to include some comment on the regulations recently introduced by World Athletics (which to a large extent reflect the *Pistorius* decision, but provide detailed procedure and deal with burden of proof questions). Unfortunately, there is no mention of para-sport here or in the previous chapter and this would be a welcome addition. There is an interesting question raised in the context of baseball with regard to the ethics and legality of *pre-emptive* surgery to prevent injury and, more generally, the

potential consequences for future biomechanical procedures to enhance sporting performance. In the context of performance enhancing drugs, there is a helpful overview of the well-trodden arguments for and against regulation and some well-chosen examples are used to question whether the 'war on drugs' and the WADA code are quite as ethically and scientifically justifiable as it might intuitively seem.ⁱⁱⁱ

Chapter 9 considers the organisation of tournaments. Of particular interest is the concept of competitive balance in the context of disparities in wealth. The comparison between the more aggressive policies of US sports and the 'break even' requirements of Financial Fair Play (FFP) regulations in Europe is both intriguing and a useful mechanism for comparing the purposes and effectiveness of such regulations. As a result, valid questions arise about whether FFP lives up to its name, given the potential to embed an unreachable elite at the top of the game. However, the position in European football is a little underdeveloped given the introduction of salary caps in some areas and vagueness about the legality of such financial restrictions given EU and domestic competition laws. There is also some underlying discussion about the meaning of 'competitiveness' and just how competitive a league ought to be.

Part 3 turns to the question of officiating. Chapter 10 focusses on interpretation of rules and there are obvious parallels drawn between the interpretative roles of sporting officials and judges. Familiar themes are introduced concerning different interpretive perspectives and the problem of 'gappyness' in creating rules. In particular, clear links are made to the never-ending debate about textualism/purposivism so visible in US law, but the sentiments are equally valid to other jurisdictions. There are reflections on the relevance of practice in interpreting and applying rules (and the phenomenon of written rules becoming obsolete through non-observance) as well as the potential for the use of discretion in deciding whether to enforce rules at all. Although the parallels drawn are clear, there could have been more recognition of the differences in context, such as the time-constraints of decision making in sport and even the sources of rulemaking powers, since these may well be

contextual issues relevant to interpretation. The context is also used to highlight the importance of recognising uncertainty in claims about how the world is, and, importantly, how such uncertainty might affect standards and burdens of proof. There is some interesting speculation about the extent to which officials might (consciously or not) alter standards of proof when it comes to application of on-field sanctions given their perspective on the severity of consequence within the context of the game. Even more interestingly, we are encouraged to consider how such behaviour might be justified and whether such varying standards might be used more in both sport and law. The issue of technological assistance is also addressed and used to introduce the concept of legal realism and Llewellyn's distinction between paper rules and real rules. The use of VAR in football provides an effective way of highlighting an underlying question about why the letter of the law should be followed and whether technology should be used to do so.

Chapter 12 is concerned with the use of an official's discretion and draws on Dworkin's analysis (Dworkin, 1977). There are a couple of excellent examples (baseball and American football) used to highlight concerns around proper limits of discretion, justifications for variable enforcement of rules and the potential for officials to create rules or to award 'makeup calls' to achieve their own sense of justice. Again, there are obvious parallels with the general law. However, some of what is said about makeup calls does appear rather speculative and it would be interesting to have more data about how common they actually are and how willing sporting officials and judges would be to admit to them.

Chapter 13 turns to the consequences of errors in officiating and there are comparisons made between the remedies available when rules are interpreted and applied incorrectly (or when mistakes of fact are revealed). If nothing else, the chapter challenges a simplistic perspective that erroneous legal decisions can be challenged but 'on field' sporting ones, in the absence of bias, cannot.

Part 4 moves to considering informal norms of sport and how players interpret and apply them; the key theme being to consider when such informal norms override the formal rules and whether this can be justified. Inevitably, this involves analysis of different perspectives on the meaning of cheating

and several sporting examples are offered to stimulate the debate. The authors draw on the sanction/price distinction introduced earlier in the book^{iv} and, with the aid of several examples, suggest that viewing sporting sanctions as a 'price' is not an uncommon perspective. This might help explain why informal norm systems develop in sport, but the authors leave open the issue of whether that approach is justifiable. The authors also consider the place of deception in sport (and what appears to be permissible) as well as related concerns such deliberate delay and sledging.

Chapter 15 concerns sportsmanship; what it means and what duties it might impose on players. Broadly, the authors suggest two key elements; a duty to try one's best and a duty to relinquish an advantage.^v Whether one agrees with their analysis, the discussion invites consideration about whether formal rules could (or should) attempt to guide such behaviour. Although there is some speculation about a perceived decline in both sportsmanship and professionalism in law, there seems to be less by way of comparisons to the general law in part 4, which is a shame, as it felt like comparisons could have been drawn (for example, some of the principles of equity that prevent people from exercising their full legal rights when it would be unconscionable to do so).

The final part of the book is dedicated to considering records and the recognition of greatness within sports. Whilst this chapter will be interesting for sports fans, as it is not, per se, about the rules of the game, it does feel slightly out of kilter with what has come before, as such, like a bit of an unnecessary addition.

With its myriad of interesting and well-chosen extracts, *The Jurisprudence of Sport* should prove to be a truly useful resource for law students, law lecturers and those interested in the ethics of sport.

The comparisons between sporting legal systems and the general law are generally insightful and thought-provoking and should be of interest regardless of whether the reader is a sports fan (although having an interest in sport will inevitably make the book more accessible). The book doesn't necessarily cover everything you might expect from the title and there is a heavy US slant,

but there is more than enough in the book to appeal to readers across disciplines and legal jurisdictions.

Reviewer:

Jonathan Cooper

Senior Lecturer in Law

Gloucestershire Business School

University of Gloucestershire

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Holmes, W, *The Path of Law*, *Harvard Law Review* Vol. 10, No.8 (1897), pp. 457-478

ⁱ For example, Wittgenstein's concept of 'family resemblance'.

ⁱⁱ Challenge being defined as a measure of the improvement of performance, given an assumed level of skill, for any increase in skill. P.61

ⁱⁱⁱ Particular concerns are highlighted surrounding the basis on which substances are included on the prohibited list and a possible disconnect between the sanction and the performance enhancing capabilities of some of the substances.

^{iv} Which they underpin more clearly by reference to the work of Wendell Holmes Jr (1897) and the possibility of all sanction backed rules being seen, not as obligations to comply with, but as a 'price list' for acting in certain ways.

^v Where an opponent is mistaken, injured, unlucky or subject to a bad call from an official.