



BOOK REVIEW

The Jurisprudence of Sport: Sports and Games as Legal Systems

THE JURISPRUDENCE OF SPORT: SPORTS AND GAMES AS LEGAL SYSTEMS. By Mitchell N. Berman and Richard D. Friedman. West Academic Publishing. 2021. \$140

Reviewed by Alexander Amir

“Sports law” is understood by many to be an amalgam of various fields of law: labor, antitrust, intellectual property, contract, tort, and the various legal and financial matters that comprise transactional work. Traditional “sports law” textbooks focus on how our federal and state statutory and common law interact with sports-related issues such as league restraints on player salaries, athlete licensing and publicity rights, players unions and collective bargaining, and much more. Mitchell Berman and Richard Friedman’s *The Jurisprudence of Sport: Sports and Games as Legal Systems*¹, by the authors’ own admission, is different. This new textbook instead “investigates sports and games as legal systems . . . [as] a study in comparative law or jurisprudence.”² Rather than study the interplay between the U.S. legal system and sports leagues, the authors instead analyze the legal structure of competitions themselves, providing a fresh perspective on how to analyze the sports industry.

The Jurisprudence of Sport is a successful textbook in three ways. First, this book serves as an essential primer on the legal structure of sports leagues, making it a worthwhile component for any sports law course. Second, by studying sports as its *own* legal system, the authors teach first-year legal concepts—rules versus standards, textualism versus purposivism, intent versus strict liability—through an accessible and exciting subject

¹ MITCHELL BERMAN & RICHARD FRIEDMAN, *THE JURISPRUDENCE OF SPORT: SPORTS AND GAMES AS LEGAL SYSTEMS* (1st ed. 2021).

² *Id.* at 3.

matter, helping readers apply what they learn to areas of the law outside of sports. Third, any student interested in sports, whether in law school or not, will find this textbook greatly enhances their knowledge of competitions through case studies, rule comparisons, and historical reviews. By analyzing the competitive dynamics of a broad array of sports through studies of law, economics, philosophy, science, ethics, and mathematics, this book will help readers become more well-rounded students, thinkers, attorneys, and even fans.

Each chapter of the book analyzes a discrete aspect of games and competition, including how to determine a winner, penalties, eligibility rules, performance enhancement, league structure, officiating, misconduct, and recordkeeping. Within each chapter, the authors generally introduce each topic with a few case studies or a scholarly piece that nicely illustrates the issue at hand. These introductory case studies draw from a variety of sports and feature relevant commentary from a diverse array of sources: from Ludwig Wittgenstein and Malcolm Gladwell to myriad sportswriters and law review authors. For example, in Chapter 6 on Penalties, the authors feature an ESPN piece written by sports analyst Bill Simmons that rants about the NBA's automatic suspension for players who leave the bench area during an altercation.³ It's an amusing inclusion in a law school textbook, as Simmons lambasts the rule as "stupid, idiotic, foolish, moronic, brainless, unintelligent, foolhardy, imprudent, thoughtless, obtuse and thickheaded."⁴ But it usefully contrasts with an interview on the next page between ESPN's Dan Patrick and former NBA Commissioner David Stern, who defends the rule.

Following each introduction, the authors engage in the daunting task of comparing how different sports leagues and other institutions implement their "jurisprudence" on the relevant issue in a robust "Comments and Questions" section. Within these sections, the authors feature discussions of broader legal and economic theory along with numerous questions and writing activities, presented even-handedly, designed to facilitate class discussion.

Chapter 8, titled "Performance Enhancement,"⁵ is an illustrative example. The first two subtopics, "Technological Change" and "Biomechanical Enhancement," are introduced with case studies on advanced swimsuits in competitive swimming and prosthetic legs used by Oscar Pistorius to become the first amputee runner to compete at an

³ *Id.* at 189.

⁴ *Id.* at 230.

⁵ *Id.* at 281.

Olympic Games. After laying out the discourse on whether these items constituted performance enhancement, the authors then apply these theories to powerlifting garments, running shoes, tennis rackets, vaulting poles, preemptive surgery, gene therapy, and baseball and football players born without fingers and toes. Later subsections in the chapter discuss the scientific, ethical, philosophical, and regulatory considerations regarding performance enhancing drugs and devices. Similar examinations follow in each chapter, ensuring that readers are equipped to understand the nuances of each major issue, both across sports and across academic disciplines.

Outside of a specific sports law course, this book is a valuable tool for first-year law students, and even undergraduates, to grapple with fundamental topics in legal theory. For example, Berman and Friedman use former Pittsburgh Steelers safety Troy Polamalu as a case study to illustrate the benefits and detriments to a textualist or purposivist interpretation of a rule.⁶ Polamalu, after an apparent injury, called his wife to explain that he was not hurt. Despite no ill-intent, Polamalu clearly violated an NFL rule prohibiting cell phone use on the sideline. The authors apply principles of statutory interpretation to debate whether the rule should have been interpreted by its plain meaning or interpreted as a flexible standard to only punish an actual wrongdoer. By studying the significant statutory interpretation case *Church of Holy Trinity v. United States*⁷ alongside the NFL Rulebook, the reader is able to learn about a fundamental topic of legal education in an accessible way.

Similarly, Berman and Friedman analyze *PGA Tour, Inc. v. Martin*,⁸ a Supreme Court statutory interpretation case that attempts to answer what “the essence of the game” of golf means. Casey Martin was a professional golfer with a degenerative circulatory disorder, preventing him from walking golf courses. Under the PGA rules, the use of golf carts is not allowed, and Martin’s inability to get a waiver to use a cart would have prevented him from participating in a PGA event. The question at issue was whether granting the waiver would “fundamentally alter the nature of [golf]” under Title III of the ADA.⁹ The authors further ask “what is a sport” of countless other athletic competitions, games, and activities, based on definitions from philosophers, sports scholars, and sports leagues. Beyond statutory interpretation, this question is also at the heart of two cases studied in a typical first-year torts class—*Knigh v. Jewett*¹⁰ and *Hackbart v.*

⁶ *Id.* at 95.

⁷ 143 U.S. 457 (1892).

⁸ 532 U.S. 661 (2001).

⁹ 42 U.S.C. §12182(b)(2)(A)(ii).

¹⁰ 3 Cal. 4th 296 (1992).

Cincinnati Bengals Inc.,¹¹—where the question of liability depends on the amount of physical violence that should be expected when playing football. In other words, to what extent is violence essential to the game of football? Studying this question in detail is one way that *The Jurisprudence of Sport* introduces students to legal thinking using cases outside of traditional law school doctrine.

The authors also go beyond legal theory to draw parallels between sports structures and various political issues. Voting reform has been a hot-button topic in recent election cycles, and Berman and Friedman use sports scoring frameworks to suggest various reforms to the Electoral College. Aggregate scoring—the most common method of scoring sporting events—declares a winner based on total points accumulated (points being baskets in basketball, runs in baseball, or the popular vote in elections). More infrequently, unit scoring will instead choose a winner based on the number of total groupings, or units, of points earned (such as sets in tennis or volleyball, or electoral votes in elections). Without taking a stance, the authors pose a variety of hypotheticals to help students flesh out various ways to apply these options to the Electoral College. The authors employ similar analogies for other topics: how to apply penalty theories in sports to *NFIB v. Sebelius*,¹² the major case on President Barack Obama's Affordable Care Act; how models for sex-based classification in sports bear on affirmative action in university admissions and eligibility requirements for the military and public safety; and what officiating errors in sports can teach us about jury selection. Framing these critical issues in the context of sports provides a fresh perspective that helps make these issues more appealing and accessible.

While the clarity with which the book covers legal theory is remarkable, its most impressive attribute is the sheer quantity of sports that are studied and its ability to place them in conversation with each other. Berman and Friedman are true to their word when they describe the book as a study in comparative law. Major sports like baseball, football, basketball, hockey, soccer, tennis, and golf tend to garner more attention, but there is much to learn even for the most niche sports fan. The authors investigate *why* certain rules are in place, such as MLB's Infield Fly Rule, the PGA Tour's swinging requirements, and the NFL's scoring system. By doing so, they introduce factors that sports jurisprudence is built upon, such as fairness, challenge, and cognitive bias. They then apply these factors to gymnastics, swimming, chess, billiards, competitive eating, and many other

¹¹ 601 F.2d 516 (10th Cir. 1979).

¹² 567 U.S. 519 (2012).

contests, significantly enhancing the reader's knowledge of and appreciation for systems and structures through sports. By studying so many permutations of rules that promote different notions of fairness, skill, luck, and administrability, students are prepared to tackle a wide array of legal questions in many different sports settings.

The Jurisprudence of Sport fills a unique role in the academic literature of sports law. The authors distill and reframe challenging legal topics through a medium that makes them more accessible and comprehensible for first-year law students and undergraduates. At the same time, the authors' probing questions, complex writing exercises, and incorporation of economics, philosophy, and mathematics makes the book equally as effective for teaching more advanced students. Ultimately, this is an invaluable resource that can be used as a primary or supplementary sports law text.

