

# Playing by the Rules

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Mitchell N. Berman, [\*"Let 'em Play:" A Study in the Jurisprudence of Sport\*](#), 99 **Geo L.J.** (forthcoming 2011).

What does sport have to do with jurisprudence? Not a great deal, one might think. To be sure, particular sports, like legal systems, are rule-governed practices. This commonality and the relative simplicity of sports makes them useful as a source of examples that might be deployed to explain more complex legal-theoretical ideas.

Philosophers of law and legal theorists commonly use sports examples in just this way. Most famously, [H.L.A. Hart](#) used examples from games and sport both in criticizing other views about the nature of law and in clarifying his own distinctive view. In his critique of Austin's command theory of law, for example, Hart invoked the scoring rules of a game as he explained why nullification under the power-conferring rules common to modern legal systems cannot be assimilated to sanctions under duty-imposing rules. (H. L. A. Hart, [The Concept of Law](#)). And he adverted to chess and cricket to explain one of his most distinctive theses—that rules, and so law, have an “internal aspect.” Chess players, he observed, do not merely have “habits of moving the Queen in the same way,” which an external observer might record. In addition, “they have a reflective critical attitude to this pattern of behavior: they regard it as a standard for all who play the game.”

Given the frequent appeals to sport in the work of legal philosophers, we should be surprised at the scant attention that has been paid to its complexities. So [Mitchell Berman](#) observes, in his wonderfully engaging essay on the “jurisprudence of sport.” As his discussion makes clear, sport isn't merely a source of useful examples. On the contrary, “sports leagues constitute distinct legal systems,” he explains, sharing many features in common with legal systems proper, such as primary and secondary rules and institutional actors who function like legislators and adjudicators. For this reason alone, sport merits serious and sustained investigation by legal theorists.

Berman launches his discussion with a detailed recounting of the [semi-final match of the 2009 U.S. Open](#). Serena Williams, the “odds-on favorite to win her third grand slam tournament of the year,” faced off against Kim Clijsters, in her surprise return to the tennis world. Williams lost the first set to Clijsters and was down 15-30, when a line judge called her for a foot fault on her second serve. Williams lost it, in more ways than one. Her outburst and threatening behavior toward the line judge resulted in a one-point penalty and a win for Clijsters, as well as additional penalties and universal criticism. As for the substance of her complaint, however, some sided with Williams, arguing that you just don't call a foot fault at such a critical juncture. The position of Williams' defenders rests on what Berman calls “temporal variance”—the view that “at least some rules of some sorts should be enforced less strictly toward the end of close matches.”

Having thus set the stage, Berman's article goes on to investigate the “contours and bases of optimal temporal variance.” But this, he quickly makes clear, is just the “surface agenda.” His grander ambition, he explains, is to illustrate the worth of theoretical investigation of sport in order to encourage the development of a jurisprudence of sport. And yet he hints at a still grander ambition when he offers that one might see his article as “a manifesto of sorts for an enlarged program of jurisprudential inquiry.”

Berman offers persuasive considerations in favor of this broadest aim. Sport and law confront many of the same issues, he observes, including when and where to guide conduct by formal written norms rather than by informal social norms, when and where to make use of rules rather than standards, when and where to leave adjudicators with discretion, and how appropriately to limit that discretion. Sport and law must each manage epistemic uncertainty, as well as the normative uncertainty that arises when gaps are exposed between “the law in the books” and “the law in action.” An enlarged jurisprudential inquiry would improve our understanding of the “phenomena and dynamics” common to law and sport. The development of a jurisprudence of sport might prove particularly useful on the law side, not only because the rich examples sport provides can be plumbed as a source of jurisprudential hypotheses, but also because our intuitions about particular practices common to both are, in the sports context, “less likely ... to be colored or tainted by possibly distracting substantive value commitments and preferences.”

Berman tells us a bit about where he anticipates that his own arguments might yield dividends for legal theory. Without elaborating, he offers that in light of his arguments, we can better understand the lost chance doctrine in torts, the difference between claim-processing rules and jurisdictional rules, and the granting of equitable remedies in certain contexts such as appellate litigation. Whatever the import of a jurisprudence of sport, and of Berman’s arguments in this article for the particular legal-theoretical issues he identifies, I suspect the broader inquiry Berman envisions may yield equally large dividends for more general legal theory.

Viewed in its entirety, Berman’s exploration of temporal variance and the rule-governed practices of various sports provides a compelling corrective to the temptation to think of rules as functioning to settle issues, and to settle them in particular by precluding appeal to the reasons for the rule—the underlying aims or standards the rule serves. Rules no doubt *sometimes* settle issues and always have some tendency to constrain, or better, to guide decision making. And yet as Berman’s essay illustrates, even the formal invariance of a rule does not always settle all questions we might have about the rule and its proper application “in action,” and not simply because of the complex interaction of the rules of a practice.

What makes his essay compelling in this way is precisely that if there are any practices in which we might be inclined to think of rules as operating pretty straightforwardly, surely sporting practices are among them. But if playing by the rules can be so complex and controversial in sport, where matters are not of such great moment, then so much the worse for law. Of course, one might naturally wonder whether puzzles of the sort Berman considers surrounding the rules and “rulified standards” in sport have important relevant counterparts in the law. More deeply, one might wonder whether the distance the study of sport allows from the evaluative commitments and preferences that operate when we consider law is such a good thing for jurisprudence. For a critical difference between law and sport is that legal issues *do* engage the values, interests, and concerns most fundamental to human life. The influence of our evaluative commitments and preferences can be distorting, but it can also help us to see things rightly.

As I suspect Berman would correctly point out, the expansive jurisprudential inquiry he advocates need neither assume near parity nor overlook how values can correct our perceptions and judgments. To be sure, among the things we would want to learn, and would learn, from a jurisprudence expanded to include sport are the limitations of sport for understanding as normatively rich a system as law. But what we learn about *that* also stands to improve our legal jurisprudence.

Mitchell Berman’s essay is beautifully written, rich in detail, and deep in its exploration of the complex interplay of the rules of sport and the distinctive aims and excellences that form the “internal morality” of particular sports. I found it thoroughly fascinating from start to finish and was left, as someone with

no particular interest in sport, with an appreciation of why people as smart and insightful as Berman would find it so gripping. One can only hope that others will take him up on his invitation and that Berman himself will, in future work, begin to bring the seeds he has planted in this essay to fruition.

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