

# Introduction

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I can date my interest in the philosophy of sport to a particular event: I was watching the World Cup in Brazil in the summer of 2014. Strategic fouls (also known as ‘professional fouls’) seemed to be the norm. Every day I was getting more and more annoyed about this. But the miscreants were penalised after all, so the football world should have been whole again. My discomfort persisted and I started thinking about why the ‘punishment’ in this instance didn’t fit the ‘crime’. My approach to the phenomenon of strategic fouling was informed by my knowledge of the law and theories of state punishment. This is nothing new; Kathleen Pearson (1973), for example, likened the agreement among players to abide by the rules of a game to a ‘contract’. Legal scholars like H.L.A. Hart, Joseph Raz and Ronald Dworkin did the reverse and used sport to clarify points in law.

Most people will not be familiar with the term ‘jurisprudence of sport’ (JOS). The idea is that looking at sport through the eyes of a legal scholar might illuminate our understanding of certain problems in sport (and vice versa). The term was first introduced in 2011, in the title of a paper by Mitchell N. Berman, who is also a contributor to this volume.

In the English-speaking world there have been few attempts to apply jurisprudential thinking systematically to sport; one exception is David Fraser’s book, originally published in 1993: *Cricket and the Law: The Man in White Is Always Right*. Readers of Spanish may be familiar with a monograph by Gregorio Robles Morchón: *Las reglas del derecho y las reglas de los juegos (The Rules of Law and the Rules of Games)* from 1984; his book has also been translated into German (*Rechtsregeln und Spielregeln*, 1987). In the German-speaking world we find a collection of essays by various authors on the theme of ‘Recht und Spielregeln’ (‘Law and Game Rules’) from 2003, edited by Andreas von Arnould. I have included one very important essay (in translation) from said collection, written by von Arnould, in the present volume: ‘On the Game Contract’.

Journal articles (in the philosophy of sport) sometimes employ the jurisprudential viewpoint, but usually in a piecemeal fashion. However, research in the JOS seems to be moving on. The first dedicated event on the JOS was probably the symposium at the New York School of Law in 2018, initiated by Robert Blecker, which resulted in the publication of ‘Getting an Edge: A Jurisprudence of Sport’, a special issue in the *NYLS Law Review*. Also in 2018, the organisers of

the IVR World Congress (the largest gathering of legal and social philosophers, occurring biannually) accepted my proposal for a workshop on the topic: ‘The Jurisprudence of Sport’. Thus, in the summer of 2019 a handful of scholars met at Lake Lucerne to present their research at the JOS workshop. This workshop has led to the present publication.

And 2021 saw the first publication of a textbook on the JOS, authored by Mitchell N. Berman and Richard D. Friedman. This is an impressive piece of scholarship; it covers many issues in many sports and subjects these to jurisprudential scrutiny. Berman and Friedman’s book gives the reader a very good idea about the scope of this approach.

In the present volume we have contributions from around the world: Italy, Spain, Germany, Australia, Great Britain, the US and the Netherlands, by authors of various nationalities. Some of the contributors were present at Lake Lucerne, the other contributions to this volume I have commissioned. Rather than give a ‘one-sided’ – enthusiastic – view on the topic, I have asked Yunus Tuncel to provide a counter balance. In 2019 he gave a talk in Prague attacking jurisprudential thinking in sport, and he has shaped this into an elegant essay.

Readers may notice that I have adopted a wide understanding of the JOS; some essays deal with *lex sportiva*, i.e. law specific to sport. It should become clear that this can be useful for understanding issues of fairness and justice in sport.

The book is divided into two parts. The first part is dedicated to foundational issues, the second to specific issues like VAR, discretion or strategic fouling. Rather than providing brief descriptions for each essay, I will let the authors speak for themselves through their abstracts.

## Part I: Foundational Issues

### *1 The Jurisprudence of Sport: A Research Strategy*

Mitchell N. Berman, University of Pennsylvania

The jurisprudence of sport is a rapidly expanding field of scholarly inquiry lying at or near the intersection of philosophy of sport, legal philosophy and theoretically inflected comparative law. As the field continues to grow, newcomers might wonder how best to contribute. This chapter offers modest guidance. Emphasising that the discipline’s relative immaturity allows scholars to raise and address arresting new questions, and not only (as in some long-established domains) to present new answers to familiar questions or new arguments for familiar answers, it encourages scholars to attend somewhat less to the existing academic literature and somewhat more to the world of sport itself. Its advice in a nutshell: keep on the lookout for puzzling practices or curious incidents arising from the field of play and then seek connections to better understood or more fully theorised practices elsewhere, often in ordinary law. To illustrate the strategy it recommends, the chapter uses biathlon’s ‘penalty lap’ to problematise the well-known legal-economic distinction between ‘prices’ and ‘sanctions’; brings the scoring protocols used in boxing and other combat sports into conversation with a puzzle known to philosophers of law as the ‘doctrinal paradox’ or the ‘discursive dilemma’; and highlights an

underappreciated difference between two methods for aggregating points to yield a final result, what it calls ‘atomic’ and ‘molecular’ aggregation.

## ***2 On the Game Contract***

Andreas von Arnould, University of Kiel

Every game is based on the agreement of the players to play together. The game therefore has a conventional basis. In this ‘constituting’ game contract the players agree *that* they want to play and *what* they want to play. Since the characteristic nature of every game can be understood as the totality of its necessary rules, the agreement on these necessary rules of the game takes place during the initial conventional stage. Changes to the rules during the course of the game, insofar as they are not within the framework of the constitutive rules, but rather alter or extend them, are to be understood as amendments to the (original) game contract. Writing game rules doesn’t make them binding for the players. It is the constituting game community (for each match) that has the authority – through the ‘game contract’ – to recognise certain rules as binding norms in a game. It is plausible to relate the ‘game contract’ to the model of a social contract. The basic idea of individuals who are born free but who enter into a community with others, binding themselves to follow rules based on a contract, shows clear parallels to someone who agrees with others to play a game and to follow its rules.

## ***3 Rules of the Game, Gaming the Rules***

Bruce Baer Arnold, University of Canberra

Competitive sport is a matter of identity, with rules about who gets to compete and therefore who gets rewarded through medals, public recognition, sponsorship and other benefits. Identity in sport is as much a matter of who makes the rules, how and for whose benefit, rather than merely who plays or does not play by the rules, in that it resembles what we see in civil and criminal law, and in the theorisation by Hart that understands law as a matter of rules about rules: rules in a game where the stakes may be higher than suspension from a competition or denial of product endorsement opportunities. This chapter construes professional and quasi-professional sport (such as the Olympics) in terms of rules about identity. It suggests that the creation, subversion and policing of identity in sport through the articulation and implementation of rules results in a jurisprudence that offers insights about sports law per se and about the nature of identity as an artefact in law, something that can be understood through lenses provided by theorists such as H.L.A. Hart, Alan Gewirth and Martha Nussbaum.

## ***4 The Overlap between State Law Systems and Sports Law Systems: The Case of Doping***

Anna Di Giandomenico, University of Teramo

An overlap can often be seen between state and sports law systems. This overlap, which can concern both the matter ruled upon and the norms adopted, is

not without problems, due to the distinctive features characterising these legal systems. Before entering into an in-depth analysis of this overlap and its consequences, we'll outline the distinctive features of the sports law system, as well as the difference existing between the sports law and state law systems. We will then examine the case of doping in greater depth, as it is truly emblematic. First, we shall analyse the rules put in place by the sports law system. Beside these regulations, there are state regulations on doping, as well as international conventions, such as the European Anti-Doping Convention (which came into force on 1 March 1990) and the UNESCO Convention, whose main achievement is that of substantial uniformity in handling cases throughout the state law systems where the Convention came into force. The analysis of the doping regulations put in place by sports law systems highlights several legal issues, due to their very strict and not wholly unproblematic nature. The same occurs as concerns state rules on doping, due essentially to the substantial lack of regulatory competence in the field of sports, as may be seen in many states. After analysing the issues of state regulations, we will focus on the UNESCO International Convention against Doping in Sport, whose text reveals several additional legal issues, especially as relates to its definition of doping, which is substantially the same as that of the first version of the WADA Code. An overlap between the different legal systems emerges from this brief, certainly not exhaustive, analysis of the doping regulatory framework (in both state and sports law). In this regard, we wonder whether this substantial overlap between the sports law system's definition of doping and that of state law systems might not give rise to a true legal aberration. Moreover, one wonders whether this overlap might not conceal another, more important issue, such as opening a way towards an ethical characterisation of law that, *de facto*, denies one of the fundamental and distinctive features of law, as has been outlined since the Enlightenment.

### *5 Contra Legalist/Formalist Conceptions of Sport*

Yunus Tuncel, New York University

Legalists attempt to understand sport as a legal field, analogous to society and its laws. However, their definition falls short in recognising the ludic nature of sport and its heterogeneous order. This paper examines some of the legalist arguments and subjects them to a Bataillean critique. First, laws are supposed to bind society, but they are generic and often at odds with the singular nature of human beings. Second, what are the legalist arguments for sports? Some of the legalist positions are examined to see why and how they liken sports to the legal sphere. Finally, what is Bataille's position on law and sports? This part presents his ideas from his critical writings and examines why and how ludic functions cannot be explained by way of law, and rules in sports cannot be confined to or understood as political laws of the homogeneous field. The culture of playfulness is discussed by way of Bataille, Caillois and Huizinga as an alternative to jurisprudence in sports, and the chapter shows how sport, a heterogeneous field of play, does not function in the way the orderly society does, even if there may be parallels between the two spheres.

## **Part II: Specific Issues**

### ***6 A Hybrid Account of Legal Interpretation: Lessons from Philosophy of Sport***

Anthony Kreider, Miami Dade College

In considering the interpretation of legal documents, there is a well-known debate between so-called ‘textualists’ (sometimes ‘originalists’) and those who adopt a ‘living tree’ (sometimes, ‘living constitution’) account. The view defended here suggests that there is a sense in which a version of both interpretive views is correct, and that the seeming conflict between living tree and textualist accounts is only apparent. In fact, it is argued that the very intuition that underlies a textualist conception of legal interpretation, that the meaning of a legal text is fixed by the meaning of the words as used by the law’s ratifiers, supports an idea of the law as living. The resolution relies on lessons that can be gleaned from the philosophy of sport, and in particular from an ‘ethos’ account of rules and game-playing. On a version of an ethos account of games, the game-players are the ones who are empowered to interpret and apply the rules to which they are subject (to which they subject themselves). Indeed, they are the original ratifiers of the rules of their game. The analogy then is that a contemporary citizenry, being the ‘players in the game’, are the true ratifiers of the rules (laws) to which they are subject. Thus, the meaning of a legal text is determined relative to the text’s contemporary meaning.

### ***7 The Dual Function of Constitutional Rights in Lex Sportiva***

Bodo P. Bützler, University of Cologne

When deciding transnational legal disputes within the realm of *lex sportiva*, constitutional rights have a dual function. First, constitutional rights embody fundamental value standards that continuously inform the normative content and structure of transnational institutional arrangements. Second, constitutional rights embody procedural legitimacy standards. Procedural legitimacy standards guarantee the equal participatory say of all actors affected by an institutional arrangement. Whenever constitutional rights of concrete persons incommensurably collide, then the collision of constitutional rights itself needs to be interpreted in light of procedural legitimacy standards that are enshrined into the very core of constitutional rights. In other words, the distribution of participatory opportunities has a direct bearing on the proper balancing of incommensurably colliding constitutional rights. When a transnational institutional arrangement such as *lex sportiva* lacks in procedural legitimacy, then the infringement of constitutional rights of constituent actors (e.g. sports governing bodies) weighs comparatively less than the corresponding infringement of constitutional rights of mere participatory actors (e.g. individual athletes).

## 8 *International Migration Law and Reforming 'Change of Nationality' Rules in Sport*

Alun Hardman, Cardiff Metropolitan University

The movement of skilled labour across the world reflects how the planet is increasingly interconnected and interdependent. The passage of workers across borders extends to international sport where the transfer of elite athletes between nation states is an enduring phenomenon. This chapter argues that the traditional constraints on the fluidity of sporting citizenship legally enshrined in *Nottebohm* (International Court of Justice, 1955) are archaic, unenforceable and unfair. In particular, the argument made is that current attempts at the transnational regulation of transfers of nationality between nation states, based on the ideal that there should be a 'genuine link' between the nation and its nationals, largely reaffirm historical inequalities forged during colonial times, as well as allowing for new forms of instrumental naturalisation. The chapter then argues that the legitimacy of sporting naturalisation should be understood within the broader context of international justice and suggests that the principles of international migration law, as a response to the enduring and significant impact of human migration, should underpin the movement of sporting talent between nations. At the core of this approach is both an emphasis on the protection of a wide range of rights in relation to individual athletes, as well as putting a stop to the most egregious forms of instrumental naturalisation that have become a political weapon of state nationalism.

## 9 *Re-thinking the 'Juridification' of Sport: Identifying the Cognitive Dimension*

Steve Greenfield, University of Westminster

Juridification has been identified as a feature in many areas of civil society including sport. The debate originated around the extent to which law could or should become involved in issues that occur on the field of play. Many sports' governing bodies have set up quasi-judicial systems to deal with disciplinary issues which provide a clear example of the increasingly tight embrace of law and sport. This chapter is not concerned with these obvious manifestations of juridification, nor legal decisions or statutes, but rather how those involved in delivering sport may think and feel about law itself and how it applies. It draws both upon the concept of legal consciousness and empirical work in the psychological area of 'concerns about litigation' within the context of claims of a 'compensation culture'. It argues that how people think and feel about law is an unrecognised, but vital, area of the juridification of sport, given that it has the capacity to alter behaviour and impact on both policy and practice.

## ***10 The Epistemic Limits of VAR***

José Luis Pérez Triviño, Pompeu Fabra University

The introduction of video assistant refereeing (VAR) into football has been met with some resistance. The objections touch on some of the negative impacts in the course of a football match. However, there are strong arguments, founded on the idea of justice in football, that support its use, since it contributes to reducing factors that diminish the importance of merit in the sport. But the main point analysed here has been the epistemic limits of VAR that make it impossible to resolve not only all the refereeing errors that may occur on the field of play, but especially the four situations in which it may intervene to review the refereeing decisions. In this context the paper analyses three problems: a) technical problems; b) arbitrariness and manipulations which may occur from those inside the VOR (video operation room); and c) the epistemic limits. Furthermore, VAR uses standards of evidence/revision depending on whether the situation reviewed is a factual problem (knowledge problem) or a problem of interpreting the wording of applicable rules (recognition problem). The varying nature of the VAR review explains the different degrees of deference that VAR receives from the referee in a particular situation. This is explained by the fact that in factual matters, VAR has an epistemic advantage over the on-pitch referee.

## ***11 Has VAR Ruined Football – And If So, Why?***

Maren Behrens, University of Twente

In this contribution, I analyse the continuing debate around the use of video assistant refereeing (VAR) in football. In comparison to the relatively quiet introduction of technological decision aids in other sports, VAR in football has led to heated controversy. Drawing on Walter Benjamin's notion of 'aura', I suggest that the continued reluctance to embrace VAR in football stems from an account of refereeing, which views the judgments of referees as unique, ritualistic acts rather than the straightforward application of general rules. This account supports a 'Luddite' argument against the use of decision-support technologies in sports, especially in cases where these technologies have 'super-human' epistemic capabilities. I argue that the Luddite argument is not compelling, and that criticism of VAR should focus on its procedural deficiencies, rather than on its experiential impact on fans and players, or on some general skepticism towards technology. In my view, what (so far) makes the use of VAR in football less attractive than in other sports is its comparative lack of procedural transparency.

**12 *Is It Ever Too Soon to Send Off a Player? A Philosophical Investigation on the Role Discretion Should Play in Considering Commercial Interests in Sport Refereeing***

Francisco Javier López Frías, The Pennsylvania State University  
 Stephen F. Ross, The Pennsylvania State University

This chapter takes Howard Webb's controversial officiating during the 2010 World Cup final as a departure point to examine issues in the sport philosophical debate on referees' exercise of discretion. First, the chapter raises the question of whether officials must consider commercial interest in the interpretation and evaluation of the rules of the game. To examine this question, the chapter identifies responses by internalist sport philosophers who, drawing on Dworkin's interpretivist philosophy of law, appeal to normative elements intrinsic to sport, such as the display of excellence, to argue against rule-crafting aimed at increasing fan appeal or even simply promoting commercial concerns. Subsequently, the chapter critically analyses these internalist arguments, centring on the difficulty of using the notion of excellence as a yardstick to guide referees' exercise of discretion. Drawing on Morgan's critique of broad internalism, the chapter argues that referees' properly delegated exercise of discretion to make the contest more appealing is appropriate and consistent with the purposes of professional sport. To conclude, the chapter identifies ways in which the role of referee discretion can be more carefully considered.

**13 *Equality and the Case of Women's Sport***

Pam R. Sailors, Missouri State University

This paper addresses the issue of inequality between men's and women's sport. Women's sport has always received less money, attention and respect than sport for men. There are fewer sporting events for women, and the women's events are often diminutive versions, for which women are paid less, a practice 'justified' by their diminutive status. Elements of the relatively new area of the jurisprudence of sport have not been brought to bear on these issues. This paper makes an attempt in that direction, beginning by employing the well-established distinction between 'easy cases' and 'hard cases' first suggested by Ronald Dworkin almost half a century ago (1977), and the more recent (2019) addition Jonathan Crowe makes of 'not-so-easy cases'. I want to suggest a fourth category, that I will call 'flashy cases', and which can be a feature of easy, not-so-easy or hard cases. I consider whether the case of transwomen participation in the female category in sports is an easy case, not-so-easy case or hard case, then move to whether it is a flashy case. I conclude by analysing in the same way the case of gender inequality in sports.



### **14 The Jurisprudence of Strategic Fouling**

Miroslav Imbrišević, The Open University (UK)

This chapter is about how jurisprudential thought illuminates the problems around strategic fouling. What is noticeable here is that we are not just applying legal categories from the outside in order to understand the phenomenon, but that theorists in the philosophy of sport frequently adopt said categories themselves; legal categories are central to their theorising. The following is a discussion of the notions of efficient breach, compensation, rights and options, prices and sanctions, restitution, and justifications and excuses – as they relate to the strategic foul.

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