Review Essay

Entering the "Grey Zone" of Sports Jurisprudence

The Jurisprudence of Sport: Sports and Games as Legal Systems by Mitchell N Berman and Richard D Friedman (2021) West Academic Publishing, 601 pp, ISBN 9781684678907

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Abstract

This review essay explores, in five parts, the burgeoning study of sports jurisprudence, where scholars analyse sports and games as legal systems. First, sports jurisprudence is introduced via a seemingly bizarre conclusion to a 2022 United States National Football League playoff game. Second, this review essay probes the so-called 'grey zone' in sports that lies at the intersection of fair strategic tactics and unfair competition manipulation. Third, using Mitchell Berman and Richard Friedman's new book, *The Jurisprudence of Sport: Sports and Games as Legal Systems*, it delves into a host of thought-provoking 'grey zone' quandaries in sports, all of which speak to a broader narrative about governance and the design of legal systems. Fourth, this review essay explains how a United States Supreme Court decision serves as a useful case study for the lessons derived from the book and associated academic articles. Finally, it concludes with some brief takeaways about how principles of jurisprudence can shape the 'grey zone' in sports.

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> We should never let a football game be determined from a coin — like, I think that's the most craziest rule in sports. You can fight your entire fight the whole game and then the game comes down to a 50-50 chance of a coin toss? Like, this ain't Vegas. We're not at the casino table.[1]

I Introduction

On 23 January 2022, United States National Football League ('NFL') fans got a lesson in sports jurisprudence. After multiple lead changes during the final minutes of a playoff game between the Kansas City Chiefs and the Buffalo Bills, the score was tied at the end of regulation time. In overtime, NFL rules dictated that a coin flip would determine which team started the overtime period with possession of the ball. NFL overtime rules also stated that if the team possessing the ball first in overtime scores a touchdown, such team will be declared the winner. The Kansas City Chiefs won the coin toss, took possession of the ball, and promptly scored a touchdown to seal the victory, with the Buffalo Bills never having had the opportunity to touch the ball in overtime. A prominent journalist described the ending this way:

> It was the worst possible ending to the best NFL playoff game ever. … When the Kansas City Chiefs won the coin flip, the game was effectively over. … Look, there is no great way to break ties in sports. Whether it's a shootout, penalty kicks or sudden death, someone is always going to feel short-changed in the some way. … [W]hen so much is at stake, something that has absolutely no relation to athletic ability or physical skills should not determine, or even influence, the winner. … Rather than allowing its biggest games to be determined by its best players, the NFL is leaving it up to the whims of a small piece of metal. … All that mattered was what side was up when a coin landed on the ground. Which really is as dumb as it sounds.[2]

Dilemmas like different mechanisms to resolve ties in sports are among the dozens of thought-provoking issues analysed in a fascinating new book written by Mitchell N Berman and Richard D Friedman entitled *The Jurisprudence of Sport: Sports and Games as Legal Systems*.[3] Berman and Friedman expertly position sports as a near-ideal laboratory to test general principles of jurisprudence and persuasively make the case that sport governance is a de facto legal system worthy of scholarly inquiry. Berman and Friedman's book also overlaps with a host of recent academic articles on the subject and dovetails nicely with a prominent United States ('US') Supreme Court ruling that delved into the essence of sports under the legal microscope.

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1 Adam Teicher and Alaina Getzenberg, 'Twenty-five Points in 2 minutes? Inside the Kansas City Chiefs' Thrilling Victory over the Buffalo Bills' *ESPN* (online, 24 January 2022) quoting Buffalo Bills player Dion Dawkins <https://www.espn.com/nfl/story/_/id/33138797/twenty-five-points-2-minutes-kansas-city-chiefs-thrilling-victory-buffalo-bills>.

2 Nancy Armour, 'Opinion: Chiefs-Bills Masterpiece Decided on a Coin Flip Shows NFL's Overtime Rule is Awful and Must Be Fixed'', *USA Today* (online, 24 January 2022) <https://www.usatoday.com/story/sports/columnist/nancy-armour/2022/01/24/nfl-overtime-rule-ruined-bills-chiefs-must-fix/6637396001/?gnt-cfr=1>

3 Mitchell N Berman and Richard D Friedman, *The Jurisprudence of Sport: Sports and Games as Legal Systems* (West Academic Publishing, 1ST ed, 2021) ('*The Jurisprudence of Sport*').

This review essay probes some of the sports jurisprudence issues at the forefront of contemporary discourse. Part II unpacks the 'grey zone' of sports jurisprudence, with a focus on a handful of influential academic articles that have tackled controversial topics similarly addressed by Berman and Friedman. Part III, with a singular focus on Berman and Friedman's book, highlights how treating sports and games as a topic worthy of scholarly inquiry can yield useful insights on governance. In Part IV, this review essay takes a deep-dive into *PGA Tour v Martin*,[4] a US Supreme Court ruling from 2001 that serves as an on-point case study of how sports jurisprudence manifests itself in a real-life dispute with practical implications. Part V offers two takeaways.

II Entering the Scholarly 'Grey Zone'

A trilogy of academic papers nudge readers into the 'grey zone' of sports jurisprudence. At the outset, King has explored gamesmanship in criminal procedure and found that there are 'fruitful analogies in the world of sport'.[5] The analogy is most clearly seen when 'the strategic and aggressive invocation of minor rules to confuse or disadvantage one's opponent' alters outcomes of sport events (or criminal trials).[6] King flags one-sided examples in sports where a team or individual may lose on purpose at the early stage of a competition to increase the chances of winning overall later. Berman and Friedman focus here too, asking in Chapter 15 of *The Jurisprudence of Sport* 'whether in a given setting a competitor should decline to maximize her chance of winning by taking full advantage of the situation'.[7]

King also pinpoints the two-sided cases where 'it will be in the interests of both teams to lose a match in the preliminary round, leading to some bizarre match behavior',[8] such as the 2012 Olympic women's badminton doubles where a farce ensued when both teams were simultaneously trying to lose.[9] King notes that purposeful losing is 'a form of gamesmanship easily addressed by changes to the governing rules'.[10] Indeed, having preliminary rounds structured as round robins, instead of double-elimination knockout draws, only serves to incentivise gamesmanship and strategies to lose.[11]

Next, Goh tackled the challenge of regulating — or not — 'performing enhancing strategies' that are unrelated to doping.[12] The author cites two high-profile examples: hi-tech polyurethane swimsuits such as the LZR Racer and fibre-plated running shoes like Nike's Vaporfly.[13] Both products were used to smash world

4 *PGA Tour Inc v Martin*, 532 US 661, (2001) ('*PGA Tour v Martin*').
5 John D King 'Gamesmanship and Criminal Process' (2021) 58(1) *American Criminal Law Review* 47, 48.
6 Ibid 60.
7 Berman and Friedman (n 3) 513.
8 King (n 5) 63.
9 Ibid 63–4.
10 Ibid 65.
11 For an alternate approach, see Julien Guyon, '"Choose Your Opponent": A New Knockout Design Hybrid Tournaments' (2022) 8(1) *Journal of Sports Analytics* 9.
12 Chui Ling Goh 'The Challenge of Regulating Doping and Non-Doping "Performance-Enhancing Strategies" in Elite Sports' (2021) 21(1–2) *The International Sports Law Journal* 47.
13 Ibid 52.

records in swimming and distance running, respectively. Goh cites the patchwork of regulatory efforts to date and recommends the establishment of a global sports integrity body to 'begin the process of harmonising the respective regulatory frameworks' when dealing with non-doping matters, rejecting calls for a hands-off approach advocated by others.[14] Similarly, Berman and Friedman analyse performance enhancement via technological change in Chapter 8 of their book, asking readers whether infrared clothing and carbon-fibre pole vault poles should be regulated too.[15]

Finally, Van Der Hoeven and four co-authors use match-fixing in road cycling as a case study to decipher the difference — or 'grey zone' — between tactics and manipulation.[16] Van Der Hoeven and colleagues explain that road cycling 'has several peculiarities that complicate the system in which cyclists have to perform … road cycling is an individual sport that requires teamwork [and] which requires both competition and cooperation between competitors'.[17] Using semi-structured interviews, the authors asked 15 research participants (road cyclists) how match-fixing is institutionalised, rationalised, and socialised in road cycling.[18] The researchers found cooperation with competitors to be pervasive, with cyclists adopting strategies to rationalise and normalise such behaviour.[19] Van Der Hoeven and colleagues recommended instituting a whistleblower program and revised competition formats.[20] They also left readers with an existential question at the core of sports jurisprudence: 'After all, if everyone agrees to fixing, is it still fixing?'[21] Such a question was probed by Berman and Friedman too, with the authors having readers consider the infamous 1982 World Cup soccer match between West Germany and Austria.[22]

III The Gamewright's Crystal Ball

A perusal of *The Jurisprudence of Sport*'s table of contents reveals the authors to be soothsayers. The topics that Berman and Friedman explore in the book represent inclusive coverage of the most vexing issues under the umbrella of sports jurisprudence. They accomplish this by setting the strongest of foundations, positing that '[s]ports play a significant and enduring role in human life'.[23] Berman and Friedman explain:

> Sports are not only rewarding to play and diverting to watch. They do more than contribute massively to national and world economies. They are also

14 Ibid 59.
15 Berman and Friedman (n 3) 284–5.
16 Stef Van Der Hoeven, Bram Constandt, Cleo Schyvinck, Wim Lagae and Annick Willem, 'The Grey Zone between Tactics and Manipulation: The Normalization of Match-Fixing in Road Cycling' (2022) *International Review for the Sociology of Sport* (advance).
17 Ibid 2 (citations omitted).
18 Ibid 8–9.
19 Ibid 16.
20 Ibid.
21 Ibid.
22 Berman and Friedman (n 3) 517.
23 Ibid 11.

> worthy of serious and sustained intellectual attention. They are fit subjects of study.[24]
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> …
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> This book concerns sports *as* law — not 'sports law'. Its subject is *not* how ordinary legal systems of a state interact with formal institutionalized sporting systems … but rather the sets of rules and standards that these superficially disparate types of systems, and less formal ones as well, establish to create and shape the competitions they oversee.[25]
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> …
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> It explores both differences among these systems and ways in which they are alike and can illuminate each other. It is about the surprising and valuable lessons we might learn about sports by thinking hard about law — and about the lessons we can learn about law by investigating sports. And because law and sports are just two of the myriad of complex rule-based systems designed to structure, facilitate, empower, regulate, deter, incentivize, and punish human behavior of varied sorts, attention to sports and law together might even teach us something interesting about human life and institutions more generally.[26]

Berman and Friedman's persuasive foundation for studying sports jurisprudence is centred around the gamewright, 'any entity or person who designs a game or sport or oversees its formal rules'.[27] The gamewright is charged with a multitude of tasks, including creating the competitive structure, adjudicating the contest via officials and umpires, and allocating awards. Three issues arising from such tasks evidence the breadth of Berman and Friedman's book.

A first gamewright issue is ties, tiebreakers, and draws. Like sports, the law has taken an interest in tiebreakers too: 'As the US Supreme Court has observed, when decision is measured by multiple factors or considerations, "any one factor will act as a tiebreaker when the other factors are closely balanced".'[28] Berman and Friedman pose several questions on this topic: When should ties be recognised?[29] When should ties remain unbroken?[30] How should ties be broken?[31]

The latter question is the most timely, as NFL fans learned early in 2022. Gamewrights have a multitude of options to resolve ties. Continuing play after regulation is the most common method, with preset overtime periods where the team in the lead upon the expiration of time wins or 'sudden death' tiebreakers where the first team to score in overtime is declared the winner. The NFL opted for neither, however: 'Starting with the 2011 playoffs, the NFL introduced a hybrid model

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24 Ibid.
25 Ibid. (emphasis in original).
26 Ibid.
27 Ibid.
28 Ibid, quoting *Metropolitan Life Insurance Company v Glenn*, 554 US 105, 117 (2008). See also, Adam M Samaha, 'On Law's Tiebreakers' (2010) 77(4) *University of Chicago Law Review* 1661.
29 Berman and Friedman (n 3) 138.
30 Ibid 144.
31 Ibid 147.

between true and equalized sudden death',[32] where an initial touchdown worth six points would end the game (true sudden death), but an initial field goal worth three points would result in the game continuing (equalised sudden death).

Berman and Friedman offer several novel tiebreaker ideas in other sports. In tennis, where each of the four Grand Slam tournaments had different tiebreak rules for the third set (women's singles) or fifth set (men's singles) in 2021, the authors suggest that gamewrights could 'count total points in the set if the score in games reaches, say, 6-6. This approach would presumably eliminate marathon matches. It would also incentivise players to compete hard on every point, no matter what the score in the particular game.'[33] To avoid soccer shootouts, Berman and Friedman opine that the size of the goal could be increased progressively during overtime or players could be removed from the field every ten minutes if the game remained tied.[34]

A second gamewright issue is the use of technology-assisted instant replay to correct in-game officiating errors, which has become pervasive in sports, although the expansion has been bumpy due to 'many difficult and interesting questions of system design'.[35] Berman and Friedman explain instant replay's rationale:

> for interrelated reasons of truth and justice we want to get things right; and given current technology that permits high-definition videography from multiple angles, many or most sports can improve accuracy by using instant replay to review at least some on-field calls in close to real time.[36]

Enter laches, the equitable principle in law that undue delay can result in the termination of a lawsuit or appeal. The same principle applies in sports: undue delay in implementing replay review of officiating calls (or non-calls) can be fatal. Tennis players and NFL coaches, for example, must challenge perceived errors promptly or risk being saddled with an error. The latency issue, according to Berman and Friedman, mandates that 'gamewrights should resist any rule changes that introduce greater delay to the conduct of competition'.[37] They cite the 8,500 words in the Major League Baseball rulebook devoted to instant replay as evidence of the 'startlingly complex' issues presented when trying to decide what calls are reviewable and what standards of review attach.[38]

In legal jurisprudence, standards such as 'beyond a reasonable doubt' and 'preponderance of the evidence' are prevalent in common law countries. In sports, the review standards run the gamut. Before 2016, the NFL required 'indisputable visual evidence' for reversal.[39] Since 2016, the standard shifted to a 'clear and obvious visual evidence' guideline.[40] Major League Baseball has a 'clear and convincing evidence' standard for appeals, while the National Basketball

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32 Ibid 148.
33 Ibid 152.
34 Ibid 154.
35 Ibid 428. For more details, see Mitchell N Berman, 'Replay' (2011) 99(6) *California Law Review* 1683.
36 Berman and Friedman (n 3) 428.
37 Ibid 428 ('The challenge for any gamewright designing a system of review is to balance these interests.').
38 Ibid.
39 Ibid 438.
40 Ibid.

Association only permits call reversals if there is 'clear and conclusive visual evidence'.[41]

Regarding a third gamewright task, Berman and Friedman tackle the 'grey zone' that is at the convergence of intentional rule-breaking and loopholing, a concept defined by them as 'cheating within the rules'.[42] Berman and Friedman persuasively frame the issue as a complicated one: 'It is routine in many sports for a competitor to intentionally break a rule based on the instrumental calculation that the competitive benefit thereby secured exceeds the competitive cost of the expected sanction.'[43] While there are intentional fouls across almost all sports, some are overt and some are covert. *The Jurisprudence of Sport* expertly distinguishes between the two and provides mind-bending examples for readers to consider. One of the most jarring involved golfer Phil Mickelson's calculated decision to intentionally strike a moving ball and take a two-shot penalty. Two scandals involving the NFL's New England Patriots team — Spygate and Deflategate — are also compared and contrasted in-depth. Likewise, baseball sign-stealing, spitballs, and corked bats receive treatment. Berman and Friedman conclude the sub-section with a jurisprudential riddle: 'If cheating is a form of proscribed advantage-seeking behavior, must a cheater be trying to gain an advantage over another competitor? Is it possible to cheat at solitaire?'[44]

Loopholing, a close cousin of intentional rule-breaking for a competitive advantage, is put under Berman and Friedman's analytical lens too. A noted criminal law professor described loopholes as 'spaces that actors reveal through new behaviors that render law underinclusive in ways lawmakers did not foresee and may have been unable to foresee'.[45] Such parameters for law generally are applicable to sports too. In 2013, tennis player Victoria Azarenka was accused of 'cheating within the rules' following a lengthy, but permissible, medical timeout that involved no apparent medical treatment at all.[46] Two decades after so-called 'spaghetti strings' were banned by tennis governing bodies, a new form of polyester strings burst onto the professional tennis scene, with Andre Agassi lauding the strings' merits and Pete Sampras describing the strings as 'cheatalon'.[47] Berman and Friedman also introduce a teaser of sorts about loopholing and doping, with an easy-to-anticipate situation where certain athletes could create specifically-tailored synthetic drugs that technically escape the narrow confines of anti-doping codes.

These three gamewright-specific issues, along with a multitude of others explored by Berman and Friedman, all converge in a golf-related US Supreme Court

41 Ibid.
42 Ibid 479.
43 Ibid 466–7.
44 Ibid 478.
45 Samuel W Buell, 'Good Faith and Law Evasion' (2011) 58(3) *UCLA Law Review* 611, 616 n 14 (emphasis omitted).
46 Berman and Friedman (n 3) 479.
47 Ryan Rodenberg, 'Conspiracy String Theory: How New Technology Killed American Men's Tennis', *Vice* (online, 27 May 2015) <https://www.vice.com/en/article/qkqyvd/conspiracy-string-theory-how-new-technology-killed-american-mens-tennis>

case — reproduced and discussed at length in Chapter 2 of *The Jurisprudence of Sport* — that addresses 'the essence of the game'.[48]

IV The United States Supreme Court Enters the Sports Jurisprudence Fray

When the US Supreme Court exercised its jurisdiction to hear the *PGA Tour v Martin* case, it is unlikely that any of the nine justices tasked with deciding the case would have predicted that it would result in a discussion of sports jurisprudence. The lawsuit started when professional golfer Casey Martin sued the PGA Tour for the right to ride in a cart while competing, even though tour rules mandated that players walk the course.[49] One of the questions the US Supreme Court had to decide was 'whether a disabled contestant may be denied the use of a golf cart because it would "fundamentally alter the nature" of the tournaments … to allow him to ride when all other contestants must walk'.[50] Berman and Friedman devote Chapter 2 almost entirely to this courtroom dispute, explaining that the case illustrates the 'fundamental questions concerning the nature of a sport and the functions of the rules that constitute it'.[51]

Martin won the case by a 7:2 vote count. The seven-justice majority looked to history in justifying its ruling:

> As an initial matter, we observe that the use of carts is not itself inconsistent with the fundamental character of the game of golf. From early on, the essence of the game has been shotmaking — using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible. That essential aspect of the game is still reflected in the very first [version] of the Rules of Golf ...[52]

The US Supreme Court rejected the PGA Tour's contention that its 'walking rule' was an essential rule of competition and any waiver thereof would fundamentally alter the nature of golf tournaments.[53] Instead, the US Supreme Court concluded that the walking rule was 'at best peripheral' to professional golf.[54] As such, accepting the PGA Tour's arguments that its rules 'are sacrosanct and cannot be modified under any circumstances' would amount to an effective exemption from the law's reasonable modification requirement, one that does not have any exemption for elite-level athletics.[55]

Two members of the US Supreme Court dissented from this view and questioned broadly why the legal system was interjecting itself into sports rule-making and enforcement. Justice Antonin Scalia penned the minority dissent and

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48 *PGA Tour v Martin* (n 4) 683.
49 Martin sued under a law known as the *Americans with Disabilities Act of 1990*: ibid 664.
50 Ibid 665.
51 Berman and Friedman (n 3) 23.
52 Ibid 683–4.
53 Ibid 689.
54 Ibid.
55 Ibid.

queried — with what appeared to be a heavy dose of sarcasm — the proper role of legal systems overseeing sports:

> Nowhere is it writ that PGA Tour golf must be classic 'essential' golf. Why cannot the PGA Tour, if it wishes, promote a new game, with distinctive rules … [T]he rules are the rules. They are (as in all games) entirely arbitrary, and there is no basis on which anyone — not even the Supreme Court of the United States — can pronounce one or another of them to be 'nonessential' if the rulemaker (here the PGA Tour) deems it to be essential.[56]
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> …
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> I am sure that the Framers of the [US] Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot *really* a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a 'fundamental' aspect of golf.[57]
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> Agility, strength, speed, balance, quickness of mind, steadiness of nerves, intensity of concentration — these talents are not evenly distributed. No wild-eyed dreamer has ever suggested that the managing bodies of the competitive sports that test precisely these qualities should try to take account of the uneven distribution of God-given gifts when writing and enforcing the rules of competition. And I have no doubt Congress did not authorize misty-eyed judicial supervision of such a revolution.[58]

In this way, two-ninths of the US Supreme Court seemingly questioned whether to enter the 'grey zone' at all. Berman and Friedman would almost certainly dissent from this minority position.

V Conclusion

Over the course of 600-plus pages, Berman and Friedman have penned the seminal treatise at the intersection of jurisprudence and sports. The book is as thought-provoking as it is comprehensive. Any professor using the book as part of a PhD-level seminar would almost certainly need two full semesters to cover the expansive content included in Berman and Friedman's work. Indeed, the 'grey zone' in sports is vast.

This expansiveness speaks to the utility of treating sports and games as legal systems. The overlap between sports and the law is easy to isolate, and sometimes evidences itself in revealing — and funny — ways, especially vis-à-vis this review essay's opening quote. As Berman and Friedman observed: 'The NFL, for example,

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[56] Ibid 699–700.
[57] Ibid 700 (emphasis in original).
[58] Ibid 703–4.

recognizes twelve (!) tiebreakers to determine a division champion when two or more teams tie for division lead based just on won-loss-tie record … The final tiebreak is a coin toss … Coin tosses are used outside of sports too. Occasionally, they have even been used to break tied elections.'[59]

The humorous aspects aside, the sports jurisprudence–legal jurisprudence coverage does lend itself to two key takeaways about 'grey zones' in the former. First, the jurisprudence of sport is real. Legal principles play a profound role in sports. And the study of sports as a de facto legal system can shed insight on law positively and normatively, a conclusion aptly demonstrated by Berman and Friedman's opus and others' academic articles covering the same ground. Second, as highlighted by the point–counterpoint in the *PGA Tour v Martin* case, it is plausibly debatable — but not realistically avoidable — for sports and legal systems to be completely detached from each other. The more relevant debate would be centred on the *extent* of overlap between the two in a sports jurisprudence Venn diagram that can be less opaquely grey moving forward.

[59] Berman and Friedman (n 3) 150.