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NYLS Law Review
Vols. 22-62 (1976-2019)

Volume 63 | Issue 2

Article 1

April 2019

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Robert Blecker

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Recommended Citation

Robert Blecker, *Prologue: A Jurisprudence of Sport*, 63 N.Y.L. SCH. L. REV. 115 (2018-2019).

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ROBERT BLECKER

Prologue: A Jurisprudence of Sport

63 N.Y.L. SCH. L. REV. 115 (2018–2019)

ABOUT THE AUTHOR: Robert Blecker, a graduate of Tufts University, Harvard Law School, and a Harvard post-graduate fellow in Law and Humanities, teaches criminal law and constitutional history at New York Law School.

PROLOGUE: A JURISPRUDENCE OF SPORT

In 1969, although conventional wisdom held that philosophically, sport couldn't and shouldn't be taken seriously, it struck me that game and sport provide us many deep metaphors and insights to illuminate legal life and constitutional culture. Since the day that a leading philosopher dismissed as "crap" the first draft of my Ph.D. thesis in philosophy of sport—thus forcing me from philosophy department to law school—I've vowed that someday, somehow, I'd get my revenge. I imagined a gathering of world-leading philosophers of sport for an extended public conversation about cheating; the difference between gamesmanship and sportsmanship; how referees differ from judges; how penalties can act as punishments or prices—in short, what law can teach sport and sport can teach law. The only problem—there was no established field of philosophy of sport at the time, nor leading philosophers of sport to gather.

But while I shifted professional focus, and after my retributive perspective on punishment—refined by thousands of hours inside maximum-security prisons interviewing convicted criminals to determine who deserved what—achieved a certain public notoriety, unknown to me, philosophy of sport had sprung to life and ripened into an international discipline with its classics, giants, and journals.

Decades later, I discovered them, and began saturating myself in sport's leading controversies when Michelle Zierler, the Publisher of the *New York Law School Law Review*, invited me to organize a symposium on crime and punishment. I flatly rejected her invitation, knowing myself incapable of organizing anything, and feeling near the end of my career a desire more and more to withdraw from the public battlefield and minefield of retributive justice. "Not interested," I told Michelle, expecting to end the conversation.

"Well, what *does* interest you these days?" she asked.

"Philosophy of sport," I quipped, confident that since there had never been a full-day symposium at a law school regarding philosophy of game and sport, much less a law review issue devoted entirely to it, she would move on. "All right, let's do that," she said. From that moment, Michelle Zierler has been the prime mover and supporter for this project, with the full backing of Anthony Crowell, our Dean and President, always willing to innovate and back the meritorious, however novel.

Painfully aware of my congenital organizational disabilities, I still would have refused were it not for my two research and teaching assistants, Christopher Fernandez and Nicole Santora. Two of the founders of philosophy of sport, Bob Simon and Scott Kretchmar, emphasized a cooperative relationship among competitors. Competition required a mutual quest for excellence, they insisted; competitors must agree to mutually test themselves—opponents united under commonly agreed upon constraints. It sounded ideal, it sounded wonderful, but could it be real? Then I witnessed Chris and Nicki vie for the top spot in their class. These fierce competitors acted at the same time as study partners and have become fast friends. In preparing the symposium and the issue on which it's based, they each played a vital role as teammates. Chris, a philosopher of sport in his own right, worked tirelessly to select and edit clips of a couple of dozen greatest sports moments and controversies to intersperse into our public conversation. Nicki also played a key

role in organizing the symposium, then became Editor-in-Chief of the *Law Review* and spent months editing every contribution.

My original perspective, which later became my graduating thesis, sponsored by Harvard Law School's Laurence Tribe, imagined splicing together the greatest sprinter's best start, best next ten yards . . . best finish into one composite 100-meter dash that could never be run. This ideal race, an unreal composite which would shatter the world record, contained all real components reassembled as if they actually happened together. My thesis called this concept the "practically ideal."

This Issue, *Getting an Edge: A Jurisprudence of Sport*, begins and ends with practically ideal conversations. It opens with an edited and supplemented transcript of a day-long public dialogue among giants in the philosophy of sport.¹ After reviewing the actual transcript, I initiated further conversations among participants to create the practically ideal published conversation.

Halfway through the day we broke for lunch—or everyone else did. Marc Lasry, principal co-owner of the NBA's Milwaukee Bucks and my former student in criminal law who used nothing I taught him to become the billionaire founder and CEO of Avenue Capital, joined me for a candid conversation from an owner's point of view. Over the next several months, in a series of follow-up conversations, Marc allowed me to press him further. The result: a practically ideal version of our actual conversation with which this Issue concludes.²

Between the opening and closing practically ideal transcripts of collective conversations, many participants provided individual essays. John Russell, who pioneered the whole subfield of jurisprudence of sport, draws provocative parallels between judges and referees;³ Paul Gaffney, a leading contemporary sport philosopher, muses about the implications of playing with cheaters;⁴ Scott Kretchmar, a founding philosopher of sport, further explores his classic distinction between a test and a contest;⁵ Mitch Berman, a law professor who coined the term "jurisprudence of sport," armed with three fresh controversies, shows how law and sport can and should illuminate each other.⁶ Finally, I weigh in on the historical ambiguity of penalties: Are they prices to be paid, or punishments to be condemned and avoided?⁷

That's this Issue in a nutshell—the first law review symposium issue on the philosophy of sport. Hopefully it will provoke many more. But whether it does, surely it qualifies as a response, if not my revenge to those who would dismiss it.

1. *What Can Law Teach Sport and Sport Teach Law(yers)? A Symposium on the Jurisprudence of Sport*, 63 N.Y.L. SCH. L. REV. 119 (2018–2019).

2. Marc Lasry, *An Owner's Game*, 63 N.Y.L. SCH. L. REV. 285 (2018–2019).

3. J.S. Russell, *Remarks on the Progress of a Jurisprudence of Sport*, 63 N.Y.L. SCH. L. REV. 175 (2018–2019).

4. Paul Gaffney, *Playing with Cheaters*, 63 N.Y.L. SCH. L. REV. 197 (2018–2019).

5. R. Scott Kretchmar, *The Nature and Value of Sporting Tests and Contests*, 63 N.Y.L. SCH. L. REV. 219 (2018–2019).

6. Mitchell N. Berman, *Why Sport Illuminates Law (and Vice Versa)*, 63 N.Y.L. SCH. L. REV. 235 (2018–2019).

7. Robert Blecker, *Penalties: Punishments, Prices, or Rewards?* 63 N.Y.L. SCH. L. REV. 251 (2018–2019).