

April 2019

Why Sport Illuminates Law (and Vice Versa)

Mitchell N. Berman

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review

Part of the [Law Commons](#)

Recommended Citation

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

This Getting an Edge: A Jurisprudence of Sport is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

MITCHELL N. BERMAN

Why Sport Illuminates Law (and Vice Versa)

63 N.Y.L. SCH. L. REV. 235 (2018–2019)

ABOUT THE AUTHOR: Professor Mitchell Berman is Leon Meltzer Professor of Law, Professor of Philosophy, and Professor of Legal Studies and Business Ethics (Wharton) at the University of Pennsylvania. Professor Berman is grateful to Robert Blecker for inviting him to participate in this symposium, and for very helpful comments on a previous draft. He also thanks his fellow symposiasts—Paul Gaffney, Scott Kretchmar, John Russell, and Angela Schneider—for all the philosophy of sport they have taught him over the years, through their scholarship and otherwise.

I. INTRODUCTION

This splendid symposium poses a straightforward two-part question: “What Can Law Teach Sport and Sport Teach Law(yers)?”¹ Professor Robert Blecker’s answer, in short, is “a lot!”² I think so, too. I hope, and would guess, that most attendees at the daylong event left persuaded. But some might not have and, in any event, readers of this issue might need some convincing. Because any two things are alike in some respects and unlike in others, you might accept that law and sport have at least something to teach each other while reasonably doubting that the similarities or points of contact are sufficient to justify a more sustained or systematic comparative inquiry. Accordingly, before starting to investigate with care *what* sport can teach law, one might want to know *why* any such teachings are likely to be forthcoming. Without a good answer to that question, one is entitled to be skeptical of the enterprise.

II. SPORT AND LAW AS NORMATIVE INSTITUTIONS

One route to an answer starts with another question: What is law? I’m not asking what is *the* law—is it legal to turn right on red around here? Does the law require one or two witnesses to validate a will? When did New York law first prohibit marital rape? Does the president have constitutional power to pardon himself? These are questions about what the law is, about what is legally prohibited, permitted, required, and so forth. I am posing a different, more abstract question: What is law, as such?

This, too, is a familiar question that has provoked diverse answers. Thomas Aquinas conceived of law as an ordinance of reason for the common good made by the authority who has care of the community.³ For John Austin, law was the command of the sovereign.⁴ H.L.A. Hart proposed that law is a system characterized by a union of primary rules of obligation and secondary rules of recognition, adjudication, and change.⁵ Ronald Dworkin viewed law as the set of moral principles that best fit and justify the institutional history of the regime.⁶ Each of these accounts, and others too, has its supporters and detractors. Yet I am not alone in finding none of the prominent extant answers entirely satisfactory. Instead, I find it useful to try to define or conceptualize law in the classical terms of genus and differentia: What *type* of thing is law, and how does it differ from other things of that same general type?

Here is a stab at what I take to be a common view, if generally inchoate: Law is a type of complex, institutionalized social system that deploys general rules laid down in

-
1. For a transcript of the daylong symposium, see *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) [hereinafter *Symposium*].
 2. See generally Robert Blecker, *Penalties: Punishments, Prices, or Rewards?*, 63 N.Y.L. SCH. L. REV. 251 (2018–2019).
 3. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Q. 90 (n.d.).
 4. See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).
 5. See generally H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012).
 6. See generally RONALD DWORKIN, *LAW’S EMPIRE* (1986).

advance to regulate a range of human behaviors for a range of ends. We could describe this genus as that of “institutionalized normative systems.”⁷ Things other than legal systems also belong to this genus, notably including religion and sport. Religions, sports, and law make up distinct *families* within this genus in virtue of their *differentia*.⁸ Arguably (and to a first pass), religions are institutionalized normative systems “founded on a belief in a superhuman order,”⁹ whereas sports are institutionalized normative systems of activity designed to facilitate the development and display of manifold human excellences, paradigmatically involving our embodied nature.¹⁰ Legal systems (on the view I have in mind) are institutionalized normative systems established and maintained by political communities and designed to serve a variety of goals, characteristically including resolving disputes, preserving public order, and sustaining the polity. Putting necessary refinements aside, institutionalized sports and legal systems each comprise a family of systems within the same broader genus.

To the extent this sketch captures something real about our normative landscape, sports and legal systems are close cousins. They rely extensively on the same type of tool (chiefly, rules of various sorts) to accomplish a diversity of ends (promote aggregate welfare, improve health and safety, facilitate the development and display of human excellences, make things more exciting, etc.) within a diversity of constraints (without infringing rights, at reasonable cost, without undue delay, etc.). That the rulebooks of many European sports are titled “the Laws”¹¹ suggests a deep affinity.¹²

-
7. I pursue this observation in the essay, *Of Law and Other Artificial Normative Systems*, in *DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE* (David Plunkett, Scott Shapiro & Kevin Toh eds., 2019).
 8. Yes, in standard Linnaean biological taxonomy, *family* is a higher order taxon than *genus*. *Taxonomy*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/science/taxonomy/Introduction> (last visited Sept. 12, 2018). Here, I present families as classes within the genus that I’m labeling (loosely) “institutionalized normative systems.” The terms don’t much matter, of course.
 9. YUVAL NOAH HARARI, *SAPIENS* 210 (2015).
 10. See Mitchell N. Berman, *Sport as a Thick Cluster Concept*, in *GAMES, SPORTS, AND PLAY: PHILOSOPHICAL ESSAYS* (Thomas Hurka ed., forthcoming 2019).
 11. See, e.g., *Laws of the Game 2018/19*, INT’L FOOTBALL ASS’N BOARD (2018), <https://resources.fifa.com/image/upload/laws-of-the-game-2018-19.pdf?cloudid=khhloe2xoigyna8juxw3>; *The Laws of the Game*, WORLD RUGBY (2018), https://laws.worldrugby.org/downloads/World_Rugby_Laws_2018_EN.pdf; *Laws of Cricket*, LORD’S (2018), <https://www.lords.org/mcc/laws-of-cricket/laws>; *The Official Laws of Badminton*, BADMINTON IR., <https://www.badmintonireland.com/file/376092/?dl=1> (last visited Sept. 14, 2018); *The Laws of Tennis*, TENNIS & RACKETS ASS’N (2012), <https://www.tennisandrackets.com/downloads/TheLawsOfTennis.pdf>.
 12. To be sure, there are differences. Law applies to persons who do not voluntarily submit to its authority, while sports rarely do. Sports involve artificial challenges and an “escape from reality,” see J.S. Russell, *Play and the Moral Limits of Sport*, in *ETHICS IN SPORT* 205, 206–07 (William J. Morgan ed., 3d ed. 2018), whereas law must often grapple with, and force us to confront, aspects of reality (torture, human trafficking, domestic abuse, and so forth) that we may prefer to ignore or pretend away. Human beings and fruit flies (*Drosophila melanogaster*) are also different from each other, but that hasn’t prevented scientists from learning plenty about us by studying them. See, e.g., Udai Bhan Pandey & Charles D. Nichols, *Human Disease Models in Drosophila Melanogaster and the Role of the Fly in Therapeutic Drug Discovery*, 63 *PHARMACOLOGICAL REV.* 411 (2011).

III. THREE DAYS IN JUNE

How can lawyers and law students learn from sport? Many ways, I'm sure. For several years, I have been teaching a three-credit law school elective (first at the University of Texas, now at the University of Pennsylvania) on just this topic, using a set of draft materials co-authored with my friend and colleague Rich Friedman of the University of Michigan. I have given the course different names over the years. It began life as "The Jurisprudence of Sport;" these days it's called "Sport and Law in Comparative Perspective."¹³ It aims to use rules, practices, and discrete incidents from across the sporting landscape to teach general lessons about what we can describe as the "architecture" of normative systems, or the "syntax" of normative regulation. For instance: NFL rule changes concerning helmet-to-helmet contact implicate timeless worries about slippery slopes and tradeoffs between rules and standards; disputes about superstar treatment in the NBA exemplify the battle between fairness and welfare; difficulties in aggregating judges' scores in figure skating illustrate Arrow's impossibility theorem and the challenge of preference aggregation;¹⁴ boxing's ten-point scoring system serves as a case study in agency costs—why they arise and how they can be ameliorated.¹⁵

I could develop any of these observations at length, but I want to be brief. Moreover, there's a cost to drawing on materials that are the product of countless person-hours of curation and analysis. Doing so risks conveying the misimpression that moments of genuine cross-domain illumination are fairly rare or require an uncommon sensibility to discern. Neither is true. To demonstrate, I will offer three incidents that occurred on three consecutive days in the middle of June 2018—the very week that I sat down to write this short essay. What I hope to convey, in somewhat

-
13. Rich and I welcome suggestions for a better title. Instructors may also e-mail me if they wish to review the materials.
 14. Kenneth Arrow's impossibility theorem, for which he won the 1972 Nobel Prize in Economics, *The Prize in Economics 1972*, NOBEL PRIZE (Oct. 25, 1972), <https://www.nobelprize.org/prizes/economics/1972/press-release>, shows that there is no procedure for deriving an ordering of collective preferences from the preference rankings of individuals who make up the collective that satisfies four constraints that one would reasonably want an aggregation procedure to satisfy. See Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950).
 15. While the first three examples should be clear even without greater detail, the relationship between agency costs and boxing scoring will elude many readers. Here's the idea: Under the 10-point "must" system, and subject to two caveats, a judge must award 10 points to the boxer she believes had the stronger round, and a lesser number to the boxer who had the less strong round. The caveats are that a round can be scored a 10-10 draw, and that any mandated point reductions (e.g., for knockdowns or infractions such as low blows) can lower a round winner's score below 10. Yet, strikingly, unless a round includes a knockdown, it is "almost always scored 10-9," making "boxing scoring . . . effectively binary." Herbert K. H. Lee, Daniel L. Cork & David J. Algranati, *Did Lennox Lewis Beat Evander Holyfield?* *Methods for Analysing Small Sample Interrater Agreement Problems*, 51 J. ROYAL STAT. SOC'Y. SERIES D. (THE STATISTICIAN) 129, 132-34 (2002). But by collapsing the difference between a highly dominant round and a squeaker, this practice seems poorly designed to reliably identify the boxer who had the better fight. It's worth wondering, then, why judges use only a tiny stretch of the scoring range. The "agency cost" hypothesis is that the status quo continues because it serves the interests of judges even if it doesn't best serve the interests of the sport as a whole, or of persons who might plausibly be considered the sport's "principals"—fighters, promoters, and fans. See *id.* at 129-46.

scattershot and impressionistic fashion, is that one need not look very far, or labor terribly hard, for episodes that are rife with significance and possibility. You can do jurisprudence of sport at home—you need only pick up the morning newspaper.¹⁶

A. Phil Mickelson and the Two-Stroke Penalty (or Price?)

The first incident arose during the U.S. Open, the second of the four major annual tournaments in professional men's golf.¹⁷ On the third day, Phil Mickelson,¹⁸ frustrated by the challenging course, ran down and tapped his still-moving bogey putt on the 13th green before it could roll down a downward slope.¹⁹ He would explain after the round that it was a tactical decision: He figured the two-stroke penalty for hitting a moving ball would still leave him with a better score than if he had allowed the ball to roll off the green.²⁰ Reactions varied. Many observers quickly condemned Mickelson for cheating.²¹ Some acknowledged that he “broke a rule,” but denied that his violation amounted to cheating.²² At least one commentator concluded that Mickelson's action was “technically legal,” but possibly “outside the spirit of the rules.”²³ And a few thought that Mickelson had simply used the rules to his advantage, and that there's nothing more to say.²⁴

-
16. A newspaper is a periodical containing information about current events, produced on a regular and frequent schedule, traditionally published on special paper called newsprint, and typically available to subscribers by home delivery. See *Newspaper*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/newspaper> (last updated July 9, 2018). Newspapers were very popular through the end of the twentieth century. See *id.*
 17. The other three major men's golf tournaments are The Open Championship, The Masters, and the USPGA Championship. *Major Competitions*, INT'L GOLF FED'N, <https://www.igfgolf.org/about-golf/major-competitions> (last visited Dec. 25, 2018).
 18. Phil Mickelson, a professional golfer with thirty-eight PGA Tour wins and five major tournament wins, was inducted into the World Golf Hall of Fame in 2012. *Phil Mickelson*, WORLD GOLF HALL OF FAME, <http://www.worldgolfhalloffame.org/phil-mickelson/?tab=achievements> (last visited Sep. 14, 2018).
 19. *How Weird Was That? An Inside-the-Ropes Account of the Mickelson Ruling that Rocked Shinnecock*, GOLF.COM (June 16, 2018), <https://www.golf.com/tour-news/2018/06/16/2018-us-open-phil-mickelson-round-3>.
 20. In Mickelson's words: “I knew the ball was going to go off in a bad spot . . . I will gladly take the two-shot penalty and move on . . . I've had multiple times where I've wanted to do that. I just finally did . . . I think knowing the rules is never a bad thing. I mean, you want to always use them in your favor.” *Id.*
 21. See, e.g., Ian O'Connor, *Why Phil Mickelson Should Apologize, Then Withdraw from the U.S. Open*, ESPN (June 16, 2018), http://www.espn.com/golf/story/_/id/23815139/phil-mickelson-withdraw-us-open-bizarre-display-13th-hole-shinnecock-hills.
 22. See Gary D'Amato, *Give Phil Mickelson the Benefit of the Doubt; He's No Cheater*, USA TODAY (June 16, 2018), <https://www.usatoday.com/story/sports/golf/2018/06/16/us-open-give-phil-mickelson-benefit-doubt-hes-no-cheater/708124002>.
 23. Karen Crouse, *Brooks Koepka, Looking for a U.S. Open Repeat, Grabs a Share of the Lead*, N.Y. TIMES (June 17, 2018), <https://www.nytimes.com/2018/06/16/sports/us-open-brooks-koepka.html>.
 24. See *2018 US Open: Did Phil Mickelson Cheat or Just Use the Rules of Golf to His Advantage?*, ANDY'S GOLF & TRAVEL DIARY (June 16, 2018), <http://www.andygolftravel diary.com/2018-us-open-did-phil-mickelson-cheat-or-just-use-the-rules-of-golf-to-his-advantage> (collecting reactions to the Mickelson incident).

Which was it—legal or illegal? Cheating or not cheating? Consistent or inconsistent with the game’s “spirit”? Rule 1-2 of the USGA Rulebook provides that “[a] player must not (i) take an action with the intent to influence the movement of a ball in play.”²⁵ Rule 14-5 provides that “[a] player must not make a stroke at his ball while it is moving.”²⁶ Both rules appear to strictly prohibit the move; that’s what “must not” means. If we take him at his word,²⁷ Mickelson seems to have acted as the proverbial Holmesian “bad man.”²⁸ Instead of internalizing the normative character of the rules, he treated a prohibition backed by a sanction as though it were a permission made available for a price.²⁹ Is that okay? Do participants have an obligation to treat prohibitions *as* prohibitions? If so, under what circumstances? And what type of obligation is this—a moral obligation or (only) a golfing obligation?

Furthermore, what penalty should the USGA have imposed? Rules 1-2 and 14-5 both provide that the penalty for breach is two strokes. But 1-2 also provides that a player may be disqualified “in the case of a serious breach.”³⁰ Given the strict rule-following ethos that golf prides itself on, a purposeful and premeditated violation of a rule designed to reduce the difficulty that tournament organizers tried to achieve through the condition of the greens and the location of pins might seem to be “a serious breach,” if anything is. But USGA officials held that Rule 1-2 did *not* apply, and that because Mickelson “didn’t purposely deflect or stop the ball,” but “actually made a stroke,” they “ha[d] to apply” Rule 14-5 and could not apply Rule 1-2.³¹ Is this right? What method of statutory interpretation directs this conclusion—textualism, purposivism, or something else? And what if Rule 1-2 did (also) apply? That rule specifies that “[a] player is deemed to have committed a serious breach if the Committee considers that the action taken in breach of this Rule has allowed him or another player to gain a significant advantage.”³² As it happened, Mickelson’s stroke on the moving ball did not hole it,³³ leaving uncertain whether his intentional violation ended up advantaging him at all after the two-stroke penalty was assessed.

25. *Rule 1-2*, U.S. GOLF ASS’N, <http://www.usga.org/content/usga/home-page/rules/rules-and-decisions.html#!rule-01> (last visited Aug. 30, 2018).

26. *Rule 14-5*, U.S. GOLF ASS’N, <http://www.usga.org/content/usga/home-page/rules/rules-and-decisions.html#!rule-14> (last visited Aug. 30, 2018).

27. *But see infra* note 59.

28. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”).

29. *See* Blecker, *supra* note 2.

30. *Rule 1-2*, *supra* note 25.

31. *Phil Mickelson Sorry for Actions at US Open at Shinnecock Hills*, SKY SPORTS (June 20, 2018), <http://www.skysports.com/golf/news/12176/11411195/phil-mickelson-sorry-for-actions-at-us-open-at-shinnecock-hills>.

32. *Rule 1-2*, *supra* note 25.

33. *See* D’Amato, *supra* note 22.

Does this mean that his breach did not allow him “a significant advantage”? And is disqualification authorized under 1-2 *only* if the breach has secured him a “significant advantage”? That is, should “if” be read as “if and only if”? What principles of statutory interpretation resolve that question?

B. Caster Semenya and the Problem of Eligibility Classifications

The second episode has roots stretching back a decade or more, but reemerged, as it periodically does, the day after the U.S. Open concluded. In 2008, a young South African runner, Caster Semenya, burst on the international athletics scene, winning gold in the women’s 800-meter at the Commonwealth Youth Games in Pune, India.³⁴ But Semenya didn’t look like most of her fellow competitors—a *New Yorker* profile would later describe her as “breathtakingly butch,” with a torso “like the chest plate on a suit of armor . . . and a build that slides straight from her ribs to her hips.”³⁵ Suspicions were immediately voiced that she was an intersex athlete.³⁶ “Intersex” is a broad term for a range of distinct conditions, also termed “differences of sexual development,” involving the presence of intermediate or atypical combinations of physical features or hormonal characteristics usually relied upon to distinguish males from females.³⁷ For purposes of elite sports, the most important intersex conditions (important because of their relative frequency and the pressure they place on sex classification) involve athletes who are genetically male, with XY chromosomes and testes rather than ovaries, who do not develop external male genitalia in utero, and who therefore present as female at birth and are raised as girls.³⁸ At puberty, however, their undescended testes produce levels of testosterone in the male-typical range, conferring corresponding male-typical biomechanical advantages such as lean body mass and higher levels of oxygen-carrying hemoglobin.³⁹

Given her masculine appearance and remarkable performances, track and field’s world governing body, the International Association of Athletics Federations (I.A.A.F.) would soon subject Semenya to “sex testing.”⁴⁰ And although it would

34. See *Caster Semenya a New Star in 800m*, TIME-TO-RUN GLOBAL NEWS (Oct. 17, 2008), <http://www.time-to-run.com/gn/news/semeyna-new-800m-star>.

35. Ariel Levy, *Either/Or: Sports, Sex, and the Case of Caster Semenya*, NEW YORKER (Nov. 30, 2009), <https://www.newyorker.com/magazine/2009/11/30/eitheror>.

36. See *id.*

37. See generally Veronica Gomez-Lobo et al., *Disorders of Sexual Development in Adult Women*, 128 OBSTETRICS & GYNECOLOGY 1162 (2016).

38. See Jessica L. Adair, *In a League of Their Own: The Case for Intersex Athletes*, 18 SPORTS LAW. J. 121, 125–26 (2011).

39. *Id.*

40. Jeré Longman, *Understanding the Controversy over Caster Semenya*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/20/sports/caster-semenya-800-meters.html>. What the sex-testing amounted to is something of a mystery. An athlete whose sex is in doubt (on bases that are not specified) is subjected to a medical evaluation before a panel consisting of varied experts (including in gynecology, endocrinology, psychology, and internal medicine), but the I.A.A.F. “has not come up with a single

clear her to compete against women for the time being, it also started a process to craft and implement new rules to govern the future participation of intersex athletes.⁴¹ After a series of twists and turns, in April 2018 the I.A.A.F. issued new eligibility rules that required competitors who have circulating testosterone near the male-typical range to take hormone-suppression therapy to reduce their testosterone levels to a specified threshold in order to compete as females in events in which elevated testosterone had been shown to confer the greatest performance benefits—mostly middle-distance running, including Semenya’s own event, the 800-meter.⁴² On June 18, 2018, Semenya announced that she would challenge the policy at the Swiss-based Court of Arbitration for Sport.⁴³ “I just want to run naturally, the way I was born,” she said. “It is not fair that I am told I must change. It is not fair that people question who I am.”⁴⁴

Obviously, the I.A.A.F. policy raises fundamental questions about fairness and equality. Some experts agreed with Semenya that it is unfair to intersex athletes. The historian of science Alice Dreger denounced the new rule as “absurd and cruel,” objecting that it has nothing to do with “natural hormone levels and fairness,” and is “actually about cultural norms of sex and gender.”⁴⁵ Others disagreed. Law professor and former elite 800-meter runner Doriane Lambelet Coleman defended the rule as based entirely on biology and not at all on cultural norms. “Advocates for intersex athletes like to say that sex doesn’t divide neatly,” Coleman observed, “but at least for competitive sports purposes, they are simply wrong. Sex in this context is easy to define and the lines are clearly drawn: You either have testes and testosterone in the male range or you don’t.”⁴⁶ Accordingly, the I.A.A.F. rules reflect a “compromise”—

litmus test for sex,” and “does not define the criteria that its group of experts must use to reach their determination.” Levy, *supra* note 35.

41. See Samantha Glazer, *Note and Comment: Sporting Chance: Litigating Sexism Out of the Olympic Intersex Policy*, 20 J.L. & POL’Y 545, 562–64 (2012).
42. Jeré Longman, *Track’s New Gender Rules Could Exclude Some Female Athletes*, N.Y. TIMES (Apr. 25, 2018), <https://www.nytimes.com/2018/04/25/sports/caster-semenya.html?module=inline>. The rules provide that an athlete who knows or suspects that she has a relevant intersex condition must advise the I.A.A.F. of her condition, and that the I.A.A.F. may ask an athlete who does not self-identify as intersex for blood or urine samples if suspicions are raised, either on the basis of blood or urine samples otherwise collected for anti-doping purposes, or on any other grounds. *I.A.A.F. Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) in Force as from 1st November 2018*, INT’L ASS’N ATHLETICS FED’NS (Apr. 23, 2018), <https://www.iaaf.org/about-iaaf/documents/rules-regulations#collapse-regulations>.
43. Jeré Longman, *Caster Semenya Will Challenge Testosterone Rule in Court*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/sports/caster-semenya-iaaf-lawsuit.html>.
44. *Id.*
45. Alice Dreger, *Track’s Absurd New Rules for Women*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/opinion/caster-semenya-intersex-athletes.html>.
46. Doriane Lambelet Coleman, *Sex, Sport, and Why Track and Field’s New Rules on Intersex Athletes Are Essential*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/sports/track-gender-rules.html>.

intersex athletes may compete as women, but must suppress their hormones—which “offers fairness both to the affected athletes and to the field.”⁴⁷ Who’s right?

Whatever your answer to this question, notice that the challenge of assigning intersex athletes only arises against a background in which a sport has chosen to sex-segregate or sex-classify. If the I.A.A.F. operated all its events as “open” regardless of sex or gender, then we would never have to worry about the testosterone levels of intersex athletes and whether they should be designated to compete as this or that. So what justifies sex-classification sports in the first place?⁴⁸

One common suggestion is that separate male and female categories are themselves required by fairness. Due to no fault of their own, female athletes have no chance to beat men in elite competitions in sports that significantly reward physical strength, speed, or explosiveness.⁴⁹ But because elite female athletes train just as hard as their male counterparts to maximize their natural potential, it is only fair that they be given a comparable chance to succeed.⁵⁰ Maybe. If so, how broadly does the argument apply? That those favored by the genetic lottery achieve greater success in sports than do those who are less naturally gifted is as true within the sexes as across them. Do men who lack the genetic gifts enjoyed by elite male athletes (think Steve Rogers, of Captain America fame) have strong fairness-based claims that the organizers of athletic competitions should make special arrangements to ensure that they enjoy a real chance to win? Or consider race. Many experts in the relevant fields believe that genetic differences across racial groups are sufficient to produce significant differences in athletic performance at elite levels.⁵¹ For example, persons of West African descent are thought to have larger muscles and more fast-twitch

47. *Id.*

48. I’m not asking whether single-sex sports teams and competitions can be justified as a matter of American law. Federal regulations under Title IX specifically authorize single-sex teams in secondary and post-secondary education. *See* 34 C.F.R. § 106.41(b) (2018). But state-operated schools are governed not only by statute, but by the U.S. Constitution, and under binding Equal Protection doctrine crafted by the U.S. Supreme Court, classifications on the basis of sex are supposed to be invalidated unless substantially related to an important governmental interest. *See* *United States v. Virginia*, 518 U.S. 515, 533 (1996). It is not obvious to me that the classification by public high schools and colleges of teams and competitions on the basis of sex or gender has the requisite close relationship to advancing an important interest, for there are ways to allow for broad participation in sports without classifying on either of these grounds: Sports competitions could be sorted by height, weight, or levels of functional testosterone. Reasonable people can reasonably disagree, it seems to me, about whether state-supported men’s and women’s teams are: (a) constitutional because supported by an “exceedingly persuasive justification,” *id.* at 531–34; (b) unconstitutional for lacking such a justification; or (c) constitutional despite lacking such a justification precisely because it is misguided to require that *all* sex-based classifications meet a standard of exceeding persuasiveness in the first place. But this is not my current concern.

49. *See, e.g.*, Robinson Meyer, *We Thought Female Athletes Were Catching Up to Men, but They’re Not*, ATLANTIC (Aug. 9, 2012), <https://www.theatlantic.com/technology/archive/2012/08/we-thought-female-athletes-were-catching-up-to-men-but-theyre-not/260927>.

50. *See, e.g.*, Adair, *supra* note 38, at 130.

51. *See, e.g.*, JON ENTINE, TABOO: WHY BLACK ATHLETES DOMINATE SPORTS AND WHY WE’RE AFRAID TO TALK ABOUT IT (2000).

WHY SPORT ILLUMINATES LAW (AND VICE VERSA)

fibers that confer advantages in short-distance foot races, whereas Caucasians have longer torsos that are beneficial for swimming.⁵²

All this is controversial, but surely not crazy.⁵³ Suppose we become convinced that it's true. Would fairness require that the I.A.A.F. create separate sprinting classifications for West Africans and others, or that the International Swimming Federation separate Caucasian from non-Caucasian swimmers? And what about mind sports? The international federations for both chess and bridge operate three competition categories: an "open" category for men and women of all ages, a second category for women, and a third for seniors.⁵⁴ Does the justifiability of sex-classification in bridge depend upon our believing that men have biological advantages over women in that game similar to their advantages in middle-distance running? If not, are there different and better rationales for sex-classification in sport?⁵⁵ And do they bear any implications for controversial questions outside of sports?

Consider, for instance, race-based admissions preferences in university admissions. Majority-race applicants who are denied admissions under such a scheme often complain that, if admissions were awarded on a race-blind basis, they would get in.⁵⁶ Sometimes they're right. Similarly, male athletes who fail to qualify for a tournament that operates separate male and female competitions might complain that, if the separate competitions were eliminated, the promoters would operate a single "open" pool with more slots than either of the single-sex tracks that the open competition replaces, and they'd get in. In some cases, at least, they, too, would be right.⁵⁷ Are the

52. *See id.*

53. For a skeptical view, see JOHN HOBERMAN, *DARWIN'S ATHLETES: HOW SPORT HAS DAMAGED BLACK AMERICA AND PRESERVED THE MYTH OF RACE* (1997).

54. *See FIDE Calendar 2018*, WORLD CHESS FED'N, <https://www.fide.com/calendar/fide-calendar.html> (last visited Dec. 26, 2018) (providing a list of competitions that are classified by age and gender); *WBF Master Point Rules*, WORLD BRIDGE FED'N, <http://www.wbfmasterpoints.com/MPRules.asp> (last visited Sept. 17, 2018) (distinguishing open, women, and senior events).

55. For an argument that the best bridge and chess players are men only because more men than women (or more boys than girls) take up these games at an early age, thus producing a larger pool of serious players, see Christopher F. Chabris & Mark E. Glickman, *Sex Differences in Intellectual Performance: Analysis of a Large Cohort of Competitive Chess Players*, 17 *PSYCHOL. SCI.* 1040 (2006). On this account, which we might call "the larger pool hypothesis," more top bridge and chess players are men than women for essentially the same reason that more men over seven feet tall are Chinese than Canadian. *Compare The World Factbook: China*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (last visited Jan. 11, 2019), with *The World Factbook: Canada*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html> (last visited Jan. 11, 2019). Of course, more needs be said to tie this explanation for observed performance disparities into a justification for creating a separate classification in which only women can compete.

56. *See, e.g.*, Don Gonyea, *Majority of White Americans Say They Believe Whites Face Discrimination*, NPR (Oct. 24, 2017), <https://www.npr.org/2017/10/24/559604836/majority-of-white-americans-think-theyre-discriminated-against>.

57. Note that, in order to comply with Title IX's mandate that colleges afford male and female students equal opportunities for athletic participation (in proportion to their representation in the student body), many schools respond not (only) by adding women's sports, but (also) by cutting men's. *See* Katie

situations analogous? If not, why not? And if so, can clear thinking about the one aid clear thinking about the other?⁵⁸

C. *Red Cards at the World Cup*

While Mickelson was melting down at Shinnecock Hills,⁵⁹ and Semenya was preparing a challenge in Lausanne, the 2018 FIFA World Cup was just getting under way in Sochi, Russia. In a first-round match on June 19, Japan notched a 2-1 upset victory over Colombia, one of the pre-tournament favorites.⁶⁰ Japan played almost the entire game a man up, thanks to the dismissal of Colombian defender Carlos Sanchez for an intentional goal-preventing handball in the contest's third minute, the second-fastest red card in World Cup history.⁶¹

That the first two incidents are at least potentially interesting or significant to students of law is plain. But what's a lawyer to learn from the Japan-Colombia match? How does this result provide grist for the legal theorist's mill? To see how it might, consider a question that participants at the live symposium discussed at some length: whether sense can be made of the practice, common to many sports, of officials calling (some) infractions less strictly at "crunch time," that is, near the end of close contests.⁶² Although it is my impression that most competitors, officials, and fans are comfortable with the practice, a sound justification is not immediately obvious, for considerations sounding in equality and "the rule of law" might seem to dictate that rules should be enforced, and penalties imposed, in just the same way regardless of the time at which they occur. If it's appropriate to call a fault when a tennis player touches the baseline when serving at 0-0 in the first game of the first set, it's also

Thomas, *Colleges Cut Men's Programs to Satisfy Title IX*, N.Y. TIMES (May 1, 2011), <https://www.nytimes.com/2011/05/02/sports/02gender.html>.

58. Here's my own view, presented telegraphically and without argument. I think that the best argument for preserving categories for women athletes in elite competition has less to do with fairness to the particular elite women who will thereby directly benefit, and more to do with the importance of making vivid to girls and young women the possibility and appeal of committed participation in athletics. I also think that race-based admissions preferences to selective institutions of higher education serve a similar—and compelling—public interest in ensuring that young people of all races and ethnicities see and thereby come to believe that all professions and domains of life are reasonably open to them. This is a justification for sex-classification in sport, which is a logical precondition for debates over how to treat female athletes with an intersex condition. It does not entail a position regarding how intersex athletes should be classified. On that question, I am disposed to think, with Coleman, *supra* note 46, that the I.A.A.F. got this close to right, but am not fully resolved in my own mind.
59. Although Mickelson initially suggested that his actions were tactical, he later changed his tune in response to widespread criticism: "My anger and frustration got the best of me last weekend. I'm embarrassed and disappointed by my actions." SKY SPORTS, *supra* note 31.
60. Victor Mather, *Japan's World Cup Starts with a Wild Win over Colombia*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/sports/world-cup/colombia-japan-live.html?mtrref=undefined&gwh=9154925F2702D170E38115B85D4E44D0&gwt=pay>.
61. Mauricio Savarese, *Colombia Remains 'United,' Backs Sanchez After Red Card*, ASSOCIATED PRESS (June 19, 2018), <https://www.apnews.com/38bd3cf727d54de99480d65395d732b2>.
62. See *Symposium*, *supra* note 1, at 153, 158.

appropriate to call a fault for the same touch when the server is facing match point. If referees should whistle a foul and award free throws in the first minute of a basketball game, the very same degree of contact should call for the same free throws in the last minute of the game.

Now, I think that rigid commitment to the principle of “temporal invariance” is unwarranted, and that some measure of whistle-swallowing is justified.⁶³ Putting my argument for that conclusion aside, the important point here is only that red cards in soccer depart from temporal invariance, though often to a far greater degree. Sanchez intentionally handled the ball—he was penalized by ejection, and his team was penalized by being forced to play a man down for the remaining eighty-seven minutes of the match (subject, of course, to the possibility of additional red cards, to Colombia or Japan).⁶⁴ Had he committed the very same infraction four score and four minutes later, Colombia would have been saddled with a mere three minutes of short-handedness. In brief, a team can suffer radically different penalties for precisely the same infraction depending solely on when the infraction occurs. The difference is not subtle. As Japanese striker Shinji Okazaki candidly acknowledged, Sanchez’s early dismissal “changed the match for us.”⁶⁵ So if there is anything to temporal invariance as an ethical principle governing sport, red cards should raise a red flag.

That’s the event and some context. What can we make of it?

First, have I characterized the situation accurately? The idea that red cards are penalties of temporally-variant magnitude depends upon conceiving them in functionalist terms rather than formalist ones (having “X” minutes of short-handedness versus being short-handed for the remainder of the match). How do we determine whether formalism or functionalism provides the right analytical framework?

Second, perhaps referees ameliorate the temporally disparate effects of red cards by being more reluctant to issue them earlier in the match. Should referees be vested with discretion regarding whether and how strictly to enforce the rules?⁶⁶ If so, how should that discretion be cabined? And if soccer referees do enjoy such discretion, is that because somebody with authority gave it to them, or for other reasons? Beyond soccer, can we say anything more general, and of possible interest to law, about how much discretion is appropriately vested in those who enforce rules and adjudicate disputes?

63. Temporal invariance in this context refers to the act of consistently calling fouls or penalties irrespective of the amount of time remaining in the contest. See Mitchell N. Berman, “*Let ‘em Play*: A Study in the *Jurisprudence of Sport*,” 99 GEO. L.J. 1325 (2011) (defending some measure of temporal variance by analogy to criminal procedure’s “harmless error” rule and to contract law’s “substantial performance” doctrine). For a competing account that seeks to *explain* the practice without *justifying* it, see TOBIAS J. MOSKOWITZ & L. JON WERTHEIM, *SCORECASTING: THE HIDDEN INFLUENCES BEHIND HOW SPORTS ARE PLAYED AND GAMES ARE WON* 7–30 (2011).

64. See Savarese, *supra* note 61.

65. *Id.*; see also Michael Caley, *Quantifying Just How Bad Carlos Sanchez’s Handball Was for Colombia*, ATHLETIC (June 19, 2018), <https://theathletic.com/399541/2018/06/19/quantifying-just-how-bad-carlos-sanchezs-handball-was-for-colombia/?redirected=1> (using statistical analysis to demonstrate how costly Sanchez’s handball truly was for his team).

66. For a provocative discussion from baseball, see BRUCE WEBER, *AS THEY SEE ‘EM: A FAN’S TRAVELS IN THE LAND OF UMPIRES* 113–14 (2009).

Third, even if soccer refs do subtly adjust the sensitivity of the trigger for the award of a red card, in order to mitigate the way that the formal rules offend against the principle of temporal invariance, is there a better way to achieve that end? It is striking how few penalty options soccer provides in comparison to many other sports.⁶⁷ Has soccer struck the optimal balance between “lumping” (treating superficially dissimilar phenomena alike) and “splitting” (treating superficially similar phenomena differently),⁶⁸ or should it expand its menu of possibilities? For example, should it introduce an intermediate penalty between caution and dismissal that would require the offender to sit for some time in a penalty box (or “sin bin”), but not for the remainder of the match, as is deployed in sports including ice hockey, rugby, roller derby, and team handball?⁶⁹ Or should a team be allowed to substitute for a dismissed player after some specified period of short-handedness? What would a regulator have to know in order to establish an optimal scheme of sanctions?

Fourth, and more fundamentally, why should *the team* suffer a period of short-handedness at all? Player ejections in any sport almost always impose a cost on the team as well as on the player himself: Even if the team can replace the ejected player, the substitute is usually less good. But to dismiss a player without permitting the team to substitute imposes a much greater cost on the team. It is a notably severe collective punishment, a form of sanction that is generally disfavored or strictly prohibited in domestic and international law.⁷⁰ Are collective punishments always permissible in team sports? If so, why? And if not, when should they be used and when should they be avoided? When, if at all, should they be permitted outside of sports?

IV. CONCLUSION

Law illuminates sport and sport illuminates law. They shed light on each other because they are kindred artificial systems of practical normativity: systems and institutions that have social origins and serve both to create new practices and possibilities, and to enable or incentivize, impede or discourage, favored or disfavored forms of human behavior. To be sure, sports and municipal law standardly concern themselves with different types of behavior, pursue sometimes disparate aims, and

67. Fouls and other infractions in soccer can call forth one of only five different penalties: a direct or indirect free kick, a penalty kick, a caution (yellow card), and dismissal-without-right-of-substitution (red card). See *Law 12*, INT'L FOOTBALL ASS'N BOARD, http://static-3eb8.kxcdn.com/documents/722/144644_310518_LotG_18_19_EN_12.pdf (last visited Dec. 26, 2018). American football, by contrast, allows for over two dozen distinct penalties: losses of five, ten, or fifteen yards, with and without loss of a down; spot penalty; loss of half the distance to the goal; loss of ball; disqualification; safety; touchdown; and more. See generally NFL, 2018 OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL LEAGUE (2018), https://operations.nfl.com/media/3277/2018-nfl-rulebook_final-version.pdf.

68. See, e.g., Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004).

69. See Aaron West, *Soccer’s Lawmaking Body Looking at Bringing the ‘Sin-Bin’ to Soccer*, FOX SPORTS (Feb. 1, 2017), <https://www.foxsports.com/soccer/story/soccer-sin-bin-ifab-rule-change-possibility-yellow-cards-020117>.

70. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (“Collective penalties . . . are prohibited.”).

WHY SPORT ILLUMINATES LAW (AND VICE VERSA)

face divergent stakes. But their tools and modes of operation (how the tools are made and deployed) are often remarkably similar. The similarities might matter at least as much as the differences insofar as we, as lawyers, law students, and legal scholars, are interested in the tools themselves and the ways that participants in normative domains interact with them—what various norms and normative arrangements can and cannot do, how they can be deployed more or less effectively, and so on. If we broaden our gaze from law, or from sports, to the larger class of normative systems that encompasses them both, we will encounter puzzles and problems that engage the mind and repay reflection, day after day, game after game.