

Taking Sports Seriously

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Law and Sports in Contemporary American Culture

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WILLAMETTE UNIVERSITY COLLEGE OF LAW

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*This sports book is dedicated to
my sports-loving boys,
Jonathan and Trevor,
and my book-loving daughter,
Emily.*

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Preface

I have been taking sports seriously, applying the tools of legal analysis to sports issues. My writings have been in the form of scholarly articles, book reviews, legal—and popular—press editorials, and in blog entries, both on my own website (The Sports Law Professor) and as a guest commentator on others. This book collects many of these materials, along with some new contributions and essays. Each piece has been amended to explain certain terms and events, to detail references, and to omit to the extent possible all unnecessary technical jargon. The pieces have also been grouped roughly according to subject matter, although, as you will see, lawyers connect the dots of the world in ways that may seem very odd to the non-lawyer mind. In the end, while modifying the pieces to facilitate easy reading, I tried to maintain the form and style of the original materials as much as feasible. You will notice that, at times, my writing style is offhand and colloquial. Sports is fun, and in my view writing about sports should try to capture and try to reflect the inherent good feelings all of us have when enjoying a sports contest, either as a player or as a spectator. At other times, the writing devolves to the lawyer's structure, with cautious paragraphs building arguments slowly and carefully. Some readers may find this latter stylistic approach strange; but if we're going to take sports seriously, we might as well get used to the analytical, logical writing style of the lawyer. This book should prove useful to stimulate thought in a law class on sports law, a college seminar on athletics or exercise science, or for the educated reader willing to reconsider and perhaps revise one's perspectives on the many "sports law" topics that permeate the daily news. In any event, right or wrong, I

hope my thoughts provide a contribution to the betterment of the field. I do want us to take sports seriously.

Welcome to the practice of law, sports-style.

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The following essays, in slightly different form, appeared first in *Legal Times*, which reserves its copyright: *Why Can't Michael Play?*, *Don't Play Pro Se*, *How A Lawyer Plays Golf*, and *Can You Hear Them Now?*

Introduction

Often one hears the complaint that people take sports far too seriously. Youth sports coaches care too much about winning, we're told, and the result is disappointed children, hurt feelings, arguments with parents, or worse. Parents take it too seriously too, and become deeply angered when their little hero doesn't get to play quarterback or merely comes off the bench on the basketball team. Even young players, subtly pressured by anxious parents to strive for stardom in high school or the rare college scholarship, overdo it, spending too much time on sports, and devoting too much of their sports time to one sport, basically trading away childhood fun for endless drills, private sports lessons, and overbearing and constant parental advice.

Taking sports too seriously continues into higher echelons. Collegiate "student-athletes" are barely students any more: the unending demands of practice, tournaments, travel and other team obligations leave little time for today's Division 1 athlete to maintain even a plausible educational commitment. Even at the professional level, times are bad. The "off-season" is now a misnomer: "serious" players train constantly, seeking improvement, even through illicit means, and the added compensation that improvement generates. The days of colorful athletes setting down their cigarette and swatting a home run are long past. Fans too take sports too seriously, wasting endless hours in sedentary solitude watching games and reviewing fantasy rosters. Wild rooting, including body painting, day-long tailgating, excessive boosterism, and even hooliganism or worse all are common attributes of today's mad fandom. To become part of the contemporary sports land-

scape, from youth player to professional, from fan to manager, the job requirement is clear: only serious people need apply.

This common perception is wrong. Our problems with sports stem not from taking these games too seriously, but from not taking them seriously enough. Often people dismiss sports as “childhood games,” implying that this multi-billion dollar industry is little more than kids goofing around after school. Others chide sports for being mere “entertainment.” This view leads to mistakes, as it unnecessarily aligns the slick, scripted productions of Hollywood and the gambling games of Las Vegas with hard-fought sports contests of skill and determination, thus missing important distinctions. A casual regard for sports leads to casual diagnosis of and remedies for sports ills. It leads to sloppy thinking and ill-considered solutions. It leads us to ignore or overlook analyses and solutions of the kind that we routinely consider and adopt in more “serious” pursuits, such as the law or public policy. Ultimately, our dismissive attitude toward modern sports leads to inattention, and inattention allows those who are paying attention, those who are taking sports seriously, to have their way with sports with but slight hindrance. Taking sports seriously is a necessary response to the importance of sports in the modern world. Taking sports seriously is the cure, not the illness.

What do I mean by “taking sports seriously”? I mean taking the rules of sports games and the constitutions of sports leagues as seriously as a lawyer takes the law. When lawyers examine a particular rule of law, or a proposal to change or amend a particular rule of law, they look at a number of aspects of the rule. They consider the relevant body or area of law, estimating how the changed rule would fit into the overall scheme. They consider the law’s history, and its purpose and structure. At a minimum the lawyer will make sure the new rule doesn’t violate or contradict other legal rules within that area. Lawyers also examine a new rule of law for its comportment with similar rules in other areas of law in order to see if the new rule presents a consistent and principled approach to solving what might seem a similar set of problems. As much as

possible, the lawyer will make sure that the new rule carries as minimal an adverse impact or causes the minimum in untoward consequences to the other body of law and to other important interests. Finally, the lawyer will conduct a purposive analysis, asking if the rule of law will further the overall goals of legal regulation. Such goals include creating incentives for good behavior, deterring harmful conduct, and promoting equality, justice, and other broad norms and goals. Taking law seriously is serious business, one which demands a level of care and thoroughness that is the hallmark of the successful lawyer. Taking sports seriously would require the same level of care.

Sports has never received this kind of attention, and it needs it. Not because sports is big business. Lots of industries are huge, but they're not the focus of scores of books and magazines, dedicated newspaper sections and omnipresent television networks. Sports deserves serious treatment because sports has an importance in contemporary society that transcends the dollar value of the business. We are moving toward a nation and world whose citizens are increasingly splintered among an endless array of television stations, internet sites, video games, and specialized jobs. Network television shows compete for a fractured viewership, and local newspapers, waning in the face of the "free-information" society, no longer form the locus of the community. What does bring us together, on both a national and more local scale, are the sporting contests and sports teams that captivate our interest. From major golf tournaments, to college basketball's "March Madness," to major league baseball seasons that involve teams from around the country, to scholastic football, sports stands as perhaps our last major repository of community spirit and togetherness. Major cataclysms, such as terrorist attacks or natural disasters, can sporadically unite us in a more profound, if temporary, way. But sports provides a persistent, regular and inextricable thread to the fabric of American society. As other sustaining elements of a common culture have been marginalized by the dawn of the information age, sports has filled the vacuum, growing in importance to our contemporary so-

cial discourse. By taking sports lightly we place at risk a vital aspect of American culture, perhaps even one of the centers of American culture.

Another center of contemporary American culture is law. To think that a mere body of statutes could have any cultural ramifications at all seems strange. Yet “the law” today means so much more than rules that constrain wayward behavior. “The law” connotes the august trappings of the courtroom, whose captivating dramas formed the precursor to today’s fascination with “reality” television programming. “The law” suggests a certain reverence for rules, especially for Americans whose regard for the founding constitution approaches mythical status, providing the document a deference that far exceeds the quality of its provisions and the limited foresight of its drafters, whose most important contribution (in contemporary terms), the Bill of Rights, was at best a briefly considered afterthought to the main document. Finally, in practical terms, for better or worse American law has just grown. The modern administrative state has become an uncontroversial feature of contemporary life. Legal regulation to varying degrees pervades nearly every meaningful aspect of our lives. Much of our contemporary culture is filtered through law. The lawyer, as mediator for much of this filtering, has taken on a role analogous to the medieval priest, explaining the hidden meanings of dimly understood provisions and proscriptions to the assembled congregation.

The importance of the lawyer, and the fascination with him or her, fills our law schools and law firms with amazingly bright, serious people. That these trained, capable people should fail to direct their attention to the problems of sports leaves sports shortchanged. The study of “sports law” was once considered a remote outpost in the field of law. In the wider culture, it was thought limited to particular problems of certain athletes, typically those who had earned themselves a criminal prosecution. Little in this traditional conception seems even relevant to sports law today. Sports law today includes a complex and pervasive set of problems concerning a unique

and multi-layered industry. Sports law has moved into the curriculum and into the mainstream of contemporary American culture.

Taking sports seriously means bringing to bear the carefulness and purposive analysis of the lawyer on issues of sports. From Little League to Major League Baseball, Pop Warner to the NFL, our carelessness about the rules of sport has yielded predictable results: our sports landscape is littered with problems, misbehaviors, bad incentives, misunderstandings, and inapt rules. No competent lawyer would have written such rules for a client or proposed such rules to a court of law or to a government. Yet we have thoughtlessly adopted many of the rules of sports without a proper concern for the incentives they create, the abuses they permit, or the collateral harms they occasion. We just haven't cared. It's time we do.