Review Essays

Review Essay: Aaron Harper's *Sports Realism: A Law-Inspired Theory of Sport*[1]

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1. Introduction

As terms go, "realism" has an impressive pedigree. It has been used to describe, at various points, theories of international relations, metaphysics, perception, consciousness, aesthetics, politics, and law, among many others. The tricky thing here is that realism in one domain often conflicts with the premises of realism in other domains. One would be hard-pressed to find anyone who subscribed to realism in every domain where there exists a theory by that name. Still, as names go, it is difficult to outdo realism. "I'm a realist," one says to one's opponent, implying that one's detractors subscribe to the unreal, naive, sentimental, or delusional. "Naive realism" might seem like a counterexample, but this only proves the point. "*Naive* realism" is a pejorative, not a term anyone uses to describe their own theory, with the emphasis on "naive" as a modifier, often posited as a foil to the speaker's pretense of a more nuanced and sophisticated realism. After all, what use are theories that rely on departures from the real? Is it not "the real" that we are all here to understand?

[1] Disclaimer: Shawn Klein is the editor of the Lexington Book series, Studies in Philosophy of Sport, which published *Sport Realism*. For that reason, Klein had no role in the substantive editing of this review.

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Whether any realisms deliver the goods is a different question. There is successful branding and then there is the substance. Aaron Harper, in his new monograph, *Sports Realism*,[2] attempts to provide yet another variation on this theme, relying on legal realism as his model.

Harper's creativity, ambition, and hard work can only be admired here. The book opens with a strange incident at the 2019 Baseball World Series. During the sixth game, an umpire called out the Washington Nationals' Trea Turner for running inside the baseline, and thus interfering with the pitcher's throw to first base, as Turner ran into the glove of the first baseman. The ruling puzzled even some on the opposing team, the Astros, even though the ruling was to their benefit. Considering the ambiguity of how the official rules can be applied to this situation, Harper observes:

> There is no straightforward rule application. Rule changes might be appropriate to address these problems and other complications. Nonetheless, while such changes may be beneficial, they do not contribute to understanding the call made on the field at the time, or what the call ought to have been, given the rules in place. (p. 2)

Hinting at the thesis he wishes to defend in this book, Harper quotes Michael Baumann of *The Ringer*, who writes of the affair, "More important than the way the rules are written is how the rules are enforced by umpires, and how their implementation is understood by players."[3] Harper expands upon this point,

[2] Aaron Harper, *Sports Realism: A Law-Inspired Theory of Sport* (Lanham, MD: Lexington Books, 2022).

[3] Michael Baumann, "The Trea Turner Interference Call Didn't Sway Game 6—But It Will Go Down as the Defining, Bewildering Image of the 2019 World Series," *The Ringer*, October 30, 2019, as quoted by Harper, *Sports Realism*, p. 2.

averring that those invested in sports are "especially interested in what call will be made next" (p. 2), a perspective he claims has been underappreciated but is actually central, or at least should be seen as so.

It is here that a rough analogy may be drawn to the evolution of a theory of law known as legal realism. Sport and law, Harper notes, feature a similar central question: To what extent are the rules of either institution constitutive of those institutions, or capable of explaining or predicting outcomes within either? (p. 5) Judges, umpires, referees, and other analogous figures are not merely applying these rules in dispassionate, objective, and impersonal ways; they must also use interpretation, imagination, or even what legal realists call "hunches." Thus, "both law and sport are rule-governed activities that are, in practice, much more complicated than they appear . . . [S]tudying these cases involves exploring the processes by which they are decided" (p. 5).

In its early twentieth-century context, legal realism can be understood as a reaction to another theory, legal formalism.[4] Formalism holds to the view that "the law" is merely the sum of the rules enshrined and formalized as law in constitutions,

[4] It should be noted here, in passing, that Brian Z. Tamanaha's *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton, NJ: Princeton University Press, 2010) contends that there was never exactly a school of thought called "legal formalism" as such, as in individuals who would have identified with or written formal articulations of formalism as a theory of jurisprudence during the decades of the late nineteenth and early twentieth centuries leading up to the advent of legal realism. There were certainly elements of what would retroactively be called "formalism" argued by many legal scholars at the time. However, it may be more properly seen more as a strawman or foil constructed by the legal realists with which they could contrast their own theory. See Henry Cohen, "Book Review: *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*," *The Federal Lawyer*, February 2010, pp. 78–79, accessed online at: https://www.fedbar.org/wp-content/uploads/2010/02/Book-Reviews-Feb2010-pdf-1.pdf.

legislation, statutes, and precedent. In contrast, while not denying that these things play some role in the law, legal realists contend that the law is ultimately a matter of what judges say it is. After all, what interests us most in law is not necessarily what might literally be written in statute, but rather what judges could safely be predicted to enforce through their rulings. Noting this, Harper intends to apply a similar framework to sport. While the rules of a given sport, as written in official guides, have some degree of importance, it is more edifying and useful to understand the rules of a sport as they are interpreted and applied by the relevant sports officials, from umpires and referees to the heads of sports organizations like the National Football League (NFL) or National Basketball Association (NBA).

Sports realism, for Harper, not only provides a more accurate, realistic framework for analyzing sport, it may also serve as an important corrective. Harper acknowledges that other theories of sport have served valuable purposes, but their drawbacks have led to understandings of sport which are, at best, incomplete. For example, the focus on rules gives theories of sport too much of a normative, even moralistic edge: "I worry that theories of sport tend to be overly moralized, turning all sports disputes into ethical issues when this may not be the best framework" (p. 7). In particular, when it comes to making sense of cheating, Harper claims that it has been unduly simplified and reduced to a mere form of ethical infraction. Likewise, previous theories presume "overly romantic" or "selfless or idealistic motivations to situations that may not call for these" (pp. 7–8). Much like how we can and sometimes must distinguish between a legal and moral diagnosis of a situation, Harper hopes that with sports realism, we can likewise gain a clearer, more pragmatic understanding in our analyses if we see the ethical dimension as somewhat separate from the domain of sport. From the perspective of players, "how decisions will be made might be more important than how they ought to be made" (p. 8). The goal, ultimately, is to

"explain sport as it is actually played in order to provide a more accurate account of sport as an activity" (p. 8).

While there is much to recommend about *Sports Realism*, such as Harper's clear prose; easily followed lines of argument; and compelling, bizarre-yet-true real-world examples, ultimately, the argument is unpersuasive. I will unpack and explain below three difficulties I find with his view.

First, in Section 2, I examine Harper's analogy between sports and the law. The analogy between sports and law, and thus between philosophy of law and philosophy of sport, is *prima facie* plausible. However, the salient differences between them undercut any attempt to import explanatory theories from one to the other. Sports and law are too different as areas of human endeavor, so that the questions that philosophers of law and sport are interested in, do not have sufficient overlap.

Second, in Section 3, I consider the weaknesses of legal realism itself that make it a questionable choice of what to import into sports from law in the first place. Harper, interestingly, concedes that there are reasons why legal realism fell from favor within legal scholarship, but nevertheless insists that realism of this kind offers more promise within sports.[5] I will disagree.

Third, in Section 4, I wonder about Harper's stated purpose for turning to legal realism. What kind of work is sports realism, as a theory of sport, intended to do? On his own account, the theory of legal realism allows one to put moral judgment about law aside, or at least reduce its role, and thereby better understand law in a more anthropological mode. Likewise, Harper seems to

[5] Harper notes (p. 84) that legal realism is often found objectionable, given that legal systems are often premised on constitutions or other foundational documents and frameworks, which by their nature suggest distinctions between legal and nonlegal reasons. Sports, in contrast, lack any similar foundational frameworks, eliminating a major objection that legal realists face.

want "sports realism" to reject or at least limit this moralizing tendency, and thereby better contextualize and explain an activity like cheating. Legal realism does not, as Harper stresses, eliminate moral judgment; it merely establishes a framework for understanding decisions in more pragmatic framing. Has Harper sufficiently motivated this move, though? I take no issue with how cheating ought be conceptualized by philosophers of sport, either as a concept fully reducible to moral wrong or not. I argue here only that sports realism, whatever its merits or deficiencies, does not seem to offer any particular help in answering this question.

2. Law versus Sports

The analogy between judges and disinterested umpires, which holds that both are there "merely to call balls and strikes," is surprisingly old and well-worn enough to approach the status of cliché. Like a politician who pledges to balance government budgets by eliminating "waste, fraud, and abuse," nominees for the U.S. Supreme Court regularly make the "only calling balls and strikes" promise in U.S. Senate confirmation hearings to assure critics that they will not engage in partisan judicial activism. If one is drawn to theories of law that are skeptical of objectivity and insist that the law amounts to what the judge had for breakfast, one may scoff at the balls-and-strikes line.

Another reaction, though, could be to draw one's attention away from these metaphorical umpires and reconsider the analogy. If judges are at least claiming to be like umpires, is there a sense in which the comparison could work the other way around? Might umpires and referees also lack the objectivity judges often pretend to have? Just as judges, these theorists contend, "cloak their biases behind judge's robes," so too might umpires and referees be cloaking their biases behind umpire and referee uniforms?

As Harper observes, as early as 1930 Karl Llewellyn, one of the most influential legal realists, made this very comparison, but in nearly the opposite way in which it would come into use for U.S. Senate confirmation hearings. For Llewellyn, judges are like umpires: hard working, perhaps well intended, but ultimately vulnerable to human-all-too-human biases, guided more by hunches than objectivity. It is with some irony, then, that this comparison between judges and umpires was not originally intended to be flattering to judges. Umpires were presumed to be biased, highly fallible at best, and judges, Llewellyn insists, are no different in this regard.[6] Harper explains that, as a legal realist, Llewellyn claims that while we like to think that "the law" consists of a discrete body of written statutes, constitutions, regulations, and precedents, in reality, the law is merely whatever judges say it is, as applied to particular cases (p. 75). To extend this comparison, if law is whatever biases draw judges to rule as they do, understanding what sport is and the rules that undergird sport is merely a question about umpires and referees. Sport is thus whatever they say it is through their rulings.[7]

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[6] Harper quotes Llewellyn (p. 75): "Like an umpire in that he [the judge] does not always see the breach of the rules. Like an umpire in that at times he is severely partial to one side, or stubborn, or ignorant, or ill tempered . . . . Like an umpire finally in that his decision is made only after the event, and that play is held up while he is making it, and that he is cursed roundly by the losing party and gets little enough thanks from the winner." Karl Llewellyn, *The Bramble Bush* (1930; repr., Oxford: Oxford University Press, 2008), p. 15.

[7] There is a not unrelated sentiment expressed even in philosophy itself. A favorite slogan that Richard Rorty is alleged to have said, according to Crispin Sartwell: "Truth is what your contemporaries let you get away with saying." Crispin Sartwell, "The Provocateur's Philosopher," *Los Angeles Times*, June 12, 2007.

The legal realists beat him to this point by a few decades. This review is likely not the best place for an exegesis on the origins of legal realism itself, but I will note in passing that it was well-timed, as a theory of law. Legal realism finds some of its earliest expressions in the more cynical opinions of Oliver Wendell Holmes, who was outraged when the U.S. Supreme Court overturned progressive legislation on constitutional grounds. Holmes did not, by and large, take their arguments about the U.S. Constitution's limits on power seriously

It is worth pausing here to consider whether there is something to this analogy. Of course, no one would expect law and sport to be identical in every respect; were that the case, they would literally be the same thing. Yet their differences ought be relatively trivial, for purposes of whatever elements are being compared. Are law and sport, as human activities and social institutions, too different to sustain importing a theory of one to the other? At a 30,000-foot level of comparison, there are obvious similarities: both involve sets of rules, methods of adjudication, and officially recognized authority figures who judge when infractions happen and what penalties are appropriate. But the differences, as I'll argue, are significant enough to frustrate any attempt to look to one as a guide for the other.

a. Domain

Law is universal in scope, at least with respect to a given jurisdiction. It need not circumscribe all we do, but it would be difficult to live a full human life without encountering law at some level.[8] We are born and are immediately given birth certificates

enough to engage with them. Rather, for Holmes, rulings such as *Lochner v. New York* (1905) amounted to what politicians in future decades would call "judicial activism," the exercise of unelected judges substituting their own policy preferences for that of the people's elected representatives. Constitutional arguments were post hoc rationalizations, a way for judges to subvert democracy. As Holmes once put it, "If the voters want to go to hell, it's my job to help them get there as quickly as possible." By the 1930s, with the Court actively opposing much of the New Deal, there was at least demand for a legal theory that delegitimized—or at least severely undercut—the prestige of the U.S. Supreme Court and perceived objectivity of judges. Legal realism, drawing from Holmes and the tradition of American pragmatism, fit the bill, providing ample justification for Franklin Delano Roosevelt's campaign against the U.S. Supreme Court and the demolition of *Lochner*-era judicial restraints on the legislative and executive branches.

[8] One might be tempted to cite, as a counterexample, social groups such as the Amish that maintain societies outside of the twenty-first century world that most of us know. Yet it would be a mistake to believe that the Amish are in some sense outside of the law. Amish children attend public school through middle school and, when born, receive birth certificates. The Amish are

and receive legally compulsory education through at least age fifteen. We sign extensive contracts for our employment and obtain marriage licenses from the state when we marry. Certainly, in our economic lives, there's a considerable body of rules dictating all the rules we must follow, if we want to start a business, hire an employee, build a factory or a store front, and so forth. The point is, law is non-voluntary and universal as a domain and institution of human activity. Law provides a backstop of sorts, a framework to adjudicate disputes or violations of rights that social norms are not strong enough to prevent on their own, requiring compulsory enforcement at some level

Sport, in contrast, only becomes relevant if we voluntarily decide to partake in it. Even if the conception of "sports" was wide enough to include casual pick-up games, as Harper posits, we would still be only considering a voluntary, opt-in social institution, a structured, rule-governed form of play that we are free to partake in as participants or spectators, but also free to ignore. (As I will discuss below, one difficulty here is precisely that Harper's sports realism leaves "sport" undefined and undefinable, so take the definition I offer here advisedly.)

By itself, this may not seem like a huge difference, but it leads to a problem for this comparison, namely, to study law is to study *rules*, as they are articulated and applied. The rules themselves are the focus, along with the institutional frameworks that create, interpret, apply, and enforce them. Even the legal realist is, of course, interested in how judges reach decisions *about rules*. However, to study sports might be to study or appreciate athletic excellence or the nature of competition. While all sports,

required to file income taxes and with Social Security, among other legal requirements. Even if one sought to escape the reach of law by venturing into places where there is no governing sovereign, like international waters, the Law of the Sea will still govern one's activities there. One may only escape the reach of law by escaping social interactions with one's fellow human beings entirely.

with the possible exception of Calvinball, require rules of some kind, the rules are ancillary to other ends, the kind of ends that draw people to sport in the first place. The rules of sport, how they should be understood or applied, are no doubt of profound interest to the philosopher of sport. However, the rules are not the *subject* of sport itself, whereas legal rules are the subject of law.

If I, as a legal theorist, want to study law as an activity, I might read up on foundational case law, attend a local criminal or civil trial, study how contracts are drafted, or even study historically famous U.S. Supreme Court cases.[9] Fans, participants,

[9] One tricky problem for those who study law and craft entire theories of law is that they tend to focus inordinately on the types of famous cases that reach appellate courts or the U.S. Supreme Court. Such cases are often politically charged; judges there frequently break along predictable political lines. Citing such examples, many legal theorists emphasize indeterminacy in law, casting doubt on the possibility of the rule of law itself. But this is misleading for the same reason why studying the career of the Beatles would give a highly misleading understanding of what a career as a musician would typically entail. These cases receive so much attention precisely because they are so unusual. As Lawrence Solum observes: "Of those potential cases that do arguably permit legal redress, a great number will be settled either by an apology, a monetary settlement, an agreement to dismiss the action for lack of proof, a stern warning from the police, or a guilty plea. Of the few cases that go to trial, a vast majority will not be appealed. Most of those that are appealed will be dismissed without a published decision. And only a tiny percentage of the published decisions are of sufficient interest to warrant inclusion in a casebook for the teaching of law students. And a significant number of these cases are Supreme Court cases. This is important because a large share of decisions at trial or intermediate level will be strongly determined by past law. Lower courts handle a steady diet of 'easy' cases; and they are not free to change or evade existing doctrine. It is only the Supreme Court that has this freedom; a focus on Supreme Court decisions thus can easily skew one's perspective." Lawrence Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma," *University of Chicago Law Review* vol. 54 (1987): p. 497.

This is in large part because, for understandable reasons, legal scholars and media coverage of legal controversies focus inordinately on highly atypical, unrepresentative legal disputes. If there is an analogy to sports, it may be precisely in that the novel cases in recent sports history that Harper cites are atypical in much the same way that U.S. Supreme Court cases are for the regular operation of law.

and even theorists of sports generally focus on game play itself, with the adjudication of potential rules violations being more of a distraction. Watching umpires, coaches, and players argue over potential rules violations and resolutions is not exactly what sports writers or fans cite as a significant draw for them.

To illustrate the point further, as I write this, it is early 2024. The biggest event in sports over the past month was the Super Bowl, played between the Kansas City Chiefs and the San Francisco 49ers American football teams. Although some attention was paid, by the sports media, to the romance between a Chiefs player and a pop singer, generally the focus was on the athletic achievements on the field and competitive strategies of the teams, not so much on potential rules infractions or their adjudication. During that same time, the biggest event in law was likely the U.S. Supreme Court case of *Trump v. Anderson*, a dispute over whether the Fourteenth Amendment's clause 3, barring insurrectionists from federal office, absent a pardon given by a supermajority of the U.S. Congress, empowers state elections officials or state supreme courts from disqualifying Donald Trump from the Presidential ballot, on the grounds that his actions prior to and on January 6, 2021, qualified as insurrection as the term was understood in 1868.[10] Having listened to the more than two hours of oral arguments heard at the U.S. Supreme Court, I can report that attention was almost entirely on the meaning of legal concepts, the history of the relevant clause, and the scope of application for this constitutional provision. In other words, as an activity, the *focus of law was on the meaning of rules*, their application, and avenues of enforcement. Try to imagine a Super Bowl that functioned that way, in which litigants argued for two hours over whether a player's shoving of an opposing player constituted "unnecessary roughness," as the concept is meant

[10] *Trump v. Anderson*, No. 23-719, 601 U.S. (2024).

within official NFL bylaws. Some sports fans might live for such a discussion, but I take it that such fans are highly atypical among sports fandom.

A closer analogy *might* be drawn not to the content of law, but to the procedural rules and norms that govern the enterprise of law. For these rules inform how "players" (litigants, attorneys, judges, etc.) are intended to carry out their legal affairs, submit evidence and other paperwork, and comport themselves toward other legal professionals. This would not be law, *per se*, but these procedural rules could be seen as playing a similar role, within law, to the rules of sports. This is to say that they are incredibly important and make the enterprise of law possible, but these rules are usually not all that controversial or interesting. It might be worth considering what degree a theory of law pertaining merely to procedural rules might look like, but I suspect that most scholars interested in law are more drawn to controversies over constitutional law, adjudication, criminal procedure, and so forth, of the kind that more directly affect the lives of those who are not legal professionals.

b. Rules of law, rules of sports

Arguably, the most striking difference between sport and law would be the former's status as of artificial design. This requires a bit of unpacking, because at first glance, it may seem that as types of order, sports and law both represent examples of human design, and indeed, of rule-governed orders at that. However, a closer examination reveals a fundamental difference.

We may start with the broader Anglo-American common law tradition. This is sometimes referred to as a "judge-made" or—by scholars such as Friedrich Hayek and Bruno Leoni—as an "emergent order" of law.[11] The historical tradition of common law

[11] See, e.g., Friedrich Hayek, *Law, Legislation, and Liberty*, ed. Jeremy Shearmur (Chicago, IL: University of Chicago Press, 2021); Bruno Leoni, *Freedom and the Law*, expanded 3rd ed. (Indianapolis, IN: Liberty Fund, 1991).

stretches back into medieval English history, prior even to Magna Carta, but its most striking feature is that it is unwritten. That is, there is no one definitive written codification of common law. It is embedded in commonly understood and accepted legal traditions; particular applications can be found in the written decisions of particular cases, which require judges to articulate the reasons for their findings with consistency and coherence to the existing set of precedents. Each decision, to varying degrees, will itself have authority as precedent for other cases and courts. Thus, the common law emerges as an organically realized order, oriented toward problem-solving to the satisfaction of litigants, who naturally will demand outcomes consistent with settled expectations.[12]

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[12] It should be noted that my description of the common law applies to what is foundational in American, British, Canadian, Australian, etc. law, at least as a model and a type. These legal systems also involve other sources of legal authority, such as constitutions, statutes and legislation, and regulations. Hayek was mindful of this, which led to his careful distinction between law and legislation. See, e.g., Friedrich Hayek, *Law Legislation, and Liberty, Volume I: Rules and Order* (Chicago, IL: University of Chicago Press, 1973), pp. 72–74 and 83–97.

For Hayek, law is the set of shared, settled expectations expressed as rules that emerged organically within a given community and served as a component of a bottom-up social order, whereas legislation was explicitly articulated by a legislature, written down, and imposed from the top-down. Hayek does not believe that a society could be governed by law alone and takes it for granted that legislation would also be necessary, but he insists that the role of legislation ought be fairly minor, limited to harmonizing and correcting law. More importantly, Hayek insists on the distinction itself, as the notion that Congress, Parliament, or any other authority could "make" law was dangerous and misleading. We often say, for example, that "ignorance of the law is no excuse," which makes sense when we speak of law in Hayek's sense. It would be ludicrous for a bank robber to plea that he had no idea that robbing a bank was illegal. However, the depth and complexity of legislation and regulation are such that even trained experts struggle to stay abreast of annual changes, so the claim that one was ignorant of obscure regulatory tweaks may have more justification.

It may be helpful to consider that some scholars have rejected the description of this type of legal order as "judge-made," for this description may give the false impression that judges may invent any legal principle they desire according to their own arbitrary personal preferences. In reality, judges do not like seeing their precedents overturned by other courts, so they are incentivized—and not merely by oath—to rule within the confines of existing, widely held principles of common law and reason itself. Thus, common law jurisprudence may be more accurately thought of as "judge-found" or "judge-discovered" law. To the extent that judges may be said to "make" law, it would be within this very specific context. For while the rules articulated by judges may not derive from explicit legislation, they derive from investigation of existing rules and usually represent extensions or applications of existing legal rules to a new phenomenon.

I mention this because, as rule-governed orders go, *sports seem to be nearly the opposite of this*. Basketball, for example, was invented, and its basic rules were laid out by one individual all at once. Its rules evolved over time, but at the guidance of official rule makers, such as the NBA or the National Collegiate Athletic Association (NCAA). To simplify a bit, we could consider the types of order represented here as bottom-up, in the case of the Anglo-American common law tradition, and top-down, in the case of sports. There might be instances of sport that evolved their rules in an organic fashion similar to the common law, such as pickleball, but this does not appear to be the case with most if not all professional and organized sports. Law lacks a particular author or moment of creation: there is an organic character to much of the body of rules that make up the law, with a somewhat evolutionary flexibility. Whereas the rules of sports are more artificial. Sports as we know them today may derive from older, now obscure forms, but rules establishing discrete time limits, giving batters three strikes, allowing American football players to

carry the ball with their hands while forbidding soccer players from doing the same, are all artificial, rules that were decided by particular individuals. In short, sports are created, artificial orders, whereas law is more of an organic, evolved order.

The common law system is only seen in the English-speaking world, so one might object that the civil code legal systems common to Europe and most of the rest of the world do, in fact, more match the nature of an artificial, rule-based order. For example, under the influential Justinian's Code and Code Napoleon, legal authorities attempt to anticipate any and all potential grounds for criminal or interpersonal dispute and have rules written to cover them all. In an American law school library, one might marvel at the size of the archives, with books of highly detailed case law stretching back at least to the state's founding and likely well before. However, in a civil code system, law school libraries are typically a lot smaller, because judges and attorneys in these systems do not particularly pay much attention to precedent. What matters is the code itself, not what prior judges have ruled even in very similar cases. Such systems may well more closely resemble organized and institutionalized sports, inasmuch as the rules are crafted in advance, at a single instance, with occasional modification from legislative and regulatory authorities.

However, even here, the analogy is fraught. It would be one thing if, for example, Justinian's Code and Code Napoleon were created from scratch, in similar fashion to sports. However, this is not the case. Justinian's and Napoleon's codes were based mostly on already existing laws, rules, and norms and represented attempts to harmonize and codify conflicting laws across different regions within their own empires. The Eastern Roman Empire and France prior to Napoleon certainly had law and courts to enforce it, but these codes attempted to standardize and harmonize practices that may have diverged between different jurisdictions.

Even under the Civil Codes of the continent, then, one finds that the lion's share of law has its origin in organically emerging laws. The Civil Codes were only possible to the extent that what they codified was consistent more or less with existing practice.

3. Legal Realism as a Questionable, Circular Import

Even setting aside the differences between law and sports as types of order, we still might consider the extent to which *philosophy* of law might generate useful theoretical frameworks that could be applied within *philosophy* of sport. Even here, though, we can see how the differences between these two types of order or human activity make that unlikely.

Let us consider Harper's general thesis about what he sees in legal realism as a useful framework to import from law into sport:

> I draw upon elements of American legal realism as I develop a theory I call sport realism. Legal realists hold that the law is found most clearly in the decisions made by legal officials, including judges, because these decisions comprise what the law really means to those individuals it applies to. By comparison, participants of sport look to decisions made by sport officials, broadly construed. Umpires and referees are obviously officials, but in practice a sport official is anyone who resolves disputes and metes out punishments or sanctions. League commissioners, managers, and even other players serve these roles. An adequate theory of sport must acknowledge that decisions made by these various figures define the sporting landscape. (p. 8)

I briefly note here an obvious objection. The adjudication of rules, resolving claims over whether any have been broken, what the appropriate penalties should be, certainly does seem central to what law is, whereas this does not seem central to what sport is. While rules and adjudication do indeed seem necessary, we typically see this as a distraction: well-played games usually have little to no breaching of rules. Setting aside this area of disanalogy, a more fundamental question remains. Consider that if there is a foundational question to philosophy of law, it is the existential question, *what is law*?

All theories exist, at least in principle, to solve a problem or provide an explanatory framework for solving a problem. Legal realism attempts to do just this, just as other theories of law do. In this case, the legal realist emphasizes the role of the judge and concludes that law is, fundamentally, merely a matter of what judges say it is. In contrast, formalism, as a theory, would point to the collective body of written (and perhaps unwritten) laws. Natural law theory would ground the answer to what law is in the moral nature of humanity and political legitimacy, denying that any law commanding injustice could be genuine law. Legal positivism would emphasize the role of a sovereign in explicitly creating rules recognized as law by a community and, as Harper discusses, the interpretivism of Ronald Dworkin identifies law with the interpretation of judges, but unlike realists, requires that they are guided by the consensus of moral norms of a community.[13] If the realist contends that laws are merely whatever

[13] Harper discusses (pp. 22–23) Dworkin's example of *Riggs v. Palmer* (115 N.Y. 506, 22 N.E. 188, 511 [1889]), a notorious case in New York probate law. In that case, a man sought to enforce his grandfather's will, naming him as the heir to his estate, which was what the will specified. The only trouble was that the man had murdered his grandfather. Unfortunately, in New York probate law at that time, there was no explicit provision revoking one's status as a beneficiary in a will on that basis. One might go to prison for life, but as a potentially very wealthy man. In that case, however, the judge ruled that the deeper common law principle that "crime should not pay" or, to be more precise, "no one shall be permitted to profit by his own fraud, or to take

judges say they are, the Dworkinian interpretivist substitutes a hypothetical Judge Hercules, as an idealized defender of the moral norms of a community, in that role.

We are left, then, with the question of what philosophy of sport aims to deliver. If theories of law attempt to characterize what law is and is not, could any of these theories, imported into sports, characterize what sport is and is not? This is a fundamental disconnection in Harper's analysis: they do not. Harper's conception of sport is broad, including any kind of rule-based athletic competition, whether as formalized as one would find in professional sports or as informal as pick-up games between friends.[14] Harper does not, however, attempt to use sports realism

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advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime" ought govern the outcome of this case. Thus, even without any explicit provision in New York statutes at that time, the murderer was denied the status of beneficiary of his grandfather's estate. Dworkin takes this case as illustrative of his theory of interpretivism, as explained in Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).

[14] Harper's wide conception of "sport" is suggested most explicitly here: "I contend that my theory of sport realism has applicability to sport of all types, including amateur and informal sporting events that lack a traditional official such as a referee or umpire" (p. 8). This falls short of a formal definition, and doesn't seem intended as such, speaking more to the applicability of the "sports realism" ethos rather than an articulation of "sport" as a concept explained by sports realism as a theory Other statements are more puzzling. For example, he writes, "According to sport realism, a sport is not defined by rules, conventions, or principles but as a system in which the rules and their corresponding punishments and penalties will be applied in predictable ways to resolve disputes" (p. 79). The first claim here seems to be a straw man: I am not aware that anyone has argued that a sport is *solely* or even primarily defined by rules, conventions, or principles, other than perhaps as ways to distinguish a given sport from another. However, the second claim, which appears to be an attempted definition, is more bizarre. A "system in which the rules and their corresponding punishments and penalties will be applied in predictable ways to resolve disputes" could describe many things having nothing to do with sport, such as, ironically, a legal system, but also any order involving rules and enforcement, such as non-athletic games.

to answer the question of what sport is. If he did, the answer would be that sports are merely whatever umpires and referees say they are. Rather, for Harper, realism is applied only to the question of what the *rules* governing a given sport are, not over what counts as sport in the first place.

This is unfortunate, but also possibly a necessity of the disconnection between law and sport as areas of philosophical inquiry. Law pertains to the nature and application of rules, first and foremost, whereas—to stipulate a potential definition myself—sport is *organized athletic competition*. The rules within a given sport are a fundamental element of that sport but are not the sport itself. Thus, a realist theory of sport could not answer the question of what sport is. A referee does not rule over what counts as American football; this question is already decided before the referee even dons his uniform. In contrast, judges, particularly on the appellate level, do settle disputes over what counts as good law and what its limits are.

Failing to define sport might seem like a trivial problem of the kind that philosophers bicker over. However, at least a working definition for sport is essential if one intends to craft a functionalist account, as Harper does. Without being able to clearly distinguish real-world cases of sport from things that are not sport, one cannot have an account of what the essential function of sport is or be able to identify how sport succeeds or fails as a social endeavor. Harper eventually looks (in Chapter 5) to Aristotelian moral theory for his account of ethics within sport, albeit within a heavily pragmatic framing. Failing to define sport—apart from the circularity that sports realism inherits from legal realism—would undermine that aspiration, for without some account of what sport is, there can be no way to establish a *telos* (end) for sport, establish what is sport at its most excellent, or distinguish it from counterfeits.

Likewise, the question of how to understand the rules—and mechanisms and standards of enforcement thereof—of a given sport would, by necessity, turn on the question of what sport is and is not. Harper only considers sport on a spectrum from levels of formality to informality, from professional and organized to amateur and informal, but this presumes given types without considering what might be included or excluded.

There is a famous exchange in the 1988 Tom Hanks film, *Big*,[15] In which Josh Baskin, a twelve-year-old transformed into an adult, suggests to a work colleague that video games ought to be considered a type of sport worthy of inclusion at the Olympics. The colleague insists that video games cannot be a sport, because a machine is doing the work rather than the player, to which Josh points out that we regard horse and car racing as sports. The colleague, fatigued by the exchange, drops the inquiry, but it is a useful example of how the boundaries of what counts as sport can be somewhat fuzzy. At the very least, we ought not be so quick to presume "sport" to be a term with obvious conceptual boundaries.

Consider these examples: professional wrestling, particularly World Wrestling Entertainment (WWE), Harlem Globetrotters basketball, and the somewhat more controversial example of figure skating. The first two here *resemble*, superficially, widely recognized sports, namely, wrestling and basketball. However, both are highly choreographed athletic performances, lacking the competition I identify in my stipulated definition. Notoriously, professional wrestling relies on a practice of "kayfabe," a kind of wink-and-nod understanding between performer and audience that they are witnessing a scripted performance between athlete-actors who inhabit characters.[16]

[15] *Big*, directed by Penny Marshall (20th Century Film Studios, 1988).

[16] The change of the name from the World Wrestling Federation (WWF) to World Wrestling Entertainment (WWE) is only one of many tells here. A common explanation has to do with state regulations, in which athletic competitions are held to a regime of legal regulations prohibiting game fixing.

Likewise, the Globetrotters resemble a conventional basketball team, who oddly only ever seem to play against the Washington Generals and who boast a win-loss ratio against the Generals of something on the order of many thousands to one.[17] Like the WWE, however, the Globetrotters are a scripted, highly choreographed performance, not an actual competitive endeavor. Nevertheless, one could imagine accounts of sport that only emphasize the audience *experience* of competition, and many in the audience of either, such as children, experience those events as if they were actual competitions.

Figure skating is more controversial, in that it is a recognized Olympic event. However, the standards of what constitutes a sport seem inconsistent here, for it is unclear how, if figure skating is a sport, why ballet and other types of dance would not also be sports. It is competitive, but points are determined by seemingly subjective artistic criteria rather than objective metrics like goal points or knockouts. Currently, the 2024 Olympic Games in Paris are slated to include *break dance* as an event. One would hope that a theory of sport could analyze questions such as: Were the organizers of the Olympics right to consider break dance? Are

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"Kayfabe" would have posed a problem for the WWF, as a professional organization of athletic competition. But as the WWE, marketed explicitly as "Entertainment," such regulatory issues would not apply, inasmuch as WWE is more or less openly conceding its nature as scripted entertainment rather than sport. With recent relaxations on sports betting, it may be noteworthy that one does not see WWE among the type of sport one may place bets on.

[17] Rodger Sherman, writing in 2015, cites a figure of more than 16,000 to 1 as of that date. Although there are reports of others, the best-documented instance in which the Generals defeated the Globetrotters appears to be January 5, 1971, in Martin, Tennessee. Rodger Sherman, "A Requiem for the Washington Generals, the Worst Sports Team of All Time," *SBNation.com*, August 14, 2015, accessed online at: https://www.sbnation.com/2015/8/14/9152971/washington-generals-harlem-globetrotters-losing-all-the-time.

they wrong to exclude ballet? Ought figure skating continue to be included in the Winter Olympics?

I bring up these examples to illustrate that a theory of sport, much like a theory of law, would need to address *what counts as sport*. Are there principled ways in which the WWE and Harlem Globetrotters games could be excluded as legitimate types of sport? It seems so, but we would want a definition and theory of sport to make this case. Such a theory could, it seems, be able to identify whether figure skating counts or is rather a kind of competitive ballet performed on ice. We need not necessarily be troubled if there turned out to be some fuzziness on the margins, where certain activities exist in some overlap between sports and other activities, such as the arts or scripted entertainment. Certainly, one would want to understand what features make sport most distinct from other forms of human activity and achievement, in order to have a clear conception of the functionality of sports or the unique *telos* of sports that would inform our understanding of excellence in sport.

However, sports realism *cannot* fulfill this role or tackle this type of question. The referees of a WWE match or a Globetrotters game can be expected to give their rubber stamp to those activities, so a claim that sports is merely whatever the umpires or referees claim it to be does not answer any question here. Sports realism could perhaps say something about the rules *within* a given sport, but not whether it was a legitimate instance of sport to begin with.

This is a deficiency it shares with legal realism. Legal realism proposes to define law merely as whatever judges deem it to be, but "judge" and "court" are themselves *legal* concepts, meaningless without some concept of what "law" is. Why are the rulings of the U.S. Supreme Court in some sense binding and definitive, while the rulings of a high school mock trial are not?

The answer is that the U.S. Supreme Court has standing within the framework of American constitutional law to perform this task, but a high school mock trial team does not. One can only say this to the extent that *law* is already an existing concept, though, which can make these distinctions meaningful. If there is a cardinal sin to legal realism, it is that its attempted definition of law as that which judges deem to create or enforce is hopelessly circular, as it relies, parasitically, on legal concepts to define law itself. In fact, the conceptual hierarchy is such that no "legal" concepts can have meaning without "law" as a prior understood concept. One need only consider the position of the legal realist judge. If she takes legal realism totally to heart, she will run into some difficulty whenever she needs to rule, for she believes that law is whatever she says it is. Apart from whatever gratification she might get from this god-like power, as a practical matter, she will immediately realize that this conception of law gives her no guidance, within her own judgment, as to what counts as a good legal argument or what counts as law in the first place independent of her own arbitrary preferences.

Likewise, sports realism, in attempting to abandon the notion that "sport" has meaning outside of what referees or other sports authorities subjectively prefer it to be, faces a similar conceptual circularity. Consider, for example, one instance in which Harper almost provides a definition of sport: "Sport realism is broadly functionalist in nature, *defining sport through consideration of what decision-makers in sport will actually do*. This entails examination of how disputes will be resolved and what sorts of punishment will be meted out by sports officials" (p. 107, emphasis mine).

We must have a coherent concept of "sport" to be able to make sense of concepts like "umpire" or "referee," much less what or who counts as a "decision-maker in sport" or "sports official." Only in that way can we tell the difference between the kind of

authority that the sport realist insists that, say, the referees in an NFL game have as opposed to the kind exercised by people who wear similar uniforms at a Globetrotters game or a WWE match. To do that, though, we would need some other theory of sport, for sports realism cannot, by its own terms, articulate a concept of sport that is not circular in the same way that legal realism's concept of law is circular.

I will also add that a concept of law as well as a concept of sport would be fundamental both to determining how either is functioning well on an institutional level and for drawing sound moral judgments about how they are done well or not. Realism does not seem to be capable of providing that.

4. What Do Legal Realism and Sports Realism Get Us?

Harper cites three "insights" from legal realism that he identifies as core to his project of sports realism. First, legal realism "defines law in terms of how it functions rather than its constitutive rules or principles" (p. 67), hence legal realism's emphasis on the role of judges, especially appellate court judges, rather than constitutions, statutes, legislation, or regulations. Second, Harper cites legal realists' rejection of the "distinction between legal and non-legal reasons, acknowledging that judges may be motivated by any number of factors" (p. 67). Third, Harper cites legal realists' embrace of law "as a profession, with its members most interested in predicting future decisions or rulings. Sports realism aims to predict future outcomes and resolutions, since people involved in sport are most interested in what will happen in upcoming disputes" (p. 68).

The first of these points has already been addressed. Legal realism fails conceptually because it puts the cart before the horse by attempting to define law in terms of the functions of institutional roles like judges. As such roles can only be identified on the basis of an established definition of "law," legal realism is by necessity circular. Second, a distinction between "legal" and

"nonlegal" reasons for judicial outcomes would likewise presume some existing definition of law, even if the legal realist only intends ultimately to reject the distinction as significant. (Paradoxically, realists must tacitly rely on the meaningfulness of the concept to claim that the distinction is not meaningful.) After all, the distinction can at least be made for purposes of distinguishing outcomes that nonrealists might anticipate as opposed to the kind realists believe they alone can predict. Finally, one could hardly gainsay the desire for predictability in any human endeavor, be it law or sports, but testable hypotheses and pattern-seeking are more the province of the sciences. Law has a necessarily normative element that cannot pretend to supply reliable predictions in a descriptive sense. This normative element, after all, is what makes it possible to distinguish between law functioning well and collapsing into dysfunction.

If legal realism inherently has these difficulties, how would sports realism be advantageous to the philosopher of sport? For Harper, the reason seems in part to do with difficulties philosophers of sport have had in understanding cheating in sports. Some philosophers have proposed understanding cheating in purely moral terms. On Harper's telling, some philosophers, such as John Russell, find "no distinctive conceptual core" to the concept, concluding that cheating is merely a broad-umbrella notion intended to "express moral disapprobation" (p. 99). As cheating, conceptually, is too broad to capture a distinct moral wrongness applicable to all cases, we would at least have a *prima facie* case for dropping the concept entirely. Harper suggests the difficulty here is that philosophers have been too quick to frame cheating as a moral concept. Rather, drawing from legal realism's distinction between an action being morally wrong as opposed to legally wrong, he posits that cheating could be seen as a distinctive kind of wrong unique to sports. While cheating may, in many instances, overlap with moral wrong, it ought not be seen as reducible to moral wrong (p. 100).

This is a puzzling warrant for sports realism. The distinction between legal and moral wrong is not controversial and hardly requires legal realism to justify it. For example, foundational to law in both an Anglo-American and Continental model is the basic distinction between criminal and civil law. Criminal law usually involves intentional injuries committed against third parties, either financial or physical, with prosecutors required to demonstrated *mens rea*, or a guilty conscience, where defendants are demonstrated to have acted willfully in the commission of their crimes. It would be difficult to think of an instance where a claimed criminal action was not also a specific moral wrong, assuming a liberal democratic legal order, though some possible divergences might be more readily found in authoritarian legal systems, or even under more religiously influenced criminal codes in the West. Homosexuality, for example, is generally not seen as morally objectionable in the West in 2024, but it was penalized in the criminal code in much of the United States as recently as the 1980s.[18] However, it would hardly have been a novel argument, even prior to 1986, to suggest that homosexuality was not in fact immoral, even while acknowledging its place in the criminal code and even if only as a novel exception to the general rule.

The distinction is more evident in civil law, though, where it is commonplace for litigants to be found liable for injuries to plaintiffs under standards of strict liability. Such liability, though, does not presume immorality on the part of the defendant. One is not necessarily seen as a "branded criminal" for having lost such a case. Many injuries are acknowledged to have been accidental by the plaintiff. In civil law, the question investigated by courts is

[18] The criminalization of homosexuality was affirmed as constitutional in *Bowers v. Hardwick*, 478 U.S. 186 (1986), a decision that was only definitively rejected by the U.S. Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003).

not moral fault, but a more basic question of who pays, who ought to be financially responsible. As a restaurateur, for example, I might take every reasonable precaution to keep my food as sanitary as possible, but there will always be some nontrivial, nonzero number of cases in which salmonella appears in a given egg dish. Civil law would find me liable, but not necessarily as having committed any obvious or distinct moral wrong.

It is not my place here to take up the question of how "cheating" ought to be understood, as a conceptual matter, by philosophers of sport. If Harper finds it advantageous to redefine cheating as a kind of wrong distinct from those of a moral nature, I offer no argument against that stance here. I observe only that if law and philosophy of law are being mined for useful examples for sport, the distinction between legally wrongful and morally wrongful hardly requires adaptation of either species of realism.

5. Conclusion

Despite the generally negative, critical stance I have taken here on Harper's book, I do not want the reader to get the wrong impression. The book is well-written, well-argued, and offers an edifying experience for those interested in philosophy of law and philosophy of sport. *Sports Realism* certainly serves the function of a book to invite the reader into questions of great importance and to help him or her to understand the broader landscape of theoretical questions that may not have been all that obvious at first. It is often more clarifying to see how a given analogy fails than where it succeeds, since in the failure of the analogy, one comes to understand the outer boundaries of the two things being investigated. Despite all the deficiencies I found with Harper's argument, I rather enjoyed reading this book. I hope that other readers find it as thought-provoking as I have.