

Adjudication As Sport: Rhetoric Astray?

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ADJUDICATION AS SPORT: RHETORIC ASTRAY?©

BY FRANK I. MICHELMAN*

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I. INTRODUCTION

Adjudication is a rhetorical activity, Allan Hutchinson tells us in his new book, and no less sincere or serious for that.¹ The same holds for the book, of course, as in general for social practices and performances having persuasive and justificatory ends in view.²

"*What do/can/should judges do?*"³ The book seeks to persuade us toward some ludic answers to those leading questions. I applaud and admire the substance and spirit of its arguments, rooted as they are in rejection of both what Professor Hutchinson names "foundationalism" and what he names "nihilism" in legal theory.⁴ I wonder, though, about some of the rhetorical dress. To highlight the elements of *play* in adjudication at its best⁵ seems to me just right, but Hutchinson's

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¹ See A.C. Hutchinson, *It's All in the Game: A Nonfoundationalist Account of Law and Adjudication* (Durham, N.C.: Duke University Press, 2000) at ix-x, 12, 152-53.

² I take Hutchinson to mean "rhetoric" in Perelman's sense of "the whole range of discourse that aims at persuasion and conviction." C. Perelman, *The Realm of Rhetoric*, trans. William Kluback (Notre Dame, Ind.: University of Notre Dame Press, 1982) at 5.

³ Hutchinson, *supra* note 1 at ix.

⁴ See *ibid.* at 23-27. Compare F.I. Michelman, "Bringing the Law to Life: A Plea for Disenchantment" (1989) 74 *Corn. L. Rev.* 256.

⁵ See, for example, Hutchinson, *supra* note 1 at 21, 41, 165, 173.

constant tacking in and out of images of Soccer and Cricket seems to me a losing proposition, rhetorically speaking. When the dust has settled, I see nothing gained but only something getting lost in the shuffle.

What I am afraid may be getting lost is a clear sense of what it is that makes sporting games *games*, in morally significant contradistinction to some other normatively constituted, competitive social practices. Hutchinson anticipates resistance to the trope of adjudication as game, by readers who will think it belittles the element of commitment that makes adjudication a morally serious matter.⁶ Mine is a converse worry. I think troping adjudication as a game risks obscuring the element of commitment in *games* that makes *them* morally serious matters in their own way.

II. PROPER GAMES

A. *Proper Games and Agreement*

There are games and then there are games. Asked to show the children a game, I might show them “House.” Hutchinson doesn’t mean that kind of game. He means the kind of game represented by Soccer or Craps—a normatively constituted, competitive social activity. I use the phrase “normatively constituted” rather than “rule-governed,” so as not to imply either (a) that the norms that constitute the activity as Craps or Soccer must be mechanically applicable “rules,” as opposed to “standards” whose each and every application requires a fresh exercise of judgement or skilled discretion; or (b) that the constitutive norms cannot be structured into primary and secondary levels, where the primary norms are alterable by methods, and on terms, that the secondary ones authorize.⁷

Now, outdoor life in capitalism may itself be regarded as a normatively constituted, competitive activity, but that doesn’t mean that all of capitalist economic and political encounter is a game. Or so I want to maintain, my point being that differences, of arguably morally crucial import, are regrettably suppressed by talking that way. People speaking of “games” usually have in mind something less than the set of all normatively constituted, competitive social activities. They mean a

⁶ See *ibid.* at 38, 41.

⁷ See *ibid.* at 12: differentiating between “the rules that comprise the body of the [game’s] substantive norms” and “those often implicit ... rules that stipulate how the game of ‘playing with the rules’ is to be played.”

subset consisting of certain confined activities—activities “within the lines”—in which players engage voluntarily, in pursuit of a victory internal to the gaming engagement, for the sake of internal rewards, meaning a type of reward that would lack value, or lack meaning, or lack existence, outside the confined and optional world of the game: a trophy, or prize-money, or the cash in a Poker “pot”—always, of course, along with the satisfactions of skillful, resourceful exertion. *Proper* games, as I shall call this subset, are what Hutchinson calls “finite” games.⁸

Proper games seem to me to be the normal case of the category of games evoked by Hutchinson’s text—as I expect they will seem to most readers, Soccer and Cricket being his central examples. No doubt there are variations around the normal case. If you forced me at gunpoint into a hand of Poker (I’ve won the ranch and made for quitting for the night), we could still say, without breaking the language, that the game of Poker was being played there. Closer to the point, professionals play their sports for a living, in quest of external rewards of public fame and fortune. But the availability to them of those external rewards depends on a public perception of them, while on the field, as wholeheartedly engaged in the internal pursuits of victory and prize. (Staged simulacra of Soccer games by script-bound actor-athletes wouldn’t draw big crowds or purses for very long, assuming people knew that was what they were.) So the fact remains that what normally distinguishes the class of games from other normatively constituted, competitive activities, such as interest-group politics and the pursuit of economic survival and well-being in a capitalist society, is their optionality and the correspondingly specialized, and limited, character of the rewards they create and make possible.

B. *Justice and the Impossibility of “Infinite” Proper Games*

An activity, I want to say, is not a proper game unless it is consensually engaged in, by all who stand to be affected by the game’s distributions of whatever (internal) rewards the play of that game is

⁸ See *ibid.* at 33-34: following James Carse’s definitions of finite games as those that “involve temporal, spatial, and numerical boundaries and in which the aim of the players is to bring the game to what amounts to a successful rule-defined conclusion,” and of *infinite* games as those in which “the very rules and boundaries themselves are always in play” and “the aim is not to bring the game to an end but to keep everyone in play.”

primarily meant to control.⁹ By that criterion, the normatively regulated, competitive activities we call “Capitalism,” “Democracy,” and “Adjudication” are excluded, because (insofar as we do regard them as competitive activities) they are meant to control general social distributions of wealth and power by which everyone is affected, like it or not.

The exclusion is not pedantry. It is prompted by a reflection on the topic of justice. I believe I merely follow Hutchinson when I suggest that there is a crucial split in our thought about justice, between ideas of justice in proper games and ideas of justice in non-consensual, normatively constituted competitive activities such as adjudication.¹⁰ In jargon—mine, not his—justice in proper games is always incontestably “pure procedural justice” and justice elsewhere arguably never is.

According to a definition offered by John Rawls,

pure procedural justice obtains when there is no independent criterion for the right result; instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, *provided the procedure has been properly followed* If a number of persons engage in a series of fair bets, the distribution of cash after the last bet is fair, or at least not unfair, whatever this distribution is.¹¹

Another term for pure procedural justice is playing by the rules. Now, if you ask how playing by the rules comes to be the sole measure of correctness—or call it of justice—in the determinations of the distributions of the internal rewards of proper games, the obvious, inescapable answer is that the players have *chosen* to play *that* game, the one constituted by those very rules, presumably because they *wish* to submit their skill, mettle, and luck to the particular sort of test that is constituted by the rules and internal rewards of the game they join. And the converse seems equally, inescapably true. A distribution of the internal rewards of a proper game by any device other than sincere application of the rules is patently unjust.

⁹ You could say that fans are among those who stand to be affected by internal-rewards distributions, but then, I think, you would be bound to say too that fans are consensual participants. “Primarily meant” allows for unavoidable spill-overs. The events they mount in the National Basketball Association are games, despite the external distributive effects flowing from the market power of the players. See R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at 160-62.

¹⁰ I have in mind Hutchinson’s insistence—which makes him part company from David Fraser, see Hutchinson, *supra* note 1 at 33—that Adjudication, unlike Soccer and Cricket, is an “infinite” game. See *infra* notes 17-21 and accompanying text, *supra* note 8.

¹¹ J. Rawls, *A Theory of Justice*, rev. ed. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999) at 75 [emphasis added].

Now I want to mention two things that do not follow from what I have just been saying, and one thing that does. The first thing that does not follow is that any game is as good as any other, provided only that play is faithfully regulated by the rules. Some games surely may be better than others—more absorbing or satisfying to play or witness, esthetically or educationally superior, healthier or better adapted to the development of worthy physical and mental muscles—and it is, of course, the rules that make the difference. But that difference is not a matter of *justice*; it falls, as John Rawls might say, under “the good” and not “the right.”¹² Which leads to the second thing that does not follow from the ineluctable link between rule-following and justice in proper games, namely, that the rules must be unalterable during a given round of play. Allan Hutchinson believes—it seems to me with good reason—that the best athletic games may well be ones in which the primary rules are indeed alterable (or, let us say, developable through interpretation), by officials deciding on the fly when and when not to blow the whistle. Americans might offer, as an example, the secular peregrinations of the strike zone, as a kind of a longitudinal vector sum of the idiosyncratic interpretive leanings of sundry men in blue, or the similar variations in what counts as pass interference in what we are pleased to call Football.

And that leads in turn to the one thing that I want to insist *does* follow from that ineluctable link between rule-following and justice in proper games, which is that a proper game cannot be what Hutchinson calls an “infinite” game. A proper game, I’ve just observed, can have secondary norms that authorize on-the-fly strong interpretation of primary rules, leading to their secular alteration. If you like, it can have tertiary norms that authorize the alteration of the secondary ones; and so on, but *not ad infinitum*, or “all the way down.” The structure has to be anchored, finally, in a normative conception of, let us say, “Baseball” sufficiently distinct and public to be a situs of agreement on the part of every player to play Baseball. By an “infinite game,” Hutchinson means a game of which this is not so,¹³ and that is exactly what a proper game can never be.

I have already cited the reasons. (As I’ve mentioned, I don’t think I am doing more here than fleshing out some remarks of Hutchinson’s own.) A proper game is a competitive activity, controlling the distribution of its internal rewards. To construct a good one, you

¹² *Ibid.* at 22: “The problem of distribution falls under the concept of the right as one intuitively understands it.”

¹³ See Hutchinson, *supra* note 1.

need rules fashioned with an eye to virtues of the kind I've cited above—absorbing or aesthetically pleasing to players and witnesses, conducive to beneficial physical and intellectual development, and so on. Rules having virtues of that kind almost certainly will lack intrinsic characteristics of symmetry or raw equity sufficiently robust and salient to warrant—by themselves, so to speak, and quite aside from consent—the justice of allowing them to control the distributions of the game's internal rewards. (Coin-flipping is not a very good game.) What warrants that justice, then, and all that warrants it, is the agreement of the players to play the game, and that means *a game, some game, some distinctively cognizable game* and not just “game” in general. No one agrees to become a contestant in generic “game,” or could have any reason for doing so.

Thus, the possibility of justice in proper games depends, absolutely, on there being for each game a “way that [the game is] meant to be played”¹⁴ or a “spirit of the law” of that game.¹⁵ There must be, in other words, for each proper game, a distinct and graspable normative concept under a proper name: Baseball, Soccer, Craps, Chess, whatever.¹⁶ The concept may be lodged on the secondary or tertiary or ---iary level of the normative structure, as long as the level on which it's lodged is foundational, not subordinate to any further level.

III. ADJUDICATION AS AN INFINITE GAME

What is of the greatest interest, and what Hutchinson's treatment helps us see, is that the conditions that make “infinite game” an impossible concept for proper games do not hold for adjudication. When the competitive activity can't exist without the competitors' agreement to compete, because nothing¹⁷ is controlled by the play but a distribution of rewards internal to that activity, then there is no resisting the identification of justice with playing by the rules—from which, as we've seen, it easily follows that the competitive activity cannot be

¹⁴ *Ibid.* at 6.

¹⁵ *Ibid.* at 29.

¹⁶ Here is an example of what I mean by a distinct and graspable concept: If the strike zone rises, or sinks, or shifts to the inside or the outside, to a point at which a pitcher of currently ordinary talent can dependably throw balls that are unhittable in fair territory by batters of currently superior talent, we won't be playing Baseball any more. I don't know that from any rule book, but I do know it as a (mainly passive) participant in Baseball.

¹⁷ For innocuous qualification, see Nozick *supra* note 9, and accompanying text.

conceived as an infinite game. But what about competitive activities that can and do exist *without* the competitors' agreement, it simply being the case, as the world turns, that these activities *do* control distributions of general, external rewards such as wealth and power? Adjudication, for example.

For such activities, playing by the rules cannot possibly be all there is to justice. By definition, such activities arise within some general regime of coercive social ordering, and the question necessarily remains of the justice of the coercive regime. (Where would be the justice in forcing me to submit a civil dispute between me and Allan Hutchinson to decision by a series of penalty kicks, he and I switching off between the roles of kicker and goal-keeper, to be kept up until one of us is two points ahead?) Absent the consent of all affected parties, the criterion of justice simply must be one that, as Rawls says, is "defined separately from and prior to the procedure which is to be followed." From which it follows that any justice in the procedure must be of the type that Rawls calls "perfect" or "imperfect" procedural justice, meaning our sincere belief that the procedure is guaranteed ("perfect") or is as likely as any procedure we can devise ("imperfect") to issue in the just result *as independently defined*.¹⁸

For bizarre example, our procedure-independent, substantive conception of justice might be one that tells us that Allan is always more deserving than Frank, regardless of what is at stake between them. But what if both the two parties before us claim to be Allan and no one present knows what Allan or Frank looks like. Given what is publicly known about our respective biographies, it might occur to someone that a round of the Soccer-tie-break game is pretty much guaranteed to pick out Allan as the victor. That would be close-to-perfect procedural justice.

But let us be serious. Our substantive conception of justice more likely tells us that an adjudicative outcome is just if it, or the practice in which it arises, measures up to some standard of equal respect or concern for every person, or reflects or conforms to Kantian laws of freedom, or maximizes social utility. There is nothing in any of those notions, nor could there be anything in any more eclectic or "pragmatic" notion of the justice we seek through adjudication, to preclude the possibility that we could approach it best by cuing judges to act as if they were players in an infinite game played with the counters of enacted

¹⁸ See Rawls, *supra* note 11 at 74.

laws, precedents, argument-bytes, and so on.¹⁹ In other words—because I think this is what the notion of Adjudication-as-infinite-game comes down to²⁰—there’s nothing to preclude the possibility that we might best approach our *procedure-independent, substantive* notion of justice by cuing our judges to approach their work playfully, creatively, as poets ever-prepared to giving strong readings to the works of fellow poets.²¹ So there is nothing to preclude the possible conclusion that we ought, therefore, to do just that.

The core of Hutchinson’s book is its extended argument that the possibilities I’ve just mentioned are nothing less than the truth of the matter.²² To that effort, I am entirely sympathetic, and in it I find the book’s great value and contribution to our thought about legal justice. But it boots that project nothing, as far as I can see, to call Adjudication a “special game of its own kind,” to wit, an infinite game.²³ That is tantamount to saying it is not a game at all, according to the sense that will be deeply engrained in the mind of almost every reader. The consequence, rhetorically speaking, is not a gain in force for Hutchinson’s contention that judges, in the interest of a justice beyond procedure, ought to be cued to approach adjudication in a spirit of play. It is only suppression of a relevant, perhaps important moral question, about the variant meanings of justice in voluntary and non-voluntary, normatively constituted, competitive social activities.

¹⁹ Here, it is important to understand that, for Hutchinson, “the important comparison is not between umpires and judges but between players and judges.” Hutchinson, *supra* note 1 at 28. Hutchinson does not want us to be thinking of games of Politics and Markets in which we are the players, the law is the rules, and judges are the officials. He wants us thinking of judges playing their own game, see *ibid.* at 5, 19, doubling as officials presiding over the play as the players in a pick-up game of Soccer have to do, see, for example, *ibid.* at 52, and working as they do so on the game’s constitutive norms and even its constitutive concept (see *supra* note 16 and accompanying text), “all the way down” as the saying goes, see, for example, *ibid.* at 21.

²⁰ As, apparently, does Hutchinson. See *ibid.* at 41: apparently equating “the practice of ‘politics as play’” with “the view of law and life as an infinite game.”

²¹ See R. Rorty, *Contingency, irony, and solidarity* (Cambridge, Mass.: Cambridge University Press, 1989) at 53: “In my view, an ideal liberal polity would be one whose culture hero is Bloom’s ‘strong poet’ rather than the warrior, the priest, the sage, or the truth-seeking ‘logical,’ ‘objective’ scientist.”

²² See, for example, *ibid.* at 41.

²³ See, for example, Hutchinson, *supra* note 1 at 21: calling adjudication “a special game of its own kind in that ... it is ... as much about deciding what game is to be played as it is about playing that game”) and at 33 (urging against a “disabling” view of law and life as tantamount to “cricket (or any other game).”