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What Can Law Teach Sport and Sport Teach Law(yers)? A Symposium on the Jurisprudence of Sport

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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)

* On October 27, 2017, New York Law School hosted a daylong symposium dedicated to philosophy of sport. This transcript, conceived, provoked, and constructed by Professor Robert Blecker, reflects and augments that day's dialogue, which featured video clips of controversial moments in sport to ignite debate and discussion.

A SYMPOSIUM ON THE JURISPRUDENCE OF SPORT

I. INTRODUCING THE STARTING FOUR

Robert Blecker: As I originally envisioned this public dialogue, six philosophers of sport would be here, including Robert Simon. Author of *Fair Play*,¹ now in its fourth edition, Simon emphasized the purpose of competition as a mutual quest for excellence. Bob Simon couldn't join us, battling as he is in that fiercest competition with nature, which we all eventually lose. So here's our starting four.²

A. Scott Kretchmar

RB: Philosophy of sport begins in the early seventies, as a community, and a culture. Among the few founding giants, only two or three still actively contribute, pushing our understanding forward. One of them here today, Scott Kretchmar, has probably written more about sport and culture than anybody else. Among his countless contributions, Scott introduced us to a vocabulary—the difference between a test and a contest³—so widely and deeply embraced, that it's almost become trite. Scott has explored how a test becomes a contest only when competitors cooperatively test themselves and each other. I give you Scott Kretchmar, a founding giant in the philosophy of sport.

SK: As Robert mentioned, one of my early papers was on test and contest. It seemed to me that the test was primary. Some of you in this room are basketball players; others are runners, bikers, play football or swim. That's the test we fall in love with. We have different game tests that we find captivating, either as participants or as spectators. So it struck me that the test comes first: Contests presuppose that there are tests. We fall in love with specific tests, not generic or decontextualized forms of contests. For example, I'm a golfer who occasionally competes. I'm not a competitor who occasionally golfs.

We need to get the horse before the cart. When we're studying ethics of sport, it seems to me the first question is about how we preserve the integrity of the test. How do we preserve the integrity of the game? What is it to play baseball with integrity? What is it to golf with integrity? The question assumes that the test is already in place. And the derivative question then becomes how do we *share* a test? To what extent must we honor game rules, for instance, in order to share a test?

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1. ROBERT L. SIMON, CESAR R. TORRES & PETER F. HAGER, *FAIR PLAY: THE ETHICS OF SPORT* (Westview Press 4th ed. 2015).
 2. The main panelists included Scott Kretchmar, John Russell, Paul Gaffney, and Angela Schneider. Mitch Berman and Chuck Vasser joined in much of the discussion. Omitted from this transcript is an extended discussion with Marc Lasry, co-owner of the Milwaukee Bucks, which took place over lunch during this daylong symposium. See Marc Lasry, *An Owner's Game*, 63 N.Y.L. SCH. L. REV. 285 (2018–2019); see also *Getting an Edge: What Can Law Teach Sport and Sport Teach Law(yers)?*, N.Y.L. SCH. L. REV., <https://www.nylawreview.com/gettinganedge> (last visited Feb. 17, 2019).
 3. See R. Scott Kretchmar, *From Test to Contest: An Analysis of Two Kinds of Counterpoint in Sport*, 2 J. PHIL. SPORT 23 (1975); see also R. Scott Kretchmar, *The Nature and Value of Sporting Tests and Contests*, 63 N.Y.L. SCH. L. REV. 219 (2018–2019).

RB: You insist the test is primary. And obviously, for you it is. But surely some serious competitors view the contest as primary. They don't much care which test forms the basis of their contest, as long as they beat the other contestant.

SK: Actually, competition is only one of two ways to share a test. We can share it by competing with each other—to see who can get the lower golf score—or we could share golf by collaborating. You take a shot, I'll take a shot, and let's see if we can score a certain low score. So we've got two levels of ethical issues here: integrity of the test, and a level playing field for the contest.

RB: You seem to imply that all contests are really shared tests. But are they really?

Clip: Katie Ledecky swimming in the 2016 Olympics, dominating the rest of the field, way out front, all by herself. In the background, two commentators call the race, obviously excited.

Commentator 1: "Well, the race is between she [sic] and the clock. The rest of them are racing for second and third. Her against the clock."

Commentator 2: "Katie Ledecky is racing against herself."

Commentator 1: "The rest turn; they can't see the feet of Katie Ledecky. She's so far away from them. Ledecky gold medal. Ledecky world record! Katie Ledecky of the USA reigns supreme, yet again!"⁴

Katie Ledecky's swim moves me to ask: Can't the dominant athlete compete alone? Whom *is* Katie Ledecky really racing against? She's not worried about the silver, and the rest of them are not going for the gold. In effect, she's in a pool by herself. Has the contest now devolved back into a solo test? By advancing the test, has she diminished the contest?

B. Paul Gaffney

PG: I have always been fascinated by this classic distinction between tests and contests. It is fundamental to our conception of competitive sport, but it is more complicated than I first thought. There is a conceptual priority to the test, and usually—at least in some sense—a chronological priority, as well. The Ledecky example is in some ways a perfect illustration because she learned how to master the test long before she put herself into a contest with others. There is no interaction in her sport other than, possibly, the swimmers seeing each other out of the corner of their eyes (although I doubt they do this much).

But in another sense, the Ledecky example is misleading precisely because of this clean separation between test and contest. In most sports there is a dynamic relationship between the two; the test often evolves as a result of efforts in the contest. For instance, hitting a baseball: In some sense there is no separate test of

4. Larry Buchanan et al., *Katie Ledecky and the Eternity of 11 Seconds*, N.Y. TIMES (Aug. 12, 2016), <https://www.nytimes.com/interactive/2016/08/12/sports/olympics/katie-ledecky-winning-swims.html>; see also Robert Blecker, *Katie Ledecky Is in a Class by Herself*, OBSERVER (Aug. 12, 2016), <https://observer.com/2016/08/katie-ledecky-is-in-a-class-by-herself>.

hitting a baseball (other than, perhaps, at the level of ‘T-ball’) because the ball is always pitched, and it therefore comes in at varying speeds, locations, and curves.

Similarly, anybody who has shot baskets knows that there is a much different test involved when one shoots against an aggressive defender than when one shoots on the move, or when one is fatigued. I would even say that there is a different test involved in shooting foul shots when one is under serious game pressure. No basketball player shoots a set shot because of the increased athleticism of defenders.

Even in a sport with no obvious interaction between its competitors, such as the high jump in track and field, competitive drive and athletic innovation cause the test to evolve. As far as I know today, nearly everyone attempts to clear the bar using the Fosbury Flop.⁵

So at some general level we can talk about the test as an independent thing that remains the same for all—hitting a baseball, clearing a high bar—but the test changes due to increased athleticism, better tactics, improved technology, and other competitive implications. Think of the power game of tennis today, which has greatly diminished the importance of volleying.

RB: Paul Gaffney has taught me much about the nature of teams and teamwork. In leading essays, Paul has engaged Scott in questions of tests and contests.⁶ He has pushed back against those who say that sport is just an extension of war minus the shooting, and has nothing unique about it other than that people aren’t getting killed.⁷ Currently the editor of the *Journal of the Philosophy of Sport*, Paul Gaffney is the keeper of the flame.

Paul distinguishes sports like baseball and basketball, where the test grows from the contest and contain a *game* within the sport, from a different kind of “athletic contest,” one which involves players physically striving to display superiority in their physical performance of mastered motions, carefully practiced, sometimes entirely rehearsed—archery, rowing, shotput, high jump. Katie Ledecky, swimming.

In these, there’s no game within the sport. It seems more a contest of performances, or “tests.” By contrast, with basketball, baseball, or football, the interactive choice of moves—the game within the sport—not only makes the contest inseparable from the test; as Paul suggests, it may make the test a derivative of the contest. Without the game within the sport, the pure physical performance without physical opposition to

5. Named after Dick “Fearless” Fosbury, the Fosbury Flop is the high-jump technique of clearing the bar head first, stomach facing up. Joseph Durso, *Fearless Flosbury Flops to Glory*, N.Y. TIMES (Oct. 2, 1968), http://archive.nytimes.com/www.nytimes.com/packages/html/sports/year_in_sports/10.20.html?scp=7&sq=1968&st=cse.

6. See generally Scott Kretchmar, *A Response to Gaffney: Teammates and the Games They Play*, 42 J. PHIL. SPORT 35 (2014).

7. George Orwell, *The Sporting Spirit*, in 4 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 40, 42 (Sonia Orwell & Ian Angus eds., 1968). Robert Blecker invokes this concept in his timely essay, *Did the PyeongChang Games Prove the Olympics Can Still Broker Peace?*, OBSERVER (Feb. 26, 2018), <https://observer.com/2018/02/will-history-show-the-pyeongchang-olympics-helped-broker-peace>.

the execution of the move makes the test primary, and, with the dominant athlete, eliminates any contest and instead isolates the test.

While physical contests such as rowing and the javelin throw may not require the athlete to react to an opponent's moves, the athlete's own performance may require constant adjustments and compensations to earlier moves—or growing fatigue or injury. So it seems to me that even a pure test may be reactive, albeit internally to the athlete.

Clip: Former Kansas City Royal George Brett's home run disallowed because of excess pine tar on his bat during a game at Yankee Stadium on June 24, 1983. Brett, furious, charges the umpire.⁸

PG: The American League [AL] President's office overruled that call [disallowing the home run], of course. And I was very, very happy at the time because I'm a Red Sox fan, and far from impartial. When I look back now, I'm less convinced that the overrule was correct. Two different perspectives clash. The rule is very clear, not vague or indeterminate: Eighteen inches of pine tar is an illegal bat.⁹ It's not, in H.L.A. Hart's language, a 'penumbra' case.¹⁰ There's nothing to interpret here. It's a dumb rule, but it's a rule. And for the President after the fact to overrule the call is wrong. I don't think you can make these decisions from the office the weekend after the game.

RB: Aristotle said that sometimes the strictest justice is the greatest injustice.¹¹ He saw the necessity on occasion to move beyond rule-bound justice and called it equity. The President is the chief executive of the League. What about 'executive prerogative'—as Locke defined it, the right if not the obligation to go outside the rules, even violate them on occasion for the good of the whole, later to be confirmed by the whole?¹² Isn't the sport analog the necessity on rare occasions to go outside the rules for the sake of the contest or the test? Enforcing that dumb rule, as you call it, completely nullified the test. Brett's pine tar in no way affected his demonstrated skill at hitting a home run. In nullifying that test, the ruling also undermined the contest.

PG: I think the concept of executive prerogative is very dangerous in this example. And the clue to this danger is Robert's suggestion that there might be occasions to go outside the rules. Strictly speaking, it is not necessary to go outside the rules, but it is necessary to go deeper into them. One is not abandoning the rules for a better idea when one is forced to interpret the rules; one is actually engaged in an effort to

8. See Eric Chesterton, *The 'Pine Tar Incident' Remains One of the Craziest Stories Baseball Has Ever Told*, MLB (July 24, 2018), <https://www.mlb.com/cut4/what-is-the-pine-tar-game/c-286938216>.

9. See *id.*

10. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–08 (1958).

11. ARISTOTLE, *NICOMACHEAN ETHICS* bk V (W.D. Ross trans., Batoche Books 1999) (c. 384 B.C.E.).

12. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 203–07 (Thomas I. Cook ed., Hafner Publ'g Co. 6th prtg. 1965) (1690).

discern the deeper meaning of the rules. This is not legal growth through extra-legal addition; it is legal growth by progressive articulation. Through hard cases, we become clearer about what the game or the Constitution means or promises. And has *always* meant or promised.

Circumstances have now forced us to clarify. Legal positivists and originalists and even some textualists (like the late Justice Antonin Scalia) sometimes miss this distinction. As philosopher of law Ronald Dworkin once put it, the debate is not about the value of fidelity to the law; the debate is about what precisely constitutes fidelity to the law.¹³

C. *John Russell*

RB: One of the classics in the philosophy of sport debunks that. Its title suggests its answer: *Are Rules All an Umpire Has to Work With?*¹⁴ John Russell has explored in the greatest depth the limits of rules and the parallel of law and sport. He has brilliantly argued that umpires and referees can and must respect the game by going outside the rules on appropriate occasions.

JR: Robert, I think you are right that this Pine Tar Incident, as it is now called, is a puzzling case. But it needs to be remembered that no one had ever explicitly proposed applying the rules in this way. The rule called for the bat to be removed from the game, not that the batter should be out. It was a creative stitching together of rules to gain an advantage that the rule authors never clearly intended. This was borne out by the discussion that ensued. Major League umpires themselves divided over what should have been done. And no one could discover why a rule was ever adopted limiting pine tar to the bottom eighteen inches of the bat. Perhaps originally the rule was to prevent balls from getting marked up and dirty in the days when balls were not replaced frequently. If so, the rule was an anachronism. American League President Lee MacPhail decided on appeal that the umpire's ruling, while defensible by piecing together statements in the rules, violated the spirit of the game of baseball. The notion of the spirit of games or sports is vague, of course. But this case and others like it afford an opportunity to think about what this might mean and whether it can be given clearer expression that might help umpires and other officials who find themselves in similar positions.

In my paper on umpiring and rules, I argued that cases like this one demonstrate Dworkin's idea that normative principles in addition to the rules can be parts of legal systems. Specifically in sport, rules should be interpreted to support and foster the physical excellences that a sport is designed to test. All agreed that there was no

13. RONALD DWORKIN, *LAW'S EMPIRE* 5–6 (1986) (“But the issue of fidelity is almost never a live one in Anglo-American courts; our judges rarely consider whether they should follow the law once they have settled what it really is, and the public debate is actually an example, though a heavily disguised one, of theoretical disagreement about law.”).

14. J.S. Russell, *Are Rules All an Umpire Has to Work With?*, 26 J. PHIL. SPORT 27 (1999) [hereinafter Russell, *Rules*]; see also J.S. Russell, *Remarks on the Progress of a Jurisprudence of Sport*, 63 N.Y.L. SCH. L. REV. 175 (2018–2019) [hereinafter Russell, *Remarks*].

advantage conferred by the extra pine tar, and so the umpires' decision to disallow the home run took away a justly earned advantage. Even the crew chief Joe Brinkman agreed that the decision did not seem right.¹⁵ If you look at decisions of umpires and League officials over baseball's history, and other sports where similar puzzles are raised, they seem, without exception as far as I can tell, to try to make sensible decisions that uphold the integrity of the tests being set for a sport.

The Pine Tar Incident offers an instructive example, among others, of the Dworkinian idea that normative principles can form part of the law in addition to the rules of legal systems and inform decisions in what might be called 'hard cases' in sport.¹⁶ And that sometimes those principles and the rules conflict strongly enough that umpires and League officials justifiably exercise discretion in line with the basic principles of a sport.

PG: There's another side to the Yankees' challenge to Brett's bat. It's a cheap trick on the Yankees' part, isn't it, to invoke that rule *after* the home run? They have this trump card they were waiting to use and that was a great time to use it. But it's not in the spirit of the game. And perhaps the President's office was overruling not so much the enforcement of the eighteen-inches rule, but the way the Yankees used it.

RB: Can't a team overlook rule violations until it's useful to point them out? Isn't the essence of gamesmanship playing with the rules while strictly playing by the rules or within the rules?

PG: An implicit principle underlies every sport: We intend to test the physical skills and tactical efforts of the players. And anything that conflicts with that basic principle is inconsistent with the game.

RB: What if the tactical effort conflicts with the test? Good tactics on the part of the Yankees, holding off challenging the bat.

PG: It's not sportsperson-like. It's not in the spirit of respect for the game. If you have a problem with the bat, call it out before Brett goes up to bat. But to wait until he's done some damage isn't in good faith. So I'm less convinced that the right call was made.

We do know there's a difference between the strict interpretation of the rules and this idea of what is in the spirit of the game—what enhances the competition. So when the AL President took away the Yankees' victory I was very happy, but I'm reminded of what Justice Robert Jackson said: "We are not final because we're infallible, but we are infallible only because we are final."¹⁷ There has to be some finality on the field. And I don't want the President's office to be tinkering with that two days later. So I'm not sure what I think about it now.

15. See *Pine Tar Game: An Oral History of the Most Controversial Home Run Ever Hit*, SPORTS ILLUSTRATED (July 22, 2016), <https://www.si.com/mlb/2016/07/22/pine-tar-game-brett-gossage-royals-yankees>.

16. See Russell, *Rules*, *supra* note 14, at 30–31; see also Russell, *Remarks*, *supra* note 14, at 181–82.

17. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

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RB: He hit a home run; his pine tar was more than eighteen inches from the bottom of the bat. It did not affect his ability to swing or hit in a way that gave him any advantage. The only question was whether you take the rules and strictly enforce them. Remember Chief Justice John Roberts in his confirmation hearings when asked what he perceived the role of a judge to be, replied that a judge is just like an umpire. You call balls and strikes. You know where the strike zone is. It's either in it or it's out of it. That's all you have to work with.¹⁸

PG: I defer to John Russell because he is the expert, but I would suggest that we should better understand the idea of going outside the rules as instances where we invoke the moral weight of more fundamental rules and principles of the enterprise, some of which might only be implicit. For example, an implicit principle underlying every sport is that we intend to test the physical skills and tactical efforts of the players, and anything that conflicts with that basic principle is inconsistent with the game.

JR: Baseball has a long and wonderful tradition of distinguishing, as it should, between adjudication with respect to calls and rules. The parallel in law is adjudication with respect to matters of fact and matters of [legal] rules. And baseball has a wonderful process whereby you can appeal a mistake in *application* of a rule. In baseball, if an umpire makes a mistake in the interpretation or application of a rule, you replay the game from that point. And that's what happened in Brett's case. I think it was a justified instance, for the reasons I gave a moment ago.

But Paul is right that we have to be careful with notions like going outside the rules. In the Pine Tar case, it is arguable that the umpires, not MacPhail, went outside the rules by stitching them together in ways that were not part of the game. That was in effect MacPhail's decision, and I think it was the right one. We have to be careful, too, to observe a difference between rules and principles. As Dworkin argues they are of a different logical character.¹⁹ Principles have weight, rules apply in an on-and-off fashion. What this means is that you have to make a judgment about whether a principle in any case raises a powerful enough consideration, typically along with other principles like *stare decisis* and respect for legislative authority, to decide on a specific reading of the rules. In this sense, the explicit rules on the books can conflict with the implicit principles and what a sport demands.

MacPhail's decision added clarity to the rules. I use baseball cases like this one to illuminate these sorts of ideas for my students about philosophy of law and legal institutions. There's a potential for a fruitful dialogue between what happens in adjudication in sport and adjudication in broader political communities.

18. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005), <https://www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf>.

19. See Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25 (1967).

RB: But doesn't your analogy fail, John, when for example, the trial judge finds *as a matter of law* or the appellate court finds *as a matter of law* that the finder of fact—whether the jury or the trial court—was wrong? The appellate court can reverse a conviction as a matter of law where no reasonable fact finder *could* find what this fact finder *did* find. But of course John's main thrust is correct: There is potential for really fruitful dialogue.

JR: Paul's point is well taken; we don't want a lot of post-game second-guessing of on-field decisions. Major League Baseball has an elegant solution. Straight judgment calls cannot be protested, or appealed. But an umpire's misunderstanding of a rule's application can be the basis for a formal protest of the game. That initial on-the-field ruling can be reviewed afterwards. This happened in the Pine Tar Incident. It was a rare case, but also instructive for everyone. We learn about the game and how it is meant to be played. The AL President used the appeal as an opportunity to clarify uncertainties and problems with the rules. Baseball, however, may be an exception due to the number and complexity of its rules. Baseball also seems exceptional in the opportunity to replay games from the point when an error in law, so to speak, occurred.

I wonder if there should not be similar opportunities in other sports. Baseball's permitting appeals forces umpires and League officials to think very carefully about the application of rules and, sometimes, to make decisions about what is best for a sport. That is highly laudable, in my view.

D. Angela Schneider

RB: Angela Schneider as an undergraduate ranked third in Canada in the heptathlon—a common measure for the greatest athlete. But Angela doesn't like thirds. So she switched sports and won the silver medal in the 1984 Olympics for rowing. But Angela doesn't like seconds either. At the time, the press reported that she looked like she was prepared to throw her silver medal into the river. That may well have been true. Angela stepped away from the boat and did not step back inside for more than twenty-five years. Returning to her beloved sport as Master, Angela has won gold medals in three World Championships.

But she's much more than a world champion athlete; she is a leading philosopher of sport in ethical and gender issues. Her classic essay explores fair play as respect for the game.²⁰ She served as vice chair of the World Anti-Doping Agency's [WADA] Ethics Committee, then its first female director. Much more than an armchair philosopher, she utilizes her great athleticism as a world champion to make greater sense of sport itself.

AS: When I wrote that essay, I was looking to make sense of excellence. What is fair play? It can't just be that people don't cheat, that they just follow the rules. It's got to be something more than that. It's the people we tell the stories about—our heroes. It's the people who exhibit great character, who are honorable. So I wanted the

20. Robert Butcher & Angela Schneider, *Fair Play as Respect for the Game*, 25 J. PHIL. SPORT 1 (1998).

definition of fair play to be about the virtues, and about the spirit of the game. What are we celebrating? Why do we care about sport? What is great about it? When we see athletes who overcome incredible obstacles with dignity, we envision ourselves, what we could be. It is awe-inspiring because we see a level of excellence and achievement, and we marvel at what is humanly possible.

I competed during the era when it seemed everybody from the Soviet Union's Eastern bloc was doping. We competed against women who each, on average, weighed up to fifty pounds more than we did. They would weigh in their crew in front of us to intimidate us. Their stern four averaged 200 pounds. We were fighting a tremendous uphill battle. But you had to find excellence in yourself. Find virtue in yourself. And that's largely why I came to this study. I'm talking about fair play and respect as a life lesson, and searching for something we can rightly celebrate in all of our lives.

RB: Exactly what are we celebrating?

PG: It's a matter of interpretation. Many of us engage in the same game, by which I mean we play according to the same constitutive rules, but we do so for different reasons and under different conceptions of the game's ideal. Those questions raised by Angela are profound and I don't know if I have a satisfactory answer. But the answer to the question 'What are we celebrating?' is not a matter of fact, any more than the answer to the question 'What is life all about?' is a matter of fact.

II. CHEATING: GAMESMANSHIP AND SPORTSMANSHIP

RB: Can cheating be defined? When does cheating become gamesmanship and when is good gamesmanship bad sportsmanship?

Clip: Major League Baseball Player Ian Kinsler intentionally backs away from an infield pop fly at the last second. Rather than catch it, he allows it to drop to the ground to make an easy force-out at second, removing the faster base runner Colby Rasmus ("Ras") from the field.

Commentator 1: "The umpires are not buying it, I don't think."

Commentator 2: "No, I don't think so either. Here comes [the manager] to make sure they don't buy it. But it just goes to show you just how much of a thinking man's game this is and how heads up Ian Kinsler is . . . all of the time. Ras is a much faster base runner. I think *if he sold it a little bit more . . .* [surprised] Ras is leaving though!"²¹

RB: Is that cheating? Or gamesmanship? Is that disrespect for the sport itself? Is it disrespect for the physical excellence that it's supposed to be testing?

PG: Recall the comment, 'If he had sold it a little bit more'—in other words, if he had been more successful in pretending that he lost the ball and unintentionally let it

21. Bill Baer, *Ian Kinsler Smartly and Intentionally Dropped a Pop-Up*, NBC SPORTS (Apr. 17, 2016), <https://mlb.nbcsports.com/2016/04/17/ian-kinsler-smartly-and-intentionally-dropped-a-pop-up>.

drop. The problem of course is that you can't always discern intent to deceive.²² Kinsler did what he did to put the slower runner at first base. He took advantage of the rules. It's an easily changed rule. But it's not cheating. How could it be cheating? It's a bad rule and invites this kind of deception.

SK: There are gradations of harm, obviously. In sport, with cheating or gamesmanship we ask: What does it do to the game? What does it do to the integrity of the contest? We have a whole range of actions that are very trivial and don't impact much for better or for worse. This one doesn't disturb our sensibilities or suggest that they're not playing the game of baseball anymore.

RB: Given that the rule doesn't prohibit letting the ball drop, it just prohibits intentionally dropping the ball,²³ doesn't it strike you that taking advantage of the flaw in the rules here violates the spirit of the game itself?

AS: Yes. He's trying to get away from competing against the best runner, the faster runner. The whole purpose of this move is to get the faster runner out of there. It may not have been cheating, but it's gamesmanship and that's not something I want to celebrate. I mean, it's clever, which is a different kind of virtue, but the excellence is in the game. You want to play against the best—you want to beat the best, playing their best. He's trying to remove that test and I think that's bad for the game.

JR: On the merits of the matter, Angela's right. There is actually a provision in the rules of baseball to allow umpires to make decisions where the rules are silent.²⁴ This is exactly that sort of a case where a degree of discretion is permitted. I don't think we would hold it against the umpires if they had called the batter out and left the faster runner in place. You're trying to preserve the integrity of the test. This is not that hard a case.

SK: I disagree. This is not the infield fly rule. That rule was designed to stop getting a cheap double play. They should have had a faster runner at bat. It's part of the game. I never thought I'd be up here defending unethical behavior, but—

RB: Mitch Berman, a pioneer in the jurisprudence of sport, and our invaluable sixth man who will be coming off the bench to start the second half [of the symposium], has thrown a challenge flag.

22. Cf. Paul Gaffney, *Playing with Cheaters*, 63 N.Y.L. SCH. L. REV. 197, 207–08 (2018–2019).

23. Rule 5.09(a)(12) states: "An infielder intentionally drops a fair fly ball or line drive, with first, first and second, first and third, or first, second and third base occupied before two are out. The ball is dead and runner or runners shall return to their original base or bases." OFFICE OF THE COMM'R OF BASEBALL, OFFICIAL BASEBALL RULES 42 (2018), http://mlb.mlb.com/documents/0/8/0/268272080/2018_Official_Baseball_Rules.pdf.

24. Rule 8.01(c) states: "Each umpire has authority to rule on any point not specifically covered in these rules." *Id.* at 92.

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MB: Gamesmanship is the virtue of playing with the rules that constitute a game in a clever manner. Sportsmanship is the virtue of respecting the excellences of a sport as a sport. Baseball, in my view, is a sport that is also a game. And one of the great historical features and virtues of this particular sport is the cagey manipulation of the rules. That was what happened here. Not all sports respect cleverness that same way. Golf might not. Baseball does. So in addition to sportsmanship, gamesmanship is one of the virtues of that game and sport we know as baseball. It didn't violate the rule, and was, I think, good gamesmanship.

PG: I respect what Angela said about wanting to play against the best. Should I not want the pitcher to pitch to the eighth batter in the lineup instead of the opposing pitcher? Pitchers intentionally walk strong hitters all the time. He didn't break the rules.

RB: Mitch characterized gamesmanship as playing with the rules. And earlier we talked about playing within the rules. Is it always appropriate to play with the rules? I take from Angela that we can show a disrespect for the sport by overemphasizing the game within it.

AS: There's a difference between embracing the spirit of the rules and taking a minimalist view of the sport—bending but not breaking the rules.

RB: So what is the relationship of gamesmanship to sportsmanship? What's the difference between playing *with* the rules and playing *within* the rules?

PG: This is a tough one. It is not a contradiction to say that someone is both playing with the rules and playing within the rules. One can, in other words, comply with the letter of the law (the constitutive rules of sport) and yet manipulate those rules, which is what Ian Kinsler did. Game designers are constantly adjusting the rules to maintain the purpose and integrity of the game. Competitors will always push the limits of what the rules allow, which is understandable. And rules must adapt to stay ahead of that effort. Those who have the responsibility to change the rules must frequently address Angela's question: What is it they wish to celebrate?

I think the relationship between sportsmanship and gamesmanship is nearly one of opposition. They are attitudes one takes to the rules, which can either support or frustrate the moral purpose of the rules. Perhaps both can involve, to some extent, the manipulation of rules. But sportsmanship supports the purpose of the engagement and gamesmanship frustrates the purpose. For example, giving an opponent more time to recover from an injury when possible is in some sense a manipulation of the rules. But it allows for honest contesting of skill. Compare that to someone in a tennis match asking for an injury timeout before the opponent attempts to serve out a match. This is also a manipulation of the rules, but it does so to make the match about something more than tennis skill.

JR: Look at the history of sport, and you'll see periods in time, or cultures within sports, where it would be regarded as inappropriate to press advantages with strategic use of the rules. This still exists to some degree, even where strategic elements may be permitted. It was in my view rightly a scandal in cricket when, in 1981, Australia's Trevor Chappell bowled a ball by rolling it along the ground, making it almost impossible to hit, to help his team beat New Zealand.²⁵ Such bowling was not prohibited by the rules, so it was a creative strategic use of the rules. But of course, if you recognized this practice as legal, you would have bowlers constantly bowling underhand, and the game and the skills cricket means to test—bowling hard thrown balls accurately and hitting them effectively—would be destroyed. The rules were changed quickly to require overhand bowling.²⁶ The lesson from this example and the Pine Tar Incident is that strategic manipulation of rules that Mitch advocates is recognized as legitimate only when it is consistent with the spirit of the game.

You see over and over that umpires or rules officials reject what Mitch has called 'rules lawyering'²⁷ when it undermines what Scott calls the tests that underlie contests. The NBA response to the Hack-a-Shaq practice is another example. All this judicial behavior in sport supports my view that umpires and other judicial officials in sport must make decisions in difficult cases that preserve the main athletic tests of a sport. Rules lawyering is like a prosecutor's desperate argument in the hope that a judge will make a bad decision. Judges and umpires are rightly wary of such tactics. They don't want to be manipulated in that way.

Clip: Game Four, First Round of the 2017 NBA Western Conference Playoffs: James Harden, basketball star of the Houston Rockets, traps the defensive player Taj Gibson of the Oklahoma City Thunder into accidentally fouling him by hooking Harden's arm as Harden takes a three-point shot he otherwise has little chance of making. By trapping the opposing player into fouling him in the act of shooting, Harden gets himself three foul shots.

Commentator 1: "He is just so smart with this play. Puts that left hand underneath and immediately goes into a shooting motion."

Commentator 2: "So smart. That's the right call. Unbelievable. You gotta work on this. I can't do this today. You gotta work on this."²⁸

RB: We're fortunate to include in this conversation Chuck Vasser, who makes a living blowing a whistle and getting half a stadium to hate him. Chuck has refereed high school basketball at the most elite level. He has reffed and mentored many

25. Martin Williamson, *Underhand, Underarm*, ESPN (Jan. 29, 2011), <http://www.espn.com/magazine/content/story/498574.html>. Chappell later admitted he "thought [the underarm delivery] was a pretty good idea at the time," even though it "obviously . . . wasn't in the spirit of the game." *Id.*

26. *Id.*

27. Mitchell N. Berman, *On Interpretivism and Formalism in Sports Officiating: From General to Particular Jurisprudence*, 38 J. PHIL. SPORT 177, 186 (2011).

28. Getting an Edge Symposium, *James Harden—Bad Sportsmanship*, YOUTUBE (Oct. 26, 2017), <https://youtu.be/TrrQKyxY9xg>.

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players who have gone on to NCAA basketball and some to the NBA. Chuck, is James Harden's move within the rules?

CV: Whenever a secondary defender comes rushing at him, invariably [the opposing player] sticks out his hand. As soon as Kobe Bryant, one of the greatest basketball players ever, would begin to stick out his hand, he would go for the shot. Every night. Automatically that's a foul. It's gamesmanship. It's within the rules, but he knew the player coming in would pick up a foul immediately. This is the same kind of play.

RB: And you feel the ref has to call it?

CV: You have to call it.

AS: Part of that's acting; it's gamesmanship. It's allowed. But acting's a skill that I don't want to celebrate in the game.

SK: I'm with Angela on this one. There is a connection between law and sport here. When we have a good game, we want to celebrate accomplishments, achievements. The team that played better—in baseball, hit better, fielded better, used legal strategies better—should win.

RB: Scott really begs the question with the phrase, '[t]he team that plays better should win.' What does it mean to 'play better'? Does better play include better tactics? Doesn't Scott really mean the team that *physically performs* better should win?

SK: When you have a good case in law you want justice to be served. You want the facts to lead to the correct decision. When you treat the rules cynically, or I call it 'instrumentally,' you're looking for cracks in the rules. You're looking to take advantage of the rules. Then you get a game or case whose outcome is invalid. Legally, O.J. Simpson was found not guilty of murder because lawyers found cracks in the rules and went over the edge in trying to win.

RB: Is there a test/contest distinction, contrasting a lawyer's search for truth—the test—and a lawyer's striving for a favorable verdict in an adversarial contest?

PG: That is a very interesting suggestion. The test in law is something like the determination of objective truth and justice. But because there are various perspectives on truth and justice, we have an adversarial system to put those perspectives in contest. Significantly, the inherent value of truth and justice is unable to carry the day unless it is made convincing to a judge or jury. A prosecutor needs more than the truth; she needs convincing evidence, which is not the same thing. Obviously the roles make a difference to what kind of test the parties confront: The prosecutor must provide convincing evidence of the truth, and the defense attorney is simply trying to block shots by raising reasonable doubts.

RB: Some say ‘stretching’ the rules; others say ‘bending’ the rules; finding ‘gaps’—Scott says ‘cracks’—in the rules. Also note Scott’s phrasing, to ‘take advantage of the rules’ versus ‘find the advantage in the rules,’ or ‘create an advantage through the rules.’ Does the choice of metaphor tell us anything interesting about the moral status of gamesmanship?

JR: Many games—not all sports—provide room for gamesmanship.

PG: I would think that most sports and games do allow for gamesmanship, if only because in all games there is the psychological element. A competitor can do a lot to get an opponent off his or her game.

JR: We’re struggling in cases like this to draw that line. If you start with an assumption like Scott’s, that games are grounded in tests that become contests, then you don’t want a large role for gamesmanship, because it can fundamentally undermine the integrity of the test, as we saw with the pine tar and cricket examples. Basketball players consistently engage in activities that force the other team to foul them. Does that undermine the test and the integrity of the game? It’s an ongoing dispute. Basketball has grey areas as to where you draw that line. Harden intentionally getting the other player to foul him is probably one of those cases.

RB: It’s legal, but are we over the line here?

Clip: A bench player for the Houston Rockets enters the game and repeatedly taps Andre Drummond of the Detroit Pistons to send Drummond to the foul line.

Commentator 1: “Wow. They put [the bench player] in to start the second half to foul Drummond and get into the penalty.”

Commentator 2: “Not going to let Drummond hurt them in the second half. That’s an interesting strategy.”²⁹

AS: Hack-a-Shaq—going after the big guys to take away their opportunity to muscle their way inside. You don’t want to test yourself against that skill so you remove it. Gregg Popovich, the San Antonio [Spurs] coach, I believe first thought of this. Popovich basically said, ‘I’m doing my job. I’m going to do whatever I can to win within the rules until they change them.’³⁰ But I would say that’s not respecting the spirit of the rules. I can’t see how that’s good for the game of basketball.

CV: Basketball is really interesting. The skills among individual NBA players are really pretty close. Gamesmanship becomes a bigger part of basketball than people realize. How do you get in the other guy’s head? The better players use gamesmanship

29. Matt Moore, *WATCH: Rockets Intentionally Foul Drummond Six Times in Under a Minute*, CBS SPORTS (Jan. 21, 2016), <https://www.cbssports.com/nba/news/watch-rockets-intentionally-foul-drummond-six-times-in-under-a-minute>.

30. See Jordan Heck, *Popovich on Hack-a-Shaq: If Someone Can’t Shoot Free Throws, That’s Their Problem*, SPORTING NEWS (May 5, 2015), <http://www.sportingnews.com/us/nba/news/gregg-popovich-hack-a-shaq-debate-adam-silver/16otfn1suw0712kzbtsov38b>.

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as an edge. And that's where someone's intent when they're fouling comes in. Under NBA rules, late in the game a second foul automatically becomes a shooting foul. Should you foul somebody? Who? You look at the clock and you don't think about one-on-one skills. You think, 'How do I put their weakest foul shooter on the line so I can get the ball back?' That's a real element in the game.

PG: I agree with Chuck that the better players in basketball use gamesmanship as an edge, but I don't think this is true in all sports. If you want to eliminate basketball's Hack-a-Shaq, you could have a rule change: If there's a foul against a team member, the team that's fouled elects its best shooter to shoot. Or you could give them possession and two shots.

RB: Or the proposed rule change currently under consideration that allows the team that's fouled to choose not to shoot foul shots and take out the ball.

PG: It's humiliating for the twelfth player on the bench to go in and foul [an opposing player] six times in a row. He probably tells the ref, 'Look, I'm going to foul him; please call it. I'm going to foul him again. Call it.' The referees must be complicit. The only way you can do anything about that is a rule change. Make it not worth it to do this. Give them a disincentive to play with the rules. Otherwise they're going to do it.

RB: Can't you denounce it? Without changing the rules, develop an ethos where it's seen as bad sportsmanship—as disrespect for the game? Right now it's considered a smart foul. Suppose instead the players and commentators called it a cheap, ugly foul—can't denunciation act as a deterrent, even without a rule change?

PG: Absolutely. I think such an ethos exists in most pickup games, because we would see such tactics as inconsistent with the whole point of going out to the park to play together. But in an officiated game I think there's more of a reliance on the referees, and so there is less sense of responsibility to maintain the integrity of the game through sportsmanship alone. Sportsmanship might be seen as a supplementary virtue, more necessary or appropriate in some settings than others.

SK: Team sport partly measures how the team plays together. It's like an orchestra. If you have a bad tuba player, the music won't be so good. You have a bad foul shooter, you can argue that's a weak link on the team. Barry Bonds had a lot of home runs. They once walked Barry Bonds, the great home-run hitter, with the bases loaded. The next batter was far less dangerous, and with a three-run lead, tactically it was better to let in that one run and take a chance with the next batter.³¹

CV: Often in baseball they pitch around somebody. I mean, that's part of baseball strategy.

31. Matt Monagan, *Let's Watch Manager Buck Showalter Intentionally Walk Barry Bonds with the Bases Loaded*, MLB (May 28, 2015), <https://www.mlb.com/cut4/barry-bonds-is-intentionally-walked-with-bases-loaded/c-127075262>.

RB: It's effective strategy, and in that sense, good strategy, but is it necessarily consistent with the spirit of the sport? We've long known in law that written rules never adequately cover all situations in advance. Principles must inform rules. And just because it's legal doesn't make it right. And just because it's effective doesn't make it a good option.

Clip: With no time outs remaining, Tyshawn Taylor, point guard for the Brooklyn Nets, "accidentally" bumped his coach, Jason Kidd, who spilled his cup of soda on the floor. The clock stops while attendants clean the wet spot on the floor and Kidd diagrams a play. Slow motion replay before the collision reveals Coach Kidd mouthing to his player, "Hit me."

Mark Jackson (former player, coach, and now TV commentator): "I used to do that all the time on purpose if I wanted to talk to the team."³²

RB: Of course, no one ever thought of enacting a rule that says, 'You may not intentionally hit another player or coach to spill soda on the floor when you're out of time outs in order to stop the clock while they clean it up.' That's a crack in the rules. Is this cheating? Or just gamesmanship and perfectly legit?

PG: I think it would merit a technical foul if the ref saw it in real time, though it probably wouldn't be called. That's cheap. Ugly. Unsportsmanlike. It has nothing to do with basketball. But is it that much different from a phony mound visit in baseball, where you're just buying time for a relief pitcher?

RB: It's gamesmanship.

PG: Yes, but it's beneath the dignity of the game. Spilling a Coke to gain a time out doesn't merit being called a cheap foul. It doesn't even merit the dignity of being called a foul. It is something outside of sport. It is not at all on the same plane as something like an intentional foul, which is a manipulation of part of the game (whatever else one thinks about intentional fouls).

CV: It's hard for the ref to catch that kind of gamesmanship.

AS: This coach caused something physical to happen, to interfere with the game. That's inappropriate. He may have gotten away with it but, that's not an honorable action.

RB: Is it cheating?

AS: I don't think it's cheating. I think it's poor sportsmanship.

RB: No one thinks it's cheating?

32. Eyder Peralta, *Jason Kidd Says He Spilled His Drink in an Attempt to Win*, NPR (Nov. 30, 2013), <https://www.npr.org/sections/thetwo-way/2013/11/30/247925614/jason-kidd-says-he-spilled-his-drink-in-an-attempt-to-win>.

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CV: Keep in mind if he gets caught doing that, he could likely be penalized for delay of game.

PG: That's going to be very hard to detect.

CV: And that's a minor infraction.

SK: But we manipulate the rules all the time. When penalties are set in sport, they are set for an average situation. You do this, you pay that. That's a penalty, but each 'this' is different. Sometimes it's huge, and if it occurs at the end of the game, or at a crucial time in the game, then the violation has huge consequences. At other times, it's relatively trivial, but the penalty is the same. And so again, the cynical coaches today do a cost-benefit analysis to determine when the penalty doesn't fit the crime. And when the penalty is less than the value gained from the crime, we call it a 'smart foul.'

PG: What Kidd did (and Mark Jackson admits he used to do) deserves punishment. A coach cannot be allowed to see this as cost effective in her competitive pursuit. That has nothing to do with basketball; it should not be introduced to the game or accepted within it. I think the Commissioner should have fined or suspended Kidd.

JR: It's a complex example. And very hard to know what to call cheating, and what not to call cheating in sport. We permit morally questionable behavior in sport all the time. Sometimes it's called gamesmanship. A catcher trying to deceive an umpire by framing a pitch over the plate. A pitcher trying to hold a runner by engaging in a balk move. But in those sorts of examples, the athletic skill involved in framing pitches, in holding a runner at first base, is what I call 'competitive shenanigans.' Shenanigans is this wonderful term we have in English to describe behavior that is sort of morally questionable, but not cheating. I think intending to deceive an umpire is a morally questionable action, but we can sometimes tolerate such shenanigans in sport.

The Jason Kidd example gives me pause. It goes beyond the pale in a way. The competitive shenanigans I like best actually add to the skills of the game in interesting ways, as with framing pitches and balk moves. And I think they're tolerated because of that. Go back to the intentional walk. I think there's a different sort of cost-benefit analysis. We say, 'Okay, we're giving up a lot by putting Barry Bonds on first base. We walk a run in; put ourselves at risk.' That's quite different than the Hack-a-Shaq technique, where the spectacle is gone and the game stops; it's boring. Is it cheating? I don't think we can really define what cheating is. But, once we start to look at the issues, the rules, the principles, and the history of the game, we can make judgments about whether or not it should be accepted as part of the game.

RB: Can cheating, whatever it is, ever be an acceptable part of any game?

PG: It depends on whether your question is a descriptive or normative question. The descriptive answer is yes—cheating is very often part of the game. And we do accept it and play on. We cannot be naïve or puritanical about this—players and coaches are

going to push the rules and deceive the referees and they will sometimes get away with it. This is simply the nature of rule-governed activity with fallible participants. But in a normative sense, no, it is never acceptable.

RB: John famously claims that cheating cannot be defined: No set of necessary and sufficient conditions exist by which we can identify cheating. I'm convinced he's wrong. But he also seems to imply that we know morally unacceptable behavior when we see it, which of course reminds me of the Supreme Court's test for obscenity, something we can't define, but we know it when we see it.³³ I'm hoping I can get you all on the same side of the line between cheating and gamesmanship on this one:

Clip: Jacoby Jones, wide receiver for the Baltimore Ravens, breaks away and heads toward the end zone for a touchdown against the Pittsburgh Steelers. At the last moment an opposing player makes a touchdown-saving tackle. Instant replay reveals Steelers coach Mike Tomlin barely stepping onto the field of play at a key moment to force the runner to slightly swerve, just giving the tackler the extra fraction of a second needed to make the tackle.

Commentator: "[Tomlin's] looking the other way but glancing back over his shoulder. But you can see he kind of . . . force[d] Jacoby Jones back into the field. A little 'Mission Accomplished,' almost. And he's snickering. He's a player now."³⁴

RB: Cheating?

AS: Notice how he threw his body weight. If he was really trying to get out of way, he wouldn't have thrown his body weight to make the runner swerve like that. That coach interfered with the play of the game! That's not the job of the coach.

SK: I agree. This shows an important aspect of sport ethics: Intent matters. I've looked at that video a number of times. I don't think it made any difference. I think he would have been tackled regardless—he didn't veer that much out of the way. So it was an ineffective move. But the coach should be vilified for his intent. And so, we don't always decide our ethics on whether a move ruined the game.

PG: I think the embarrassed smile gives him away. And when you look at that replay, you can see he's looking away from the play. You know, Aristotle once said that you can tell if an action is involuntary by the reaction afterwards.³⁵

CV: Dennis Rodman. Probably one of the greatest athletes in professional basketball. Probably also the most incredible gamesman in the game. He changed the game not

33. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

34. NFL, *Jacoby Jones Dodges Mike Tomlin on Kickoff Return*, YouTube (July 23, 2015), <https://www.youtube.com/watch?v=0NpzVqPvFFU>; see also Will Brinson, *Did Mike Tomlin Try to Trip Jacoby Jones? Sure Looks Like It*, CBS SPORTS (Nov. 28, 2013), <https://www.cbssports.com/nfl/news/did-mike-tomlin-try-to-trip-jacoby-jones-sure-looks-like-it>.

35. ARISTOTLE, *Nicomachean Ethics* bk III (W.D. Ross trans., Batoche Books 1999) (c. 384 B.C.E.).

only with his athletic ability but how he bent and changed the rules. Sometimes he would literally beat people up. Other times he would just flat out outplay them. And as a result, he walked away with five championship rings.³⁶

You watch out for players and coaches who are good at bending the rules. From a referee's perspective, players and coaches develop a history. [Former NCAA basketball] coach Bobby Knight. Perfect example. Anybody that reffed a Bobby Knight game knew that he was going to pull some coach-thing to try to affect the game. And you had to be on top of your game to not let that happen.

JR: Being on top of the game, does that mean being especially vigilant? Or making calls that go against him on borderline plays to send a message that you're not going to tolerate that behavior?

III. REFEREES V. JUDGES

*Clip: Former Detroit Tigers pitcher Armando Galarraga's perfect game ruined on the very last out by an umpire clearly blowing the call at first base, calling the runner safe.*³⁷

RB: Armando Galarraga is about to pitch a perfect game—a rare feat. No walks, no hits, no errors. It's two outs in the ninth. He's one out and one pitch away from making history. One pitch from baseball immortality:

Commentator 1: "He's out! Why is he safe?"

Commentator 2: "He must have missed the base."

Commentator 1: "Are you kidding me? Why is he safe? Why is he safe? Oh my goodness. [Umpire] Jim Joyce. No! What a travesty. What an absolute travesty for Armando Galarraga."³⁸

RB: We all know in retrospect, it was a blown call. Reasonable minds can't disagree. That umpire's error cost Galarraga the perfect game he actually pitched. The Commissioner declined to overrule this, even though he had the power. And it would have and should have been what it was in fact: a perfect game. It should have gone down in history as a perfect game. Recall the American League President restored the pine tar home run that had been taken away. Galarraga never got his perfect game and never got another one. First question to all of you, should the Commissioner have restored Galarraga's perfect game?

36. *Dennis Rodman*, BASKETBALL REFERENCE, <https://www.basketball-reference.com/players/t/rodmade01.html> (last visited Nov. 2, 2018).

37. Ben Cosman, *It's Been Five Years Since Armando Galarraga Threw a Perfect Game that Wasn't*, MLB (June 2, 2015), <https://www.mlb.com/cut4/armando-galarraga-threw-a-one-hit-perfect-game-5-years-ago/c-127909514>.

38. *Id.*

JR: This is a complex matter, and I have been ambivalent about what should have been done here. But I have decided that I am in favor of the way the League handled this, to let this clearly mistaken decision stand.

SK: I don't think the Commissioner had the authority to overrule a judgment call by an umpire.

RB: Surely the Commissioner has the prerogative in extraordinary instances to act to preserve the integrity of the game. And suppose he had illegally exercised that discretion for the good of the game, who would have contested that exercise? Not the owners, not the players. Certainly not the umpire who blew the call. No one would be heard to complain. The umpire should have been overruled.

SK: Should it have been overruled? Since then, the rules have changed to allow for some review of those sorts of calls. But back then, in that circumstance, the rules were clear. Baseball has this tradition, which I think the law reflects as well. Generally speaking courts of appeal do not like to tamper with a judge or jury's findings with respect to the facts—unless they're egregiously wrong.

RB: In New York, the intermediate court of appeal may reverse a conviction 'in the interests of justice.'³⁹ That analogy certainly holds here. Besides, it was clearly wrong.

JR: Should there have been a review and overruling? I don't think we know the answer to this question. It's not entirely clear to me that instant replays and reviews of judgment calls have been good for sport. They have caused a lot of inefficiency and taken away from the drama and challenge that are part of the game. Imperfections actually work to the advantage of the game, as part of the challenge that builds resilience. I understand why people want to get the calls right; we should try to do that. But I'm actually worried, more worried than I was ten years ago, that video and other electronic review of judgment calls have not been a good thing in sport on balance.

SK: I agree with John and would go further. Sometimes we take sport too seriously. If you take a more playful attitude toward games, you can actually celebrate luck.

RB: So you're saying we shouldn't reduce the role of luck even if we could? That too much luck ruins a sport, but that too little luck can also detract?

SK: The law is different, of course. A trial for somebody's life—that's not playful. Luck's not something we can tolerate in the law. Different degrees of chance should enter into the realms of sport and law. In sport, umpiring errors are chance events. Umpires are human and will miss some calls. While it might hurt—I'm a Cleveland fan—I'll get over it. I won't get over a trial that gets it wrong on a murder charge.

RB: When a guy's got a perfect game on the line, and it's the last pitch, the last out, isn't there an unwritten rule that you give the close play to the pitcher? And for

39. N.Y. CRIM. PROC. LAW § 470.15(3)(c) (McKinney 2019).

Galarraga, it wasn't even close. In [New York Yankees pitcher] Don Larsen's perfect game in the World Series, that final called strike wasn't really a strike.⁴⁰ It was a ball, but it was close enough. You give the perfect game in the crucial moments like this—

AS: And you do it in other sports. Watching somebody high jump for the world record, everybody's quiet. No matter a person's nationality, we want the athlete to get the record, and to celebrate that. On the scale of human tragedies, Galarraga's fate was not an epic one. But it does seem that for him it was a tragedy. And there was a clear mistake. So why can't there be a process to correct the error?

RB: And when in doubt, should it be called differently in different situations? How could Jim Joyce have been sure that the runner was safe when he was so clearly out? If you're not sure in this situation, shouldn't you call in favor of the perfect game? [Supreme Court] Justice Louis Brandeis once said that we should be lawyers for the situation.⁴¹ Shouldn't we be referees for the situation? Doesn't this situation call for an out call if he's not sure?

PG: I don't think you should change those kinds of calls for situations. I think it's very dangerous to start playing with that. Now, in sports like basketball I *do* think that foul calls at the end of the game are different than at the beginning. To win, you're going to have to earn it at the end of the game. If you start playing with the strike zone or with 'out' calls, though, it's very dangerous. But I disagree with Robert's essential premise. Galarraga did not in fact pitch a perfect game, nor did O.J. in fact murder his wife and Ron Goldman. Now, of course, I know this sounds crazy but we have to remember that both sports and law have set up conventions to determine the truth in their respective domains. They do this precisely because we recognize the difficulty of ascertaining the truth when there are various perspectives and interests. In baseball, what *really* happens is determined by the umpires, and now with the help of video replay, interpreted by the umpires. What they say is final and is what really happened.

Do I think O.J. killed his wife? Yes, I do. But was he found guilty beyond a reasonable doubt? No. Thus he didn't murder his wife. The difference between these two answers is a matter of position—whether one is inside or outside the domain. When I make these pronouncements from the outside I attempt to take the position of God, which is precisely the problem.

RB: Not necessarily God. Just a historian pronouncing what actually happened.

PG: I am a moral realist. My position is not that we cannot know the real truth in matters of ethics and that we therefore only decide issues by convention and majority

40. Louis Jacobson, *George Will Says Final Pitch by Don Larsen in 1956 Was Foot-and-a-Half from Strike Zone*, POLITIFACT (June 11, 2010), <https://www.politifact.com/truth-o-meter/statements/2010/jun/11/george-will/george-will-says-final-pitch-don-larsen-1956-was-f>.

41. See Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1502 n.194, 1503 n.199 (1996).

rule. I think it is an achievement of moral realism to set up these conventions. We place high value not only on the truth, but also on the manner in which we establish the truth—we value substantial and procedural justice. Paradoxically, one of the costs of the system that maximizes truth and justice in both of these senses is the occasional frustration of truth and justice. That is what the Galarraga game and the O.J. case represent.

Game contests are conventional situations. So we're asking very loosely whether he was really out. The answer is no because in baseball there's only one way that you determine that—what the umpire calls.

RB: But he *did in fact* pitch a perfect game. The record books don't reflect the historical reality. O.J. Simpson did in fact commit murder: He was wrongly, inaccurately acquitted. Legally he was not guilty under the conventional rules of trial. But historically, in fact, he did unjustifiably and intentionally kill two people. Whether it was the right call is a question separate from whether it happened.

CV: You often have basketball plays where you ask yourself as a ref, 'Where am I going with this? It was definitely a foul. Was it a defensive foul or an offensive foul? Do I put the guy on the line or not? What if I put the guy on the line, he makes two shots, and ties or wins the game?' Now you've penalized the other team, perhaps unfairly. Let's play.

RB: In baseball, if it's the last out with a significant lead, and it's otherwise a perfect game, there's no great significance attaching to having a runner on first with two outs in the ninth, down by a few runs. But there's an enormous significance attaching to having pitched a perfect game. So applying your logic, assuming you don't know which way it should come out, how do you not make the call in favor of the pitcher and give him this perfect game?

PG: This is not showbiz.

JR: Robert, you've heard our arguments against that, right?

RB: I feel your annoyance, John. Do you feel my pain?

JR: Yes, I do feel your pain. I coached pitchers for many years. But the history of this is now settled. Everyone recognizes Galarraga's achievement and has forgiven Joyce's error. And that says something good about all of us. As I have said, I like sport when we leave behind what happened on the field. There is some real virtue in that. I also think bad calls can be part of the challenge of a game. We should make exceptions when umpires set bad precedents that undermine the integrity of a game with misinterpretation or misapplication of rules, but I am not so sure it is wise to set a precedent about reversing calls after games have finished.

RB: What should be done when you've made a mistake?

A SYMPOSIUM ON THE JURISPRUDENCE OF SPORT

Clip: New York Yankees face the Boston Red Sox at Fenway Park: The pitch, obviously high, is called a strike. The batter protests to the umpire in disgust.

Commentator 1: "Got a high strike and didn't like it."

Commentator 2: "If you read his lips, he's saying, 'That's up.' He said it more than once."

Clip: The next pitch is obviously a strike, but the umpire calls it a ball.

Commentator 1: "And that's the give back."

Commentator 2: "Okay, now we're even."

Commentator 1: "[The game] shouldn't be played this way."⁴²

RB: Make-up calls. Do they happen? Should they happen? And to what degree should they be limited?

PG: The commentator said the game shouldn't be played that way, and he's right. Once you start doing that, you have to be omniscient to know exactly where that tally stands. You call every single one individually and honestly. And they will even out. But once you try to manage that, I think you're really playing with fire.

RB: Anybody want to make the case for make-up calls? Once again, do I stand alone?

CV: It's called credibility. We set a tone. That's what umpires and referees do. Professional athletes ask themselves, 'What can I get away with? What's he going to call?' But it's also a question of credibility. If I miss a call, you know what happens on the next play? He goes to the other end of the court and he smacks the guy that fouled him. Why? Because I didn't protect him. And he's got to earn respect. So he lets the other guy know, 'I'm not gonna let you do that.' Now my game is out of control.

RB: Do you call *that* one?

CV: Well, now you'd make it worse. Because now you call that one, and the guy says, 'You didn't call it at the other end.' Your credibility is gone.

JR: So do you call it?

CV: You have to call it. Because you have to rein it in. But you've already made the fatal mistake. Now neither player respects you.

SK: It raises an interesting question about working the officials. You see it in basketball all the time. A questionable call occurs and a coach goes into his playacting mode. It's theater. He throws his clipboard down; he goes crazy. The coach doesn't

42. Getting an Edge Symposium, *Yankees v. Red Sox*—"It Shouldn't Be Played This Way," YouTube (Oct. 26, 2017), <https://youtu.be/-b62LO5wUKM>.

know whether it was a good call or not. But he's working you to get the next call. That's distasteful and speaks to something in contemporary sport.

When I was twenty-two years old I was playing baseball at a fairly high level; an umpire called me out on a high pitch. And I gave him a quick look. I was a rookie, so I didn't have much to say. But later in the game, the umpire came over to me and said, 'Scott, I blew that call.' I appreciated that. I've never forgotten it. Because it's a human enterprise. We're not on different teams.

RB: I imagine the very same conversation with [New England Patriots coach] Bill Belichick and the refs in this game:

Clip: The Patriots receiver Danny Amendola catches the ball and has a clear path to run for a touchdown. The ref accidentally blows the whistle. Play immediately stops.

Commentator: "You can't give Bill Belichick a good explanation on this one. I think Danny Amendola would score here . . ."

Ref (announcing to the spectators): "The ruling on the field is . . . that when the receiver caught the football there was an inadvertent whistle by an official on the field. By rule, the ball is dead at the spot the receiver gained possession when the whistle was blown. There was also a foul for interference by the coach on the Buffalo [Bills] sideline. That fifteen-yard penalty is going to be added. . ."⁴³

RB: So the ref's clearly blown call cost New England a touchdown. The rules say the ball must be dead at the spot. Notice the refs did their best to make up for their own injustice, by tacking on a fifteen-yard penalty because the opposing coach supposedly had stepped in bounds. But the video reveals the opposing coach wasn't anywhere near stepping in bounds. Look at Belichick as the ref explains it to him. I imagine, Scott, that very same kind of conversation the umpire had with you: 'Sorry. We blew it. We know you would have scored a touchdown; we're doing our best.' And Belichick tried to quiet the home team fans' howls of protest. The refs did their best to compensate for their error by tacking on a phony foul. But by doing less than they might, did they do more than they may? Clearly this was a make-up call. Was this right?

AS: You can argue a higher level of acceptability in this case, because of the coach's response. Not only did he accept it as being some form of an attempt to make play fair. He also tried to get the crowd to shut up about it. So this case gives you a stronger argument for the make-up call.

PG: I wonder what the other coach thought about that resolution. I don't like it myself.

43. See Rodger Sherman, *The Patriots Got Robbed of a Potential TD Thanks to a Referee's Inadvertent Whistle*, SB NATION (Nov. 23, 2015), <https://www.sbnation.com/nfl/2015/11/23/9789660/patriots-bills-inadvertent-whistle-tom-brady-danny-amendola>.

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RB: Didn't Aristotle insist that sometimes the strictest justice becomes the greatest injustice?⁴⁴ Don't principles of equity appropriately prevail on a football field from a ref's perspective?

PG: Well there are rules to determine how that equity is going to be cashed out. And that's what you've agreed to live by.

RB: But if it's strictly rule-bound, Paul, as you insist, then it's not equity. The essence of ruling equitably, like Plato's true statesman, requires fitting the ruling to the specific occasion.⁴⁵

PG: Robert, it seems to me we are emphasizing different things here. You are concerned much more with the absolute truth of the matter, or the absolute demands of justice and equity, from which vantage point I don't know—the view from nowhere or perhaps from God's point of view. This is the classic philosophical quest, or some might say the classic philosophical conceit. My emphasis, on the other hand (and I think John is worrying about the same thing), is more about precedent and procedure. I would much rather get one call wrong and keep the respect for the rules intact. It is like letting a guilty person walk in a criminal case because of inadmissible evidence. If this is a fair way to look at our discussion, you are playing the philosopher and I am playing the lawyer! The idea that there's some kind of pure equity or justice hovering around that corrects what the umpires and referees do makes me very nervous. I think it's too much power.

JR: In a legal sense I'm worried about the issue around precedent.

RB: In law, as you well know John, decisions in equity have no precedential effect.

JR: Equity is for exceptional circumstances. But you're on a slippery slope here. Where does this end? Mark Hamilton argues that make-up calls inevitably end up using somebody improperly as a mere means.⁴⁶ The pitcher who throws the strike that intentionally gets called a ball; the coach who did nothing wrong but is penalized. Those are powerful reasons not to do it.

Equity is important. But you have to look at the consequences—there is at least a rough precedential aspect to equity. And the courts recognize this all the time. A judge might choose a remedy that is not as just as it could be for a particular party. But abusing the law and making too many exceptions potentially creates greater dangers. I don't want to see umpires have to make these calculations. I think that puts them in an untenable situation. And it will undermine the players' and participants' respect because it uses them as mere means to put things in a moral context.

44. ARISTOTLE, *supra* note 11.

45. See PLATO, *THE STATESMAN* (Benjamin Jowett trans., Global Grey 2018) (ebook).

46. Mark Hamilton, *The Moral Ambiguity of the Makeup Call*, 38 J. PHIL. SPORT 212, 220 (2011).

RB: But we just saw the ball called a strike and then the next strike called a ball. As an umpire, you just evened it out. You're not using anybody as a means. You're keeping the pitcher and batter even with the proper count.

JR: That's a special case. I think these make-up calls happen at the plate quite often.

RB: But you're saying they shouldn't happen?

JR: I'm not sure they're necessary. I think it's part of the challenge of being a batter. A mistaken call that's an inch off the strike zone is a mistake. Whether it is egregious or not. If we start to institutionalize this, we'll start to wonder, was that a make-up call or a mistake? What is the standard for make-up calls? That will do tremendous harm to injure the status of the judges in games.

CV: Besides, how do you balance things? In basketball you have two referees. Each works with his partner very closely. My partner calls a three-second call at his end of the court, so I need to find a three-second call at my end. If the other team is even close to three seconds I need to blow the whistle. Because my partner now set the tone and I need to make both teams feel that they're getting the same calls. And I need to do that early in the game.

RB: To clarify: You will make a three-second call that you would not otherwise have made, reacting to a three-second call that your partner made, in effect making up for something that you think your partner should not have done. You've never acknowledged to me that you would do a make-up call to correct your own error. I'm wondering whether you're willing to acknowledge that you will do a make-up call to correct your partner's error.

CV: I didn't say he made an error. I said he made a call. Because he's highlighted that rule or regulation, I need to look for that rule and regulation. And if it's even close I need to make sure we keep them close. Scott, I'm really glad that referee apologized to you. I did that early in my career and the coach looked at me and said, 'How many more are you going to get wrong today?'

AS: I don't think we need to have that made up foul against the coach to correct it. Why can't we just correct it because an error was made? And admit that as the justification. 'We made an error.' For the good of the game, fairness requires making up for errors. And not by creating some false foul that didn't happen.

RB: They did their best to make up for their error. Within the rules. There was no way completely to make up for it.

PG: That's right. He has no power to just say, 'I'm going to give you twenty more yards.' He must come up with a bogus call.

AS: But that shouldn't happen.

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PG: It's semi-respectable to say, 'They made this violation, so I'll give you fifteen yards, even if it didn't happen.' But if he says, 'In my judgment, because it was an inadvertent whistle, we will give you twenty yards,' then everybody will run to the referee. If we give the referees too much discretion to rule on exceptional plays, such as an inadvertent whistle, they will be in a position to arbitrarily decide every non-standard occurrence. A legal system should strive to eliminate the human element as much as possible. We seek a rule of law, and not of men.

RB: In which case we achieve a rule of lawyers and not of people.

SK: Different sports have radically different ethics. No football player from the opposing team would ever go up to the official and say, 'Give him a touchdown. They deserve the touchdown.' But in golf, you hit the ball twice or you jiggle the ball in the grass, and the golfer says 'put a stroke on my scorecard.'

JR: There used to be more of this in sport. In tennis, if the umpire made a bad call, the person advantaged by that bad call would intentionally hit the next volley into the net. There would be nothing wrong with a coach saying, 'This is a mistaken call.' If you look at the Galarraga clip, you see the base runner turns around, puts his hands on his head and walks away. He knew the call was blown. One other way of resolving this would've been to ask the base runner, 'Are you out?'

SK: But the culture can't support that.

RB: Calling a make-up call on yourself strikes me as a clear example of sportsmanship. Why can't the culture support it?

PG: Certainly this *looks* like a sportsmanlike thing to do, but how often and on what occasions should you call make-up calls? Only for truly egregious mistakes? At different times in the contest? It's one thing in the first set of a tennis match but another in the last service game. I think the answer to this question depends on where you are in the contest, and what level you play at. At the highest level I think there is a danger of overstepping your authority—let the officials do their job. If everyone is operating in good faith it will work out better in the long run. We can learn from Kant here: Do no less but no more than your duty.⁴⁷

IV. PENALTIES: PRICE OR PUNISHMENT?

Clip: At a crucial moment during the 2009 U.S. Open, the lineswoman calls a foot fault on Serena Williams's serve. Outraged, Serena protests vociferously. She is penalized a point and thus loses the match.

47. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* IN FOCUS 31 (Lawrence Pasterneck ed., Routledge 2002) (1785).

Serena (to head judge): “I didn’t say I would kill you. Are you serious?”⁴⁸

RB: Mitch Berman, who now officially joins us from the sidelines, wrote a classic piece, using this incident as his through line.⁴⁹

MB: Thanks, Robert. Let me say a few words of background before offering a thought about the Serena incident.

I teach a course in what I call ‘the jurisprudence of sport,’ which isn’t sports law but rather sport as law. Each sport is its own legal system. Sports involve formal rules promulgated in advance to shape and incentivize behavior to accomplish a whole variety of ends. Sports have all the institutional trappings of legal systems, too. You have rule makers, judges, and also the enforcement officials. So I think we can learn a lot about the law by using sport as the raw materials.⁵⁰

Students are supposed to learn two sets of things in law school, even putting aside the honing of various inferential and rhetorical skills. They learn the substantive rules that vary from one doctrinal area to the next. And they also are supposed to gain command of a vast array of conceptual tools and frameworks that cut across specific doctrinal areas. In the latter category, for example, the difference between rules and standards, or prices and sanctions, or mens rea and strict liability, and burdens of proof.

Law schools expect students to gain mastery of these, but rarely teach them in a systematic way. You’ve got to gain command of them to be a really effective lawyer. Students can learn and master these by studying sports as legal systems.

I’ll give you a couple of examples: Take the use of instant replay in sports to review contested calls. Just about every sport that uses this technology applies a very demanding standard of review. In the NFL, which pioneered this practice, officials may not reverse a call unless they have indisputable visual evidence that the call was mistaken. Is this an appropriate standard? There are two ways we can end up with an incorrect call after review: The official could affirm a mistaken call, or reverse a correct call. Is the latter outcome so much worse than the former? If so, why? If not, is there a different justification for making reversal so darn difficult? This is an accessible route into a host of questions about standards of proof and review.

Consider questions about the interpretation of rules, or how to understand what the rules of a system are, what they actually require or permit. In basketball, some rules are not written as permissions. What the rule says is that a player shall not

48. See Matthew Futterman & Carl Bialik, *So Did Serena Williams Foot-Fault or Not?*, WALL ST. J. (Sept. 14, 2009), <https://www.wsj.com/articles/SB125288970980407601>; *US Open 2009: Serena Williams Unrepentant for Rant After Kim Clijsters Defeat*, TELEGRAPH (Sept. 13, 2009), <https://www.telegraph.co.uk/sport/tennis/usopen/6182175/US-Open-2009-Serena-Williams-unrepentant-for-rant-after-Kim-Clijsters-defeat.html>.

49. See Mitchell N. Berman, “*Let ‘em Play: A Study in the Jurisprudence of Sport*,” 99 GEO. L.J. 1325, 1326–31 (2011).

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

hold, push, charge into, impede, et cetera. It's written as a command, a prohibition. If you're reading the rule book, it's not, 'You get five fouls.' It's, 'You may not do this and if you do it six times, you're out.' But many people understand it as getting five free fouls.⁵¹

Is this the right understanding of the rules? Does this shed light on more general debates over textualism and purposivism in statutory interpretation, or over originalism and living constitutionalism in constitutional interpretation? Is the rule simply whatever a formally promulgated text says, or do legislative purposes matter? Or evolving enforcement practices—what Roscoe Pound called 'the law in action?'⁵² The Pine Tar Incident raises the same broad question: How do we understand what the rules are?

For me, the Serena Williams foot-fault episode also raises questions concerning enforcement discretion: What discretion do officials have? And how should they exercise it? More particularly, should they enforce some rules of some sports less strictly at crunch time?

Most sports fans would say yes. But from a legal perspective, it's easy to see how the answer would be no. After all, values of equal treatment and the rule of law would seem to suggest that if a rule is enforced one way this time, it should be enforced the same way next time. So, there's a great puzzle here that might draw on, and contribute to, understandings in law.

RB: As I mentioned earlier, Brandeis may have had this in mind when he spoke of a lawyer for the situation. If the defendant has everything at stake and the plaintiff next to nothing, should the judge hesitate before bankrupting the defendant? Should the referee be the referee for the situation? Should suspensions for violating the anti-doping code vary from one sport to another? A two-year suspension in gymnastics likely costs you your career, whereas for an equestrian it's a blip. What does a commitment to fairness or equality under the law entail when it comes to calling fouls or meting out penalties afterwards for cheating?

MB: Important questions. How *do* you figure out the right answer to this problem? From the perspective of an athlete or sports fan, sometimes it seems you should call fouls less strictly. But what's the justification for that?

RB: Are rule violations options? Some look at the sixth foul that gets you ejected from the game as permissive—a price, an option within the game. So let's consider: What is the appropriate attitude toward rule violations and violators? Are penalties punishments? Or are penalties prices? Are they options? And, if you're willing to pay the price, then there's nothing to be criticized for when exercising the option.

51. Cf. Lasry, *supra* note 2, at 299–300.

52. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

*Clip: Luis Suarez for Uruguay prevents a goal with his hands. After Ghana misses the penalty kick, Uruguay triumphs by shoot-out to advance to the semi-finals of the 2010 World Cup.*⁵³

RB: Suarez intentionally used his hands to stop a goal. This directly violates the rules and the essence of soccer. He gets thrown out and there's a penalty kick. The other team misses the penalty kick. So his foul turned out to be worth it. Was what he did wrong?

AS: Yep! No surprise from me, I guess.

RB: Did he cheat?

AS: Well, he didn't try to deceive. Suarez didn't seem to try and hide the fact that he used his hands. It was really blatant.

RB: Perhaps as an observer in retrospect, but not at the time. Is it less disrespectful if it's blatant? Someone once said that hypocrisy is the tribute vice pays to virtue. Are you suggesting that we should honor civil disobedience but condemn evasion? Is that the political analog?

AS: I don't think there's a good analogy here with civil disobedience, because the purpose of civil disobedience is to try to effect social change, to change an unfair practice. That is not the motivation here; the motivation here is, quite simply, to win.

MB: Do you think that deception is a necessary constituent of cheating?

AS: Yes. I do.

RB: So do I. We're together on this. And John's against us.

MB: I'm with John.

PG: Cheating is normally deceptive. But one who intentionally and openly breaks the rules for strategic reasons, as perhaps Suarez did, is something like a cheat. I think we have a sense that he only paid a price, and he should have paid a penalty. So he got away with it—and that violates our sense of justice. But soccer cannot simply reward the other team with an automatic goal, nor would it make sense to give them three or five penalty kicks, because that would be like giving them an automatic goal. And that seems draconian. We still want the other team to exercise some sport skill to benefit from this violation.

RB: Let's show Maradona's infamous 'Hand of God' play—probably the most famous of controversial plays in the history of soccer.

53. *World Cup 2010: Luis Suarez Handball Against Ghana 'Instinctive' Says Uruguay Coach*, TELEGRAPH (July 3, 2010), <https://www.telegraph.co.uk/sport/football/teams/uruguay/7869777/World-Cup-2010-Luis-Suarez-handball-against-Ghana-instinctive-says-Uruguay-coach.html>.

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Clip: At the 1986 World Cup quarter-finals, Diego Maradona of Argentina raises his arm and punches the ball at the same time the goalie from England raises his hand in an attempt to block it—Maradona scores. Officials were none the wiser.⁵⁴

AS: Suarez is a poor sport. Maradona's a cheat. He made much more effort to deceive with his body than Suarez did. That's clear.

CV: Could you speak to intention?

SK: What makes it controversial *is* the intention. One could argue that the six or five fouls in basketball are for accidental fouls. When you play a physical game, you're playing all out: You're going to bump into people, you're going to step on the line, you're going to do things that go against the rules. A purist might argue you get five accidental 'oopses.'

RB: Are you suggesting that penalties are only designed for accidents and serve only to compensate?

SK: We put penalties there to nullify any advantage accidentally received from a move that wasn't part of the rules. But the more cynical attitude toward the rules is that penalties are not there just for accidental fouls; they're there strategically. And so now we calculate, 'If I do this illegal thing, what are the chances I'm going to get caught; and if I do get caught, is it worth it?'

RB: So penalties have largely become prices. But what of those of us who claim that penalties should sometimes be punishments? Or even deterrents? Something above and beyond compensation. Or should punishments be reserved to the supervising authority who, after review, maintains the integrity of the sport by punishing violators? Doping violations come to mind.

JR: Generally speaking, we ought to be at least morally ambivalent about intentional fouling. You grab the shirt; you hold somebody; you trip somebody. It's not an athletic move. And it's not aesthetic, either. It tries to take away an earned advantage without using the skills of the game. So those to me are reasons to be suspicious of strategic fouls. On the other hand, in some circumstances strategic fouling actually adds to the interest of the game. But that's a very delicate balance. I support strategic fouling where it makes sports better, but I think it falls into the class of competitive shenanigans.

PG: I think John is right; generally, the intentional foul is neither athletic nor aesthetic. I am not all that convinced that accidental fouls are in themselves athletic or aesthetic, either. They are certainly much more acceptable than intentional fouls because we can see the action of the play in an accidental foul as an inevitable implication of the speed and intensity of competition. Interestingly, at the end of a basketball game, as the

54. Oli Platt, *Diego Maradona & the Hand of God: The Most Infamous Goal in the World Cup*, GOAL (June 26, 2018), <http://www.goal.com/en-us/news/diego-maradona-the-hand-of-god-the-most-infamous-goal-in/15sev9f2t2sn814f2n8d2ah3zc>.

clock winds down, the team that trails can always very aggressively go for a steal in a sincere attempt to make an athletic play. There is every reason to try for the steal, which, if successful, would be preferable to intentionally fouling the other player and putting him at the line. The intentional foul makes the most sense when the leading team has a bad foul shooter on the floor and the trailing team deliberately targets him. A rule change could eliminate this whole phenomenon: Award three foul shots in the last two minutes of the game, or allow the team to substitute a foul shooter of its choice. Apparently, basketball powers-that-be have decided that intentional fouls and pressure free-throws add drama at the end of the game.

JR: I'm skeptical that basketball's made better by strategic fouling at the end of the game. There are going to be these grey areas. But it doesn't help to describe it as cheating or not cheating.

RB: I think the label is very helpful. Building on the work of others, I define cheating as the deceptive attempt to gain an unfair advantage by violating written or unwritten rules the cheater has voluntarily agreed to abide by.⁵⁵ But let's suppose we can't define it and we grant you your premise. Looking at these two handball plays, both of which are intentional, one of which is done on defense—and taking Angela's point as established, one openly done—and the other deceptively done on offense to score a goal. Do you distinguish those two?

JR: The intention is the same in both cases—to gain an advantage by acting illegally. I'm not persuaded there was a profound difference. I'm actually not even convinced that Maradona did it deceptively. I think he did it intentionally, but it was done in the spur of the moment. How much time was there to form the intent to deceive? I don't know.

RB: Why can't deception be unplanned and at the spur of the moment? In the criminal law, traditionally intent was divided into premeditated and spur-of-the-moment intent. While some states have abandoned premeditation, others continue to elevate premeditated intent. Do you distinguish between a player using her hands offensively to score a goal and defensively to stop a goal?

JR: In both cases it seriously affected the outcome of the game. Let's say the acts were intentional and wrong. I'm not so interested in trying to grade the extent of the wrong. Both cases are criticizable and inappropriate. I agree with Angela: It's not in the spirit of the game. Soccer is not a better game with that sort of behavior.

RB: Well, Angela goes a step further in what she's written. Angela imagines two teams: One looks at handball as a strategic option and calculates, 'What are the odds they're going to catch me? If they catch me, I'm going to be thrown out. We're going to

55. See Robert Blecker, *Olympic Controversy over British Athletes' Suits Should Make Us Redefine Cheating*, OBSERVER (Feb. 23, 2018), <https://observer.com/2018/02/british-olympic-skeleton-team-suits-should-make-ioc-redefine-cheating>.

be a player short. But if it's near the end of the game and I'm stopping a near-certain goal and I think it's worth it, then I do it.' Now suppose the opposing team refuses to calculate costs and benefits and instead looks at intentional handball as an immoral violation of the essence of the sport, which, unless you're the goalie, is to use your feet, and never use your hands. And Angela suggests that if one team looks at handball as a price, while the other team looks at it as a punishment—one as an option and the other as an absolute prohibition—although they use the same written rule book, they really aren't playing the same game.

AS: There's also a cultural difference in the game. Flopping is much more common in some countries. And so when they play each other at an international venue, each have their own practices, culture, and ethos; then some people yell about fairness. They haven't agreed that you can use your hands, but that's the practice by this group. So now what do we do? That's when they appeal to the ref, but they're playing two different games.

PG: There's a distinction between the *real* rules, which are part of the practice, and what's written. One thing I would add: Suarez's handball was an act of desperation. He knows if he doesn't use his hand, it's over. Desperation moves in sport, like using one's hands to prevent a goal in the closing minutes of a match, are understandable, even though very unattractive and perhaps unsportsmanlike. Most fans understand such a desperate move, because the alternative is a certain loss. I don't know if that excuses him—I don't think it does. But Maradona's handball wasn't desperate. That wasn't made during crunch time.

RB: Perhaps you're suggesting that desperation doesn't excuse but does mitigate, which may suggest a parallel to the mitigation for intentionally killing in the heat of the moment, classically reducing murder to manslaughter for an intent formed in the heat of passion. Desperate times call for desperate measures?

PG: We should give some consideration to desperation. But that, too, has its limits. I would certainly not accept a desperation move in the last seconds of a soccer match that was maliciously violent—where, for example, the only way to prevent a game-winning goal in the final seconds is to take out an opponent's knee. I would like to think that most fans—even partisans—would not accept that desperate move. So sport desperation might justify a lot, but it doesn't justify everything.

MB: The first question to me is, did you violate a rule? The flat-footed response is to pick up the rule book and read the provision and say, 'Well, this is what the rule is.' But Paul points out that what the rule *is* and what the text *means* can be different things. It could well be that in basketball now, notwithstanding what the rule book says—that no player shall hold, impede, whatever—at the end of the game, to stop the clock, it could be that's not prohibited. If I fouled John who's on the opposing team to stop the clock but the ref doesn't call it, *I've* got a complaint. Which is weird if I'm prohibited from doing it.

PG: Mitch's thought is quite interesting. I have seen instances when the ref prefers not to call it, perhaps for his or her own sense of the aesthetic of the game. That is very dangerous because the fouling player must now do something much more physical to get a call. In baseball they have recently eliminated the four pitches needed for an intentional walk—they could do something similar in basketball. For example, the team could say to the ref that they intend to foul a specific player and put him at the line.

MB: Rules are organic. First you want to figure out, have you violated a rule? And you can't fully resolve that just by telling us, 'Well, this is what the text says.' A second question is if you have violated the rule intentionally, is it cheating? Logically there can be intentional rule violations that aren't cheating. So we have several possibilities: It could be that the player doesn't really violate a rule even though that's what it seems if you just read the text; or that the player does intentionally violate a rule, but doesn't thereby cheat; or it could be that the conduct does violate a rule and, in violating the rule, is cheating. It's complicated.

RB: Obviously, for you, intentional fouling in basketball to stop the clock is not cheating, although it's violating the rules.

MB: No, that's not even violating the rule. It's violating the semantic content of the text, but the rule is different from what the text says because of the widespread practice.

RB: Consistent with the ethos.

PG: I agree with Mitch that the intentional foul is not a violation of the rule, whatever else it is. Philosophers of sport debate this issue, but most basketball people don't think of it as rule-breaking or dishonorable. I don't think intentional fouls are akin to civil disobedience, except in a superficial way—both openly violate the rules, and people committing both intentional fouls and civil disobedience have an interest in being caught. But with intentional fouls one is happy the rules are there to break because one hopes the price will be worth it; in civil disobedience, one attempts to overthrow those very rules by calling attention to their moral status.

RB: Yet both share Mitch's oddity that the rule breaker can insist on enforcement. Intentionally violating the rule to advance the game or sport seemingly parallels civil disobedience. It's done openly in contrast to deceptively violating or evading the rule to gain an immediate advantage.

SK: In law you have justifiable rule breaking, even with homicide. It's an amelioration of an otherwise bad act. Having worked with coaches at the Big Ten level, I can assure you that every coach thinks that other coaches are cheating more than he is. So there's a downward spiral. Coaches with integrity don't go down that road.

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MB: It's a collective action problem. It occurs all the time in life, in law, in cooperative enterprises. No one wants to be a chump. It's very hard to maintain that respect for rules when the other team isn't.

CV: What if the playing field starts out imbalanced? Say you're playing against Shaquille O'Neal, over seven feet tall, over 300 pounds, faster than anybody on the court, five feet from the basket, ten seconds left, tie score. He's going to win. What do you do?

AS: Certain athletes are in a league of their own. They've won the genetic lottery. Does that mean it's unfair? Well, then we should have a test where everybody plays with the same ability, same equipment, and say, 'Okay. Now play.' And we don't do that.

CV: Is it cheating when they try to even the playing field by exposing his weakness and making him shoot fouls? 'You're head and shoulders better than everybody else. So I'm going to make you not dunk on me.'

PG: It's a problem. But you'd be a fool not to make him earn it at the foul line. This is where you get to the problem of five permissions—sixth one and you're disqualified. But let's say I've got five fouls on me, we're at the end of the game, we're up one point; he's five feet from the basket; he's going to dunk. No sir; you're going to have to earn it on the foul line. Is that unethical? That's certainly the way you're going to play that.

CV: They wouldn't hit him. They'd wrap him up so he can't lift his arms. Clearly flagrant.

PG: It's intentional. It's not a flagrant foul. You're not trying to hurt him.

SK: And the six permissions to foul—that's how the sport's understood today. Every coach knows it.

RB: Permissions? Not only options but permissions?

SK: Yes, permissions to use these strategically without moral censure.

RB: But how far does that extend? That attitude becomes 'everything is a price.' Anything strategically or tactically effective becomes a permission. So then there's nothing that restrains me, except efficacy. I've spent thousands of hours inside prisons interviewing convicted con men and killers. That's the predominant attitude among street criminals. Everything's an option; everything is a price. Weigh it, calculate. And you pay a price.

PG: Here's the inconsistency of my thought. I don't think you should do that to Shaq all game long. But in the last five seconds, I would.

JR: I'm inclined to think that the answer lies in the question: Does it make it a better game?

RB: I want to test how far you're willing to go.

Clip: A hockey goalie, desperate to stop a near-certain goal, intentionally knocks the goal itself off its moorings.

Commentator: "That should be a delay of game penalty."

Clip: Penalty shot; goalie blocks the shot and saves the goal for his team.⁵⁶

RB: He literally takes the goal and throws it aside to stop a 2-0 break. Blocks the penalty shot. Wins.

SK: Indefensible!

RB: But why?

MB: He changed the sport in a positive way. If it's the first time anyone ever came up with this, it's pretty clever. If it's been done a few times and now it's being done again, then the fault is with the rule makers for not making that a goal tending penalty—an automatic goal. And then it is no longer efficacious to do it.

RB: First time it happens, pretty clever and even gets some praise. If rules aren't changed, it remains efficacious.

MB: Cheating.

RB: Why is it cheating? I don't get how your conclusion follows from your premise. The rules haven't changed. You point to the obligation of the League to change the rules to make sure it doesn't happen again. The innovator's pretty clever and gets away with it the first time. The League has an obligation to change the rules to make sure no one else does it. The League fails to change the rules; now in effect it's still legal.

MB: It's not still legal. The rule says you can't do it. What the rule is isn't always so simple as what the text says. Shame on the rule makers for not curing it by an appropriate rule change. But the fact that they messed up doesn't make it permissible for someone to take advantage of it if no sport values are served.

PG: Two levels operate here: There are prices and prohibitions, and cleverness in the innovators. It's disgraceful; it's so contrary to what we're doing on the ice. So even if the rules do not change, or even if it's the very first time this happens, you could say that's very clever, but still absolutely disgraceful.

56. Daniel Rapaport, *Goaltender David Leggio's Antics Cause Another League to Change Its Rules*, SPORTS ILLUSTRATED (Dec. 13, 2017), <https://www.si.com/nhl/2017/12/13/david-leggio-dislodge-nets-rule-change-deutsche-eishockey-liga>.

JR: Our reaction or revulsion against it is puzzling. There was no guarantee that they were going to score a goal. The puck could have dribbled off the guy's stick; the goalie could have made a great save. He ends up making a great save on the penalty shot. Suppose a hockey defenseman tackles somebody in the act of putting the puck in an open net. We don't have the same revulsion about that, although it takes away even more of a deserved advantage. Is that part of the game?

If you think about this as lawyers or judges and look at the hockey goaltender example as precedent, that raises questions about other strategic behaviors to gain advantages. It should make us at least recognize the moral ambiguity of strategic fouling, even where we're prepared to accept it. I suspect sport is remarkable in accepting some shenanigans at a moral and perfectionist cost. This comes from the value of play.

SK: I want to consider the quality and integrity of a game. Usually the result of penalties, the payback system is not as interesting as the game itself. And so there's a trade-off. In basketball, five-on-five going up and down the court is very interesting to watch. Foul shooting can be dramatic at the end but the act bores us spectators. No dribbling, no passing, no great play. It's just standing there and doing it. We're spending all the time on a relatively simple act, when the game of basketball can and should be much more complex than that. And we should be determining the result by the full game rather than at the foul line. But our culture focuses on who's ahead, so we're willing to stoop very low to conquer.

RB: The Ancient Greeks never talked about games. They talked about contests. And everything was focused on the contestants. The Romans talked about games and the focus shifted. It became professional and the focus was on the spectators' enjoyment. There seems to be some parallel to this: whether our focus should be upon the contestants' experience and the purity of the contest, or upon the effect on the spectators. Who are we playing to? Who are we playing for?

CV: Purity of the public versus purity of the sport.

RB: Or the contest.

CV: Athletes mirror the general public. How pure is the public and how pure do you expect your players to be?

SK: It speaks to the question about the amateur. How much do you love the game? It's paradoxical if not contradictory to say, 'I love the game, but I'm willing to trash it to beat you this afternoon.' If it can be such a beautiful game, preserve it, play it.

PG: Let's say we're playing an officiated basketball game; I grab your jersey and the referee calls it. I know you're going to get two foul shots. But if we're playing a pickup game on the playground and I grab your jersey, I think you'll turn around and say, 'Come on, we came here to play; stop it.' Because if every time one of us beats the other going in for a layup, one player grabs the other's jersey, we've ruined the game.

MB: I agree with Paul. I'm a contextualist. I think the right answers to these questions depend on many factors. Is it amateur or pro? Are you calling your own or is there an official? What's the history of this particular sport? Baseball is a very gamey system. The history is cleverness; stratagems play a big part—the mental game. Playing with the rules and pushing them is a big part of that history. Golf isn't like that. So you have to understand the prescriptive and normative ethos of that particular type of sport. The same answer might not apply, even at the professional level, that 'sport is sport is sport.' You want to be sensitive to the nuances and particularities of any particular sport.

RB: To whom are the rules directed? Are the rules really directed to the officials? Or are they directed to the players? There's ambiguity and tension. Some criminals in prisons or boardrooms would insist that rules are directed at the police or law enforcement. They think, 'They're going to punish me for whatever they can catch me doing. But I don't have any obligation to follow the rules. I've just got to figure out whether I can get away with what I'm going to do. But I don't snitch.' They may feel that obligation [not to snitch] precisely because that relationship's not officiated.

MB: When we think about how the rules should be crafted and officiated, we don't want to eliminate all humanity. Sport really is an arena for the display of humanity—all the things that make us what we are.

RB: I agree. In society and some sports the optimal level of rule violation is *not* zero. Only tyrannies have zero crime. If you don't have crime, you don't have any freedom. A basketball game with no fouls would be a very sterile game. It's challenging to figure out the optimal level of rule violation.

JR: Interesting insight, Robert. The comparison between tyranny and sport has to be made carefully though. In some sports we would not say that contests without fouls would be sterile. You are clearly thinking about sports that incorporate strategic fouling, that is intentional fouling, as part of the game.

V. HOW SPORT CAN TEACH LAW AND LAW TEACH SPORT

RB: Home stretch; final lap. We never fully discussed Serena and the call that cost her the match on a foot fault.

MB: The penalty for a rule violation ordinarily should be super compensatory. That is, it should give the victim more than the victim would have gotten if she hadn't been fouled in the first place. It must be super compensatory in order to deter. That's as it should be.

But toward the end of a close contest, everything matters more. Some rules should be enforced less strictly at crunch time. If the score is zero-zero at the beginning of the game and you score a touchdown, it changes the win probability relatively slightly. If it's zero-zero with a minute to go and you score the same amount, it has a huge impact on the win probability. Which means the absolute

magnitude of the gap between the competitive effect of the foul and the competitive effect of the penalty imposed for the foul can get really big.

So you overlook pass interference on a Hail-Mary pass in the end zone, where the interference had a trivial impact on the probability of winning. But if you do call pass interference then, and give the offense the ball on the one-yard line, it has a huge impact on probability of winning. You don't want to give that windfall benefit to a team.

It's like the substantial performance rule in contract law. Suppose that you breach a contract in a tiny way, and the promisee demands perfect performance. For example, in the famous case of *Jacob & Youngs v. Kent*,⁵⁷ the contractor installed the wrong brand pipe, and the plaintiff demanded that they rip out all the pipe and start over. And the Cardozo court in effect said to the plaintiff, 'No. Suck it up.' The rationale behind the doctrine—that specific performance will be ordered only for a material breach—is the same reason why we don't want these ticky-tack fouls called at the end of the game: Because the competitive impact of imposing the penalty would be too great and therefore detract from the test, that relative excellence that should really determine the outcome.

RB: Law is way ahead of sport in assessing what's deserved and what's disproportionate. The United States Supreme Court has held that the Eighth Amendment's prohibition against cruel and unusual punishment also outlaws grossly disproportionate punishment.⁵⁸ So it's not only the nature of the punishment, the absolute size of the penalty, but also whether it's disproportionate in its effect to the crime actually committed, as measured by the culpable mental state of the criminal and/or the harm caused.

AS: I want to comment from a totally different perspective: the culture of the sport and gender here. Serena's body—incredible presence. Tennis is very etiquette-oriented. Serena's physicality as a woman is so intimidating. And when she intimidates the lineswoman with her racket—you see the officials' body language striding across the court—'We're coming to get her.'

Did they ever similarly sanction John McEnroe?⁵⁹ They paid attention to Serena because of her gender and her physicality within the culture of tennis. It was much

57. 129 N.E. 889 (N.Y. 1921).

58. See *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Weems v. United States*, 217 U.S. 349, 367 (1910); see also U.S. CONST. amend. VIII.

59. When former World Tennis Champion John McEnroe reflected on the only game ejection of his career, he acknowledged that he "pushed it to the limit a lot," and that although he shouldn't have been ejected in that particular match, "there were a few others where [he] probably deserved to be." Christopher Clarey, *25 Years Later, McEnroe Reflects on an Ejection (He Can Be Serious)*, N.Y. TIMES (Jan. 23, 2015), <https://www.nytimes.com/2015/01/24/sports/tennis/mcenroe-takes-it-all-in-stride-25-years-after-epic-meltdown-at-australian-open.html>.

different when bad boy McEnroe threw his racket or worse. And I think that's an interesting lesson for us.⁶⁰

PG: I felt that they were coming out to protect the lineswoman who made the call.

AS: Yes, definitely.

PG: It was clearly a foot fault, and I think the lineswoman has very little discretion to say it's too critical a moment to make the call. Besides, it didn't cost her the match. What cost her the match was the code violation. Now I watched that live. And I heard McEnroe in the booth say that you can't call it at that time. He's wrong. The lineswoman can't sit there and say it's too big a point. That much of a foot fault gives almost zero advantage in the serve. But what is that lineswoman supposed to do? She is not empowered to think about the time.

About McEnroe and [Jimmy] Connors,⁶¹ and even worse, [Ilie] Năstase⁶²—why didn't the linesmen just kick them out? Money. They needed McEnroe as much as McEnroe needed the tournament. These guys were superstars. And that's a common problem. The commercialism of the sport determines some of what is enforced and when.

MB: I'm not a huge fan of instant replay but it has had a very beneficial effect on tennis. McEnroe himself has said so.⁶³ To be precise, tennis doesn't actually use video replay; what appears to be a video is an animated graphic generated by tracking technology. But put that detail aside. The key point is that when you see the graphic that shows a ball in or out, you can't scream and argue. The graphic appears simply decisive.

RB: Up until now, we've focused on what sport can teach law or teach us in life. Let's focus on what law can teach sport.

60. Editor's note: In the summer of 2018, nearly one year after this symposium, Serena Williams made headlines again when, after a verbal altercation with the chair umpire for his officiating, he issued a penalty, ultimately costing her the final match at the U.S. Open. See Ben Rothenberg, *For Serena, a Memorable U.S. Open Final for the Wrong Reasons*, N.Y. TIMES (Sept. 9, 2018), <https://www.nytimes.com/2018/09/09/sports/tennis/serena-williams-sexism-us-open.html>. Williams and other female athletes have since expressed frustration about disparate treatment by officials of male and female players. See *id.*

61. Jimmy Connors is a retired American tennis champion known for his energetic style of play, which included colorful language and outspoken behavior on the court. See Joel Drucker, *Jimmy Connors at the U.S. Open, First Hate, Then Love*, N.Y. TIMES (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/sports/tennis/jimmy-connors-us-open.html>.

62. Former Romanian tennis champion Ilie Năstase similarly gained notoriety for his outlandish behavior—both on and off the court. See *Ilie Năstase Arrested Twice in the Space of Six Hours*, TELEGRAPH (May 25, 2018), <https://www.telegraph.co.uk/tennis/2018/05/25/ilie-nastase-arrested-twice-space-six-hours>.

63. See Clarey, *supra* note 59.

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*Clip: Golden State Warrior Zaza Pachulia sticks his foot out as superstar Kawhi Leonard from the San Antonio Spurs goes up for a jump shot. Leonard lands on Pachulia's foot and twists his ankle.*⁶⁴

Jeff Van Gundy: “That should have been a Flagrant 2. Now, the League doesn’t see it that way. They call it just a straight personal. But if you’re serious about a player’s safety, you penalize that play harshly.”

Gregg Popovich (Spurs head coach): “It’s dangerous. It’s unsportsmanlike. It’s just not what anybody does to anybody else. And this particular individual has a history with that kind of action. . . . And because he’s got this history, it can’t just be, ‘It was inadvertent. He didn’t have the intent.’ Who gives a damn about what his intent was? You ever heard of manslaughter? You still go to jail, I think, when you’re texting and you end up killing somebody. But you might not have intended to do that. All I care is what I saw. All I care about is what happened. And the history there exacerbates the whole situation. It makes me very, very angry.”

Ernie Johnson: “Shaq, when you look at that video, you think that was an intentional move by Zaza?”

Shaquille O’Neill: “When you’re a big guy, and you have big feet . . . you put your foot out like that, there’s a fifty-fifty chance that when he lands, he will come down on your ankle. I don’t know if he did it on purpose but it’s always like that for big guys.”

Charles Barkley: “I’m hesitant to call a person dirty unless they have a history.”

Johnson: “Gregg Popovich seems to think he does.”

Barkley: “I’ve heard other guys say, ‘I did this.’ It is a dirty play, but . . . I don’t want to call a guy dirty, unless I have proof or he has a track record. But let me say this, it *is* a dirty play.”

Shaq: “He knew what he was doing.”

Kenny Smith: “Zaza Pachulia is in the NBA because of his reckless abandon. But he’s one of twenty-five guys [who play that way]. I don’t think it’s dirty. I think it’s a guy who plays recklessly—”

Barkley: “I’m not going to say that Zaza Pachulia is a dirty player. But that is a dirty play.”⁶⁵

MB: The law is way ahead of sport in thinking systematically about levels of culpability. Mental states are fundamental to many areas of the law. And we slice and dice them pretty finely. Sport by and large is pretty rudimentary, pretty brute in thinking about mental states.

64. See Ananth Pandian, *Watch the Questionable Foul by Zaza Pachulia That Knocked Kawhi Leonard Out of Game 1*, UPROXX (May 14, 2017), <https://uproxx.com/dimemag/warriors-spurs-playoffs-kawhi-leonard-injures-ankle-foul-zaza-pachulia/2>.

65. NBA Stats All Seasons, *Inside the NBA: Did Zaza Pachulia Intentionally Injured [sic] Kawhi Leonard?*, YouTube (May 15, 2017), <https://www.youtube.com/watch?v=HotFKUu9Y4Y>.

JR: The problem partly is that referees are also witnesses. In a court of law, you've got two parties in an adversarial system laying out the evidence before a neutral judge. It may take several months, a morning, an hour, even a mere twenty minutes. To assess gradations of intent is something you can do, *ex post facto*. But how do you do it within a game where the judge, who's also a witness, must make instant judgements? It's very complex to witness something in real time and try to assess intent.

So, was this a dirty play? I'm encouraged that expert TV commentators disagreed about it. That implies it's not something routinely practiced as a defensive move—to jump in underneath the shooter so that as he's going up, he's got to be thinking about, 'How am I going to be able to come down safely?'

AS: I think it's not unreasonable to expect players to have control of their bodies. I don't think it's a really hard case. He caused harm. They should come down harder on this. They should be protecting the players.

SK: My question of what law can teach sport is a question about a very interesting dynamic—the relationship between rule breaking and penalties. Mitch said that as a general rule, penalties should exceed the benefit from rule breaking. I'm not sure that's true. Another logic would make the penalty equal to the benefit gained if the foul had never occurred. The penalty should balance the benefit. People have thought a lot more about penalties for recklessness, for intentional harms, for accidents and so forth. And I don't know if they can help sport or not. Sport is different than regular life. Law can't really teach sport about breaking rules and penalties.

MB: I don't think it's as simple as a sport system grabbing something off the rack from law. But law has systematically thought through some recurring problems of mental states.

In tort law for example, if bad results don't happen, no harm, no foul. If you're careless as can be and no one gets injured, you haven't committed a tort. In criminal law, generally, you can be guilty of an attempt even if the harm doesn't occur. In law, every adjudication comes with a set of standards of proof and review that apply to different issues. Sports don't have that. Read a rule book. It doesn't say how confident you have to be in order to call something. It's very puzzling. So sport can learn a lot from law, though the optimal answer in sport may be very different from the optimal answer in law.

RB: Chuck said a number of times that he looks to intent. And sport assumes that the world is divided into the intentional and unintentional. But in criminal law, 'unintentional' covers three separate categories, one of which is recklessness. A reckless actor is aware of and consciously disregards a risk. The risk must be substantial; it must be unjustifiable. And the disregard must be grossly deviant from what a reasonable person would do. That recklessness—a culpable, non-intentional

mental state—can attach to a serious violation, even if there’s no harm. We call the crime reckless endangerment.⁶⁶

Shaq was reaching for it instinctively when he said that it’s a fifty-fifty chance that you come down on someone’s foot. No, it isn’t, nor should it have to be. It can be a fifteen percent chance and, although you had no intention to injure, still be reckless. Zaza Pachulia probably didn’t intend to injure Kahwi Leonard. But if you’ve passed a certain threshold of risk, your awareness of and conscious disregard of that risk makes you culpable. With his, ‘I don’t give a damn if you intended it. Did you ever hear of manslaughter?’, Coach Popovich was searching for an expression that would convey the seriousness of recklessness.

Sport should start embracing reckless endangerment as a serious offense. It isn’t ‘no harm, no foul.’ The *danger*, the substantial possibility of serious injury makes it a serious foul. The crime of reckless endangerment should have its analog in sport. And you should be penalized.⁶⁷

As to the appellate process, John’s correct. There’s more time for a court of law to decide than there is on the field in real time in sport. But the League later reviews (or should) not just the flagrant foul where there’s been an injury. When they review it, they should first assess, was it intentional? The next inquiry should be, was it reckless? Zaza’s in this zone because of his reckless abandon. The League shouldn’t tolerate that.

CV: That was the world’s easiest call. But notice the ref didn’t blow the whistle before there was contact. Once a shooter jumps up in the air, they have a right to come down. On that play the player jumped into the air, the [defensive] player made contact with the player’s leg before he returned to the floor. That’s automatically a foul.

RB: But how serious a foul is it?

CV: It doesn’t matter.

RB: It matters to me.

CV: It doesn’t matter—it’s automatically a foul. The referee’s responsible for protecting the airborne shooter—watch him go up and down and then turn his attention to the rest of the play. That was not intentional.

RB: Was it reckless?

CV: No. It was clumsy.

RB: Was it negligent?

66. See Robert Blecker, *Penalties: Punishments, Prices, or Rewards?*, 63 N.Y.L. SCH. L. REV. 251, 271–72 (2018–2019).

67. See *id.*

CV: Think about what you saw. Intentional is when I push you out of bounds and knock you into the cheap seats. That's intentional; that's flagrant. You need to get thrown out. The League needs to suspend you for three games. Zaza turned around and kind of backed out. We teach people to box out. He boxed out badly. But the shooter [Leonard] still had from the three-point line to the end line to come down. Did the shooter go straight up and down?

RB: Leonard backed off.

CV: Think about his leg. Leonard stuck out his leg. Reggie Miller used to do that all the time to intentionally draw a foul.⁶⁸ He would stick out his leg because if you made contact with that leg it was automatically a foul. None of those commentators are referees. A referee would say he made contact on the airborne shooter.

Let's watch the clip again, in slow motion. Did Zaza run into Leonard? The guy's got his leg way out.

Clip of injury to Kawhi Leonard injury is replayed in slow motion.

CV: Did the player run into him and knock him down? Did he do anything intentional to hurt the player? No!

RB: That's not the issue! Did he do something *recklessly* to hurt or endanger the player?

MB: His act was intentional. But did he do something reckless as to the prospect of injuring the player?

CV: There's nothing that the referee could have interpreted as an intentional play to hurt that guy.

RB: It shouldn't be necessary. Was he aware of, and did he consciously disregard a substantial and unjustifiable risk that Kawhi Leonard would be injured? That's his style of play—dangerous. Even if he didn't consciously disregard the risk, at least he failed to perceive it. I'll take negligence. I'll take anything! He should have been suspended.

CV: He lands awkwardly, re-injures his ankle. And now Zaza should get charged with a flagrant foul?

RB: Yes.

CV: Really?

68. Reggie Miller was so notorious for this move that when the NBA adopted a rule in response to the practice (and long after Miller's retirement), the rule became known as the "Reggie Miller Rule." See Dan Favale, *Breaking Down What the New 'Reggie Miller Rule' Will Mean for NBA Jumpshooters*, BLEACHER REP. (Oct. 24, 2012), <https://bleacherreport.com/articles/1382890-breaking-down-what-the-new-reggie-miller-rule-will-mean-for-nba-jumpshooters>.

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RB: Yes! If we understand flagrant as dangerous. Yes.

PG: I agree. As a basketball player, you don't take somebody's space out when they're up in the air. That's dangerous. One of the significant words used in this discussion is history. This guy does it all the time. Maybe he's not aware. You've got to become aware, that's dangerous. You've got to learn how to play the game right. The TV panelists were reluctant to use the word 'intent,' as we all should be. We don't know what's in somebody else's mind. But if you are so careless, so reckless, you don't know how to play the game—because when we play even competitively against each other, we have to cooperate with each other. That guy's got a history, he deserves punishment.

CV: If it was a flagrant foul and the ref missed it, why did nobody criticize the ref? Why did they only focus on the play?

AS: The coach said it.

CV: The coach said it because of the disastrous results.

MB: Maybe Chuck and Robert are speaking past each other. Robert, to what extent were you saying that under the current rules this is a flagrant or dangerous foul? I took you to be saying the rules should be more sensitive to the variations within culpability.

RB: Correct.

MB: I take you, Chuck, perhaps to be saying that, given how the rules are written, this was not a mistake by the ref. And I take Robert to be saying the rule makers should be more sensitive to the wide variety within what we sometimes loosely call intentionality. And they should draft rules so that it clearly covers this situation and would make it a reckless offense.

I don't mean it as a criticism of the ref because in real time it's very difficult to make that judgment, whether it was intentional, reckless, or negligent. The League should review it. And if it turns out retroactively that it was reckless endangerment, the League should punish it and send a message of deterrence and retribution.

CV: Flagrant 1 and 2 are relatively new animals. Once upon a time, there was no distinction. There has been an effort to declare, 'We think that's a bad play; you're going to get penalized for it more than as a common foul.'

RB: But the definition of a Flagrant 2 is that it's unnecessary and excessive contact. The definition of a Flagrant 1 is that it is unnecessary contact. And my point is, talk about dangerousness, then talk about viciousness. As a retributivist, I want there to be punishment. That's another thing sport should learn from criminal law—about punishment. It's not only deterrence.

MB: Should there be the same gravity of offense even if it's an unimportant game with a relatively unimportant player? Would we be interested in that case?

RB: Your question, of course, concerns equal protection. The Constitution talks about equal protection. Here it applies literally. To what degree are superstars better protected than ordinary players? To what degree do you give the superstar a break when you call a foul? And is the message coming from the League, 'Don't foul out our superstars, that's who the people are paying to see'?

So the same kind of play that might draw a foul on an ordinary player won't get called on a superstar. In my criminal law class we just read cases where corporate executives were given a pass for maintaining deadly workplace conditions where six people died and dozens were wounded.⁶⁹ On the other hand, one robber leaves his drunken, helpless, victim on the side of the snowy road. And when the victim crawls to the middle of the road and a speeding truck runs him over, that robber gets convicted of murder.⁷⁰ A double standard operates. Both law and sport have the equivalent ideal of equal protection. And both have much to answer for in terms of their failure to live up to that ideal.

SK: The issue of retribution and deterrence in sport runs a little bit different than in society at large. Some people have argued that if the rule makers of basketball really wanted you not to do something, they would make the penalty higher. But the penalty is pretty low, so that invites people to break the rule.

Against that we could argue that we want people to play with gusto. And when you play with gusto that's part of the fun of the game. And if the penalty is too high, we're shooting ourselves in the foot. Because then people play too cautiously and that doesn't help the game.

We also want the game to have integrity. We want to reward people who played better during the course of the game. And so if there's an event that carries a huge penalty, particularly near the end of a close game, then we complain that the officials decided the game.

RB: Are you in favor of reining in the risk of injury?

SK: Yes. I would go that far. But, there's still that tension with how to rein it in and how big the penalty should be.

RB: Another question from law and sport: We say in criminal law that it's better that twenty guilty people go free than one innocent person be convicted. That's essential. We much prefer to acquit the guilty than convict the innocent. Does that apply to sport, and should it? Would we prefer to over-penalize or under-penalize if we have to make an error? Or are we indifferent?

AS: Well, we certainly have made a reverse decision in doping because of the strict liability rule. If they find even trace elements of prohibited substances in your body, you're presumed guilty until and unless you prove your innocence. You're guilty until proven innocent. And it totally reverses western legal traditions.

69. See *People v. Warner-Lambert Co.*, 414 N.E.2d 660 (N.Y. 1980).

70. See *People v. Kibbe*, 321 N.E.2d 773 (N.Y. 1974).

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RB: That's especially odd. The New York Penal Law says unless the legislature's intent is clear, every crime is to be considered a crime of mental culpability. It instructs us to avoid strict liability whenever possible.⁷¹

AS: Yes, it's reversed. And they did that because CAS, the Court of Arbitration for Sport, was completely bombarded with all these cases—challenging them to determine intent. So they said, 'It's just too much. We either give up chasing down doping or we change the rules.' And the rules are, if it's in your body you're responsible. We don't care how it got there.⁷²

RB: Following up on Mitch's earlier comment, what's the burden of persuasion, how heavy? How clearly must you prove that?

AS: Not very heavy; it seems very few get off.

RB: And there are sometimes innocent explanations for having prohibited substances?

AS: Yes. Andreea Răducan from the Sydney Olympics, a sixteen-year-old gymnast from Romania, was under the care of a physician and prescribed a cold remedy by that doctor. And they not only stripped her of the gold medal but also the whole team.⁷³

PG: Wow.

AS: Because it was in her system. Strict liability. The whole question whether she got an unfair advantage was absurd. They showed she didn't even choose to take a banned substance. She was a minor under the care of the team doctor who gave it to her. And she was found guilty.

VI. TESTS V. CONTESTS REDUX

Clip: During the 2016 Olympics, a relay runner from Brazil steps out of her lane and fouls the American runner, causing her to drop the baton. The error resulted in the decision to allow the U.S. relay team to run alone, without any other competitors on the track.⁷⁴

71. N.Y. PENAL LAW § 15.15(2) (McKinney 2018).

72. See *Strict Liability in Anti-Doping*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/questions-answers/strict-liability-in-anti-doping> (last visited Nov. 3, 2018). The organization notes that strict liability was imposed "[i]n accordance with [World Anti-Doping Agency]'s stakeholders' wishes." *Id.*

73. Richard Sandomir, *Sydney 2000: Olympics: Drug Testing; Arbitrators Reject Appeal by Romanian Gymnast*, N.Y. TIMES (Sept. 28, 2000), <https://www.nytimes.com/2000/09/28/sports/sydney-2000-olympics-drug-testing-arbitrators-reject-appeal-by-romanian-gymnast.html>.

74. See Jeré Longman, *U.S. Women Drop Baton, but Advance After a Second Chance*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/19/sports/olympics/relay-usa-women-drop-baton.html>.

RB: Angela suggested this clip. The Brazilian team clearly fouled and is eliminated. But that foul knocked out the U.S. team. They couldn't qualify for the next round. So, the U.S. protested. And the protest was upheld. But now what do you do? You can't ask everyone to re-run the race because they already ran and have their relay times. So their solution was to have the U.S. team re-run the race alone. And remember, they're competing against the times of all the other teams that have already run at the same time. Is this re-run, this do-over, a test or a contest?

AS: And there's more to the story. Because Brazil and the U.S. were disqualified, China was able to advance to the final.⁷⁵ When the U.S. appealed and were allowed to run again, they edged out China with a faster time. But then China appealed that the U.S. shouldn't have been able to bump them because by the U.S. running alone, the relay had turned into a test and not a contest. China lost the appeal. And they shouldn't have. Because the IAAF [track's international governing body] didn't understand Scott Kretchmar's concept. And it would have helped.

MB: Not to be the skunk at the picnic here but many sports are not run simultaneously.

RB: Look who you're talking to—a world-champion rower.

MB: Well, in rowing it is simultaneous.

RB: Not always. Angela just rowed the Head of the Charles. That's not simultaneous.

MB: You're on the course at the same time, but you don't start at the same time. Take a more extreme case—downhill skiing. There you're the only person on the course at that time.

AS: But that's not what a relay is. A relay is always run with the other teams. And the test of relay is not about who has the fastest runners, but whose runners can pass the baton without running out of the lanes. That's the biggest challenge. So they coach you not to turn around because if you do, you throw your body weight backwards and you go out of bounds. And you may have secured the baton, but you probably interfered with the other team's runner. So you have to teach people how to contest.

SK: I would distinguish highly valid contests from less valid contests. You can have a contest sequentially but it's defective in obvious ways. Certain parties don't have knowledge that's relevant while contesting—that is, whether or not they are ahead of the other contestants. If they complete the test independently, and well before the other contestants, the aggrieved party can argue, 'If I had known you were right beside me, who knows what I could have done?' You can compare scores and say it was a contest, run on the same track, under the same rules. But there's a defective

75. Philip Wen, *Rio Olympics 2016: Chinese Sprinters Cry Foul After US Granted Solo Re-Run*, SYDNEY MORNING HERALD (Aug. 19, 2016), <https://www.smh.com.au/sport/rio-olympics-2016-chinese-sprinters-cry-foul-after-us-granted-solo-rerun-20160819-gqwsy6.html>.

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element to this. And as sport and competition lovers we like to have rich contests where the competitors know about one another.

Golfers love to play match play because it's head-to-head and they can watch the other golfers side-by-side making shots. But some golfers finish first and they don't know what later golfers are going to do. If they had known they might have tried a riskier shot on the eighteenth hole that could have saved them a stroke. And they could have a complaint to say, 'This was a defective competition because I had to go first.' You can compare scores in terms of winning and losing with a degree of sense to it, but it's not a good contest.

PG: We assume the U.S. team has this advantage to have the track all to themselves. But perhaps running side-by-side with others makes you run faster. That's the whole point of a contest. But one of the first things about the test/contest distinction—I can try very hard to master a test. But when I do it against someone who's trying to beat me, I might find something I didn't know was in me. I was only running this fast and I saw he was a stride ahead of me and I found a gear I didn't know I had. Which is one of the great things about the contest.

VII. QUESTIONS FROM THE AUDIENCE

QUESTION: If each of you were Commissioner for a day—choose your sport—what's the one thing you would change?

PG: If I were the Commissioner of almost any professional sport I would reduce the schedule. Because it is ruining the integrity of the game and the health of the players—just for money. All these sports seasons are too long. They're going to have a World Series one day under two feet of snow. And they deserve it. Somebody's got to be a steward of the game and protect its integrity.

AS: I'm much more interested in elite level amateur sport than in professional sport. And so what would I change? We've got to look at anti-doping rules. I think we should only be scrutinizing Cadillac drugs and forget about Sudafed and caffeine. The prohibited list has grown to over 600 substances.⁷⁶ I think it's a waste of money and a waste of time for seventy-five percent of the drugs on the list.

RB: And that comes from somebody who lost her Olympic gold medal to a team that cheated by doping.

SK: I would expand the conversation. I would include more people at the table who have a stake in sport. Kids at Penn State talk about college sport and not having a voice in their own future. Because adults make all the decisions. I don't know how it works at the NBA level, but I suspect a small group makes most of the important decisions. So I would broaden the conversation and get more stakeholders at the table.

76. See WORLD ANTI-DOPING AGENCY, PROHIBITED LIST (2019), https://www.wada-ama.org/sites/default/files/wada_2019_english_prohibited_list.pdf.

RB: I got very involved in the Deflategate controversy.⁷⁷ Commissioner Rodger Goodell, consistent with what the players signed on to in their Collective Bargaining Agreement, got to decide whether Tom Brady cheated, and decided he did. That decision and penalty went up on appeal. To whom did it go on appeal? Commissioner Goodell. He actually sat as the sole appellate judge over his own earlier opinion. If that isn't an outrageous violation of due process, you tell me what is. The person judged his own case, thereby violating fundamental western cultural norms in law that no one can ever rightfully be a judge in their own case. I'd eliminate that.

JR: My answer will sound sort of quaint, but I would like to see the size of hockey goaltenders' pads reduced substantially. If you look at goaltenders from the seventies and eighties, they look like stick men compared to today. It's made the game much less interesting because there's less goal scoring. And that's brought more strategic fouling into the game because scoring a goal means so much more. And so you no longer see as much creativity because you're negated by goal pads that are too wide. And responding to what Angela just said, I would go one step further. I don't see a good argument for banning any safe performance enhancing drugs.

AS: I would not necessarily disagree with that, as long as it doesn't reduce or remove or change the test, the virtues, the excellences of that game.

JR: We might agree on that, too.

MB: I think we should fix the 10-point must scoring system in combat sports. The scoring is really a joke. Whoever wins the round gets ten points and whoever loses gets something less. In boxing, nearly every round is scored 10-9. So you have this big range which you're not using at all. If combat sports are going to be taken more seriously, you must have better scoring.

CV: Basketball is a team sport. I am appalled that superstar players like Kobe Bryant can take several shots in a row. That's not basketball. The League should change the rules so that more people must touch the ball. One person can't score three times in a row. Somebody else has to score.

Q: Do you view the rules of sport as a code of conduct, as opposed to contractual provisions? When you breach a contract, we don't necessarily punish the breaching party. Perhaps that's why people in the sports world want to use the word 'flagrant' rather than dangerous. They don't want to mix their world of sports which you look at from an ethical point of view. And they want to maintain the integrity of entertainment, which is what these sports are—entertainment.

77. See Brief for Professor Robert Blecker as Amicus Curiae in Support of Appellees, Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527 (2d Cir. 2016) (No. 15-2801); Michael McCann, *The Only Outside Opinion That Judges Can Hear*, SPORTS ILLUSTRATED (Mar. 30, 2016), <https://www.si.com/nfl/2016/03/31/deflategate-tom-brady-roger-goodell-robert-blecker-amicus-brief>; FOUR GAMES IN FALL (Lemon Martini Productions 2017).

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MB: I think that sports create and enforce codes of conduct. It's quite clear if you read the rules, understand the logic of the rules, they often say 'thou shall not.' European sports often refer to the rules as 'the laws of the game.' These are systems of rules which govern conduct and have permissions and prohibitions; powers and duties. That seems reasonably clear to me, even though it's true that participants enter voluntarily into the normative domains that sports create.

Q: Isn't that a little dangerous? Penalize them, suspend them, but don't sue them or send them to jail.

MB: I don't think the legal consequences of fouls is a very big worry in American law. By participating in a sport contest you consent not only to injuries that might occur legally; you consent to the possibility that you're going to be injured by conduct which violates the rule of that sport. So, there would be no great danger if the NBA changed the rules in ways that Robert's proposing—it wouldn't open up players to tort or criminal liability. But if a guy in hockey picks up his stick, in some really extreme case, things could happen in the course of the game which would make someone liable under tort law or criminal law. So, flagrant fouls—even unnecessary roughness in football—clearly violate the rules of the sport, but do not plausibly open up the rule breaker to civil or criminal liability under the American scheme.

JR: This is an area where law has helped sport. A flagrant assault in hockey happened in Vancouver where an enforcer, Marty McSorley, chased down a guy he wanted to fight, Donald Brashear.⁷⁸ Brashear was skating away, refusing to fight. So McSorley took his stick and hit him across the back of the head, knocking him unconscious. McSorley's lawyers argued that this was part of the game; that a lot of gratuitous violence goes on in the sport. And the judge rejected the consent argument and held that this sort of behavior was too dangerous to consent to.

Q: I want to frame this question with two legal concepts: jurisdiction and standing. Recently I read a headline that the NCAA refused to take any action against the University of North Carolina at Chapel Hill for its flagrant academic violations.⁷⁹ Should we have any respect for college sports' integrity? If the NCAA doesn't have jurisdiction to bring an action against Chapel Hill, who does?

78. See Kostya Kennedy, *Up Against It in an Exclusive Interview Marty McSorley Discusses His On-Ice Assault of Donald Brashear and the Resulting Suspension, the Longest in NHL History*, SPORTS ILLUSTRATED (Nov. 20, 2000), <https://www.si.com/vault/2000/11/20/292610/up-against-it-in-an-exclusive-interview-marty-mcsorley-discusses-his-on-ice-assault-of-donald-brashear-and-the-resulting-suspension-the-longest-in-nhl-history>.

79. See Marc Tracy, *N.C.A.A.: North Carolina Will Not Be Punished for Academic Scandal*, N.Y. TIMES (Oct. 13, 2017), <https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html> ("The N.C.A.A. did not dispute that the University of North Carolina was guilty of running one of the worst academic fraud schemes in college sports history, involving fake classes that enabled dozens of athletes to gain and maintain their eligibility. But there will be no penalties, the organization said, because no rules were broken.").

SK: A lot of people who love college sport and are concerned about its integrity were shocked by that decision. The NCAA makes each institution responsible for its own academic integrity. If a school has a bogus major to keep football players eligible and in good academic standing, the NCAA won't have anything to say about it. The NCAA refuses to cross that academic line.

When I first became a faculty rep, I went to a school that had not graduated a basketball player in something like seven years. Egregious. A total sham of college sport. I went to their faculty representative and said, 'What are you doing here; why aren't you yelling and screaming about this? Where are the faculty?' And she said, 'The faculty gave up years ago. They signed off.' So that's one answer to your question. It's not a good answer.

VIII. CONCLUSION

RB: You might have noticed the 'Since 1891' sign hanging overhead. A great philosopher of sport, James Naismith, invented basketball in 1891 by logical reasoning.⁸⁰ Assigned to invent an indoor winter sport, he tried and failed to modify traditional sports such as lacrosse and football. And he retreated to his office and thought it through: Football was too rough to be played indoors in a gym. Why? Because the ball carrier got tackled. Why tackle? To stop him from running with the ball. First rule: No running with the ball. If you can't run with the ball what do you do? Pass it. But that's just 'keep-away'—a game for children and hardly calculated to quiet a rebellious gym class of graduate students. There must be a goal. But if you hurl a ball in a confined space, someone's likely to get hurt. So force the player to arc a ball. But how to prevent the defense from swatting the ball away as it arcs into the goal on the floor? And Naismith thought: You elevate the goal, place it higher than anybody can reach. That was the birth and essential principle of basketball. No running with the ball; pass until you shoot by arcing a ball into an elevated goal.

So in 1891, a great philosopher of sport by a great leap of logic invented basketball. That year also saw the first appearance of the penalty kick in soccer.⁸¹ Until then, the working ethos was that no gentleman would intentionally violate the rules. So intentional fouls did not exist. And since accidental behavior has no moral significance, nothing should be punished. But reality intruded and a key match was lost because of an intentional foul. So for the first time in 1891, the penalty kick made its appearance.

Around that same year, the flying wedge was invented as an offensive strategy in American football.⁸² Based upon a Napoleonic concept of war—that if you attack an

80. *James Naismith and the Invention of Basketball*, JR. NBA, <https://jr.nba.com/james-naismith-invention-basketball> (last visited Feb. 18, 2019); see also *Newly Found Documents Shed Light on Basketball's Birth*, ESPN (Nov. 13, 2006), <http://www.espn.com/nba/news/story?id=2660882>.

81. CLARK MILLER, *HE ALWAYS PUTS IT TO THE RIGHT: A HISTORY OF THE PENALTY KICK 10–11* (1998).

82. See *Flying Wedge First Used in 1892 by Deland Coached Harvard Team*, HARV. CRIMSON (Nov. 6, 1926), <https://www.thecrimson.com/article/1926/11/5/flying-wedge-first-used-in-1892>; see also Terrence P. Jeffrey, *How Harvard Drove a Wedge into Football*, CNS NEWS (Dec. 21, 2016), <https://www.cnsnews.com/commentary/terence-p-jeffrey/how-harvard-drove-wedge-football>.

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enemy's weak point, it will shatter, rendering all other force around it irrelevant—the football wedge concentrated an offensive attack on a single vulnerable defender. It also killed and paralyzed many players in the prime of their youth, and was eventually outlawed, largely by the pressure President Theodore Roosevelt exerted to save the sport.⁸³

And finally, in 1891, New York Law School was founded.⁸⁴ And that event has ripened into this day. A heartfelt thanks to the six of you, including our referee, Chuck Vasser, and of course, Marc Lasry, who made possible this public conversation—a labor of love and a close approximation to the reply and revenge I dreamed of fifty years ago to the claim about philosophy of sport: "This is crap!"

83. Katie Zezima, *How Teddy Roosevelt Helped Save Football*, WASH. POST (May 29, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/05/29/teddy-roosevelt-helped-save-football-with-a-white-house-meeting-in-1905/?noredirect=on&utm_term=.224375c3b943.

84. *Mission and History*, N.Y.L. SCH., https://www.nyls.edu/about_the_school/mission_and_history (last visited Nov. 3, 2018).