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J.S. RUSSELL

## Remarks on the Progress of a Jurisprudence of Sport

63 N.Y.L. SCH. L. REV. 175 (2018–2019)

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## REMARKS ON THE PROGRESS OF A JURISPRUDENCE OF SPORT

### I. INTRODUCTION

A little over twenty years ago, I wrote a couple of articles that I thought would outline and begin a jurisprudence of sport.<sup>1</sup> That was probably too ambitious a goal, but that there should be a jurisprudence of sport that deserved scholarly attention seemed as obvious to me then as it does today, for sport embodies the main elements of a legal system. It has laws (rules), legislators (gamewrights and official bodies responsible for writing and amending rules that govern conduct), and enforcement officials (referees, umpires, and other officials charged with upholding the rules and handling appeals). The parallels with legal systems of political communities are obvious, but so are the ways in which sport is distinctive. Consequently, sport as a type of system of law seemed fertile ground for having its own jurisprudence—that is, for the theoretical study of the foundations of sport as a legal system and of the study of the nature of rules and norms, legal validity, and legal reasoning in sport.

As it happened, this was unturned ground. No one had written about these issues and the possible parallels with jurisprudential study of law. It was a welcome discovery, however, that there was a flourishing emergent scholarly discipline in philosophy of sport with an active scholarly society, the International Association for the Philosophy of Sport, and a journal where such articles could find a natural home, the *Journal of the Philosophy of Sport*, which at that time had been publishing well-informed and thoughtful work for approximately twenty-five years.<sup>2</sup>

Any jurisprudential theory presumes philosophical positions about the nature and activities of legal systems, and so my initial articles drew on philosophy of law—in particular, legal positivism, natural law, and Dworkinian accounts of law and legal interpretation.<sup>3</sup> These perspectives could illuminate the legal and judicial aspects of sport, and in particular, the role of umpires and referees<sup>4</sup> as judges or legal decision-makers.<sup>5</sup>

1. See J.S. Russell, *Are Rules All an Umpire Has to Work With?*, 26 J. PHIL. SPORT 27 (1999) [hereinafter Russell, *Rules*]; J.S. Russell, *The Concept of a Call in Baseball*, 24 J. PHIL. SPORT 24 (1997).
2. For the Journal's body of work, see *Journal of the Philosophy of Sport*, TAYLOR & FRANCIS, <https://www.tandfonline.com/loi/rjps20> (last visited Feb. 18, 2019).
3. Legal positivism holds that law is a type of social fact with no inherent moral content, and it is humans who decide whether to incorporate moral standards into it. See Stephen W. Ball, *Facts, Values, and Interpretation in Law: Jurisprudence from Perspectives in Ethics and Philosophy of Science*, 38 AM. J. JURIS. 15, 16 (1993). Natural law theory holds the contrary: that law necessarily incorporates certain moral standards. See *id.* at 18–19. Dworkinian accounts of law, named after legal philosopher Ronald M. Dworkin, are frequently associated with natural law theories in holding that moral standards, or principles, are parts of law in addition to legal rules. See *id.* For more on legal positivism, natural law, and Dworkin's views, see ANDREW ALTMAN, *ARGUING ABOUT LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* (Peter Adams et al. eds., Wadsworth 2d ed. 2000).
4. The terms “umpires” and “referees” are often used interchangeably across sport, and in some cases connote different levels of decision-makers. For simplicity, this article will usually refer to “umpires” to capture all those in judicial roles in sport—that is, all officials that serve in some judicial decision-making capacity regarding the conduct of sporting events, including umpires, referees, and those in positions to review and amend their decisions.
5. I had hoped that my articles would encourage a literature, but with the notable exception of GRAHAM McFEE, *SPORT, RULES, AND VALUES* (Routledge 2004), not much was published initially, though my articles did have an impact on the broader sport philosophy literature. See, e.g., Nicholas Dixon,

Legal scholars and lawyers can think of this essay as roughly an investigation into the officiating of matters of law and fact within sport. Part II of this essay focuses on the relationship between rules and principles in sport, including a review of criticisms of positions that I advanced two decades ago. Part III discusses how these rules and principles inform umpire discretion in making calls, and the role that human error and technological review of judgment calls have on sport as a whole. Finally, Part IV concludes this essay with a review of the evolution of philosophy of sport and how these concepts can and should be used to inform a jurisprudence of sport.<sup>6</sup>

## II. ARE RULES ALL AN UMPIRE HAS TO WORK WITH?

My paper by the same name of this section<sup>7</sup> has been used to inform perhaps the leading position today about the nature of sport, which goes by the name “broad internalism,” or sometimes “interpretivism.”<sup>8</sup> Broad internalism holds that normative principles (ethical standards or norms) are embedded within and form constitutive

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*Canadian Figure Skaters, French Judges, and Realism in Sport*, 30 J. PHIL. SPORT 103 (2003); William J. Morgan, *The Normativity of Sport: A Historicist Take on Broad Internalism*, 43 J. PHIL. SPORT 27 (2016); Robert L. Simon, *Internalism and Sport*, in THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF SPORT 22, 22–34 (Mike McNamee & William J. Morgan eds., 2015); Robert L. Simon, *Internalism and Internal Values in Sport*, 27 J. PHIL. SPORT 1 (2000). Things have changed dramatically—the last several years have seen rich interest in jurisprudential issues in sport, often partly motivated by these earlier articles. Here is a partial list of contributions in addition to those already cited: HARRY COLLINS, ROBERT EVANS & CHRISTOPHER HIGGINS, *BAD CALL: TECHNOLOGY’S ATTACK ON REFEREES AND UMPIRES AND HOW TO FIX IT* (2016); ROBERT L. SIMON, CESAR R. TORRES & PETER F. HAGER, *FAIR PLAY: THE ETHICS OF SPORT* (Westview Press 4th ed. 2015); Mitchell N. Berman, “*Let ‘em Play*”: *A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325 (2011) [hereinafter Berman, “*Let ‘em Play*”]; Mitchell N. Berman, *On Interpretivism and Formalism in Sports Officiating: From General to Particular Jurisprudence*, 38 J. PHIL. SPORT 177 (2011) [hereinafter Berman, *On Interpretivism*]; Mitchell N. Berman, *Replay*, 99 CAL. L. REV. 1683 (2011); S. Seth Bordner, *Call ‘em as They Are: What’s Wrong with Blown Calls and What to Do About Them*, 42 J. PHIL. SPORT 101 (2015); Harry Collins, *The Philosophy of Umpiring and the Introduction of Decision-Aid Technology*, 37 J. PHIL. SPORT 135 (2010); Mark Hamilton, *The Moral Ambiguity of the Makeup Call*, 38 J. PHIL. SPORT 212 (2011); Patrick Lenta & Simon Beck, *A Sporting Dilemma and Its Jurisprudence*, 33 J. PHIL. SPORT 125 (2006); Stephen Mumford, *Truth Makers for Judgement Calls*, 6 EUR. J. SPORT SCI. 179 (2006); Graham McFee, *Officiating in Aesthetic Sports*, 40 J. PHIL. SPORT 1 (2013); Graham McFee, *Fairness, Epistemology, and Rules: A Prolegomenon to a Philosophy of Officiating?*, 38 J. PHIL. SPORT 229 (2011); Tamba Nlandu, *The Fallacies of the Assumptions Behind the Arguments for Goal-Line Technology in Soccer*, 6 SPORT ETHICS & PHIL. 451 (2012); Richard Royce, *Refereeing and Technology—Reflections on Collins’ Proposals*, 39 J. PHIL. SPORT 53 (2012); Steven Weimer, *Consent and Right Action in Sport*, 39 J. PHIL. SPORT 11 (2012).

6. An area of jurisprudence in sport I will not address, in part because it has no direct parallel in the legal systems of political communities (at least not that is obvious to me), is the role of judging in what might be called “aesthetic” or “performance” sports. These are sports where the role of officials (usually called “judges”) is to measure how well athletic performances realize certain standards of physical and aesthetic excellence (gymnastics, figure skating, and diving for example). However, any complete theory of jurisprudence in sport must give an account of judging aesthetic or performance sports.
7. Russell, *Rules*, *supra* note 1.
8. See Simon, *Internalism and Internal Values in Sport*, *supra* note 5, at 2; Simon, *Internalism and Sport*, *supra* note 5, at 22.

elements of a conception of sport and of individual sports themselves.<sup>9</sup> This realist theory holds that sport has a reasonably fixed constitution of normative principles that are broadly consistent with basic human values.<sup>10</sup> These principles are reflected in the rules and practices of specific sports.<sup>11</sup>

My early work on the role of principles within sport did not mention directly any commitment to realism; I was more concerned with disputing what I called “the ideology of games,” which I claimed was the view that, as well-known baseball umpire Joe Brinkman once put it, “[R]ules are rules. Rules are all an umpire has to work with.”<sup>12</sup> This position—that rules are fully authoritative and thus the only source of normative authority for informing umpires’ decision-making—is a prevalent view in public discourse, shared by judges and baseball umpires alike.<sup>13</sup> The limitations of this view, as well as the role of normative principles and umpire discretion, can be illustrated by a variety of notable moments in baseball history.

#### *A. Rules, Principles, and Judicial Discretion in Sport*

In 1887, in an American Association baseball game between Louisville and Brooklyn, Louisville baserunner Reddy Mack safely scored after a ball was hit into play.<sup>14</sup> After crossing home plate, Mack turned around and jostled the Brooklyn catcher to prevent a tag on the following baserunner.<sup>15</sup> At the time, the rules in baseball prohibited baserunners from interfering with fielders in their handling and throwing of baseballs, but Mack—after crossing home plate—was no longer a

9. Simon, *Internalism and Internal Values in Sport*, *supra* note 5, at 7.

10. *See id.*

11. The realist part of this theory has had conventionalist (anti-realist) critics, but even those critics agree that broad internalism was correct to identify normative principles as constitutive parts of sport and particular sports. *See, e.g.*, Morgan, *supra* note 5.

12. Russell, *Rules*, *supra* note 1, at 27, 30; *see also* JOE BRINKMAN & CHARLES EUCHNER, *THE UMPIRE’S HANDBOOK* 6 (The Stephen Green Press rev. ed. 1987). Brinkman spent thirty-five seasons as an umpire for Major League Baseball, during which time he owned and operated an umpiring school. Kevin Hennessy, *Joe Brinkman*, *SOC’Y AM. BASEBALL RES.*, <https://sabr.org/bioproj/person/62a6e3cc> (last visited Feb. 18, 2019).

13. A parallel to the ideology of games is apparently held by some judges about the limitations of their judicial role. In his opening remarks at his United States Supreme Court confirmation hearing, Chief Justice John G. Roberts likened his view of judicial authority to that of baseball umpires: “Umpires don’t make the rules, they apply them . . . it is a limited role.” *John Roberts Opening Statement*, C-SPAN (Sept. 12, 2005), <https://www.c-span.org/video/?c4284078/john-roberts-opening-statement>. When I teach philosophy of law and law classes, I like to point out that proper appreciation of what umpires do in sport, including how they exercise discretion from time to time to make and amend rules, shows that sport is not the model for judicial restraint that Chief Justice Roberts assumed. I should add that this ideology was also held by some law professors, in particular my colleague at the University of British Columbia, Stephen Wexler—a lively and very helpful informal coffee- and lunch-time adversary who happened to have attended and graduated from Brinkman’s umpiring school.

14. DAVID NEMEC, *THE RULES OF BASEBALL: AN ANECDOTAL LOOK AT THE RULES OF BASEBALL AND HOW THEY CAME TO BE* 174 (1994); *see also* Russell, *Rules*, *supra* note 1, at 28.

15. NEMEC, *supra* note 14.

baserunner, and so there was no rule explicitly regulating his conduct.<sup>16</sup> In a virtuoso performance worthy of a great Supreme Court justice, umpire Wesley Curry ruled the first baserunner following Mack “out” and ordered the second baserunner immediately following him back on base.<sup>17</sup>

Curry’s on-the-spot decision was not supported by any specific rule.<sup>18</sup> However, his reasoning appeared irreproachable: Mack had prevented the catcher from making the tag on the first baserunner immediately following him, and so that runner was called out, rendering the ball dead. The next runner, therefore, could not be out, but was restored to the base he was on when the play was interrupted.<sup>19</sup> Curry’s decision, in effect creating a rule governing the conduct of non-baserunners, was controversial, but any decision that permitted Mack’s behavior would have encouraged others to imitate him, threatening to turn the game of baseball into a nine-inning wrestling match. The rules were later changed in line with Curry’s decision.<sup>20</sup> There should be a statue of Wes Curry in any pantheon of great judges.

The strike zone in baseball is another area rife with umpire discretion. Throughout the history of the game, strikes have rarely, if ever, been called according to how the rules define them.<sup>21</sup> Generally, umpires give extra room for strikes off the outside of the plate and no extra room on the inside.<sup>22</sup> Strike zones are also adjusted based on the count on the batter.<sup>23</sup> In addition, the vertical dimensions of the strike zone have shown themselves to be typically smaller than defined in the rules.<sup>24</sup> Major League Baseball umpire Jim Evans defended the discrepancy between the rules defining the strike zone and the way umpires call it by saying that the strike zone “has evolved according to what the game demands.”<sup>25</sup> His remarks make clear that sometimes the rules are at odds with what a sport requires, and umpires sometimes give priority to what a sport demands.

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16. *Id.*

17. See Russell, *Rules*, *supra* note 1, at 28.

18. NEMEC, *supra* note 14.

19. See Russell, *Rules*, *supra* note 1, at 28.

20. *Id.*

21. Cork Gaines, *What an MLB Strike Zone Really Looks Like and Why Players Are Always So Mad About It*, BUS. INSIDER (Sept. 17, 2014), <https://www.businessinsider.com/mlb-strike-zone-2014-9>.

22. Michael Lopez & Sadie Lewis, *An Exploration of Umpires’ Strike Zones*, *HARDBALL TIMES* (May 4, 2018), <https://www.fangraphs.com/tht/an-exploration-of-mlb-umpires-strike-zones>; see also *Calling Balls & Strikes*, *UMPIRE BIBLE*, <http://www.umpirebible.com/index.php/rules-pitching/calling-balls-strikes> (last visited Sept. 25, 2018). When I was receiving umpire training, I was told these amendments to the strike zone are justified because balls just off the outside of the plate are hittable and those just off the inside of the plate are not, and are dangerous to boot. We were also told that strike zones need to be adjusted based on the playing ability found in a league. Leagues with better pitching will see smaller strike zones.

23. John Walsh, *The Compassionate Umpire*, *HARDBALL TIMES* (Apr. 7, 2010), <https://www.fangraphs.com/tht/the-compassionate-umpire>.

24. Gaines, *supra* note 21.

25. Russell, *Rules*, *supra* note 1, at 40.

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Of course there is also the famous Pine Tar Incident, when Kansas City Royals hall-of-famer George Brett had a potentially game-winning, top-of-the-ninth, two-out, come-from-behind home run against the New York Yankees disallowed because he had pine tar on more than the bottom eighteen inches of his bat, which was specifically prohibited by the rules.<sup>26</sup> The Yankees waited until after Brett's home run to bring the bat to the umpires' attention and, by stitching League rules together, claimed that the home run was hit with an illegally batted ball and should be disallowed, making Brett out and ending the game.<sup>27</sup>

The crew chief for the game happened to be Joe Brinkman, who argued that “[i]t didn't seem right to take away Brett's homer because of a little pine tar, but rules are rules. Rules are all an umpire has to work with.”<sup>28</sup> The American League President Lee MacPhail disagreed, accepted the Royals' protest of the game, and overturned the decision of Brinkman's crew, arguing that their decision inappropriately put the letter of the rules over the spirit of the game.<sup>29</sup> The home run was reinstated, the rest of the game was played later in the season, and the Royals won on the basis of Brett's homer.<sup>30</sup>

Baseball is hardly unique in having umpires exercise discretion with respect to rules, sometimes ignoring the letter of the rules in favor of the spirit or integrity of a sport. In hockey, for example, umpires are more lenient toward the end of a game, letting penalties go that would have been called earlier—particularly letting more go in the playoffs.<sup>31</sup> A similar phenomenon can be seen in American football: Umpires

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26. “Th[e] rule—now cited as Rule 3.02(c) in the 2018 Rulebook—states: “The bat handle, for not more than 18 inches from its end, may be covered or treated with any material or substance to improve the grip.” Eric Chesterton, *The Pine Tar Incident*, MLB (July 24, 2018), <https://www.mlb.com/cut4/what-is-the-pine-tar-game/c-286938216>; see also NEMEC, *supra* note 14, at 11–14; Russell, *Rules*, *supra* note 1, at 30–31. League rules allow for the use of pine tar to improve a batter's grip, but pine tar beyond eighteen inches confers no advantage to the batter. See BRINKMAN & EUCHNER, *supra* note 12, at 5.
27. NEMEC, *supra* note 14, at 12.
28. BRINKMAN & EUCHNER, *supra* note 12, at 5–6; see also Russell, *Rules*, *supra* note 1, at 30.
29. George Vecsey, *The Spirit of the Rules*, N.Y. TIMES (Aug. 1, 1983), <https://www.nytimes.com/1983/08/01/sports/the-spirit-of-the-rules.html>; see also NEMEC, *supra* note 14, at 13.
30. Russell, *Rules*, *supra* note 1, at 30. Major League umpires were divided over whether Brinkman's crew made the right decision. RON LUCIANO & DAVID FISHER, STRIKE TWO 214 (1984). Some thought that the rules only required the removal of the bat from the game with no penalty, which was ultimately MacPhail's decision and how the rules were clarified. *Id.*; NEMEC, *supra* note 14, at 14.
31. Ingrid Rolland & Michael Lopez, *Linking Penalties and Game Minute in the NHL*, HOCKEY GRAPHS (May 28, 2018), <https://hockey-graphs.com/2018/05/28/linking-penalties-and-game-minute-in-the-nhl> (observing that referees call fewer high-stakes penalties in the third period of a hockey game, particularly in the last few minutes). This is not the same thing as calling fewer penalties in absolute numbers, because players may try to get away with more in the postseason. If there is greater lenience in the postseason, this is probably another application of Berman's position. Berman, “Let ‘em Play”, *supra* note 5, at 1334–36 (arguing that since more is at stake near the end of games, referees may adopt a more lenient approach to calling penalties); see also Mitchell N. Berman, *Why Sport Illuminates Law (and Vice Versa)*, 63 N.Y.L. SCH. L. REV. 235, 245–46 (2018–2019).

tend to be more lenient earlier in the game,<sup>32</sup> and it is often said that a penalty for holding “could be called on every play.”<sup>33</sup> What are umpires doing in these circumstances? Can there be a justification for revising, adding, or ignoring rules? What are we to make of this evidence of umpire discretion?

These cases and practices suggest that umpires are guided consistently by certain principles that are part of the sport in addition to the rules. The evidence suggests that the prime principle that guides them is to maintain and foster a context for displaying the excellences that sport is designed to test. I call this the internal principle: Rules should be interpreted in such a manner that the excellences embodied in achieving the lusory goal of the game are not undermined but are maintained and fostered.<sup>34</sup>

I argue, drawing on Ronald Dworkin’s theory of law and judicial discretion, that this internal principle and derived ones, such as competitive balance, fair play, sportspersonship, and good conduct of games, are normative principles that are constitutive elements of sport as a legal system in addition to the constitutive rules of a sport.<sup>35</sup> These principles constrain the discretion of judicial officials who must make decisions that are consistent with an understanding of what the principles require. This requires judgment over how much weight to give principles in any decision.

For example, Wes Curry apparently made a judgment that Reddy Mack’s interference with the catcher was inconsistent with the purposes of baseball and the excellences it is meant to test, justifying a decision to call a runner out and the play dead even though there was no rule requiring it. Curry’s decision seemed to accept that something like the internal principle described above carried enough weight to justify his decision. Rules, by contrast, apply in an on-and-off fashion, depending on whether the facts fall or do not fall within their ambit.<sup>36</sup>

Dworkin often described legal interpretation as a “chain novel,” where a separate author for each chapter attempts to develop the story in the best way possible in light of what other authors have done in previous chapters.<sup>37</sup> When principles and rules conflict, discretion should be exercised using a Dworkinian notion of integrity: Judges are to interpret the law to make it as coherent as possible, showing legal rules,

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32. Andrew Beaton, *Referees Call Fewer Penalties at Beginning, End of Games*, WALL ST. J. (Sept. 29, 2015), <https://www.wsj.com/articles/referees-call-fewer-penalties-at-beginning-end-of-games-1443556417>. This practice seems to apply particularly to penalties that involve a clear discretionary element—for example, penalties involving holding or interference. See Berman, “*Let ‘em Play*,” *supra* note 5, at 1335–36.

33. Ty Schalter, *The NFL Holding Crisis: Where Do Refs Have a Responsibility to Throw Flags?*, BLEACHER REP. (Dec. 6, 2012), <https://bleacherreport.com/articles/1435107-the-nfl-holding-crisis-where-do-refs-have-a-responsibility-to-throw-flags>.

34. J.S. Russell, *Moral Realism in Sport*, 31 J. PHIL. SPORT 142, 146 (2004); see also Russell, *Rules*, *supra* note 1, at 35 (describing this principle initially as “the first principle of games adjudication”).

35. Drawing from Dworkin, I argue that moral and perfectionist principles are parts of the legal system of sports and games. Dworkin agrees. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 102–05 (Bloomsbury Acad. 2013) (1977) (discussing the Tal-Fisher chess controversy).

36. See *id.* at 29–64.

37. See RONALD DWORKIN, *LAW’S EMPIRE* 228–32 (1986).



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principles, and decisions in their best light.<sup>38</sup> Principles can of course be codified, but this does not change their logical character. And rules can—and indeed should—reflect the underlying principles of an institution. A Dworkinian approach to judicial decision-making in sport would follow a principle of integrity to interpret and apply principles and rules found in sport to guide conduct in light of the history of a sport's practice, attempting to show it in its best light.<sup>39</sup>

### *B. Criticisms: Legal Positivism, Rulism, and Rules Lawyering*

This generally accepted Dworkinian reading of sport as a legal system was criticized as too activist, giving umpires too much discretion to amend rules.<sup>40</sup> This criticism favors the virtues of legal positivism's purported greater respect for efficiency, predictability, and separation of powers between umpires and gamewrights—that is, judges and legislators—over a Dworkinian approach to adjudication in sport.<sup>41</sup> This criticism is understandable, but the history of sport suggests that umpires tend to exercise principled discretion in a restrained way.

Dworkin's own theory acknowledges respect for legislative authority and stare decisis,<sup>42</sup> so it is not clear to what extent Dworkin's theory mandates an unduly activist approach to judicial decision-making. Moreover, critics acknowledge that the judicial virtues attributed to legal positivism are not always overriding, and that a legal positivist and a Dworkinian approach could agree on how to deal with difficult cases.<sup>43</sup> Where the Dworkinian approach is superior is its recognition of the role of both moral principles and normative perfectionist principles—the pursuit of athletic excellence—as inherent features of sports as legal systems.<sup>44</sup> By contrast, legal positivism rejects the claim that legal institutions have any inherent substantive principled normative content.<sup>45</sup>

Another view acknowledges that sport has internal normative principles, but argues that literal black-letter reading of the rules may nonetheless be consistent with Dworkinian interpretivism in sport.<sup>46</sup> This view goes beyond the idea of respecting

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38. *See id.* at 176–275.

39. To be clear, I do not claim that a Dworkinian approach should be used when interpreting the laws of political communities. My point is that Dworkin's analysis seems particularly evident in sporting contexts where umpires exercise discretion regarding rules.

40. Lenta & Beck, *supra* note 5, at 132–37. *See my response in* J.S. Russell, *Limitations of the Sport-Law Comparison*, 38 *J. PHIL. SPORT* 254, 266–68 (2011).

41. Lenta & Beck, *supra* note 5, at 132–37; Russell, *supra* note 40, at 266.

42. DWORKIN, *supra* note 37, at 401.

43. *See* Lenta & Beck, *supra* note 5, at 137–38.

44. Russell, *supra* note 40; John S. Russell, *Sport as a Legal System*, in *ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF SPORT* 255, 266–67 (Mike McNamee & William J. Morgan eds., 2015).

45. *See* Ball, *supra* note 3.

46. *See* Berman, *On Interpretivism*, *supra* note 5, at 177–78; *see also* Russell, *Sport as a Legal System*, *supra* note 44, at 267–69 (discussing Berman's critique at length).

the legislative authority of gamewrights—which is itself a principle that is consistent with a Dworkinian analysis—and claims that from a practical perspective, umpires may often do a better job enforcing rules if they take a formalist approach, called “rulism.”<sup>47</sup> This view does not rule out a role for the exercise of principled discretion from time to time—it merely acknowledges that “some degree of formalism in sports officiating may often be supported.”<sup>48</sup>

This position also argues that rulism is itself a principle that is an aspect of at least some sports and games.<sup>49</sup> The theory is that in some instances, “rules lawyering”—or the practice of using rulism to creatively stitch rules together in unforeseen ways—has a prominent place.<sup>50</sup> Baseball is claimed to be such a sport that incorporates this feature, and the Pine Tar Incident and other examples from baseball are presented as evidence.<sup>51</sup> However, instances like the Pine Tar Incident involve decisions that ultimately uphold the spirit or integrity of the sport—namely, that the rule against extra pine tar serves practical rather than competitive ends, and that a display of athletic excellence, therefore, should not be nullified on that basis. The decision to ultimately overturn the umpire’s call and allow the home run clearly favored an interpretivist approach over rulism or rules lawyering.

The evidence from these examples suggests that rulism is not a serious consideration in baseball. Furthermore, it appears that the role of principles within the sport of baseball severely limits the rules lawyer’s gambits or gamesmanship. American League President MacPhail did not reward the Yankees for cleverness; he considered the precedent for the sport as an institution that would be set by accepting such stratagems, stating that the umpire’s decision was not in keeping with “the intent or spirit” of the game and that “games should be won and lost on the playing field—not through technicalities of the rules.”<sup>52</sup> A similar idea had to be going through Curry’s mind in the Reddy Mack case and the umpires who disagreed with the decision of Brinkman’s crew to disallow Brett’s home run. Perhaps there will be some cases that go beyond mere cleverness and enrich the practice or institution of baseball. These will deserve more serious consideration.

Both views—interpretivism and rulism—agree that discretion by umpires is something that should be exercised with restraint; the disagreement in practice may only be one of degree. My view is that sports sometimes demand the exercise of

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47. See Berman, *On Interpretivism*, *supra* note 5, at 178.

48. *Id.*

49. *Id.* at 185–86.

50. *Id.* at 186–87.

51. *Id.* at 183, 187–88.

52. Russell, *Rules*, *supra* note 1, at 30; see also Russell, *The Concept of a Call in Baseball*, *supra* note 1, at 34. To be fair, the argument for rulism does not purport to side with the umpire’s decision in the Pine Tar Incident. Rather, it points out that if rulism is a principle of baseball, the umpire’s decision is more difficult than my discussion acknowledges. Berman, *On Interpretivism*, *supra* note 5, at 182. My response is that the decisions of the umpires and League officials in the hard cases from baseball stand strongly against acknowledging rulism and rules lawyering. I do not see evidence for it in other sports either.

discretion in ways that cannot be reasonably avoided, or discretion is justified because it makes for a better sport. These exercises of umpire discretion are not typically controversial—discretion with respect to late game penalties or the strike zone in baseball is accepted as part of the game. However, sometimes genuine puzzles are raised that the rules do not account for, as with the Pine Tar Incident or the Reddy Mack case, so that whatever is decided is going to be controversial. A principled solution that tries to make sense of a sport in light of its practice should be preferred because it represents a sincere effort to preserve the integrity of the contest. Since an action must be taken, and since any decision is unlikely to please everyone, an impartial, principled attempt to make the right decision may also be the best way to defend the legitimacy of and trust in the umpire's authority. All this is consistent with amending the rules, where possible, to reflect discretion that has been exercised wisely.

*C. Subversive Play, Competitive Shenanigans, and Value Pluralism in Sport*

There is a deeper point implied in the rules lawyering argument that has made me think more carefully about the normative principles that underlie sport. The suggestion is that intellectual cleverness in finding ways to get around what the practice of sport seems to require is itself a type of sport skill.<sup>53</sup> Identifying this principle helps to explain further some of the normative complexity umpires face in weighing principles. More importantly, it illustrates quite nicely a depth of competing values, or value pluralism, in sport that the internal principle might seem to discount. But while this additional principle requires us to recognize added complexity, it also helps to explain that the internal principle retains a dominant role. That principle is a principle of *play*.

A common feature of play is that it takes liberties with accepted values and conventions.<sup>54</sup> While much of the philosophical discussion of play has centered on its connection to intrinsically valued activities that reflect unalienated exercise of agency, this discussion has overlooked play's *disengagement* from serious aspects of moral and perfectionist values of everyday life and within sport. Play is often subversive of worldly standards and practices, like morality and perfection, and is reflected in morally ambiguous and often questionable behavior that is tolerated because of its disengagement from everyday life and the delight it gives.<sup>55</sup>

Think of children playing cops and robbers, gleefully committing imagined murder or mayhem. This behavior would not be tolerated outside a realm of play. Indeed, it would be cause for moral condemnation and, often, legal action. But because play can be disengaged from the worldly, such activity is often tolerated

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53. See Berman, *On Interpretivism*, *supra* note 5, at 187.

54. See BRIAN SUTTON-SMITH, *THE AMBIGUITY OF PLAY* (Harv. Univ. Press 1997); see also J.S. Russell, *Play and the Moral Limits of Sport*, in *ETHICS IN SPORT* 205, 208–22 (William J. Morgan ed., 3d ed. 2018).

55. I argue that this is also the position on play in the classic conceptual analysis given by JOHAN HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE* 13 (Routledge & Kegan Paul 1949).

because of the delight it brings to our lives.<sup>56</sup> Similarly, when it comes to sport, play reflects a measure of moral and emotional disengagement.

The gratuitousness of sport and its practical separation from the worldly makes sport a natural and fertile playground. Partisan fan behavior, intentional attempts to deceive umpires (for example, baseball pitchers making illegal “balk moves” to hold runners, or catchers “framing” pitches), and strategic fouling are all types of “competitive shenanigans” that are in conflict to some degree with moral or perfectionist values found within sport.<sup>57</sup> Some types of gamesmanship involve clever barbs to throw opponents off their game. Recall the Chicago Bulls’ Scottie Pippen’s remark to Karl “The Mailman” Malone of the Utah Jazz, when the latter was about to take free throws that would likely seal a Jazz win in the Sunday Game 1 of the 1997 NBA Finals.<sup>58</sup> Pippen said, “Just remember, the mailman does not deliver on Sundays, Karl.”<sup>59</sup> Malone missed both free throws; the Bulls recovered the ball and sank a shot at the buzzer to win.<sup>60</sup>

Remarks like Pippen’s and other competitive shenanigans are found in sport in part because of sport’s (and play’s) disengagement from the worldly. We tolerate these activities, and often celebrate them. Of course, the behavior described above has its limits. But where competitive shenanigans add to the challenge, drama, and fun of sport, they can be incorporated because they make sport better.

Drawing the boundary where competitive shenanigans improve or at least do not detract from a contest is a complex matter, and it may be thought that this adds to the argument for tending toward formalism. Perhaps this is true. The principle of play implies added complexity in weighing values, and so apparently adds burdens to real-time decision-making of umpires, which could be eased by strict adherence to black-letter rules. But umpires are also expected to exercise discretion where this value is engaged. When does playful verbal repartee like Pippen’s cross a boundary and interfere with the good conduct of games? Umpires are expected to police these matters and, in many sports, penalize players for unsporting behavior.

Perhaps rules lawyering in sport is best thought of as a form of competitive shenanigans. Rules lawyering takes a disengaged attitude toward the institution of a sport in a gambit to see what can, and cannot, be done to gain a competitive advantage. If the baseball examples are any indication, rules lawyering efforts may strike too closely at the core of the game to be accepted. But while play as disengagement and related competitive shenanigans are not dominant values in

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56. Philosopher John Morreall argues that in the case of humor, play gets a pass because it is non-cognitive—the humorous gibes are not meant to be true or to be taken seriously—and because it is practically disengaged from everyday life. JOHN MORREALL, *COMIC RELIEF: A COMPREHENSIVE PHILOSOPHY OF HUMOR* xii (2009).

57. See Russell, *supra* note 54, at 213–14.

58. Aaron Dodson, *On This Day in NBA Finals History: ‘The Mailman Doesn’t Deliver on Sunday,’ THE UNDEFEATED* (June 1, 2017), <http://theundefeated.com/features/nba-history-scottie-pippen-karl-malone-1997-finals>.

59. See *id.*

60. *Id.*

sport, they have a place to the extent that they add to the challenge and drama of those institutions, or at least do not significantly detract from them. Further, they press us to consider and weigh competing values in developing, evaluating, and revising rules. They suggest an important value pluralism is present in sport between the moral, athletic, and play values. The presence of these and other potentially competing values—including those that are focused on the development of sport-related excellence, such as resilience, grit, patience, perseverance, and coping<sup>61</sup>—suggests more complexity in working out a jurisprudence of sport than I suggested in my original article.

### III. MAKING THE CALLS

#### *A. The Concept of a Call*

When hall-of-famer Bill Klem, arguably the doyen of baseball umpires, remained silent momentarily after a pitch, the batter pressed him, “What is it? A ball or a strike?” Klem responded, “Sonny, it ain’t nothin’ ‘til I call it.”<sup>62</sup> Another baseball hall-of-fame umpire, Bill McGowan, made a similar point to a player protesting his call: “If you don’t believe you’re out, read the morning newspaper!”<sup>63</sup> Their point? Umpires create facts by their calls.

In sport, umpires often have the role of determining by their pronouncements the events on the field by calling ball, strike, safe, out, fair, or foul. However, it is a property of facts that they do not have the status of being true or false—facts *exist* as pieces of information that have objective reality. It is a property of *descriptions* of facts that those descriptions are true or false. We cannot let this rest, then, with Klem’s and McGowan’s comments. If we treat calls simply as facts, and not also as statements that can be true or false, the idea of “getting the call right” would be meaningless, which it is not.

The philosopher of language J.L. Austin proposed a solution to the puzzle presented by Klem and McGowan. Austin noted that the “performative” parts of language (language we use when doing things like making promises, laws, or marriages; or calling balls, strikes, or outs) are often combined in the same utterance with descriptive or declarative statements which are true or false.<sup>64</sup> Austin called judicial pronouncements “verdictives” as one illustration of this combination, since

61. See J.S. Russell, *Robert L. Simon on Sport, Values, and Education*, 43 J. PHIL. SPORT 51, 53 (2016). Other possible normative perspectives in sport have been identified as 1) achieving excellence; 2) seeking opportunities for new experiences or serendipity; 3) discovering things about oneself and what one can do; 4) participating in dramatic narrative; 5) transcending limits; and 6) creating community through cooperation and shared achievement. Scott Kretchmar, *Pluralistic Internalism*, 42 J. PHIL. SPORT 83 (2015). These ideas have clear connections to moral, athletic (perfectionist), and play values.

62. GEORGE SULLIVAN & BARBARA LAGOWSKI, *THE SPORTS CURMUDGEON* 164 (1993).

63. *Id.* at 165.

64. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS: THE WILLIAM JAMES LECTURES DELIVERED AT HARVARD UNIVERSITY IN 1955* 148–52 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975).

judicial decisions create facts (the verdict) and can be true or false.<sup>65</sup> Thus, the verdict in a criminal trial (say, “not guilty”) is a fact, but it also expresses a statement that is true or false (the accused may have been guilty despite the verdict).

Verdictive utterances are also commonly accompanied with “exercitive force,” or the authority to do things like remove runners from baseball games.<sup>66</sup> Consider the duality of the umpire’s statement: “You are out.” Or simply, “Out.” The latter expression emphasizes the exercitive force, making the runner out, but the former phrasing shows itself as more clearly a statement of fact based on evidence, meaning, “The first baseman caught the ball before your foot touched first base.” Thus, verdictives are pieces of language that combine the creation of facts with statements that are true or false, and so explain the limitations of Klem’s and McGowan’s claims about calls.<sup>67</sup> This position justifies umpire discretion to consult with other umpires and officials to review cases of unwitnessed calls, egregious errors, guesses, and failures of impartiality in an effort to find the correct decision.<sup>68</sup> Since these are only calls in a technical, equivocal sense, umpires function equivocally (at best) as judges. In such cases, help should be sought or given, as these calls can be legitimately subject to review in consultation with other umpires in an effort to find the correct decision.

My argument on this topic was published at a time when video reviews of calls in sport were just being introduced.<sup>69</sup> As a consequence, I did not address in any detail the question of the extent to which video review should be used. I suggested only that more discussion was needed and that there was a good argument for its use on crucial plays.<sup>70</sup> Since that time, video review has been used quite extensively in Major League Baseball and other sports.<sup>71</sup> I have a few critical comments about this, but I would like to begin by addressing a recent objection to my earlier analysis. This will lead to a more nuanced discussion about calls and the use of video replay and other technology to assist umpires in making calls.

### B. *Criticism: Calls Can’t Be Wrong!*

Jim Joyce, veteran MLB umpire, admitted immediately after a game that he had “cost [then Detroit Tigers pitcher Armando Galarraga] a perfect game” when he

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65. *Id.* at 151.

66. *See id.* at 155.

67. I noted another feature about making calls in sport is that umpires are also *witnesses* to the events that they observe, and of course, a call as a witness’s report can be either true or false. Russell, *The Concept of a Call in Baseball*, *supra* note 1, at 23–24.

68. *Id.* at 24–27.

69. *See* Howard Beck et al., *Let’s Go to the Tape: How Other Sports Handle Video Review*, N.Y. TIMES (Aug. 15, 2013), <https://www.nytimes.com/2013/08/16/sports/lets-go-to-the-tape-how-other-sports-handle-video-review.html> (providing the years in which various professional sports began utilizing video technology for reviewing plays).

70. Russell, *The Concept of a Call in Baseball*, *supra* note 1, at 36–37 n.20.

71. *See* Beck et al., *supra* note 69.

called a runner safe at first when he clearly should have been out.<sup>72</sup> In a post-game interview, Joyce did not make the excuse that it was a close call. Instead, he apologized for his mistake, claiming that he blew “the biggest call of [his] career.”<sup>73</sup> “This is a history call, and I kicked the shit out of it.”<sup>74</sup>

One analysis of calls argues that umpires like Jim Joyce cannot be wrong.<sup>75</sup> The argument re-characterizes the issue as a version of the famous dilemma from Plato’s dialogue *Euthyphro*—whether something is morally obligatory because God commands it (the first horn), or whether God commands something because it is morally obligatory (the second horn).<sup>76</sup> In philosophy of religion, “voluntarism” takes the former position (God’s pronouncements by themselves make or constitute morality), and “intellectualism” takes the latter (God’s pronouncements reliably identify what morality is).<sup>77</sup> The argument suggests the following parallel and dilemma arise with an umpire’s judgment call: “Is a pitch a ball/strike, a batted ball fair/foul, a runner safe/out because the umpire calls it as such, or is a pitch a ball/strike, a batted ball fair/foul, a runner safe/out independently of the umpire’s call?”<sup>78</sup>

In response to this “baseball dilemma,” the argument rejects what it says is the strictly intellectualist position in favor of a version of the first horn of the dilemma, calling it “restricted umpire voluntarism.”<sup>79</sup> The strict intellectualist, it claims, holds that a runner who is “out at first” has an obligation to leave the field independently of the umpire’s call, and since this obligation “has nothing to do with the umpire’s call,” the umpire is, in theory, “wholly dispensable.”<sup>80</sup> By contrast, the voluntarist argues that it is the authoritativeness of the umpire’s call that makes the runner out.<sup>81</sup> Since an umpire’s call is not a report of an event or a witness’s observation—it is a fact, pure and simple, and is not true or false—the player has a duty to leave the field because of the umpire’s authority to make the call and the powers that go along with it.<sup>82</sup> The umpire is therefore indispensable in a way that the intellectualist cannot

72. Bradley Blackburn & Lee Ferran, *MLB Will Not Reverse Ump’s Call that Cost Armando Galarraga Perfect Game*, ABC NEWS (June 3, 2010), <https://abcnews.go.com/WN/bad-call-reviewed-major-league-baseball-ump-admits/story?id=10815336>.

73. *Id.*

74. ARMANDO GALARRAGA, JIM JOYCE & DANIEL PAISNER, *NOBODY’S PERFECT: TWO MEN, ONE CALL, AND A GAME FOR BASEBALL HISTORY 5* (Atlantic Monthly Press 2011).

75. See Amber L. Griffioen, *Why Jim Joyce Wasn’t Wrong: Baseball and the Euthyphro Dilemma*, 42 J. PHIL. SPORT 327 (2015).

76. See *id.* at 329–31; see also PLATO, *FIVE DIALOGUES 12–14* (G.M.A. Grube trans., Hackett Publ’g Co. 2d ed. 2002).

77. See Griffioen, *supra* note 75, at 329–31.

78. *Id.* at 331.

79. *Id.*

80. *Id.* at 335–36.

81. *Id.* at 339–40.

82. *Id.* at 335. Notably though, the argument adds that a call “may be responsive to certain assessments which are truth-evaluable.” *Id.*

accept. According to this “restricted voluntarism” view, Joyce’s admission of error and his apology for that error is conceptually confused, because “[a]s a prescriptive utterance, it was incapable of being incorrect.”<sup>83</sup>

I think this misconceives a fundamental aspect of what it is to be a judge—namely, to do one’s best to get decisions correct based on the evidence. The very concept of a judge presupposes exercise of authority in line with this function, which is fundamentally truth-evaluable. When judges fail badly in fulfilling this function, they are not really performing the role of a judge or umpire. The very idea of a *human* judge or umpire, then, seems to be intellectualist, not voluntarist. Joyce’s personal apology to Galarraga immediately after the game is an admirable reflection of an intellectualist’s understanding of his role, his responsibility, and his failure to live up to it in a crucial situation.

The voluntarist view allows that Joyce might apologize for a failure of judicial virtues, including competence and consistency.<sup>84</sup> But that invites the question: Competence and consistency in relation to what? Joyce’s apology was for failing to live up to expected epistemic standards, thereby getting an important call wrong on the evidence that was available to him. An apology that does not admit that full account misses a crucial point about the call, namely, Joyce “missed it,” and missed it badly. An apology for a lack of competence, but not for any mistake made as a result of that incompetence because calls cannot be mistaken, seems too paradoxical to accept. The intellectualist view, on the other hand, encompasses the admission of being both wrong and having made a mistaken decision or choice.

Further, the voluntarist position separates the verdictive from the exercitive forces in an umpire’s call, but I doubt this is possible. Verdicts attempt to make truth-evaluable decisions based on evidence.<sup>85</sup> In the case of sport, this evidence includes the umpire’s own observations. Those verdicts (such as “strike” or “out”) have exercitive force or authority when uttered by an umpire whose job is to make an assessment about whether certain behavior is captured by the rules they are charged with upholding. Put simply, the exercitive force of a call derives its authority from the making of a truth-evaluable assessment or verdict, because it is the function of a human judge to exercise authority based on a judgment or verdict regarding the evidence; otherwise, judicial direction is just an empty exercise of authority. These direct connections mean we can evaluate the quality of the decision, both the verdict and whether the authority should have been exercised a certain way, based on how well it is justified in light of the evidence.

The voluntarist also seems to argue that players have no obligation to leave the field on a mistaken call in their favor.<sup>86</sup> It is difficult to see how a voluntarist can take this idea seriously, or even regard it as coherent, if umpires are “incapable of being

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83. *Id.* at 342.

84. *Id.*

85. See AUSTIN, *supra* note 64, at 152.

86. Cf. Griffioen, *supra* note 75, at 336.



incorrect.”<sup>87</sup> It appears to be a virtue of the intellectualist position that a player could take seriously the argument that they have an obligation to correct mistaken calls.<sup>88</sup> It seems relevant, too, that it used to be a fairly common practice in some officiated games for players to correct umpire errors in their favor.<sup>89</sup> This suggests recognition of some degree of duty to play the game according to the rules and not to accept undeserved benefits based on known officiating errors.<sup>90</sup> Consistent with an intellectualist position, I have argued that cooperative practices around officiating should be encouraged, and umpires’ consultations with players and coaches on calls should form part of the evidence for decisions on contested or unwitnessed calls.<sup>91</sup>

Finally, the trend toward video review is implicitly a trend toward acknowledging that the epistemic quality of the decision or verdict of the umpire bears on its exercitive force. Arguably, an implication of this trend toward electronic review and getting calls right should be to recognize a more cooperative approach among umpires—and among umpires and contestants—to getting calls right where electronic reviews are not available.

### C. *Accepting Umpire Fallibility for the Good of the Game*

An alternative to the voluntarist’s view that we may be accepting of undeserved advantages gained by umpire errors could be supported by the notion of play as a relevant normative principle in sport. If play can significantly be about disengagement or separation from moral or perfectionist considerations, then we have evidence for allowing some acceptance of undeserved advantages, especially including some umpiring errors. This use of a principle of play does not change an understanding of the role of umpires to get calls right based on the evidence before them. Indeed, it presupposes it by suggesting that umpiring errors can be part of the fabric of sport—part of the challenge, drama, and delight it provides.

87. *Id.* at 342.

88. *See id.* For a comparison between accepting undeserved benefits in sport and making use of undeserved benefits outside of sport—for example, not reporting and then spending a banking error in one’s favor—see J.S. Russell, *Coaching and Undeserved Competitive Success*, in *THE ETHICS OF COACHING SPORTS: MORAL, SOCIAL, AND LEGAL ISSUES* 103, 103–20 (Robert L. Simon ed., 2013). I cannot see how such a comparison can be taken seriously on Griffioen’s view.

89. An example of this is in tennis, when players intentionally hit their next volley into the net. *See* Ashley Fetters, *How Instant Replay Changed Professional Tennis*, *ATLANTIC* (Sept. 7, 2012), <https://www.theatlantic.com/entertainment/archive/2012/09/how-instant-replays-changed-professional-tennis/262060> (“[I]f an umpire blew a call, the beneficiary of the wrongly awarded point would sometimes lose the following one on purpose.”) In the 2005 Rome Masters, tennis great Andy Roddick went so far as to refuse a mistaken match point call in his favor, allowing his opponent Fernando Verdasco to re-serve and eventually win the match. Giles Lucas, *Ten Examples of Great Sportsmanship*, *EVENING STANDARD* (Aug. 1, 2011), <https://www.standard.co.uk/sport/ten-examples-of-great-sportsmanship-6428038.html>. In 1997, Liverpool striker Robbie Fowler received a commendation from FIFA for informing the referee during a match that he had not been fouled and a penalty shot should not be awarded. *Id.*

90. *See* SIMON, TORRES & HAGER, *supra* note 5, at 23.

91. Russell, *supra* note 88.

Voluntarists must say this is conceptually confused, since umpires do not make errors.<sup>92</sup> Intellectualists can fully embrace this position by recognizing the value of play *qua* disengagement from morality and perfection (athletic excellence) as an element of a sport. We accept umpire errors because they can make some sports games better, even at some cost to having sports reflect pure contests of athletic excellence. There is no obligation, then, to leave the field on a mistaken call because sports that embody a value of disengaged play provide a reason for accepting a mistake that is independent of the umpire's authority.

I am not sure how these competing normative positions should be evaluated in sports like baseball. Certainly, the culture and history seem to favor the play-inspired practice that accepts some disengagement with some perfectionist or moral values by accepting that bad luck through umpire errors can be part of the game. More discussion is needed about this and what appears to be a distinctive feature of a jurisprudence of sport. I do not mean to defend a specific position here, but I suspect the moral tone of sport would be improved if a more cooperative approach were sometimes taken to collecting evidence to make calls. It would also, I suspect, encourage better sportspersonship, and it would help to address, if not completely resolve, some of the morally challenging features that seem intrinsic to competitive sport.<sup>93</sup>

#### *D. Brief Remarks on the Use of Video and Other Technological Forms of Review*

I confess that I find the human element as well as the element of luck introduced by fallible human umpiring to be a part of sport that is worth cherishing. It might be morally messy or ambiguous to accept such fallibilism, but play as disengagement often supports such practices. My analysis of play and making calls affords a way of preserving the purported baseball purist's position without adopting the paradoxical voluntarist view. We might acknowledge that a principle of disengaged play justifies accepting *some* measure of fallible umpire decision-making. This brings us to the topic of video review, since this appears in tension with this position.

As I have suggested, one solution grounded in the value of play that would preserve the human element and improve call-making would be to encourage a more cooperative approach on the field between umpires and participants. However, others have argued that if we had electronic systems that could do better jobs than humans, we should adopt those systems, even if they eliminated human umpires completely.<sup>94</sup> I am not so sure. There would still be luck, mistakes, and probably some interesting moral failures—cooperating participants may still make incorrect calls and some participants may lie or be evasive about what they saw. Officiating would remain a deeply human enterprise. I suspect this sort of on-field process would be more enjoyable and dramatic to watch than the increasingly extensive use of video review that is emerging as standard practice at the most elite levels of sport, or having robot

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92. See Griffioen, *supra* note 75, at 342.

93. See J.S. Russell, *Competitive Sport, Moral Development, and Peace*, in *THE BLOOMSBURY COMPANION TO THE PHILOSOPHY OF SPORT* 228, 228–44 (Cesar R. Torres ed., 2014).

94. See Bordner, *supra* note 5, at 114.

officials run games. We might also argue that non-technological, purely human officiating processes would make games more challenging, dramatic, and interesting for everyone. Given the capacious presence of technology in our lives, we might choose to preserve sport as a fully human enterprise, along with its shortcomings.<sup>95</sup>

There are a variety of other issues raised by the use of video replay and technological aids for identifying interactions of balls with playing areas. There is a substantial literature now that is emerging on these topics—in effect, a jurisprudence around the use of technological aids and related umpire decision-making in sport.<sup>96</sup> Some emphasize that some technological aids are themselves imperfect, as they have “zones of uncertainty” that tend to be obscured by their apparently scientific modes of measurement.<sup>97</sup> One argument is that only errors identified conclusively using technology should overturn on-field umpires’ decisions.<sup>98</sup> This has been the standard practice in sport.<sup>99</sup> I am not sure this argument is fully persuasive—if machines or video review have a smaller risk of error, then arguably we should defer to them when there is a controversy. However, this view seems to lead us ultimately to something like the position that we should prefer the use of technological aids whenever they are demonstrably superior to human judgment.<sup>100</sup>

There are practical issues to be addressed in addition to the philosophical ones already discussed that might qualify the use of such technology. The use of technological aids for umpiring can disrupt the flow of games to the detriment of the competition and spectator enjoyment.<sup>101</sup> Athletes are expected to sit on the sideline or take a knee, sometimes over several minutes, waiting for a call to be reviewed; fans experience a delay in celebrating results once momentum on the field has dissipated. Not only does this delay produce boring, inactive dead time for athletes and fans waiting for results of review, but there is also a potential cost to competition, as flow and momentum are interrupted, and athletes stiffen up or fatigue sets in.

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95. This is probably contrary to what we might want from a municipal judicial system. If somehow demonstrably better justice could be served with robot judges who were not corrupted by the vagaries of human cognitive biases and other limitations, I would find it difficult to reject supporting their use, dystopian science fiction notwithstanding. This is now a topic of public discussion. Andrew Griffin, *Robot Judges Could Soon Be Helping Court Cases*, INDEPENDENT (Oct. 24, 2016), <https://www.independent.co.uk/life-style/gadgets-and-tech/news/ai-judge-robot-european-court-of-human-rights-law-verdicts-artificial-intelligence-a7377351.html> (discussing a study where an artificial-intelligence judge accurately predicted seventy-nine percent of 584 European Court of Human Rights verdicts).

96. See, e.g., COLLINS, EVANS & HIGGINS, *supra* note 5; Bordner, *supra* note 5; Berman, *Replay*, *supra* note 5; Collins, *supra* note 5; Royce, *supra* note 5.

97. See COLLINS, EVANS & HIGGINS, *supra* note 5, at 88; Collins, *supra* note 5, at 140–41.

98. Collins, *supra* note 5, at 143.

99. See Berman, *Replay*, *supra* note 5, for a thoughtful discussion about the presumption of giving on-field umpires the benefit of the doubt when video results are less than conclusive.

100. See Bordner, *supra* note 5, at 102 (“[W]e ought to use technology to aid officials in making their judgments whenever doing so would prove more effective than relying on unaided human perception.”).

101. See Peter Shawn Taylor, *Video Replay Is Ruining Professional Sports*, MACLEAN’S (May 7, 2017), <https://www.macleans.ca/sports/video-replay-is-ruining-professional-sports>.

Another issue is that technological aids may interfere with important athletic challenges that umpires impose through the exercise of discretion. In sports generally, calls often depend on the circumstances of the game, the influence of crowds and “home-field advantage,” and the tendency of umpires and crews to call certain infractions more or less often.<sup>102</sup> In baseball, technology now makes it possible to eliminate umpires calling balls and strikes—but baseball purists argue against this, even if it would more accurately reflect the strike zone as defined in the rules.<sup>103</sup> Sports like golf, in which “[p]layers are expected to call penalties on themselves” and “to protect the field” by monitoring each other’s play,<sup>104</sup> provide another instructive example about the potential corrupting effects of technological aids.

These are real costs to sport that have to be weighed against the cost of getting calls right. It is unclear to me when the benefit of getting a call right outweighs these other costs. Arguably, sport tests human resilience as much or more than any other value, so dealing with adversity seems to be a fundamental value of sport.<sup>105</sup> Players have to adapt to these circumstances. From coaching baseball for many years, my sense is that the need to make these adaptations adds to the interest, challenge, and fun of some sports. Their value should not be discounted lightly.

The general takeaway from this discussion is that making judgment calls in many sports is complex, and recent changes to incorporate various types of electronic review of such calls are more controversial and require considerably more thought than has been recognized. I doubt that the homogenization that the use of technological aids brings necessarily makes for better, more interesting sports. A proper jurisprudence of sport needs to work through and come to terms with these complexities.

#### IV. CONCLUSION: PHILOSOPHY OF SPORT AND A JURISPRUDENCE OF SPORT

Sport can be used to illustrate basic issues and theories in jurisprudence. The connection between a jurisprudence of sport and a general conception of sport and its

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102. See David Beaudoin, Oliver Schulte & Tim B. Swartz, *Biased Penalty Calls in the National Hockey League*, 9 STAT. ANALYSIS & DATA MINING 365, 367 (2016), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/sam.11320> (noting the variance in penalties levied against “road teams” and “home teams” in professional hockey); see also Thomas Dohmen & Jan Sauermann, *Referee Bias*, 30 J. ECON. SURV. 679 (2015), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/joes.12106>. In baseball, for example, it is well known by players and fans that the strike zone is called differently by different umpires. Lopez & Lewis, *supra* note 22. When I received umpire training, I was told to call a strike on any pitch up to half a ball’s width off the plate, because pitches are hittable in most of the zone from top to bottom, and the pitcher deserves a strike if he can hit that spot.

103. See Oliver Staley, *When Robots Call Balls and Strikes, Who Will Baseball Fans Yell At?*, QUARTZ (July 11, 2017), <https://qz.com/1026559/all-star-game-this-will-be-one-of-the-last-all-star-games-in-baseball-not-umpired-by-robots> (“Baseball purists lament that technology will make pitch-framing obsolete—a robot can’t be fooled by a slight [sic] of hand—and that removing umpires will eliminate the human drama that produces some of baseball’s most memorable and embarrassing episodes.”).

104. *The Human Element*, U.S. GOLF ASS’N, <https://www.usga.org/handicapping/handicapping-101/the-human-element-25503.html> (last visited Feb. 28, 2019).

105. J.S. Russell, *Resilience*, 42 J. PHIL. SPORT 159, 159 (2015).

## REMARKS ON THE PROGRESS OF A JURISPRUDENCE OF SPORT

animating values is direct, necessary, and predicted by a Dworkinian analysis.<sup>106</sup> Just as judges of modern political communities are engaged at some level in political philosophy,<sup>107</sup> umpires and officials charged with enforcing, evaluating, and writing rules are engaged in philosophy of sport. But this comparison also suggests some limitations in comparing the legal systems of political communities with sport as a legal system. Many of the main values that each is concerned with are, of course, fundamentally different, and I suspect that despite the range of competing values of sport as an institution, its values are considerably less contested. Some evidence of this is that the internal principle, as I suggested above, has a dominant role among these other principles and values, and can be helpful in guiding and justifying a range of decisions.<sup>108</sup>

This should not be very controversial in my view, since sport begins with displaying, contesting, or testing excellences that have an important physical element.<sup>109</sup> Also, it does not seem controversial to say that certain normative principles are fundamental to the fabric of sport. For all its undoubted complexity, I suspect that sport represents a simpler, less contested, conceptual arena for developing a jurisprudence, because normative principles can be identified as part of the institution, and are arguably accepted in deed, if not always in word.

I got into this business, in part, by using sport in my philosophy of law classes to illustrate Dworkin's ideas and contrast them with legal positivism and other theories of law. I am hopeful that legal scholars will pick up the ball (so to speak) and get to work explaining how other jurisprudential ideas from law can assist understanding issues in sport and philosophy of sport. I am pleased that this is beginning to happen. My legal scholar colleagues have been hard at work productively explaining how jurisprudential ideas can assist in understanding issues in philosophy of sport and how legal practice in sport can illuminate, often at a more accessible level, jurisprudential concepts and practices of political communities.<sup>110</sup> My general sense,

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106. Russell, *Rules*, *supra* note 1, at 38–39.

107. See DWORKIN, *supra* note 35.

108. But see Mcfee, *Fairness, Epistemology, and Rules*, *supra* note 5, at 236–42, for a thoughtful, critical discussion of the usefulness of this principle, and my response, Russell, *Sport as a Legal System*, *supra* note 44, at 269–70. McFee thinks that sports are too contextual for general principles to guide decision-making in controversial cases. The examples discussed here suggest otherwise.

109. See Bernard Suits, *The Elements of Sport*, in *THE PHILOSOPHY OF SPORT: A COLLECTION OF ESSAYS* (R. Ousterhoudt ed., 1973).

110. See generally Berman, *supra* note 31. Robert Blecker has provided an acute, and in my view compelling, analysis about how notions of intent in criminal law can assist with clarifying concepts and evaluation of unsportsmanlike conduct (in particular, “flagrant” fouls in basketball), among other things. See Robert Blecker, *Penalties: Punishments, Prices, or Rewards?*, 63 N.Y.L. SCH. L. REV. 251 (2018–2019). There is much rich, unturned ground here. I also suspect that when the jurisprudence of a political community is silent on an issue, sport can be instructive. I note, for example, that “cheating” is not a legally defined term. I have expressed skepticism that the term can be defined in such a way as to provide meaningful normative guidance. See J.S. Russell, *The Problem of Cheating*, in *PHILOSOPHY: SPORTS* 92, 92–110 (R. Scott Kretchmar ed., 2017). The absence of a definition of cheating in law is some support for my view. Robert Blecker suggests that cheating must involve intentional deception. See *What Can Law Teach Sport*

then, is that we are in a position now to begin a rich dialogue that will allow us to begin to integrate a more fine-grained analysis of the values that sport encompasses with conceptual and other resources from modern jurisprudential theory into a more sophisticated and comprehensive jurisprudence of sport.

Much of this essay and the short history of a jurisprudence of sport has focused on philosophical and related normative issues about what sort of legal system sport is. It has tied sport *qua* legal system to fundamental debates in philosophy of law and to discussion of fundamental human values, like excellence (perfection) and play. My essays have drawn heavily on these resources. I would like to think that starting with foundational discussions in philosophy of law and about basic human values was a good place to begin, and that the discussion that has followed has been productive in illuminating the nature of sport as a legal system and processes of legal reasoning that take place there. I hope and expect these investigations to continue and to deepen our understanding of sport.

However, there is more than this to a jurisprudence of sport. I would like to see a jurisprudence of sport develop further in the direction of comparative law—comparing sport as a legal system to the less abstract aspects of the operation of legal systems of political communities. This is not something that philosophically trained scholars are particularly competent to do. It takes jurists and lawyers, ideally with some solid knowledge of sport, to be able to draw relevant comparisons, because the topics at this level tend to be more applied and focused directly on practice than are addressed by general theories of law and legal reasoning. Questions of intent, blame, punishment, standards of proof, the conduct of judicial review, and the like are often subjects of comparative law, and they all have counterparts in sport. This invites comparative evaluation, but that ground has barely been touched. Again, my colleagues have begun serious work in this area, and I look forward to their work attracting the interest of others. This Issue of the *New York Law School Law Review*, which is devoted to questions about relationships and comparisons between law and sport, should encourage that interest as well. To my knowledge, it is the first law journal that has devoted an entire issue to jurisprudential issues raised by sport. Hopefully its publication will encourage further works by legal scholars in all areas encompassed by a jurisprudence of sport. The past twenty years have shown that there are rich opportunities for scholarship. I look forward to seeing the results of the next twenty years.

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*and Sport Teach Law(yers)? A Symposium on the Jurisprudence of Sport*, 63 N.Y.L. SCH. L. REV. 119, 149–51 (2018–2019); 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>. But many sport philosophers and legal scholars have rejected this. See SIMON, TORRES & HAGER, *supra* note 5, at 59–61; BERNARD GERT, *MORALITY: ITS NATURE AND JUSTIFICATION* 191–95 (1998); see generally STUART P. GREEN, *LYING, CHEATING, AND STEALING* (2006).