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Paul Gaffney

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PAUL GAFFNEY

## Playing with Cheaters

63 N.Y.L. SCH. L. REV. 197 (2018–2019)

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## I. INTRODUCTION

We live in an imperfect world populated by imperfect characters. We frequently interact with others who do not share our moral attitude about the conditions that make collective engagements possible.<sup>1</sup> An especially acute instance is when we encounter people cheating. As the ordinary sense of the term indicates, cheating implies that someone is being harmed or put at an unfair disadvantage, typically through deceptive means, and when we are involved we may wonder what we can or should do about it.

This essay explores cheating in sport through the lens of non-cheating participants in an athletic contest. Parts II and III of this essay focus on the non-cheater's experience of the contest and the mens rea and actus reus in the context of sport cheating. Parts IV and V outline and defend the concept and implications of "playable cheating," which holds that contests can often proceed despite rule violations. Parts VI and VII discuss how cheating impacts non-cheating teammates and non-cheating opponents, and Part VIII concludes with some final remarks. Although this essay focuses on the athletic arena, the dynamic has parallels beyond sport, often with legal implications.

## II. THE INDIRECT PROBLEM OF CHEATING

Cheating inherently involves a general moral and legal problem, of which sport provides a particularly interesting case. While it is true that the world of sport is somewhat contrived and separate from the larger moral universe, competitive sport is an interpersonal engagement that requires cooperation and trust for its activity.<sup>2</sup> Despite its playful character, many people consider sport to be a serious and meaningful enterprise worthy of their time and devotion, and central to their sense of who they are. Most participants and observers share the intuition that cheating is inconsistent with the very nature of sport, even if it is unclear what constitutes cheating, or the sense in which it is wrong.<sup>3</sup>

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1. "Collective engagements" refer to any group activity or interaction that is governed by authoritative rules or ethical guidelines. This includes games or sports, co-workers collaborating in a professional setting, or even citizens participating in a community. The responsibilities of participants who encounter instances of cheating will vary according to the nature of the engagement.
  2. Participants in sport confront "unnecessary obstacles," which seems to diminish the moral seriousness of the rules within that world. See BERNARD SUITS, *THE GRASSHOPPER: GAMES, LIFE, AND UTOPIA* 39 (Univ. of Toronto Press 1978). In this seminal work, Suits offered a now classic definition of games, namely, the "voluntary attempt to overcome unnecessary obstacles." *Id.* at 41. Suits argues that games are deliberately designed to make the achievement of certain goals difficult, which is what provides the satisfaction in their accomplishment. *Id.* at 38; see also R. Scott Kretchmar, *The Nature and Value of Sporting Tests and Contests*, 63 N.Y.L. SCH. L. REV. 219, 223 (2018–2019).
  3. See J.S. Russell, *Is There a Normatively Distinctive Concept of Cheating in Sport (or Anywhere Else)?*, 41 J. PHIL. SPORT 303, 304 (2014) ("[D]escribing some behavior as cheating is typically little more than expressing strong, but thoroughly vague and imprecise, moral disapproval or condemnation of another person or institution about a wide and ill-defined range of improper advantage-seeking behavior."); see also *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, 149–51 (2018–2019) (discussing the definition of cheating).

Although the relationships and stakes may be different, life outside of sport has its fair share of cheaters, and behavioral guidelines exist, with penalties and punishments attached to transgressions in both sport and the social order beyond.<sup>4</sup> We might witness problematic behavior and worry how it threatens or possibly implicates us. Indeed, the mere fact of witnessing something problematic is troubling, especially if the cheater knows he is being watched.

Most of the sport literature approaches the issue of cheating from either the perspective of the cheater or the official whose duty is to detect and punish non-compliance.<sup>5</sup> The message to both is relatively straightforward. To the player: “Don’t cheat. If you cheat, you cannot win because non-compliance with the game’s constitutive rules effectively removes you from the game altogether.”<sup>6</sup> To the official: “Apply the rules, whatever you determine them to be, in a consistent, fair, and unbiased manner.”<sup>7</sup>

The *indirect* problem of cheating, by contrast, takes the perspective of the rule-abiding participants. These players enter the contest under the assumption that all participants accept the rules as the very condition of their activity. What is their experience when they encounter deliberate non-compliance, and what are their options or obligations?

The non-cheaters’ reactions to cheaters reflect their respective roles. Playing against a cheater is a challenge that might be a test of one’s mettle and power of concentration in the middle of an athletic engagement. A teammate’s cheating, however, might present additional conflict due to considerations of loyalty and practicality. The non-cheater’s moral outrage might be tempered by her teammate’s increased effectiveness, although the non-cheater’s awareness potentially makes her complicit. The problem of cheating in sport is therefore complicated because the non-cheater has a rooting interest in the outcome of the cheating.

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4. See generally Robert Blecker, *Penalties: Punishments, Prices, or Rewards?*, 63 N.Y.L. SCH. L. REV. 251 (2018–2019).
  5. Compare Randolph M. Feezell, *On the Wrongness of Cheating and Why Cheaters Can’t Play the Game*, 15 J. PHIL. SPORT 57 (1988) (discussing cheating from the lens of participants), with Mitchell N. Berman, “Let ‘em Play”: *A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325 (2011) (discussing the concept as it relates to officiating).
  6. Fred D’Agostino, an early philosopher of sport, distinguished between a game’s “constitutive” rules, which formally define the moves and scoring, from the “regulative” rules, which stipulate penalties but whose violation still keeps the game intact. Fred D’Agostino, *The Ethos of Games*, 8 J. PHIL. SPORT 7, 11–12 (1981).
  7. The message to the official is more complicated because the enforcement of rules requires interpretation: What precisely constitutes a rule? Do the formal rules exhaustively define the enterprise, or are there other standards or considerations to bear in mind? Given the inevitability of errors, should an official attempt to correct past mistakes and thereby even the competitive playing field? Are there some rules that are more rigorously enforced than others, perhaps depending on the situation? See Robert Blecker, “Sore Sport” *Solo Has a Point*, OBSERVER (Aug. 18, 2018), <http://observer.com/2016/08/sore-sport-solo-has-a-point> (discussing the controversial nature of make-up calls in sport); see generally J.S. Russell, *Remarks on the Progress of a Jurisprudence of Sport*, 63 N.Y.L. SCH. L. REV. 175 (2018–2019); J.S. Russell, *Are Rules All an Umpire Has to Work With?*, 26 J. PHIL. SPORT 27 (1999).

## PLAYING WITH CHEATERS

The non-cheater occupies an interesting role midway between the cheater and the official. Like the cheater, she is subject to the rules and has no official authority to enforce them during the contest. But like the official, she is invested in the social practice that she enjoys and might be in a position to encourage compliance. Arguably, all participants in the social practice have a responsibility of stewardship.

### III. MENS REA AND ACTUS REUS IN SPORT CHEATING

Defining cheating can be complicated, but it is typically characterized by 1) a violation of an accepted rule; 2) deceit; 3) a “guilty mind”; and 4) intended and resulting competitive advantage.<sup>8</sup> Whatever the definition, cheating occurs; it is wrong, and it presents a variety of problems for the other, non-cheating participants in sport. But what precisely makes cheating wrongful, and what kinds of problems does it create?

To develop the analogy with criminal law, we must identify the guilty action (actus reus) and the guilty mind (mens rea) of sport cheating. Is every rule violation a guilty action, regardless of its effect on the contest? Or does a rule violation need to impact the competitive integrity of the event before it qualifies as cheating?

Consider the following fictional candidates for cheating, all of whom are Major League Baseball players taking (or attempting to take) performance-enhancing drugs (PEDs):

A) A thirty-year-old player struggles in the final year of his contract. Prospects for a new, long-term, and lucrative contract are dim. He has had drug convictions in the past, but has changed his ways and is now firmly against taking illegal substances. He resists the suggestion that he take PEDs, but his personal trainer nevertheless includes them in his protein shake, and the player has a great final year.

B) A frequently injured player, centrally important to the team’s success and making very good money for his efforts, desperately tries to play through an injury. He feels pressure to live up to his contract and performance level from previous years, and takes PEDs because he finds that they allow him to recover faster from his rehabilitation workouts. His personal statistics for the year match his career projections.

C) A pitcher has a history of PED violations, and once served a fifty-game suspension. His team qualifies for the World Series this year, but he is struggling with both his velocity and his confidence. He asks his personal trainer to provide some PEDs, and the trainer agrees. But unbeknownst to the pitcher, the trainer disapproves of this practice and decides to inject him with a placebo instead. The pitcher believes he has taken PEDs; he pitches great and his team wins the Series.

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8. I do not make any claim about which of these elements, if any, are necessary or sufficient conditions. Various factors could contribute to our understanding of cheating, such as the intention to gain an unfair advantage, the achievement of a competitive advantage, the violation of a valid rule, and other considerations.

D) A player takes PEDs but does not seem to derive any benefit from them. He is a marginal player at best, and soon will be out of the game. He does, however, remain an active member of a World Series winning team.

Although a defense could be mounted for any of these characters, they would all seem to be guilty of something. But none have a clear combination of a mens rea and an actus reus, if we understand the latter to constitute both the violation of a rule and the achievement of some competitive advantage. They represent different kinds of sport scoundrels and deserve different consequences.

In some respects, Player A (who ingests PEDs unwittingly) is a sympathetic figure because he respects the authority of the rule and has apparently repented and changed his ways. But he violated the League rule—he upset the competitive dynamic with his enhanced performance. He did not have intention, but from an opponent’s point of view, the violation is real and should be punishable because the contest was compromised.

Player B (who takes PEDs because of his injury) will plead that he did not gain a competitive advantage, even though he admits to taking a banned substance knowingly and deceptively. He might argue that he is a victim of a rule that casts its net too wide<sup>9</sup>: The ban on PEDs, he argues, seeks primarily to protect competitive integrity.<sup>10</sup> In his case there was no threat to competitive integrity; he merely wanted to return to the game and his level of performance. On the other hand, injuries and recovery time may be considered part of the game, and any artificial speeding up of that process was a competitive advantage. The obligation he feels to his teammates may or may not compensate for the nagging feeling that cheating is wrong.

Player C (who believes he has taken PEDs but has not) clearly intended to deceptively break the rules and gain a competitive advantage, but in fact did not violate any codified rule since he had no PEDs in his system.<sup>11</sup>

Player D (who took PEDs with no noticeable result) has a strong case that the PEDs did not help him, although he might have performed even worse without the drugs. He seems to combine cheating and ineptitude, which could be dismissed except for one detail: This player was a member of a championship team, even if not a major contributor. In some sports, this would threaten disqualification of the whole

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9. See generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (Oxford Univ. Press 1991). Schauer argues that all rules are suboptimal, which means they either include cases that do not come under the intention of the rule or exclude cases that do come under the intention of the rule. *Id.*

10. In fact, there are a number of justifications for the prohibition of PEDs listed in the MLB’s Joint Drug Agreement (JDA); among them, concern for players’ safety, fairness, and integrity of the competition. See *Joint Drug Prevention Agreement*, MLB, [http://www.mlbplayers.com/ViewArticle.dbml?DB\\_OEM\\_ID=34000&ATCLID=211078494](http://www.mlbplayers.com/ViewArticle.dbml?DB_OEM_ID=34000&ATCLID=211078494) (last visited Feb. 12, 2019). The press release of the JDA explicitly mentions the need to “educate players on the risks associated with the use of prohibited substances.” *Id.*

11. Funnily enough, he did gain a competitive advantage by believing he had something in him that gave him an advantage over others, which, if one thinks about it, is a fair description of a champion’s self-image.

team, which raises the issue of collective punishment—a complex problem in itself.<sup>12</sup> In Major League Baseball, a subsequent disclosure of this violation would at least partly taint the memory of his team’s glorious season.

Before judging these cases, we must ask: What is the point of the rule that has been violated? Specifically, what constitutes the *actus reus*? If illicit competitive advantage is the sole justification for the prohibition, then perhaps we could understand the plea of Player B and maybe even Player D. If competitive advantage is not the sole purpose of the ban, intake of the drugs, regardless of their effectiveness, would be sufficient to pronounce guilt.

The importance of intent also depends on the specific target of the ban. Three of the players (B, C, and D) intended to violate the rule, but only the latter two clearly intended to gain a competitive advantage. Player C intended to gain an illicit competitive advantage but does not in fact violate the rule. If moral blameworthiness is the primary concern of cheating, Player A, the trainer’s dupe who didn’t know he was cheating but was, is morally superior to Player C, who believed he was cheating, even though he wasn’t. In fact, all of the players are rule-violators and, to that extent, culpable, except for the agent who is arguably the worst moral character, Player C. Ironically, if the policy is strict liability, Player C is in the clear.

These examples merely touch on the complexity of cheating in sport. As informative as the legal analogy might be, there are obvious differences between criminal law and sport cheating. First, in sport we assume that the players have voluntarily accepted the authoritative rules of the game, and any violation is a breach of that promise.<sup>13</sup> Second, as we saw in the examples above, rule violations in sport are not always effective, so it can be difficult to identify what external act deserves punishment. Third, the stakes of sport and law differ; in sport, moral intention is more important than actual harm because violations occur within a voluntary and conventional social practice. The opposite holds true in law.

In any event, in the following sections I argue that some athletic events can and do proceed as genuine competitions despite instances of cheating.

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12. See Robert Blecker, *How the Russian Doping Scandal Caused a War Between World Sporting Authorities*, OBSERVER (Feb. 9, 2018), <https://observer.com/2018/02/court-olympics-and-anti-doping-agency-disagree-over-russian-doping> (examining collective punishment in the context of Olympic sport).

13. See J.S. Russell, *Limitations of the Sport-Law Comparison*, 38 J. PHIL. SPORT 254, 263 (2011), stating:

Given the voluntarist aspect of games, there is no similarly profound need to justify the exercises of coercive authority of games and game officials over game players, assuming the game players genuinely agree to participate in games, since game players voluntarily accept the constraint and enforcement of the rules by their decision to play the game. In this respect, games represent a simpler and fundamentally different institution for justifying the use of coercive authority than municipal legal systems.

See also Steven Weimer, *Consent and Right Action in Sport*, 39 J. PHIL. SPORT 11, 12 (2012) (“[I]t is natural to think . . . that to consent to participate in a sport in which participants are expected to perform certain actions and refrain from performing other actions is to place oneself under a *prima facie* duty to conform to those expectations.”).

## IV. THE CONCEPT OF PLAYABLE CHEATING

The concept of playable cheating confronts the “logical incompatibility thesis,” a formalist position which holds that cheaters do not actually play the game as it is defined by constitutive rules.<sup>14</sup> Many commentators have defended versions of this argument:

Rules in games thus seem to be in some sense inseparable from ends . . . . If the rules are broken the original end becomes impossible of attainment, since one cannot (really) win the game unless one plays it, and one cannot (really) play the game unless one obeys the rules of the game.<sup>15</sup>

The two parenthetical qualifiers leave some conceptual space for a distinction between *playing* the game and *really playing* the game—space that I believe allows for the concept of playable cheating.

The chief drawback of the logical incompatibility thesis would seem to be that it excludes too much. If accepted, countless athletic events—seasons, championships, records, and career statistics—would have to be wiped from the books because, at least in principle, even one instance of rule non-compliance by the victors would nullify the results.<sup>16</sup>

But critics of the incompatibility thesis argue that rule violations do not always destroy games.<sup>17</sup> For example, former MLB pitcher Gaylord Perry was widely suspected of throwing illegal spitballs during his long and successful career.<sup>18</sup> Although many pitchers are known to bend this rule, Perry appeared to flout it—yet he was ejected only once in his career for ball-doctoring.<sup>19</sup> In 1991, Perry was elected to the Baseball Hall of Fame after pitching more than 700 games in his career.<sup>20</sup> As

14. See generally William J. Morgan, *The Logical Incompatibility Thesis and Rules: A Reconsideration of Formalism as an Account of Games*, 14 J. PHIL. SPORT 1 (1987).
15. SUITS, *supra* note 2, at 24; see also Feezell, *supra* note 5; Edwin J. Delattre, *Some Reflections on Success and Failure in Competitive Athletics*, 2 J. PHIL. SPORT 133, 137 (1975); Kathleen Pearson, *Deception, Sportsmanship, and Ethics*, 19 QUEST 115 (1973).
16. This formalist position in sport parallels the so-called “wrong note paradox” in music theory, which suggests that if even one note is misplayed by even one member of an orchestra, the work has not been performed, strictly speaking, because it is defined by notation. THEODORE GRACYK, *THE PHILOSOPHY OF ART: AN INTRODUCTION* 76–77 (2012); see also NELSON GOODMAN, *LANGUAGES OF ART: AN APPROACH TO A THEORY OF SYMBOLS* 186–87 (Bobbs-Merill Co. 1968).
17. See, e.g., Craig K. Lehman, *Can Cheaters Play the Game?*, 8 J. PHIL. SPORT 41 (1981) (rejecting the notion that cheating in a game is logically incompatible with winning).
18. See Ira Berkow, *Gaylord Perry: The Lonely Quest for Victory No. 300*, N.Y. TIMES (Mar. 1, 1982), <https://www.nytimes.com/1982/03/01/sports/gaylord-perry-the-lonely-quest-for-victory-no-300.html>.
19. See Jay Jaffe, *A Gripping Saga: 11 Tales of Pitchers Using Spitters, Sandpaper and Scuffing*, SPORTS ILLUSTRATED (May 3, 2013), <https://www.si.com/mlb/strike-zone/2013/05/03/a-gripping-saga-11-tales-of-pitchers-using-spitters-sandpaper-and-scuffing>. He even had the gall to write a book after his retirement. See GAYLORD PERRY, *ME AND THE SPITTER: AN AUTOBIOGRAPHICAL CONFESSION* (1974).
20. *Gaylord Perry*, NAT’L BASEBALL HALL OF FAME, <https://baseballhall.org/hall-of-famers/perry-gaylord> (last visited Nov. 9, 2018).

one skeptic of the incompatibility thesis asks: “Does anyone seriously want to say that no baseball game [was] ever played when Perry [pitched]?”<sup>21</sup>

Another noteworthy example is the “Deflategate” controversy.<sup>22</sup> Allegedly, before the AFC championship game in January 2015, someone within the New England Patriots organization tampered with team footballs—deflating them slightly to make them easier to grip—after they had been officially measured and approved for the game.<sup>23</sup> If there was a transgression, it is doubtful that it affected the outcome of the game: Before the second half, game officials properly re-inflated the balls, and the Patriots had even greater success than in the first half, scoring twenty-eight unanswered points and blowing the game open with a final score of 45-7.<sup>24</sup> The Patriots went on to win the Super Bowl that year.<sup>25</sup> Nevertheless, the National Football League, sufficiently convinced that it was “more probable than not” that star quarterback Tom Brady was “generally aware” of ball tampering, suspended him for four games the following season.<sup>26</sup>

These examples would appear to support the criticism levied against proponents of the logical incompatibility thesis by suggesting that games can continue despite instances of cheating. But this conclusion depends on the eye of the beholder. Generally, there are four different perspectives to analyzing whether these examples are either consistent with or refute the logical incompatibility thesis.

A strict formalist would insist that if the allegations are true, neither Gaylord Perry nor the New England Patriots actually played their respective games. It would also follow that the Patriots did not, in fact, become NFL champions. According to a strict formalist, these counterexamples do not show that the logical incompatibility thesis is incorrect; rather, they indicate a serious lapse in sport governance.

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21. Lehman, *supra* note 17, at 42.

22. *See Deflategate Timeline: After 544 Days, Tom Brady Gives In*, ESPN (July 15, 2016), [http://www.espn.com/blog/new-england-patriots/post/\\_/id/4782561/timeline-of-events-for-deflategate-tom-brady](http://www.espn.com/blog/new-england-patriots/post/_/id/4782561/timeline-of-events-for-deflategate-tom-brady).

23. *See id.*; *see also* Chris Mortensen, *11 of 12 Pats Footballs Underinflated*, ESPN (Jan. 21, 2015), [http://www.espn.com/boston/nfl/story/\\_/id/12202450/nfl-says-new-england-patriots-had-inflated-football-afc-championship-game](http://www.espn.com/boston/nfl/story/_/id/12202450/nfl-says-new-england-patriots-had-inflated-football-afc-championship-game). Skeptics and critics point to the National Football League itself as the cheaters for having doctored its findings and distorted the science on which it was purportedly based. *Cf.* FOUR GAMES IN FALL (Lemon Martini Productions 2017); Brief of Professors of Physics and Eng’g as Amici Curiae in Support of Appellees’ Petition for Panel Rehearing or Rehearing en Banc, by John Leonard et al., *Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d 527 (2d Cir. 2016) (No. 15-2801); Brief for Professor Robert Blecker as Amicus Curiae in Support of Appellees, *id.* (No. 15-2801).

24. *See Deflategate Timeline, supra* note 22.

25. *See id.*

26. *See id.*; *see also* THEODORE V. WELLS, JR. ET AL., INVESTIGATIVE REPORT CONCERNING FOOTBALLS USED DURING THE AFC CHAMPIONSHIP GAME ON JANUARY 18, 2015 2, <https://nflabor.files.wordpress.com/2015/05/investigative-and-expert-reports-re-football-afc-championsh.pdf>. Assuming the report was accurate, I would argue that Brady cheated and most of the players on the field were aware of it. I would also argue that it was playable.

A second approach, which I call interpretive formalism, recognizes difficult cases, much like H.L.A. Hart's explanation of "penumbral cases" in law.<sup>27</sup> This position argues that throwing spitballs, although technically outlawed, is part of baseball's conventions. Therefore, it is not genuine cheating and the logical incompatibility thesis still holds true. One does not cheat when playing within the customs of the game.<sup>28</sup>

Whereas the first two positions maintain the incompatibility thesis, the anti-formalist position effectively denies it. Under this third approach, instead of attempting to reconcile the behavior in question with the spirit of the rules through an interpretive effort, the anti-formalist acknowledges that the rule has been broken; everybody knows it goes on and implicitly accepts it.<sup>29</sup> This view claims that what people call cheating is actually part of the fascination of sport: Successful cheaters are savvy competitors deserving of our admiration.<sup>30</sup>

The fourth position, institutional formalism, is the premise of my discussion and also denies the logical incompatibility thesis. It holds that despite clear instances of cheating, some games are nevertheless recognizable and legitimate if the basic activity of the contest is not fatally compromised. Institutional formalism agrees with strict formalism and anti-formalism that a rule violation is genuine cheating; institutional formalism also agrees with interpretive formalism and anti-formalism that the contest can often continue despite rule violations. Whereas anti-formalism thinks violations might "spice up" the contest, institutional formalism argues that the contest can tolerate and absorb *some* degree of rule-breaking. Of course, every determination depends on specifics. Every game would seem to have some threshold level of compliance, without which the event would be impossible. If there is enough compliance—or at least enough apparent compliance—for a game to proceed, I suggest it presents the possibility of playable cheating.<sup>31</sup>

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27. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–08 (1958) ("There must be a core of settled meaning [of a particular law], but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.").

28. Feezell, *supra* note 5, at 5. Because Feezell likely did not want to compromise the validity of the logical incompatibility thesis, he had to redefine what qualifies as cheating.

29. Oliver Leaman, *Cheating and Fair Play in Sport*, in ETHICS IN SPORT 153, 153–59 (William J. Morgan ed., 3d ed. 2018). I think we can distinguish two different senses of rules: the codified guideline and the actual practice. When one goes outside of the latter it is considered immoral and unacceptable.

30. *Id.* at 156–57. Leaman states:

It might be suggested that many competitions, especially those with some sort of authority present to regulate cheating, would be more interesting if cheating takes place within it, or if several players try to stretch the rules. Such deviant behavior adds a new dimension to the game which can also add to its interest.

*Id.* at 157. His position is not amoral, however, because Leaman insists that this wider understanding of sport is still governed by the principle of fairness: "The existence of an authority in sport enshrines cheating in the structure of the game; the authority is there to ensure that cheating does not interfere with the principle of fairness in a game." *Id.* at 158.

31. My terminology might be different, but I do not think the concept that I suggest here is particularly novel. Other commentators generally describe minor violations as something other than cheating, but

As an early proponent of the incompatibility thesis once proclaimed, cheaters are not “really” playing, a precision that seems to suggest a sense in which they are *indeed* playing.<sup>32</sup> Although the cheater resembles someone engaged in the activity of the contest, strictly speaking, his violation disqualifies that activity. In principle, the cheater would defeat his own purpose were he to destroy the game altogether, because then he could not collect his sought-after, unmerited award. So he occupies a self-defeating position: He needs the appearance of a legitimate contest for his award to have any meaning, and yet his actions may objectively destroy the contest. The cheater must operate within the game’s institution, hence “institutional formalism.”<sup>33</sup>

The game’s institution provides a general standard according to which we distinguish playable from unplayable cheating, although it raises two important questions. First, can the game continue despite these violations? Is the game’s institution, in other words, sufficiently recognizable and intact to allow for play?<sup>34</sup> A “yes” to this question will prompt the second question—the moral question—which is, *should* the game continue? That question turns on how the non-cheater considers his relationship to the cheaters and, indeed, his participation in the game.

## V. THE IMPLICATIONS OF PLAYABLE CHEATING

There are, of course, many types of cheating outside of sport: cheating on examinations, on taxes, on spouses, on diets. We might consider whether there is some core value that cheating harms. I suggest that there are two basic paradigms.

First, cheating can involve an attempt to gain an unfair advantage in a contest, or produce an inaccurate measurement in a performance.<sup>35</sup> The core value here is

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they, too, draw a distinction between major violations that are destructive of events and minor violations that are not. See Russell, *supra* note 3, at 316 (“It is more accurate to say that sometimes cheating destroys a game or a contest, as when a coach manages to rig the judging of an event. But I suspect that many instances of cheating create imperfections in games though they do not destroy them.”). Earlier discussions also acknowledge the possibility of some non-compliance in otherwise legitimate events, but they do so by downplaying the seriousness of the violations, as if to say they are not *really* instances of cheating. See Fezzell *supra* note 5, at 61 (using the term “subtle illegalities” that have become embedded in baseball); J.S. Russell, *Play and the Moral Limits of Sport*, in *ETHICS IN SPORT*, *supra* note 29, at 208–22 (using the term “competitive shenanigans”). I find myself in agreement with these positions, but I prefer to retain the language of cheating because it presents the moral issue more clearly.

32. See Suits, *supra* note 2, at 24.
33. See *id.* at 46 (“Thus, although he is not really playing the game, he has not abandoned the game’s institution. On the contrary, his continuing to operate in terms of the institution is a necessary condition for his exploitation of the game and his opponent.”).
34. Ironically, successful deception on the part of a savvy cheater might actually allow the game to continue.
35. There are different types of athletic events that present the problem of unfair cheating in different ways. Some events, such as football and basketball, are directly interactive contests. Others, such as swimming and gymnastics, are individual performances that seek to outdo other performances. One can cheat in an attempt to gain an unfair advantage over opponents in both of these events, but the cheating manifests itself differently according to the structure of the event. In either case, the moral issue is similar, although the manner is quite different. Bernard Suits discusses this contrast:

The Olympics (as well as the Commonwealth Games, and so on) contain two distinct types of competitive event, what I have elsewhere called judged as opposed to refereed

fairness. Correlatively, with respect to mens rea, we would specifically blame the intention to surreptitiously gain an advantage to skew the results of the contest.

Second, cheating can violate a commitment that created a new relationship or grouping, such as a marriage or the social practice of a sport. The core value here is fidelity. The wrongness of cheating has less to do with advantages and more to do with the damage and disrespect that non-compliance represents. We are offended by this breach even if no advantage follows from it.

We might wonder if there is a relationship between these paradigms. Fidelity seems to be more of a deontological notion—an imperative rather than a value that could be measured or balanced against other values. On the other hand, the fairness paradigm, although intelligible in itself, might well presuppose the fidelity paradigm on some level. People who cheat on their taxes, for example, attempt to gain an unfair economic advantage over other taxpayers, but the real offense is the disregard for the implicit social contract that sustains that practice.

This mixed paradigm involving the values of both fairness and fidelity helps us understand the nature of cheating in sport. Their relationship reflects what many point out—namely, that competitive sport presupposes cooperation as a ground of that antagonistic encounter.<sup>36</sup> The conceptual priority of cooperation vis-à-vis competition parallels the basis that fidelity provides to concerns for fairness.

Recall the logical incompatibility thesis. The thesis does not itself imply the wrongfulness of cheating; it simply makes the analytical point that non-compliance—whether intentional or not—disqualifies one from participation.<sup>37</sup> The wrongfulness of cheating derives from the promise one makes that he will play *that* game. Cheating in sport is not only unfair but it also breaks faith; it ruptures to some extent this new social ontology created by the promise.

The type of cheating that most naturally lends itself to this discussion involves deceit—a participant pretends to comply with the rules and does so rather convincingly to most observers, including the officials. But not all cheating in sport is deceptive. There is brazen cheating, such as a boss who moves his ball to a better lie at the company golf tournament, or, more maliciously, a bully who openly disregards the rules. There is also calculated cheating, which includes open violations,

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events. One is a performance and so requires judges. The other is not a performance but a rule-governed interplay of participants, and so requires not judges but law-enforcement officers, that is, referees. Performances require rehearsal, games require practice.

Bernard Suits, *Tricky Triad: Games, Play, and Sport*, 15 J. PHIL. SPORT 1, 2 (1988).

36. See, e.g., ROBERT L. SIMON, CESAR R. TORRES & PETER F. HAGER, *FAIR PLAY: THE ETHICS OF SPORT* 59–80 (Westview Press 4th ed. 2015); R. Scott Kretchmar, *From Test to Contest: An Analysis of Two Kinds of Counterpoint in Sport*, 2 J. PHIL. SPORT 23 (1975); Scott Kretchmar, *Competition, Redemption, and Hope*, 39 J. PHIL. SPORT 101, 103 (2012) (“Sport becomes a *mutual* quest for excellence, a *collaborative* search for knowledge, a *cooperative journey* in search of riveting drama, an inclusive laboratory for human development.”).
37. See Lehman, *supra* note 17, at 41. According to the nature of the contest, the disqualification of one participant might effectively end the contest. For example, one cannot play tennis against someone who is not playing tennis. But in other sports, such as track and field or golf, a single elimination does not affect the general competition.

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perhaps usually as desperate measures that seem worth the risk, even if one might hope that they will not be detected by the officials. Examples include a deliberate handball in soccer to prevent a goal, or a defensive back in American football holding a wide receiver to prevent an easy touchdown pass.<sup>38</sup> Open cheating might be playable, but poses different conceptual issues for the integrity of games.<sup>39</sup>

Generally speaking, deception makes all wrongdoing worse by adding dishonesty to the mix. But the brazen, open cheater does not even pretend to respect or acknowledge equal standing before the rules, which might turn the encounter into something rather different than sport. Deception, as bad as it is, might actually allow a game to continue as playable—not only as a matter of appearances, but also because the deceptive cheater implicitly accepts the premise of fair play, which is why he hides his violations.<sup>40</sup> In this qualified sense, the deceptive cheater is more respectful than the open cheater.

### VI. WHEN TEAMMATES CHEAT

The relationship teammates share is multi-dimensional. As competitors, they are invested in each other's athletic efforts, even though they have separable roles. They also have personal relationships as a consequence of their time together. They are often friends, and older teammates may serve as mentors to younger teammates. To some extent, their actions and their attitudes reflect upon one another, and fairly or unfairly, outsiders might assume complicity when a team member cheats. So what should a player do when she becomes aware that a teammate is cheating?

Teams are comprised of individuals with separate intentions and responsibilities, who can each be assessed individually. But teams are not simply collections of individual agencies. A team is a “plural subject,” which means that members think of themselves reflexively as a unit and act accordingly.<sup>41</sup> For this reason, a teammate's behavior is never wholly separable from the rest, even if it does not imply something like collective guilt.

The non-cheater might be genuinely outraged by the behavior and desire to correct it out of respect for the game. But there are good moral reasons to hesitate—the integrity of the contest is not the only value at stake here, however important it is. Private admonitions are a delicate matter, and whistle-blowing, even if only internally, would likely have a devastating effect on team morale. Loyalty is a foundational moral

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38. Even without deception, it is difficult to deny the cheating spirit of these examples. See Russell, *supra* note 3, at 309–10.

39. This is not a theoretical claim; it is a practical judgment about whether or not the rule violations have sufficiently compromised the contest. For example, a game would be unplayable if the skills that normally decide the contest are no longer able to overcome the cheating activity.

40. The appearance of rule compliance helps makes the game playable, even if morally bad. If the officials, players, and spectators all think the game is proceeding normally (which might require a certain level of skill on the part of the cheater), the game can go on.

41. MARGARET GILBERT, ON SOCIAL FACTS 2–3 (Princeton Univ. Press 1989).

value in all group dynamics, especially one in which members interact so closely.<sup>42</sup> We must also assume that the non-cheater, however principled, shares the competitive commitment of his teammates. To negatively impact the team's collective efforts should give one pause; as with any instance of whistle-blowing, the correct decision requires consideration of the circumstances of the case and good prudential judgment. Further, the non-cheater may not fully understand the context of the apparent violation. Some instances of cheating may be responses to the cheating of opponents.<sup>43</sup> Such considerations give principled reasons to overlook some transgressions.

Moral considerations aside, the non-cheater has practical reasons to intervene due to worries about penalties or disqualification. Cheating puts everyone on the team in danger of some kind; an appeal to the common self-interest is both understandable and justified.<sup>44</sup> A concern expressing practical worries is probably less offensive to the cheater precisely because it is not a moral, authoritative judgment from a peer. The practical concern might not jeopardize the team dynamic and could even reinforce it if the non-cheater appeals to common interest.

A teammate's cheating also presents a (quasi) legal worry: To what extent does interaction with a cheating teammate implicate the non-cheater? If we consider cheating in sport as analogous to a legal crime, at what point does a teammate's interaction amount to complicity?<sup>45</sup> Complicity is a relational concept; by definition it involves two or more agents, one of whom is the principal whose action constitutes the original crime.<sup>46</sup> The legal doctrine of complicity stands as a complement to the doctrine of causation.<sup>47</sup> Both actors are blameworthy, but in different ways.<sup>48</sup> In a dissenting opinion in a 2005 Colorado case, Justice Michael Bender stated:

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42. See generally Paul Gaffney, *The Nature and Meaning of Teamwork*, 42 J. PHIL. SPORT 1 (2015).

43. For example, if an opposing baseball player is stealing signs it might warrant a response outside the rules to prevent it. See S.K. Wertz, *The Varieties of Cheating*, 8 J. PHIL. SPORT 19, 24–27 (1981) (discussing the concept of retaliatory cheating).

44. Consider the Jamaican relay team that was stripped of its 2008 Olympic gold medal because one member was discovered to have violated the International Olympic Committee drug policy. See Colin Dwyer, *Usain Bolt Loses a Gold Medal After 2008 Teammate's Failed Test*, NPR (Jan. 25, 2017), <https://www.npr.org/sections/thetwo-way/2017/01/25/511605094/usain-bolt-loses-a-gold-medal-after-2008-teammates-failed-test>.

45. Complicity is a legal concept, although it has an analogous moral sense as well. The term has pervaded the news in recent years: According to *Dictionary.com*, “complicit” was the word of the year for 2017. *Word of the Year 2017*, DICTIONARY.COM, <https://www.dictionary.com/e/word-of-the-year> (last visited Nov. 9, 2018).

46. See *Grissom v. People*, 115 P.3d 1280, 1283 (Colo. 2005) (en banc) (“Complicity is not a separate and distinct crime or offense. Rather, it is ‘a theory by which a defendant becomes accountable for a criminal offense committed by another.’”) (quoting *People v. Thompson*, 655 P.2d 416, 418 (Colo. 1982)).

47. See Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 327 (1985) (“Complicity emerges as a separate ground of liability because causation doctrine cannot in general satisfactorily deal with results that take the form of another’s voluntary action.”).

48. *Id.* at 337.

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To prove that a defendant is complicit in the commission of a crime, the prosecution must prove a dual mental state before the complicitor may be held legally accountable for the offense of another. The complicitor must have: (1) the culpable mental state required for the underlying crime committed by the principal; and (2) the intent to promote or facilitate the crime committed by the principal.<sup>49</sup>

This description indicates that complicity involves something more than mere association with the criminal but something less than actual causation. The complicitor must do something that can be construed as assistance, support, or encouragement:

It is important not to misconstrue derivative liability as imparting vicarious liability. Accomplice liability does not involve imposing liability on one party for the wrongs of another solely because of the relationship between the parties. Liability requires action by the secondary actor—as we shall see, intentional action designed to persuade or help—that makes it appropriate to blame him for what the primary actor does.<sup>50</sup>

How do these descriptions apply to a player on a team sport? Membership on a team is more than an association. Teammates have a common project; they coordinate their efforts and they are invested in each other's success. At the same time, they perform as individual actors and carry separable responsibilities. Teammates spend a great deal of time together, both on and off the field, and generally become very familiar with each other's activities and habits. Secrets are hard to keep in such close quarters. It is likely that teammates become aware of any illicit activity when it occurs—either before the action begins, as the action unfolds, or after it has taken place. In general, omission to act does not imply criminal liability, except in special cases where there is a pre-existing duty such as the failure to look after children in one's care.<sup>51</sup> A similar presumption undoubtedly holds true in the case of sport cheating with respect to complicity, although knowledge does perhaps imply some practical responsibility.

One may be complicit if one encourages an actor to commit an act he would otherwise be less motivated to do:

If one persuades or encourages another to commit a criminal act by appealing to some consideration that moves him, by giving him emotional support and approval, by offering a rationalization for the action, or by similar means, one has not caused the principal to act in the physical sense of cause.<sup>52</sup>

What does encouragement mean in team sport? One might imagine how pressure from teammates and coaches to perform at a certain level holds out the promise of greater acceptance and increased playing time. The competitive spirit and the sense

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49. *Grissom*, 115 P.3d at 1288 (Bender, J., dissenting) (internal citations omitted).

50. Kadish, *supra* note 47, at 337. Presumably, the meaning of the word “action” used by Kadish includes some types of inaction or omission.

51. See MODEL PENAL CODE § 2.07 (AM. LAW. INST. 2017).

52. Kadish, *supra* note 47, at 344.

of obligation teammates feel to one another can certainly contribute to the violation of rules, particularly if the cheater observes that his teammates are aware of his transgression but have not intervened to remedy it or to prevent its repetition in the future.

Facilitation, however, is more than mere encouragement; it involves some kind of practical agency, although not as much to qualify as causation. The transgression is that of the principal, but there is some kind of assistance. “The problem of the secondary party’s liability does arise where one of the parties commits all the acts necessary for the crime and the other commits none of these acts but renders some assistance, typically by providing the means or opportunity.”<sup>53</sup>

Some sports require a more intimate interaction with teammates than others, and even within some sports there is a significant positional difference.<sup>54</sup> For example, catchers who worked with Gaylord Perry cannot credibly claim to have been uninvolved with his cheating because they must have known which pitches were coming. On the other hand, a center-fielder would be less involved; although players in the field sometimes reposition themselves based on pitching strategy, they are further removed from the pitcher’s tactics than the catcher.

The observance of a teammate cheating might call for the exercise of leadership. Much depends, however, on a player’s status on the team. For example, it might be difficult for a team member to confront the team’s star player—any expression of disapproval could bring unpleasant consequences, maybe a benching or even a trade.

But consider a different team dynamic. In 2014, New York Yankees pitcher Michael Pineda was thrown out of a game against the Boston Red Sox for using pine tar, a strictly forbidden substance.<sup>55</sup> The violation was evident to television viewers.<sup>56</sup> In the photographs published after the game, Derek Jeter, former captain of the Yankees and five-time World Series champion, can be seen surrounding Pineda on the mound with his teammates.<sup>57</sup> A respected veteran like Jeter was in a position to help a young teammate like Pineda understand that using pine tar is not the right way to play the game, if only as a matter of prudence. Pineda was ultimately ejected from the game.<sup>58</sup> General Manager Brian Cashman admitted team responsibility: “We certainly are responsible. There’s certainly failure on our part as an organization as a whole that he took the field in the second inning with that on his neck. He’s responsible for his actions, but we failed as an organization for . . . him being in that position.”<sup>59</sup>

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53. *Id.* at 345.

54. Gaffney, *supra* note 42, at 16–17.

55. Bryan Hoch, *Pineda Ejected for Having Pine Tar on Neck*, MLB NEWS (Apr. 24, 2014), <https://www.mlb.com/news/yankees-right-hander-michael-pineda-ejected-for-having-pine-tar-on-neck/c-73145346>.

56. *Id.*

57. *See id.*

58. *Id.*

59. *Id.*

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Perhaps the most famous case of how the actions of teammates can negatively affect the whole unit is the so-called “Black Sox Scandal” of 1919, when members of the Chicago White Sox decided to throw the World Series against the Cincinnati Reds in exchange for money from a gambling syndicate led by Arnold Rothstein.<sup>60</sup> The players were generally dissatisfied with their salaries, but according to most accounts they were not united in their decision to throw the series.<sup>61</sup>

The most famous player involved was “Shoeless” Joe Jackson, a hall-of-fame caliber hitter and the star of the White Sox team.<sup>62</sup> Controversy exists even today about his knowledge and intent in the midst of the scandal.<sup>63</sup> He never attended any meetings about the plan and some suggest that, because he was illiterate, he did not have access to some of the materials they shared.<sup>64</sup> Even though he hit .375 and had the only homer in the Series,<sup>65</sup> Jackson was later found guilty, and received a permanent ban from Major League Baseball activities, including honors such as the Hall of Fame.<sup>66</sup> In his decision to permanently ban eight players from the league, the commissioner reasoned:

Regardless of the verdict of juries, no player [who] throws a ball game; no player [who] undertakes or promises to throw a ball game; no player [who] sits in a conference with a bunch of crooked players and gamblers where the ways and means of throwing games are planned and discussed and does not promptly tell his club about it, will ever play professional baseball.<sup>67</sup>

This is a sad baseball story. It does not involve an attempt to gain an unfair advantage in the game, but it does demonstrate how wrongdoings in team sport have a sweeping effect on everyone in the room. What is vividly true in team sport is reflected to some degree in all human associations. Depending on our relationships, we participate in the actions of others, both as beneficiaries and victims, even if we do not commit them as primary actors. Sport provides a suggestive analogy for the social implications of what goes on around us.<sup>68</sup>

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60. Evan Andrews, *The Black Sox Baseball Scandal*, HISTORY (Oct. 9, 2014), <https://www.history.com/news/the-black-sox-baseball-scandal-95-years-ago>.

61. *Id.*

62. Sarah Pruitt, *Did Shoeless Joe Jackson Conspire to Throw the 1919 World Series?*, HISTORY (Feb. 20, 2013), <https://www.history.com/news/did-shoeless-joe-jackson-conspire-to-throw-the-1919-world-series>.

63. *Id.*

64. *Id.*

65. *Id.*; *Shoeless Joe Jackson*, BASEBALL REFERENCE, <https://www.baseball-reference.com/players/j/jacksjo01.shtml> (last visited Nov. 12, 2018).

66. See Andrews, *supra* note 60; Pruitt, *supra* note 62.

67. *Sportscenter Flashback: The Chicago Black Sox Banned from Baseball*, ESPN CLASSIC (Nov. 19, 2003), [http://www.espn.com/classic/s/black\\_sox\\_moments.html](http://www.espn.com/classic/s/black_sox_moments.html).

68. George Herbert Mead used a baseball example to describe the social character of human nature:

Each one of own his acts is determined by his assumption of the action of the others who are playing the game. What he does is controlled by *his being everyone else on that team*, at

## VII. WHEN OPPONENTS CHEAT

The question of guilt or complicity does not normally arise when playing against a cheating opponent.<sup>69</sup> Whatever success the non-cheater achieves is without moral taint. But the opponent's cheating presumably makes success all the more difficult to achieve, and might even be the difference between winning and losing. Overcoming the additional obstacle might be a particularly satisfying resolution to the issue, although not fully satisfying in the true spirit of sport.<sup>70</sup> Such a victory overcomes the unfairness of cheating, but does not repair the bad faith.

There is an obvious difference between officiated and pick-up games. In the former, one can always appeal to authorities and ask them to enforce the rules, although this is not always effective. Some cheating—for example, holding opponents in contact sports—is difficult to detect when done by a skilled cheater. Another complication is that a player might be hesitant to make such an appeal if his teammate is thought to be using similar tactics, presenting the issue of who will cast the first stone.<sup>71</sup>

On the other hand, pick-up games must be self-governing, and for that reason would seem to require a more genuinely moral commitment among the players. In these games, we often are familiar with our opponents, which further complicates the social dynamic and gives rise to non-deceptive cheating. We can imagine instances when a boss or a grandfather takes some liberties on a golf course, knowing full well that no one will say anything.

A much more unpleasant instance is when the relationship approaches hostility, nearing the point of event destruction. When this occurs it fundamentally transforms the activity. What was previously an autotelic engagement—a game played for its own sake—now becomes a means through which a very different kind of struggle takes place. Competitive athletes at some point in their careers, whether on the local playground or at the professional level, need to confront displays of gamesmanship, as if “playing one game to win another.”<sup>72</sup> It is not always clear that it is worth the

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least in so far as those attitudes affect his own particular response. We get then an “other” which is an organization of the attitudes of those involved in the same process.

GEORGE HERBERT MEAD, *MIND, SELF, AND SOCIETY* 154 (Charles W. Morris ed., 1934) (emphasis added).

69. For the sake of simplicity, I am here taking for granted that competitors go into contests fully committed to winning. In some instances, however, a team might deliberately try to lose, possibly because of considerations of a more favorable draw later in a tournament. An example of this behavior occurred in the 2012 Olympics when eight badminton players attempted to secure an easier draw in the Games. *Olympic Badminton: Eight Women Disqualified from Doubles*, BBC SPORT (Aug. 1, 2012), <https://www.bbc.com/sport/olympics/19072677>. Their intention was discovered and they were rightfully disqualified from the tournament. *Id.*
70. All games by definition seek to overcome unnecessary obstacles, but the *additional* unnecessary obstacle of overcoming a rule violation is not strictly part of any game or sport. See SUITS, *supra* note 2, at 41.
71. For example, a week before Michael Pineda was ejected for using pine tar, it was obvious he was doing the exact same thing against the same team. See Hoch, *supra* note 55. But the Boston Red Sox did not call attention to it until it became too blatant to ignore, and for a very good reason: Their pitchers sometimes use pine tar themselves, particularly in cold weather. *Id.*
72. Leslie A. Howe, *Gamesmanship*, 31 J. PHIL. SPORT 212, 212 (2004).

effort, particularly when the opposition demonstrates contempt for the integrity of the social practice.

Perhaps the non-cheater, driven by a healthy competitive spirit and finding herself locked in this kind of struggle, instead decides to engage in “retaliatory cheating.”<sup>73</sup> One could make the argument that this is not cheating at all and that it simply levels the playing field, although it does so by altering the game in some manner.

Do we look with moral indignation upon the player who cheats to make the opponent stop cheating him or her? No, we might not; we might take this action as an attempt to restore the playworld. The restoration might be thought of as more important than the specific act of cheating which brought it about.<sup>74</sup>

Arguably, this should be understood as an attempt to promote competitive fairness, which might be accepted as one of the unwritten rules of the game:

Cheating in some instances seems to be approved by people; retaliatory cheating is a good example. This kind of cheating involves a covert set of norms, because established social norms dictate against it. But we also find cases where retaliatory cheating is approved. This is rather like “beating the system.”<sup>75</sup>

Here we recall the anti-formalist position suggesting that the presence of officials “enshrine[s] cheating in the structure of the game,” which only adds to its intrigue.<sup>76</sup> The phenomenon of retaliatory cheating can be understood as a perfect example of how reciprocal violations exploit the plastic character of constitutive rules without compromising the overriding principle of fairness. Cheaters creatively manipulate the game, but as long as officials oversee the action, and presumably as long as the opponents have an equal opportunity to respond, the essential character of competitive sport is maintained.

The idea of unofficial, retaliatory actions in sport might find an analogy in what is called “legal pluralism,” which could be considered a practical solution to overcrowded courtrooms: “Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. . . . Courts (and other official agencies) comprise only one hemisphere of the world of regulating and disputing.”<sup>77</sup> The players themselves can check the opposition’s cheating better than officials—they are closer to the action, their perception is more accurate (although less impartial), and often they can rectify violations in the normal flow of the game.

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73. Wertz, *supra* note 43, at 25, 35.

74. *Id.* at 33.

75. *Id.* at 35. One might go into a contest fully prepared to comply with the rules, but also savvy enough to protect oneself in the event of non-compliance by others. It suggests someone saying, “Oh, you want to play *that* game?”

76. Leaman, *supra* note 29, at 158.

77. Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 17, 34 (1981).

Retaliation could have a number of effects: It might embolden, enrage, or escalate the situation. And there is, of course, always the possibility that the one who believes herself to be retaliating against a previous wrong has misjudged the situation and is in fact initiating the trouble. Despite all these worries, we can understand the urge to retaliate because two fundamental principles—competitive drive and stewardship—are put into conflict. In fact, we could understand the defense of the retaliator who insisted that her response was an attempt to align these principles. We must remember that however noble the non-cheater is, and however much she cares to protect the practice, she did not come to the field of play to make a moral statement. She came to compete.<sup>78</sup>

### VIII. CONCLUSION

First, playable cheating does not imply that the results are set in stone because the event can continue or indeed did continue to completion. One might have to play under a cloud of uncertainty; authorities may decide after the event that violations were serious enough to change or nullify the results, which is never a fully satisfactory outcome. But it happens, and sometimes, it should happen.<sup>79</sup>

Second, “playable” as contrasted with “unplayable” is not tantamount to minor versus consequential. Some instances of playable cheating are seriously wrong, and some instances might be significant enough to decide a contest. After all, why cheat if it does not put you in a better position to perform better or possibly win?

Third, it is fair to ask whether the institutional standard of playability works, because it relies so much on appearances. This standard, which posits that a contest can continue so long as the game is not fatally disrupted by the violations, begs a host of questions: Precisely what qualifies as a fatal disruption? Is the institutional standard satisfied as long as the game sufficiently resembles a contest played strictly according to the rules? Does this understanding of playability ask everyone to ignore that others, teammates or opponents, are cheating and getting away with it? Participants might be willing to do this for the sake of having a game, however flawed, but that reasoning should not persuade critical minds. Philosophy as a discipline begins with a systematic distinction between appearances and reality, so even if the cheater appears to be operating within an institutional structure, the game is still not fully legitimate. The formalist position is not easily dismissed.

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78. Some sports might allow us to play with cheaters if we distinguish between playing and competing. For example, in a race I might choose to ignore my opponent’s suspicious activities—like cutting corners on a distance race—and concentrate simply on achieving my personal best. The same might be true in other performance sports, such as golf, where I can focus on the challenge of the test itself. See R. Scott Kretchmar, *supra* note 2. But of course, this greatly diminishes the sense in which one plays with or against others.

79. A good example is the 100-meter final in the 1988 Olympics in Seoul. Ben Johnson apparently won the race, but was later disqualified. All the other sprinters ran the race as they normally would, and many of them probably knew that Johnson was taking steroids. Andrea Mann, *September 27, 1988: Ben Johnson Is Stripped of His Olympic Gold Medal After Failing Drugs Test*, BRIT. TELECOMM. (Sept. 26, 2018), <http://home.bt.com/news/on-this-day/september-27-1988-ben-johnson-is-stripped-of-his-olympic-gold-medal-after-failing-drugs-test-11364007354384>.

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It is undeniable that the events discussed in this essay—contests that are impacted by illegal steroid usage, tampering with equipment, and undetected rule violations—are tainted and compromised affairs. They fall short of the sport ideal. But we live in a world where the mental toughness required to become a champion or optimal performer may well include mastering dealing with low blows. No doubt, it is sometimes appropriate to throw up one's hands and declare, "No game!" But it is sometimes necessary to play through it. Perhaps cheating is not part of the game, strictly speaking, but playing with cheaters probably is.