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ROBERT BLECKER

## Penalties: Punishments, Prices, or Rewards?

63 N.Y.L. SCH. L. REV. 251 (2018–2019)

ABOUT THE AUTHOR: Robert Blecker, a graduate of Tufts University, Harvard Law School, and a Harvard post-graduate fellow in law and humanities, teaches criminal law and constitutional history at New York Law School.

## I. INTRODUCTION

Even a dog knows the difference between being kicked and tripped over, U.S. Supreme Court Justice Oliver Wendell Holmes famously declared.<sup>1</sup> We higher-order animals seem programmed to react differently to intentional attacks than to accidents that cause us pain. Instinctively, we penalize or forgive others based on attitudes or motives that we read into their acts. Animal behaviorists have recently confirmed what pet parents long observed—dogs also have an innate sense of justice and become angry or despondent when treated unfairly or cheated out of promised rewards. Perhaps further research will reveal they accept their keeper's penalties with contrition only when they think they're deserved.

For millennia, penalties for transgressions have ranged from pure prices to pure punishments based on the intentions, actions, and harms caused. The world of sport similarly enforces commands or rules by imposing a range of sanctions. In law, ideally, not only does the punishment *fit* the crime, but in reality, the punishment *makes* the crime. So, too, prospectively in sport, the penalty makes the sporting foul.

Some penalties do not fall neatly into the category of price or punishment. The simple dichotomy between priced options and pure punishments turns out to be a continuum: At one end, a penalty has no discouragement or disapproval attaching and operates purely as a price—a known cost of deliberately exercising an option. At a neighboring point, a penalty can act as a deduction for an imperfection that automatically reduces a score, diminishes a reward, or adds a burden. Judged sports such as gymnastics or figure skating regularly penalize imperfections. No culpability or moral disapproval accompanies the penalty—it attaches not because the actor did something bad, but because the actor performed badly.

Somewhere further along this continuum, penalties operate to compensate injured opponents. Everyday torts or basketball fouls can result in some form of compensation or foul shots. In theory, that compensation counterbalances the unjust harm suffered, or strips the violator of an unjustified benefit, keeping a contest or relationship in balance. Where the benefit to the transgressor outweighs the harm to the victim, the victim can be made whole while the violator still gains on balance. In that case, the violation that incurs the penalty may still amount to exercising an option and the penalty acts as a price, often worth paying.

At some point further still from penalty as pure price or option, penalties can act as more than compensation for the injured. These penalties are designed to punish and thereby deter those who intentionally, recklessly, or negligently cause or threaten harm. Some penalties also denounce the transgression—the word “foul” connotes disapproval—and can include heavy fines, suspension, or both.

Finally, at a far end of the continuum, penalties act as retributive punishments: conscious inflictions of deserved pain and suffering beyond what's necessary to deter and denounce, specifically designed to discomfort and disadvantage the party condemned—often including sanctions outside the immediate transaction or contest—with a culpable mental state required.

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1. OLIVER WENDELL HOLMES, *THE COMMON LAW* 3 (1909).

While law and sport have for millennia utilized penalties, philosophy of law—and more recently, philosophy of sport—have only begun to categorize and analyze penalties along the continuum between prices and punishments. In the world of sport, because of a relative lack of self-consciousness, rulebooks of many major professional sports contain flaws and inconsistencies which, if eliminated, could improve the game, reduce cheating and injury, and promote a greater respect for the sport itself. But that practical program awaits the aid of others, and may not serve financial interests of team owners or athletes. For now let's survey the nature, history, and purpose of penalties along the continuum between price and punishment in order to illuminate and enrich sport.

## II. THE CODE OF HAMMURABI

As early as 1750 B.C. in Babylon, a set of official rules imposed prices or punishments for breakdowns in financial and familial relationships. The ruler Hammurabi, presumably reflecting some cultural consensus, must have viewed these penalties as appropriate responses. The Code of Hammurabi's nearly 300 provisions included penalties designed to compensate the wrongfully injured for others' selfish or lazy behavior.<sup>2</sup> Other penalties more than compensated the injured by imposing a heavy burden on the transgressor to deter others from behaving the same way in the future. And some penalties denounced and punished bad people's evil, selfish choices, deliberately inflicting pain and suffering upon them, separate from compensation or deterrence. These penalties clearly counted as punishments, not options. No rational person would choose them, and little good would come from them—except justice.

The Code, our first still extant formal code of rules, included purely priced options: "If any one hand over his garden to a gardener to work, the gardener shall pay to its owner two-thirds of the produce of the garden . . . and the other third shall he keep."<sup>3</sup> This split between owner and cultivator acted as a simple price without penalty. But suppose "the gardener do no work in the garden and the product fall off"? In that case, "the gardener shall pay in proportion to other neighboring gardens."<sup>4</sup> This penalty—the difference between the neighbors' average and the gardener's poor yield—would act as a penalty designed purely to compensate the owner disadvantaged by the gardener's inefficiency. Suppose the person who "take[s] over a field to till it, and obtain[s] no harvest. It must be proved that he did no work on the field."<sup>5</sup> What should we do to this ultra-lazy, negligent tenant-farmer? "If he do not till the field, but let it lie fallow, he shall give grain like his neighbor's to the owner, and the field which he let lie fallow he must plow and sow and return."<sup>6</sup> Here,

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2. For a list of all 282 edicts, see *The Code of Hammurabi*, AVALON PROJECT, <http://avalon.law.yale.edu/ancient/hamframe.asp> (last visited Dec. 29, 2018).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

the penalty more than compensates the owner; it also acts as a deterrent to other lazy tenant-farmers, and operates in that sense as a punishment. In contemporary tort terms, the extra labor plus the grain acts as punitive damages.

Hammurabi applied penalties to the familial as well as the commercial. Suppose a husband has grown tired of his sickly wife and wants another. He may remarry, but “[i]f a man’s wife be seized by disease, if he then desires to take a second wife he shall not put away his wife, who has been attacked by disease, but he shall keep her in the house which he has built and support her so long as she lives.”<sup>7</sup> Here, the obligation to support a sick wife for life becomes part of the cost of exercising the option to take a second wife. It also gives the sickly, rejected wife an option of her own: “If this woman does not wish to remain in her husband’s house, then he shall compensate her for the dowry that she brought with her from her father’s house and she may go.”<sup>8</sup> So the price he pays for taking a second wife is the option his sickly wife exercises: lifetime support in the marital home or liberation and return of the dowry.

Long before 1750 B.C., wives, too, sometimes grew discontent and might want to separate from their husbands. Whose foul? It depends: “If a man’s wife who wishes to leave his house, plunges into debt, tries to ruin her house and neglects her husband,” then he has the option to “offer her release, she may go on her way and he gives her nothing as a gift of release.”<sup>9</sup> He keeps her dowry as a compensatory penalty for her household mismanagement. Or “[i]f her husband does not wish to release her, and if he take another wife, she shall remain as servant in her husband’s house.”<sup>10</sup> This option, converting the neglectful wife into the lower status of lifelong household servant, clearly denounces her neglectful behavior, and should deter others. Perhaps, too, it serves retributive purposes by imposing pain and suffering. But suppose she doesn’t ruin the house, and instead “quarrel[s] with her husband, and say[s]: ‘You are not congenial to me.’”<sup>11</sup> She wants out. Then “her reasons must be presented.” If there is no fault on her part, but he neglects her, “she shall take her dowry and go back to her father’s house.”<sup>12</sup> Pure compensation and freedom for the neglected wife. But what if after inquiry, she’s found at fault? “If she is not innocent but leaves her husband, and ruins her house, neglecting her husband, this woman shall be cast into the water”—that is, killed by drowning.<sup>13</sup>

From this grotesque, asymmetric sexism that barely penalizes a neglectful husband yet kills a neglectful wife, here we see penalties acting as compensation or denunciation, deterrence and arguably retribution—depending upon the culpable mental states of the actors.

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

At the end of his Code, Hammurabi issued a stern warning to his successors who would in the future administer it: Apply the rule book accurately, avoid gamesmanship by bending or stretching the rules—or as Hammurabi phrased it, avoid “corrupting my words.”<sup>14</sup>

### III. ANCIENT GREECE

A thousand years after Hammurabi, the Ancient Greeks imposed penalties for cheating in competitive sport. The rules of *pankration*, a very popular mixed martial arts Olympic sport combining wrestling and boxing, prohibited eye-gouging and testicle-grabbing.<sup>15</sup> Referees stood over combatants and penalized infractions by whipping or beating the offender with a stick as he fought.<sup>16</sup> The Ancient Greeks never inflicted corporal punishment on free men, except for violating sport rules.<sup>17</sup> This penalty then acted as more than simple compensation for the victim: The whipping denounced and humiliated the transgressor, and as applied, became painful and degrading—clearly retributive.

Penalties not only respond to violations, but also supply a motive to comply with the rules. And yet, the Ancient Greeks recognized that penalty avoidance could not be the sole motive for compliance: We keep to the law *because* it commands our deep respect, Pericles famously declared in his funeral oration of Athens.<sup>18</sup> Democritus praised the ancient virtue of *aidos*—an inner feeling of respect for what deserves respect and revulsion from wrongdoing per se, not from a fear of punishment:

Self-respect and shame before one’s own conscience should keep one from doing a wrong even if no other man will know of it. . . . [H]e who is kept from wrong by law is likely to sin in secret, but he who is brought to duty by conviction is unlikely to err either in secret or openly.<sup>19</sup>

A century later, Aristotle refined this view by distinguishing two types of violations or transgressions: Some were prohibited and penalized for being wrong in themselves—*malum in se*—while other transgressions were not prohibited and penalized because they were wrong, but were wrong only because they were penalized—*malum prohibitum*.<sup>20</sup> In sum, for at least 2,500 years, leaders have recognized that a well-functioning state or well-played sporting contest requires

14. *Id.*

15. *Pankration*, ANCIENT OLYMPICS, <http://ancientolympics.arts.kuleuven.be/eng/TC007cEN.html> (last visited Dec. 29, 2018).

16. Jakob Renner, *Pankration (Greek Martial Arts)*, CLASSICAL WISDOM WEEKLY (Oct. 1, 2013), <https://classicalwisdom.com/culture/sport/pankration-greek-martial-arts>.

17. *Rules and Corporal Punishments*, ANCIENT OLYMPICS, <http://ancientolympics.arts.kuleuven.be/eng/TB015EN.html> (last visited Dec. 29, 2018).

18. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 145 (Rex Warner trans., Penguin Books 1972).

19. 2 WILLIAM KEITH CHAMBERS GUTHRIE, A HISTORY OF GREEK PHILOSOPHY: THE PRE-SOCRATIC TRADITION FROM PARMENIDES TO DEMOCRITUS 494, 496 (1965).

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

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most participants to abide by the rules, not merely to avoid penalties but also from an allegiance to the activities the rules constitute.<sup>21</sup>

Set against this point of view, a more pragmatic perspective toward penalties also suffused Ancient Greece. Aristotle's distinction between behavior bad in itself and transgressions bad only because they were prohibited made little sense to the sophists, those ancient Western pragmatists who denied rules' objective moral content. Nothing was true or false, good or bad in itself; everything was only true or false, good or bad relative to some conventional system. "A man can best manipulate justice . . . when in the company of witnesses he upholds the laws," declared Antiphon, representing his fellow sophists who insisted there was no truth but merely appearances and the art of persuasion. "So if the man who transgresses the legal code evades those who have agreed to these edicts he avoids both disgrace and penalty."<sup>22</sup>

Today, the U.S. Supreme Court strikes down penalties when they are found "grossly disproportionate" to the crime and therefore violative of the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>23</sup> Mostly, however, it defers to the legislature to define crimes and deserved punishments which are proportional because and only because the legislature, the people's representatives, say they are.<sup>24</sup> Sport today reflects this same split: Some fouls seem serious in themselves, essential transgressions objectively calling for serious penalties, while the vast majority of transgressions can only be understood in relation to the rules that establish them.

### IV. THE MODERNS: KANT VS. HOLMES

Modern giants continued the conflict between obedience from respect for the rules or from fear of the consequences. We obey the rules, explained Kant, sounding much like Pericles, "act[ing] out of reverence for the law . . . [as] something which does not serve my inclination but outweighs it."<sup>25</sup> No fear of penalties motivates a person who reveres the rules. Instead, Kant insisted, a feeling self-imposed and distinct from inclination or fear restrains the citizen.<sup>26</sup>

The sophists, too, had their modern successors, prominent among them, U.S. Supreme Court Chief Justice Oliver Wendell Holmes Jr., who saw law as simply the

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21. Plato's Socrates submitted to his own punishment of death when he could have escaped. See PLATO, CRITO 5–12 (Benjamin Jowett trans., Wildside Press 2018) (c. 360 B.C.E.). Proclaiming his respect for the institution of law and its process of adjudication, he felt duty-bound to submit and not evade the punishment, however unjust the jury's verdict may have been in his case. *Id.*

22. KATHLEEN FREEMAN, ANCILLA TO THE PRE-SOCRATIC PHILOSOPHERS 147 (1983).

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

24. See *Weems*, 217 U.S. at 378 ("[P]rominence is given to the power of the legislature to define crimes and their punishment. We concede the power in most of its exercises.")

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

26. See *id.* at 32.

prediction of public force<sup>27</sup>—the discounted value of penalties attaching to rule violation. Morality? Irrelevant. Holmes famously defined a legal duty as “nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way”<sup>28</sup> by the judges. Thus Holmes conceived of the law as simply “the prophecies of what the courts will do in fact, and nothing more pretentious.”<sup>29</sup> Penalties were simply the price paid more or less certainly for actual or claimed rule violation. “From [a bad person’s] point of view,” Holmes famously challenged us, “what is the difference between being fined and taxed a certain sum for doing a certain thing?”<sup>30</sup>

A pragmatist sees no difference between a price and a punishment. Duty merges into fear, and dutiful obedience which purports to exist separate from the prospect of penalty “grows more precise when we wash it with cynical acid.”<sup>31</sup>

## V. THE PENALTY KICK: PRAGMATISM TRIUMPHS ON THE FOOTBALL PITCH

With Holmes, the dominant mood in philosophy and practice of law turned pragmatic. Just as the Roman emperors professionalized Olympic athletics, played now more for the audience than the athletes, so, too, around the turn of the twentieth century, a great transformation took place within the world’s most popular sport—football, or “soccer” in the United States—long the province of amateurs and gentlemen. In the 1880s, crowds grew, “and horror of horrors, players were beginning to be paid.”<sup>32</sup> Fouls were few, play could be rough, even turn deadly, but no matter how serious the violation, the offended player could not score a goal directly from a free kick. The transgression of batting away a sure goal with hands carried a price well worth paying—an indirect free kick, which rarely scored.<sup>33</sup>

Victorian sensibility held that no gentleman would ever *intentionally* do such a thing. Thus no penalty need be authorized. An intentional foul would never occur and an accidental foul had no moral significance. In the early 1880s, however, the football association introduced a “law” which gave referees “the discretion to award a goal” when a player other than the goalkeeper handled the ball and thereby “prevented a goal being scored.”<sup>34</sup> But referees, largely seen as unnecessary, could only award a goal as a penalty if the players appealed to them. As football itself became

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27. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (“The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”).

28. *Id.* at 458.

29. *Id.* at 461.

30. *Id.*

31. *Id.* at 462.

32. CLARK MILLER, *HE ALWAYS PUTS IT TO THE RIGHT: A HISTORY OF THE PENALTY KICK* 5 (1998).

33. *Id.* at 6–7. While a direct kick is shot on goal, an indirect kick requires the ball to first touch another player before going in.

34. *Id.* at 8.



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professionalized, and the monetary incentives grew, athletes discovered and employed “professional fouls.”<sup>35</sup> Early in 1891, in a quarterfinal championship match, “winning 1-0, [a defender] fisted the ball clear with his goalkeeper . . . well beaten and the ball clearly destined for the goal.”<sup>36</sup> The opposing team, awarded a free kick, could not under the rules score directly. The goalkeeper and defenders blocked the shot and the offending team won.<sup>37</sup>

Everybody knew the “penalty” grossly failed to compensate or deter. And so, a few months later, the authorities felt forced to concede that the professional foul—a result of a “win at all costs” attitude—required a professional penalty. Originally proposed one year earlier by William McCrum, an Irish goalkeeper proud of his reputation for sportsmanship, the penalty kick would punish not just an individual offender but the whole team.<sup>38</sup>

In June of 1891, a year after soundly rejecting McCrum’s penalty kick as a “slur on the integrity of football players everywhere” for suggesting that players would intentionally resort to unsportsmanlike methods, the football association adopted the penalty as a pragmatic response to the human impulse to profitably and intentionally cheat:

If any player shall intentionally trip or hold an opposing player, or deliberately handle the ball within 12 yards from his own goal-line, the referee shall, on appeal, award the opposing side a penalty kick. . . . All players, with the exception of the player taking the penalty kick and the goalkeeper, shall stand behind the ball. . . . A goal may be scored from a penalty kick.<sup>39</sup>

For years, the best amateur team of England, the Corinthians, simply refused to recognize the new law—criminals may intentionally commit crimes, but gentlemen never committed intentional fouls.<sup>40</sup> The Corinthians refused to attempt to score from a penalty kick and their goalkeeper refused to attempt to save a goal from a penalty kick, standing aside and allowing the opponent to shoot into an open goal.<sup>41</sup> This civil disobedience stood as a principled rebuke to penalties as punishments. But paid professionals soon replaced these champion amateurs and “robbed the penalty kick of its sting.”<sup>42</sup> The new professional pragmatic ethos fit neatly with American

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35. *See id.* at 10.

36. *Id.*

37. *Id.*

38. *Id.* at 10–11. There was apparently no extended discussion then of the ethics of collective punishment, a problem that will have a contentious history ahead of it, stretching to today’s controversy over banning the Russian team at the 2016 Olympics for its state-sponsored doping. *See* Rebecca R. Ruiz, *Russia’s Track and Field Team Barred from Rio Olympics*, N.Y. TIMES (June 17, 2016), <https://www.nytimes.com/2016/06/18/sports/olympics/russia-barred-rio-summer-olympics-doping.html>. The Ancient Greeks never faced this issue, as all their sports were individual.

39. MILLER, *supra* note 32, at 11–12.

40. *Id.* at 16–17.

41. *Id.* at 17.

42. *Id.* at 20.

pragmatism: While the amateurs saw the penalty kick as a shameful punishment to be avoided at all costs, these rising professionals looked upon the penalty kick as a price to be risked and paid whenever worth it. And all too often, with goalkeepers consistently making saves, the penalty was well worth the foul.

With the appearance of a penalty kick, the gamesman quickly replaced the gentleman. A clever player might still calculate the offense of deliberate handball as advantageous. Thus in 1903, pragmatists added another rule change, this time to prevent a penalty from becoming a reward. “Advantage” entered football: “The referee may refrain from [calling penalties] where he is satisfied that by enforcing them he would be giving an advantage to the offending side.”<sup>43</sup> One commentator characterized this new law as “a blow at the astute and unprincipled player,”<sup>44</sup> a phrase well calculated to illustrate the tension between gamesmanship and sportsmanship. These pragmatic players, worthy descendants of Antiphon and Holmes, had “managed to twist even a law specially imposed to deter [them] from unfair play to [their] advantage. For rather than run the risk of losing a goal [they] preferred to take the chance of a penalty kick, which experience had shown [them] failed in a large percentage of cases.”<sup>45</sup>

Today, the vast majority of penalty kicks result in goals, and the refs continue to adjust their calls to prevent penalty rules from getting in the way of the game they supposedly constitute, often ignoring mild fouls within the penalty area rather than producing a game-altering penalty kick.<sup>46</sup> Everybody knows it, and nearly everybody accepts it.

#### IV. THE PUSHBACK ON HOLMES: H.L.A. HART

The evolution of football’s penalty kick seemed a perfect triumph of the sophistic Holmesian pragmatic view that conceived law from the “bad person’s” perspective as nothing but a prediction of the exercise of official power. Rules, a game theorist might claim, simply direct officials to do certain things under certain conditions.<sup>47</sup> Laws, then, are merely the basis for predicting what officials—the courts or refs—will do. But if players (or citizens) conceive rules as directed not to them but to officials, then those commands lose all morally binding force on the players. The penalties become nothing more than prices. The referees or police displace the moral conscience of players who might otherwise feel restrained by a sense of community

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43. *Id.* at 38.

44. *Id.*

45. *Id.*

46. See Mitchell Berman, “*Let ‘em Play*”: *A Study in the Jurisprudence of Sport*, 99 *Geo. L.J.* 1325, 1366–68 (2011) [hereinafter Berman, “*Let ‘em Play*”] (suggesting that referees, aware of the high price a penalty kick might exact on a traditionally low-scoring game, adjust their penalty-calling accordingly). Berman also discusses this phenomenon in his article from this Issue, *Why Sport Illuminates Law (and Vice Versa)*, 63 *N.Y.L. Sch. L. Rev.* 235, 245–47 (2018–2019).

47. See H.L.A. HART, *THE CONCEPT OF LAW* 102 (3d ed. 2012).

with their opponents.<sup>48</sup> By this account, the rules become contingent commands to officials and a price list to the players. These prices do not act as internal restraints so much as external threats.

Sooner or later, however, counterparts to Pericles, Socrates, Democritus, and Kant who had embraced the essential necessity for voluntary compliance out of respect for the system would push back. H.L.A. Hart insisted this Holmesian attitude toward foul behavior fails to capture something absolutely vital. We condemn cheaters when we catch them not only because they miscalculated the probability of detection and penalty, but on a deeper, more constitutive level: Because they calculated at all.<sup>49</sup> Equating obligation with probability of penalty, Hart insisted, “miss[es] out on a whole dimension” of social life.<sup>50</sup> For those who feel obliged to follow the rules, “the red light is not merely a *sign* that others will stop: [T]hey look upon it as a *signal* for them to stop, and so a reason for stopping.”<sup>51</sup>

Drawing on games to illustrate this profound “internal” dimension, Hart cites chess. Sometimes “predictions of what a court will do are like the prediction we might make that chess-players will move the bishop diagonally: [T]hey rest ultimately on an appreciation of the non-predictive aspect of rules, and of the internal point of view of the rules.”<sup>52</sup> Even if somehow I could get away with changing my chess piece’s position illegally when my opponent takes a bathroom break, few serious chess players would dream of it. In short, for the majority of society, “the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a reason for hostility.”<sup>53</sup>

Can the same be said for elite players and coaches? Will the majority adopt an “internal point of view,” forgoing the temptation to violate even when they calculate that the benefit of violation outweighs the cost? Do players view penalties as prices possibly worth paying, or do they treat penalties as punishments to be avoided at all costs?

[T]he life of any society which lives by rules, legal or not, consists in a tension between those who, on the one hand, accept and voluntarily cooperate in

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48. Joyce Carol Oates made this point powerfully in her essay *On Boxing*:

The referee, the third character in the story, usually appears to be a mere observer, even an intruder . . . . But so central to the drama of boxing is the referee that the spectacle of two men fighting each other unsupervised in an elevated ring would appear hellish, obscene—life rather than art. The referee is our intermediary in the fight. He is our moral conscience, extracted from us as spectators so that, for the duration of the fight, “conscience” is not a factor in our experience; nor is it a factor in the boxers’ behavior.

Joyce Carol Oates, *On Boxing*, N.Y. TIMES (June 16, 1985), <https://www.nytimes.com/1985/06/16/magazine/on-boxing.html>; see also JOYCE CAROL OATES, ON BOXING 47 (Harper Perennial 1994).

49. See HART, *supra* note 47, at 90.

50. *Id.*

51. *Id.* (emphasis added).

52. *Id.* at 147.

53. *Id.* at 90.

maintaining the rules, and so see their own and other persons' behavior in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment.<sup>54</sup>

Legal theory must somehow accommodate both points of view, Hart insisted. Sport theory too.

Although we might desire fully to be bound by the rules, language cannot precisely describe, nor humans fully anticipate, every set of circumstances that may arise. Experience becomes infinitely richer than any set of rules specifically designed to govern it. Thus we fail to describe fully every violation and cannot precisely delineate all penalties that should follow in every circumstance.<sup>55</sup> Judges and referees must interpret and apply the rules by resorting to criteria or standards outside the rules themselves. Because we cannot always determine in advance with exact precision who transgresses or cheats and exactly what penalty they should get, the “disappointed absolutist” becomes a “rule sceptic.”<sup>56</sup> Embracing the ancient sophistic perspective, these skeptics insist that anybody who violates a rule and gets away with it cannot cheat and has not cheated.

## VII. THE JURISPRUDENCE OF SPORT

Both law and sport long shared common problems: What are the *real* rules, as against the posted rules? Can unwritten rules of law or sport be more binding than the written rules? When a participant breaks or violates written rules defining a practice, what penalties do and should follow? Should judges or referees apply rules literally? Should they adjust enforcement to the situation?

### A. *What Are the Real Rules?*

Aristotle taught us that the strictest justice sometimes produces the greatest injustice. Thus, we need equity to supplement or sometimes supplant the written rules.<sup>57</sup> In the New York Penal law, Article 5 declares that the rules shall not be strictly construed; rather, they “must be construed according to the fair import of their terms to promote justice and effect the objects of the law.”<sup>58</sup>

John Locke urged the vital necessity for executive prerogative in an emergency—the right to go outside the rules for the good of the whole.<sup>59</sup> Standard “choice-of-evils”

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54. *Id.* at 91.

55. “It is impossible to provide by rule for the correction of the breach of every rule,” Hart declared. *Id.* at 143; see also J.S. Russell, *Remarks on the Progress of a Jurisprudence of Sport*, 63 N.Y.L. SCH. L. REV. 175, 178–80 (2018–2019) [hereinafter Russell, *Remarks*]; J.S. Russell, *Are Rules All an Umpire Has to Work With?* 26 J. PHIL. SPORT 27, 30–32 (1999) [hereinafter Russell, *Rules*].

56. See HART, *supra* note 47, at 138–39.

57. See ARISTOTLE, *supra* note 20.

58. N.Y. PENAL LAW § 5.00 (McKinney 2018).

59. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 84 (C. B. Macpherson ed., 1980) (1690).

provisions in penal codes today allow a person to violate every single command: Any act that would otherwise be criminal becomes justifiable when, according to ordinary standards of intelligence and morality, rule violation avoids a much greater harm that would occur by following the rules.<sup>60</sup> So the rules themselves demand transcendence; they declare occasions for dispensing with their own literal application. They call for something more. Ronald Dworkin continued this tradition of transcendence by emphasizing principles underlying the written rules. Whereas rules introduce a dichotomy—obey or violate—principles have weight and incline a decision in one direction or another. Principles operate in context rather than isolation.<sup>61</sup>

Philosophy of sport quickly embraced these insights from legal jurisprudence. John Russell took the lead in developing a jurisprudence of sport, searching for and finding a theory of umpire enforcement by drawing on legal jurisprudence. While some formalists insisted written rules alone constituted a game or sport,<sup>62</sup> classical debates in legal jurisprudence and Dworkin's jurisprudential theory provided Russell a "framework for a theory of umpire discretion."<sup>63</sup> Just as judges interpreted statutes "by providing the best moral interpretation of previous judicial decisions, in particular by showing those earlier decisions in the best light," so, too, umpires were obliged to get it right and "decide controversial cases in a principled way where the rules are significantly indeterminate."<sup>64</sup> When it comes to issuing penalties, "umpires legitimately use their authority to clarify and resolve ambiguities in rules, to add rules, and even at times to overturn or ignore certain rules."<sup>65</sup> Their discretion should be "governed by principles underlying the games themselves and by an ideal" of the game's "integrity."<sup>66</sup>

Charles Evans Hughes, Governor of New York and later Chief Justice of the U.S. Supreme Court, had insisted that the "Constitution is what the judges say it is."<sup>67</sup> Famous umpires have similarly insisted that a pitch *becomes* a ball or strike only because the umpire called it that way.<sup>68</sup> Russell pushed back against these modern sophists. Authoritative calls by sport and legal judges could be wrong and rightly subject to criticism, and sometimes review and reversal. Umpires, Russell insisted, are obliged to interpret the rules "to generate a coherent and principled account of

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60. See, e.g., N.Y. PENAL LAW § 35.05(2) (McKinney 2018); see also Robinson et. al., *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 42 (2015).

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

62. See J.S. Russell, *Broad Internalism and Moral Foundations of Sport*, in *ETHICS IN SPORT* 51, 55 (William J. Morgan ed., 2d ed. 2007).

63. Russell, *Rules*, *supra* note 55, at 34; see also Russell, *Remarks*, *supra* note 55, at 178–82.

64. Russell, *Rules*, *supra* note 55, at 35.

65. *Id.* at 28.

66. *Id.*

67. 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 204 (1951).

68. See GEORGE SULLIVAN & BARBARA LAGOWSKI, *THE SPORTS CURMUDGEON* 164 (1993); see also Russell, *Remarks*, *supra* note 55, at 186.

the point and purposes that underlie the game, attempting to show the game in its best light.”<sup>69</sup>

*B. An Optimal Level of Crime: “Let ‘em Play”*

Leave it to a law professor to coin the phrase “Jurisprudence of Sport.”<sup>70</sup> In 2011, Mitch Berman argued for applying some rules with “temporal variance.”<sup>71</sup> Drawing on the harmless error concept in law, where an appellate court rightly overlooks inconsequential errors, Berman made the philosophical case for cutting athletes some slack at “crunch time”—the end of close games—by overlooking minor violations that embody the essential physical skills the sport was designed to test and display.<sup>72</sup>

Abandoning the rules when the penalty seems disproportionately severe has a long history in law.<sup>73</sup> So, too, in sport, the principle of “no harm no foul” supplements or supplants a literal application of the rules. Having drawn the distinction between “tort law (largely designed to ensure compensation for injury),” which requires harm, and “criminal law (principally designed to deter and to inflict retribution for blameworthy wrongdoing),” which does not,<sup>74</sup> Berman didn’t pursue its implications: Should there be more or less temporal variance with penalties that act as prices or compensation than with those that act as punishments? After all, prices do vary with market conditions. Then again, the notion of letting the punishment fit the crime has been modified to letting the punishment fit the criminal.

But calling it accurately sometimes means calling it inappropriately. A penalty strictly corresponding to an isolated rule violation might, in operation and effect, undermine the very purpose of the sport it’s meant to constitute or govern. At crunch time, when the contest is on the line, sometimes the strictest justice in principle becomes the greatest injustice in practice. Berman concludes that just as a commitment to a rule of law might sometimes require ignoring the rules in favor of standards or principles to accomplish justice, so too a commitment to allowing the contest to be rightly decided might require not penalizing certain violations at certain moments. For Berman, that cry from the stands to “let ‘em play” has not only deep intuitive appeal but also great jurisprudential weight. The harmless error doctrine seemingly applies this insight.

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69. Russell, *Rules*, *supra* note 55, at 35.

70. Berman, “*Let ‘em Play*”, *supra* note 46, at 1330.

71. *Id.* at 1327.

72. *Id.* at 1333–34.

73. For example, when England automatically attached the death penalty for thefts of greater than forty shillings, juries, repulsed by the penalty, often falsely found as a matter of fact that the thief stole property worth thirty-nine shillings. *Punishment Sentences at the Old Bailey*, OLD BAILEY ONLINE, <https://www.oldbaileyonline.org/static/Punishment.jsp> (last visited Dec. 30, 2018).

74. Berman, “*Let ‘em Play*”, *supra* note 46, at 1339.

Berman sought an “optimal degree of laxity.”<sup>75</sup> For example, the rules of basketball essentially prohibit physical contact. Yet basketball has become a great sport largely because refs have not strictly enforced those rules. A basketball game without fouls would be sterile. In most sports, what appears to be a rule often turns out to be a standard or principle, having weight, pointing officials in a direction rather than strictly dictating a penalty uniformly applied.

So, too, it seems to me, the optimal level of crime in a free society cannot be zero. Only in tyrannies where the people live in constant fear of government always applying the law literally and harshly does the actual crime rate approach zero. For a society or a sport to become the best that it can be, we need to determine an optimal level of crime or fouling—neither too little nor too much. We need to enforce rules not too strictly nor too loosely, and penalize not too heavily nor too lightly. Only then can the practice reach its full potential.

Berman’s jurisprudence of sport mapped essential concepts from law onto sport, including the burden of proof. Official National Basketball Association rules do not vary the contact required to constitute a foul; in theory they call for the same penalties early and at crunch time, during the regular season and during the playoffs.<sup>76</sup> They do, however, vary the standard of proof, calling for a “higher degree” of certainty “to determine a foul [involving] physical contact . . . during impact times when the intensity is risen, especially nearing the end of a game.”<sup>77</sup> Burdens of persuasion play a key role in criminal law. They also play an increasingly significant and controversial role in policing sport.<sup>78</sup>

“The formal rules that specify what *constitutes* a foul are context-invariant,” Berman explains, “but the standards of proof that determine whether a particular action will be *adjudged* . . . are context-variant.”<sup>79</sup> Could sport or law keep foul-calling invariant while at the same time vary the *penalty* according to the level of certainty? Berman does not entertain this possibility. But through Berman’s seminal work, building on the early lead of Russell, the jurisprudence of sport not only found its calling; it has moved into its early maturity.

### VIII. SEBELIUS: PRICE VS. PENALTY TAKES CENTER STAGE AT THE BIG THEATER

The year after Berman gave “Jurisprudence of Sport” its name, the difference between a price and a punishment filled the marquee under the stage names “tax” and “penalty.” In perhaps the most noticed and controversial U.S. Supreme Court case during the Obama administration, twenty-six states and certain individuals challenged the constitutionality of the Affordable Care Act, otherwise known as

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75. *Id.* at 1333.

76. *See id.* at 1334–35.

77. *Id.*

78. *See infra* Part XIII.

79. Berman, “*Let ‘em Play*,” *supra* note 46, at 1335 (emphasis in original).

Obamacare.<sup>80</sup> The states insisted the federal government couldn't coerce them into expanding Medicaid to include pre-existing conditions.<sup>81</sup> Individuals claimed the federal government couldn't mandate health insurance, requiring they buy insurance or make "a shared responsibility payment" as a "penalty" to the IRS.<sup>82</sup>

Viewing penalties functionally, the five states'-rights justices in two separate opinions struck down the Medicaid expansion.<sup>83</sup> In form, the states had an option: Expand Medicaid to cover pre-existing conditions or risk losing all federal Medicaid funding.<sup>84</sup> In theory, a state could choose to decline to expand Medicaid coverage. In fact, losing federal funding for Medicaid would throw a state into a financial health crisis. A bare majority struck down that part of Obamacare: Congress simply could not constitutionally "penalize"—or *punish*—states that choose not to participate in the new program.<sup>85</sup> "Congress may use its spending power to create incentives for States to act. . . . But when pressure turns into compulsion" it becomes unconstitutional.<sup>86</sup> By threatening to withhold all Medicaid funding, Congress had given the states "no real choice."<sup>87</sup>

Although he rejected the power of the federal government to coerce the states, Chief Justice John Roberts found himself on the other side when it came to its power to mandate every individual to be insured. Bitterly disappointing opponents of Obamacare, Roberts upheld individually mandated insurance with its "shared responsibility payment," a "penalty" for any person who failed to have or purchase insurance.<sup>88</sup> Accordingly, Congress might call it a "penalty"—an automatic punishment for violating the mandate and failing to be insured—but the people would not experience it as such.<sup>89</sup> The "penalty" really operated as "a reasonable financial decision"—a price, sometimes well worth paying—"rather than . . . [a] financial punishment."<sup>90</sup> In sum, the penalty was a price, not a punishment, and therefore constitutional. "[I]f someone chooses to pay rather than obtain health insurance, they have fully complied with the law."<sup>91</sup>

The four conservative, limited-government justices dissented but embraced Roberts's constricted concept of penalties: "The provision challenged under the

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80. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

81. *Id.* at 579.

82. *Id.* at 544.

83. *Id.* at 529, 589.

84. *Id.* at 585.

85. *Id.*

86. *Id.* at 577–78.

87. *Id.* at 587.

88. *Id.* at 568–69.

89. *Id.* at 565–66.

90. *Id.* at 566.

91. *Id.* at 568.



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Constitution is either a penalty or else a tax.”<sup>92</sup> It could not be both. But these justices failed to recognize the deep ambiguity of the term “penalty,” which can range from a pure price to a pure punishment. If Roberts had appreciated that a penalty can include a price—a tax without a punishment—he could have more directly upheld the penalty as a constitutional price rather than an unconstitutional punishment.

Justice Ruth Bader Ginsburg and her three fellow expansive-government justices concurred to uphold the individual mandate and shared-responsibility payment by viewing the mandate as an option to “either obtain insurance or *pay a toll* constructed as a tax penalty.”<sup>93</sup> These four obviously understood a penalty in its expanded sense to potentially include a price—a “penalty collectible as a tax” as they called it elsewhere.<sup>94</sup>

### IX. INSIDE THE PRISONS: PUNISHMENT OR PRICE?

The Chief Justice upheld the penalty for not purchasing health insurance because a citizen would experience that “penalty” as a price but not a punishment. Someone who chose to self-insure and make the penalty payment to the IRS would have fully complied with the law. Does a similar philosophy adhere in sport? Does an athlete who intentionally fouls and takes the penalty fully comply with the law? Philosophers of sport continue to debate this issue.

Those who insist that intentional fouls are not legitimately part of the game have looked to criminal law for support. Surely, they insist, although the penal codes list the punishments for murder and rape, someone committing those heinous crimes have not acted *within* the law.<sup>95</sup> But that analogy seems fundamentally flawed if criminals themselves reflect the stark disconnect between penalties legislatively designed as punishments but actually experienced as options or prices.

During the thousands of hours I spent inside maximum-security prisons over three decades, street criminals, mostly murderers, robbers, and drug dealers—prototypical Holmesian “bad men”—opened up to me.<sup>96</sup> They typically expressed little remorse but much regret, directed not toward the victims of their foul behavior but inward on themselves or their hustling buddies for their bungled transgressions

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92. *Id.* at 661 (Scalia, J., dissenting).

93. *Id.* at 596 (emphasis added).

94. *Id.* at 621 (Ginsburg, J., dissenting). In December 2018, the U.S. District of Northern Texas struck down the Affordable Care Act as unconstitutional after a 2017 tax overhaul bill reduced the individual mandate to zero. *See Texas v. United States*, 340 F. Supp. 3d 579, 605 (N.D. Tex. 2018).

95. *See* Kathleen Pearson, *Deception, Sportsmanship and Ethics*, in *PHILOSOPHIC INQUIRY IN SPORT* 183, 184 (William J. Morgan & Klaus V. Meier eds., 2d ed. 1995). “Someone might argue that the penalties for fouling also are contained within the rulebook for a particular game, and therefore, fouls are not outside the rules for the game,” observed Pearson, an early philosopher of sport. “The obvious rebuttal to this position is that penalties for breaking the law are contained within the law books, but no sensible person concludes, therefore, that all acts are within the law.” *Id.* For more on this debate, see Paul Gaffney, *Playing with Cheaters*, 63 N.Y.L. SCH. L. REV. 197, 203–06 (2018–2019).

96. *See* ROBERT BLECKER, *THE DEATH OF PUNISHMENT: SEARCHING FOR JUSTICE AMONG THE WORST OF THE WORST* (2013); Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149 (1990).

that police, prosecutors, and corrections detected and punished. “I’m paying for my crime by being here,” one armed robber explained. “I’m not angry at you for locking me up; you shouldn’t be angry at me for doing what I did to get locked up.”

Common criminals largely see the law as warnings of prices they should discount but might have to pay if they violate the rules. “Don’t do the crime if you can’t do the time,” goes a common prison aphorism, embodying the Holmesian pragmatic point of view, and carrying with it a corollary. Consider the crime if you can handle the time, and do it smoothly so it’s worth risking getting caught. Well-heeled street criminals see penalties as threatened punishments that are also actual prices: “Every serious stickup man knows he’s going to jail *sometime*. You try to make it so it’s never *this* time. But it’s going to be sometime.”

Most career criminals, then, operate according to a cost-benefit calculus, fully inheriting the sophistic perspective that there is no truth or justice except as labeled by those in power. “The only difference in my mind between a criminal and a non-criminal is that one gets caught and the other gets away,” said one inmate.<sup>97</sup> For criminals, respect for the law, and often for other people’s rights, merely means carefully avoiding paying the price.

Ironically, corrections officers often aid and abet prisoners’ perception of their penalty as a price but not a punishment. “The way I look at it,” a ranking corrections officer explained to me prototypically, “I don’t care what they did or why they did it. Prison is the price they pay. And I get paid to keep them here safely.” Corrections’ professional ethos demands unconcern with the crime which prison supposedly punishes. “I don’t care what a man did out there; I only care how he behaves once he’s inside.” Professional officers should not know or care about a prisoner’s violation or violence on the streets. Officers across the country escape into their common mantra of indifference: “We’re not here to punish; their being here is the punishment.”

Legislatures routinely separate crimes according to severity, and judges reduce or increase prison terms according to the mens rea and harm a criminal causes. But prison administrators divide prison life by security level—maximum, medium, and minimum—largely on the basis of escape risk and future danger. Whether a prisoner serves a year, ten, or life, day-to-day his lifestyle inside has little to do with the crime he committed. In fact, the lifers—those who committed the most heinous crimes on the outside—often experience the most unrestricted lifestyle inside. By largely quantifying time spent in prison as the primary measure of a penalty, rather than qualitatively adjusting daily life inside to the seriousness of a crime, punishment becomes less distinguishable from price.

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97. This particular inmate, Henry Daniel, expanded on this sophistic perspective:

They have banking laws that they put loopholes in, and tax breaks they give the rich. They get away with their criminal activities because they have the money, the lawyers, the power, the prestige, and the intellect to use the word game and get what the system calls “compensation.” So when you ask me what’s the difference between a criminal and a respectable person, or one who respects the law, it’s one who gets caught and the other who doesn’t. Those who have not been caught are what you call innocent, law-abiding citizens. And those who have go on record as “criminals.”

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Likewise, criminals see the police on the street violating court-imposed restrictions on their own behavior as a price they, too, may be willing to risk or pay. When the Supreme Court announced the “plain view” doctrine, allowing a search without a warrant only for items in plain view,<sup>98</sup> police routinely perjured themselves and testified that criminals were dropping their contraband in plain view, knowing they would not be penalized.<sup>99</sup> So how do police view the exclusionary rule for violating a defendant’s constitutional rights during a search and seizure? It’s a price often worth risking and paying to get credit for an arrest.

Experience inside prisons with prisoners over decades convinces me that criminals are more willing to violate the law when they view its threatened “punishments” as a price list—a true embodiment of the “bad person’s” point of view. For criminals, “respect” for the law merely consists of carefully avoiding paying the price.

### X. PREVENTING THE PENALTY FROM BECOMING A REWARD

“Prison preserves us,” one lifer explained to me, revealing why he found his “punishment” of life in prison quite tolerable. “If I had kept on ripping and running in the streets, I’d be long dead.” For some inmates, the punishment of incarceration increasingly becomes a reward. There’s something perverse, of course, when down-and-out homeless street criminals intentionally commit petty crimes in order to be caught and given “three hots and a cot” at the state’s expense through the winter, only to be released by spring.<sup>100</sup> So, too, some who want to break free from their downward spiral commit crimes in order to get sanctioned so they can clean up,<sup>101</sup> get an education, or learn a trade to start fresh on the outside.<sup>102</sup> For these violators,

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98. See *Coolidge v. New Hampshire*, 403 U.S. 443, 465–66 (1971).

99. See *People v. McMurty*, 314 N.Y.S.2d 194, 195 (N.Y. Crim. Ct. 1970) (“For several years now, lawyers concerned with the administration of criminal justice have been troubled by the problem of ‘dropsy’ testimony.”); see also Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 248–49 (1998).

100. See, e.g., *Hungry Homeless Man Gets Arrested Intentionally*, ASSOCIATED PRESS (May 1, 2012), <https://www.cbsnews.com/news/hungry-homeless-man-gets-arrested-intentionally>; Randeep Ramesh, *A Fifth of All Homeless People Have Committed a Crime to Get Off the Streets*, GUARDIAN (Dec. 22, 2010) <https://www.theguardian.com/society/2010/dec/23/homeless-committing-crimes-for-shelter>.

101. See Jenny Wagner, Kelly Kultys & Marion Callahan, *For Some Addicts, Jail Has Become De Facto Treatment*, U.S. NEWS (Mar. 29, 2018), <https://www.usnews.com/news/healthiest-communities/articles/2018-05-29/for-some-addicts-jail-has-become-de-facto-treatment>; see also Mark Abadi, *Some People Get Arrested on Purpose So They Can Go to Jail—and Their Reasons Range from Sad, to Nefarious, to Political*, BUS. INSIDER (Mar. 28, 2018), <https://www.businessinsider.com/jail-getting-arrested-deliberately-2018-3#because-theyre-lonely-8>.

102. See *Undergraduate Degree Correspondence Programs*, PRISON EDUC., <https://prisoneducation.com/correspondence-programs/undergraduate-degree> (last visited Jan. 2, 2019); *GED and High School Diploma*, PRISON EDUC., <https://prisoneducation.com/correspondence-programs/ged-high-school-diploma> (last visited Jan. 2, 2019); *Career and Vocational Courses*, PRISON EDUC., <https://prisoneducation.com/correspondence-programs/career-vocational-courses> (last visited Jan. 2, 2019).

the penalty, no longer punishment, has become more than simply a “price” worth paying: Perversely, it has become a reward.<sup>103</sup>

In sport, too, a penalty can sometimes operate as a reward. When philosophy of sport was in its infancy, my graduating thesis from Harvard Law School, *To Root in a Flowing Stream: Game and Sport as Prototype for Social Solution*, talked of “taking the penalty” as a prototype for such perverse situations, using the example of an American football team about to attempt a field goal that intentionally delayed the game to be “penalized” five yards. Although now further from the uprights, their new spot actually decreased the angle for the kicker and made it easier to kick the field goal. The penalty for delay of game acted as a reward.

Life may be full of such anomalies—consider the adage “the squeaky wheel gets the grease”—but sport *usually* seeks to prevent turning a penalty into a reward for the transgressor. American football allows the team on offense to continue a play notwithstanding a defensive foul, and “[u]nless expressly prohibited, the penalty for any foul may be declined by the offended team and play proceeds as though no foul had been committed. The yardage distance for any penalty may be declined, although the penalty is accepted.”<sup>104</sup>

Similarly, the baseball rule book provides that when a fielder interferes with a batter or baserunner, the “manager of the offense may advise the plate umpire that he elects to decline the interference penalty and accept the play.”<sup>105</sup> The corollary directs the umpire who has called catcher’s interference “with play in progress” to “allow the play to continue because the manager may elect to take the play.”<sup>106</sup>

Soccer’s “playing the advantage” most clearly demonstrates a sport’s commitment to prevent making a penalty into a reward: The referee allows the play to continue when the victimized team might benefit from such an advantage.<sup>107</sup> Later the ref penalizes the original violation only if the anticipated advantage does not materialize.<sup>108</sup>

While not allowing a team to decline a penalty, basketball to a small degree seeks to avoid turning a penalty into a reward by allowing a player fouled in the act of shooting to continue, and then crediting the basket if made.<sup>109</sup> Then again, there’s “Hack-a-Shaq”—the practice of fouling the same weak foul-shooter every time his

103. Sigmund Freud, who wrote next to nothing about crime and punishment, did posit that criminals subconsciously commit crimes from a sense of guilt *in order to* be punished, claiming that for them punishment acted as a reward. SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 62 (Dover Thrift 2016) (1930).

104. NFL, 2018 OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL LEAGUE 56 (2018), [https://operations.nfl.com/media/3277/2018-nfl-rulebook\\_final-version.pdf](https://operations.nfl.com/media/3277/2018-nfl-rulebook_final-version.pdf).

105. OFFICE OF THE COMM’R OF BASEBALL, OFFICIAL BASEBALL RULES 24 (2018), [http://mlb.mlb.com/documents/0/8/0/268272080/2018\\_Official\\_Baseball\\_Rules.pdf](http://mlb.mlb.com/documents/0/8/0/268272080/2018_Official_Baseball_Rules.pdf).

106. *Id.*

107. INT’L FOOTBALL ASSN. BD., LAWS OF THE GAME 2018/19 64 (2018), <https://img.fifa.com/image/upload/khhloe2xoigyna8juxw3.pdf>.

108. *Id.*

109. *Rule No. 12: Fouls and Penalties*, NBA, <https://official.nba.com/rule-no-12-fouls-and-penalties/#foultypes> (last visited Mar. 13, 2019).

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team has the ball, disrupting the flow of the game. Some players and coaches show their respect for the game by refusing to employ the tactic, declining to treat a threatened penalty as a price well worth paying and instead insisting upon it as an absolute prohibition. Why not do it if it works? “It’s just something we don’t do,” said Jason Kidd, Hall-of-Fame point guard who, as coach, rejected the strategy.<sup>110</sup> Even if good gamesmanship, Kidd and many like-minded others, including former coach and leading commentator Jeff Van Gundy, see it as disrespecting the sport—undermining a genuine athletic test and contest of essential skills the sport was meant to display.<sup>111</sup> Although pure formalists cannot make sense of this, Kidd would not allow the rules to undermine or get in the way of the sport they constitute. One could argue that the rules themselves are the culprit, greatly underpricing or even rewarding repeated fouling, failing to denounce or in any way punish the foul behavior.

Ordinarily, those who respect sport should be determined to prevent a penalty from acting as a reward. But sometimes it just turns out that way. For those of us convinced that the National Football League manufactured “Deflategate” and falsely “punished” Tom Brady,<sup>112</sup> the New England Patriots legendary quarterback, his four-game suspension at the start of the following season for his alleged “general awareness” that team personnel had illegally deflated footballs provides a most satisfying example.<sup>113</sup> The Patriots won three of those four games during the ageless but aging Brady’s forced rest and relaxation.<sup>114</sup> In the end, down 28-3 in the beginning of the third quarter, Brady had just enough left in the tank to stage that miraculous comeback to win the Super Bowl.<sup>115</sup>

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110. Conversation with Jason Kidd, then head coach of the Milwaukee Bucks, in Milwaukee, Wis. (Feb. 23, 2016). Kidd is the same coach who desperately needed a timeout he didn’t have and ordered his player to accidentally bump into him to spill his soda, requiring officials to stop the clock while they cleaned the spill and allowing Kidd to diagram a play. Brian Mahoney, *Nets’ Kidd Pays \$50,000 for Cup of Soda*, STAR (Nov. 28, 2013), [https://www.thestar.com/sports/basketball/2013/11/28/nets\\_kidd\\_pays\\_50000\\_for\\_cup\\_of\\_soda.html](https://www.thestar.com/sports/basketball/2013/11/28/nets_kidd_pays_50000_for_cup_of_soda.html). But stopping the clock for thirty seconds to clean up soda, arguably gamesmanship, arguably cheating, still respected the athletic sport of basketball as it could and should be played. Hack-a-Shaq does not. See *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, 135–36 (2018–2019) [hereinafter *Symposium*].
  111. See Sam Amick, *Jeff Van Gundy Says Change Hack Rule Now*, USA TODAY (Feb. 4, 2016), <https://www.usatoday.com/story/sports/nba/2016/02/04/jeff-van-gundy-adam-silver-hack-a-shaq-rule-change/79855426>.
  112. See Michael McCann, *The Only Outside Opinion on Deflategate That Judges Can Hear*, SPORTS ILLUSTRATED (Mar. 30, 2016), <https://www.si.com/nfl/2016/03/31/deflategate-tom-brady-roger-goodell-robert-blecker-amicus-brief>.
  113. See Dan Eaton, *Deflategate: Tom Brady’s Suspension Will Likely Stick This Time*, CNBC (Apr. 26, 2016), <https://www.cnbc.com/2016/04/26/deflategate-tom-bradys-suspension-will-likely-stick-this-time-commentary.html>.
  114. Tim Layden, *Four Weeks Without Brady: How the NFL Spurred the Patriots to the Super Bowl*, SPORTS ILLUSTRATED (Jan. 25, 2017), <https://www.si.com/nfl/2017/01/25/patriots-tom-brady-suspension-roger-goodell-super-bowl-51>.
  115. Barry Wilner, *Super Bowl LI: Patriots Overcome 25-Point Deficit to Claim Fifth Title*, METROWEST DAILY NEWS (Feb. 6, 2017), <https://www.metrowestdailynews.com/sports/20170205/super-bowl-li-patriots-overcome-25-point-deficit-to-claim-fifth-title>.

## XI. MENS REA

Except for the rare and disfavored “strict liability” offenses, legislatures have long graded crimes and punishments according to a rule breaker’s culpable mental state. The Ancient Hebrews and Ancient Greeks reserved the greatest penalty for intentional killings aggravated by premeditation and preplanning, demonstrated by lying in wait or poisoning.<sup>116</sup> A person who did not plan to kill but acted lethally with a heightened recklessness, aggravated by a grave risk and depraved indifference to human life, deserved the same or nearly the same penalty as the premeditated killer. Lesser culpable mental states such as ordinary recklessness, where the actor didn’t intend harm but was aware of and consciously disregarded a substantial risk, got serious or lesser penalties. Lowest on the ladder of culpable mental states, negligence—defined as a grossly deviant, unjustifiable failure to perceive a substantial risk—created controversy over whether it was evil enough to be punished. Last and not least, a pure accident without any culpable mental state—non-punishable, unless, again, the actor were held strictly liable, a real rarity in the criminal law.<sup>117</sup>

In sum, for centuries, holding the harm constant, the more culpable a transgressor’s mental state, the harsher the penalty and the more clearly that penalty was meant to be experienced as a punishment and not a price.

In this regard, sport has lagged far behind the criminal law.

Sport has long equated accidental with unintentional. “[C]onsider the case of accidental fouls,” declared Kathleen Pearson, during the infancy of philosophy of sport.<sup>118</sup> “[A]n act must be designed to deliberately interfere with the purpose of the activity in order for that act to be labeled unethical. Since the criterion of intentionality is missing from the accidental foul, that act has no ethical significance.”<sup>119</sup> For Pearson and likeminded philosophers of sport, the players’ attitudinal field divide into two: intentional and accidental. Anyone even slightly acquainted with centuries of criminal jurisprudence would scoff at such simplistic naiveté. Yet, by and large, sport rule books fail to reflect even that, only occasionally distinguishing and penalizing intentional fouls more harshly than “unintentional,” ones which they wrongly equate with “accidental.” Rarely do rule books or referees single out recklessness and almost never negligence as separately punishable mens rea of lesser culpability.

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116. See generally RUSSELL E. GMIRKIN, *PLATO AND THE CREATION OF THE HEBREW BIBLE* (2017) (comparing ancient laws and punishments for various crimes).

117. The Model Penal Code provides a classification of culpable states of mind as follows (in descending order of severity): 1) purposely: the agent had a “conscious object” to commit the act; 2) knowingly: the agent is “practically certain” that conduct will produce an effect; 3) recklessly: the agent “consciously disregard[ed]” knowable and foreseeable risk; 4) negligently: the agent did not know of the risk but should have known. MODEL PENAL CODE § 2.02 (AM. LAW INST. 2017).

118. See Pearson, *supra* note 95, at 184.

119. *Id.*

The ankle injury to basketball's superstar Kawhi Leonard during the 2017 NBA Playoffs elicited an unusual recognition and discussion of unintentional recklessness.<sup>120</sup> Whether or not Zaza Pachulia *intended* to injure Leonard by planting his large foot on Leonard's likely landing spot, the big man must have been aware and certainly should have been aware that he was subjecting Leonard to a substantial risk of a twisted ankle—a series-ending injury upon landing. Coach Gregg Popovich, furious at the loss of his superstar and certain loss of the series, emphasized the seriousness of common law and common-sense reckless manslaughter, although the coach's better analogy would have been to reckless assault.<sup>121</sup>

Some commentators, however, pointed out that refs rarely call a foul on other players who plant a foot on a jump shooter's likely landing spot when the shooter lands uninjured. A penalty in such instances seems more compensatory than punitive. But that, again, displays basketball's relative insensitivity to recklessness as a culpable mental state that should be punished. Criminal codes generally define and punish the crime of reckless endangerment, whether or not injury results.

Reckless endangerment in sport should be a foul worthy of punishment.

Whether or not to punish negligence—an unjustifiable failure to perceive a substantial risk—has divided legal philosophers at least since Aristotle, who argued that a person could choose to develop an inattentive persona.<sup>122</sup> Today, although statutes and courts punish criminally negligent homicide as a felony with prison time,<sup>123</sup> negligent assault generally requires a dangerous instrument or deadly weapon in addition to injury, and negligent endangerment generally does not exist.<sup>124</sup> With negligence: no harm, no crime. But at least criminal law struggles with a hierarchy of culpable mental states, and consciously seeks a proportionate response to the reckless actor's dangerous behavior whether or not it resulted in harm. In deciding when the appropriate penalty imposed upon the negligent or reckless actor should be punishment, clearly beyond compensation that would otherwise arise in tort, criminal law has continued to develop and refine its views as science has progressed.

Sport has a long way to go.

Rule books sometimes do distinguish intentional from accidental behavior. But rarely, if ever, do the rule books of any sport distinguish recklessness and negligence

120. See Ananth Pandian, *Watch the Questionable Foul by Zaza Pachulia That Knocked Kawhi Leonard Out of Game 1*, UPROXX (May 14, 2017), <https://uproxx.com/dimemag/warriors-spurs-playoffs-kawhi-leonard-injures-ankle-foul-zaza-pachulia/2>; see also *Symposium*, *supra* note 110, at 160.

121. For the interview with Popovich and commentary, see NBA Stats All Seasons, *Inside the NBA: Did Zaza Pachulia Intentionally Injured [sic] Kawhi Leonard?*, YouTube (May 15, 2017), <https://youtu.be/HotFKUu9Y4Y>.

122. See ARISTOTLE, *supra* note 20.

123. See, e.g., N.Y. PENAL LAW § 125.10 (McKinney 2018) (“A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person. Criminally negligent homicide is a class E felony.”).

124. See, e.g., *id.* § 120.00 (“A person is guilty of assault in the third degree when . . . with criminal negligence, he causes physical injury to another person by means of a deadly weapon or dangerous instrument.”).

as two forms of intermediate and prohibited culpable “non-intentional” behavior still worth penalizing.

In basketball, a player who intentionally acts illicitly or dangerously will not only pay a price, but also be punished, whether or not harm occurs.<sup>125</sup> A player faces automatic ejection for a “thrown elbow toward an opponent above shoulder level,” whether or not there’s actual contact.<sup>126</sup> “A player or coach must be ejected,” not only for “punching” or “fighting” but also for “an attempted punch or swing with no contact,” the NBA rule book reads.<sup>127</sup> As phrased, the no-fighting rule conclusively rebuts the claim that rules always provide options and prices to players because they are solely directed to officials, commanding them to impose certain penalties in certain circumstances. “There is absolutely no justification for fighting in an NBA game. The fact that you may feel provoked by another player is not an acceptable excuse.”<sup>128</sup> Banishment for “an attempted punch or swing with no contact” clearly punishes the intent without harm.<sup>129</sup> But the team whose player has been ejected for fighting does not lose possession of the ball. The penalty, suspension plus a fine up to \$50,000, attempts to punish the transgressor personally while eliminating any price for the rest of the team.<sup>130</sup>

Sometimes intentional violations, while strictly prohibited, still do not bring much of a penalty when no harm results. “The free throw shooter shall not purposely fake a free throw attempt,” the rule commands.<sup>131</sup> It’s a violation, resulting in the loss of a shot, while immunizing opponents who react to the fake by jumping into the lane too early. Similarly, “during all free throw attempts, no opponent in the game shall disconcert the shooter” by “waving his arms or making a sudden movement” within “the visual field of the shooter.”<sup>132</sup> And no trash “talking to the free throw shooter, or talking in a loud disruptive manner.”<sup>133</sup> But what’s the penalty for this bad sportsmanship, this intentional attempt at illegal distraction? Pure compensation without punishment: “No penalty is assessed if the free throw is successful. A substitute free throw will be administered [only] if the attempt is unsuccessful.”<sup>134</sup> No harm, no penalty, although foul, Berman would say.<sup>135</sup>

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125. See *Rule No. 12: Fouls and Penalties*, *supra* note 109.

126. *Id.*

127. *Id.*

128. See *Comments on the Rules—Fighting*, NBA, <https://official.nba.com/comments-on-the-rules/#fighting> (last visited Jan. 19, 2019).

129. See *Rule No. 12: Fouls and Penalties*, *supra* note 109.

130. *Id.*

131. See *Rule No. 9: Free Throws and Penalties*, NBA, <https://official.nba.com/rule-no-9-free-throws-and-penalties> (last visited Jan. 19, 2019).

132. *Id.*

133. *Id.*

134. *Id.*

135. See Berman, “*Let ‘em Play*,” *supra* note 46, at 1336–42.



## PENALTIES: PUNISHMENTS, PRICES, OR REWARDS?

Fines can be pure retributive punishments, not prices, even though expressed entirely in monetary terms. They only become prices if they're designed or experienced as options.<sup>136</sup> Basketball strictly prohibits taunting. It's not an option, but a command. The rule book doesn't say "punished" of course, but it means to prevent and condemn the behavior, and if it occurs, to punish it: "A player guilty of taunting must be singled out and penalized."<sup>137</sup> Here, the word "penalized" surely means punished. Although the penalty is expressed in dollars, the command is serious, its purpose is retributive: "must be singled out and penalized." The fine should bite you. You deserve it. Retributivists can advocate and consciously inflict monetary pain and suffering without being attacked as sadistic.

### XII. STRICT LIABILITY: WADA'S PENALTIES FOR DOPING

The World Anti-Doping Agency (WADA) has adopted an anti-doping code (WADC, or the "Code") that seeks to "promote . . . fairness and equality for Athletes worldwide;" ensure equal "detection, deterrence, and prevention" internationally; and impose "appropriate consequences" on doping athletes.<sup>138</sup> This last goal hints at retribution. Although the Code calls its own rules "sport-specific" and "distinct in nature from criminal and civil proceedings,"<sup>139</sup> it clearly aspires to include well-established essentials of legal and constitutional due process: fair notice, equal protection, and "respect" for "the principles of proportionality."<sup>140</sup>

"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body," the Code proclaims.<sup>141</sup> So far so good. But then the Code abandons the well-established essence of personal responsibility—a culpable mental state: "It is not necessary that intent, [f]ault, negligence or knowing [u]se on the Athlete's part be demonstrated to establish an anti-doping rule violation."<sup>142</sup> The Code specifically calls it "strict liability" but says that the Court of Arbitration for Sport (CAS)—the world's high court of sport tasked with enforcing the Code<sup>143</sup>—will take "fault" into consideration "in determining the consequences," the penalty for "this anti-doping rule violation."<sup>144</sup>

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136. Think of double-parking the company car and paying the ticket as a cost of doing business. Of course, a large enough fine can drive you out of business.

137. *See Comments on the Rules—Taunting*, NBA, <https://official.nba.com/comments-on-the-rules/#taunting> (last visited Jan. 19, 2019).

138. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE 11 (2015), <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf>.

139. *Id.* at 17.

140. *Id.*

141. *Id.* at 18.

142. *Id.*

143. *See generally History of the CAS*, CT. ARB. FOR SPORT, <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited Jan. 19, 2019).

144. WORLD ANTI-DOPING AGENCY, *supra* note 138.

So we have a strict liability violation, but the penalty, or what the Code calls “sanctions,” will largely depend upon the violator’s culpable mental state.<sup>145</sup> “If the Athlete establishes that he or she bears “No Fault” or “Negligence” for the violation, the Athlete’s individual results” in other competitions may be left intact.<sup>146</sup> Further, the standard four-year suspension may be reduced for an athlete who establishes that the anti-doping violation was not intentional.<sup>147</sup> “The term ‘intentional[,]’ [which] is meant to identify those Athletes who cheat,” the Code defines to include knowingly and recklessly—knowing “there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregard[ing] that risk.”<sup>148</sup> While intent doesn’t change the crime, its proved absence can decrease the punishment or penalty adjusted to the actor’s fault.

To some degree.

However unfair and repulsive to us retributivists—committed to keeping the punishment proportionate and never grossly greater than the heinousness of the crime, measured largely by the actor’s culpable mental state—the Code, consistently enforced by the CAS, demands the *automatic disqualification* of any athlete whose body contains *any* amount of any prohibited substance, whether or not that athlete was at fault, and whether or not that substance in any way advantaged the athlete in his or her contest! “An anti-doping rule violation in Individual Sports . . . automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes.”<sup>149</sup>

Are they serious? Or was this a threat never to be actually carried out?

Sixteen-year-old gymnast Andreea Răducan won a gold medal at the 2000 Olympic Games.<sup>150</sup> Before the women’s individual all-around, Răducan’s doctor prescribed a standard cold and flu medication that happened to contain tiny amounts of a prohibited substance.<sup>151</sup> When drug testing after her victory revealed trace amounts of pseudoephedrine in her body, Olympic officials disqualified Răducan and stripped her of her gold medal.<sup>152</sup> The CAS acknowledged that she gained absolutely no competitive advantage, but still upheld the penalty for accidentally ingesting even a trace amount of the banned substance.<sup>153</sup>

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145. *Id.* at 63.

146. *Id.* at 60.

147. *Id.* at 63.

148. *Id.*

149. *Id.* at 59.

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

151. *Id.*

152. *Id.*

153. *Id.*

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Nor is this an isolated instance. In 2008, U.S. swimmer Jessica Hardy, a world record-holder in the women's 100-meter breaststroke, tested positive for clenbuterol.<sup>154</sup> She had done her best to avoid ingesting any banned substance, consulting with the team's nutritionist, researching the supplement which didn't list the banned substance in its ingredients, and even contacting the manufacturer who assured her it was pure.<sup>155</sup> Despite her best efforts, Hardy tested positive four weeks before the 2008 Beijing Olympics and was forced to withdraw.<sup>156</sup> "Instead of defending her title, . . . she found herself defending not only her reputation against allegations of cheating, but also her career against a two-year suspension from swimming competitions," handed down by the CAS.<sup>157</sup>

These and other examples of gross injustice should trouble us. Apparently they even troubled the very authors of the Code which produced them: "[A] strict liability test is likely in some sense to be unfair in an individual case, such as . . . where the athlete may have taken medication as a result of mislabeling or faulty advice for which he or she is not responsible," the 2003 WADA Code admitted.<sup>158</sup> WADA removed this concession from the current 2015 Code, while retaining strict liability.<sup>159</sup> The CAS has steadfastly rejected the principle from criminal law, *nulla poena sine culpa*—no punishment without culpability—calling that basic principle "damaging" and rendering "the fight against doping . . . practically impossible."<sup>160</sup>

Perhaps. But allowing for innocence and harmlessness as a defense would help restore a semblance of justice, even if the burden of persuasion were placed on the defendant to prove she was blameless.

### XIII. BURDENS OF PERSUASION: COMFORTABLE SATISFACTION

The criminal law has long focused on and struggled over burdens of persuasion. Civil actions in tort, contract, and property law standardly require the plaintiff to prove a claim by a mere preponderance of the evidence—as more likely than not.<sup>161</sup>

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154. Karen Crouse, *For Swimmer, Ban Ends, but Burden Could Last*, N.Y. TIMES (Aug. 7, 2010), <https://www.nytimes.com/2010/08/08/sports/08hardy.html>.

155. See *Jessica Hardy Suspension Reduced to One Year, Supplement Ruled as Contaminated; USA Swimming Releases Statement; USADA Press Release; AdvocaCare Disputes Findings*, SWIMMING WORLD (May 4, 2009), <https://www.swimmingworldmagazine.com/news/jessica-hardy-suspension-reduced-to-one-year-supplement-ruled-as-contaminated-usa-swimming-releases-statement-usada-press-release-advocare-disputes-findings-updated>.

156. *Id.*

157. Melissa Hewitt, *An Unbalanced Act*, 22 IND. J. OF GLOBAL LEG. STUD. 769, 771 (2015). "Scores of other athletes . . . have either been stripped of their medals or suspended for the accidental ingestion of banned substances." *Id.* at 770.

158. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE 9 (2003), [https://www.wada-ama.org/sites/default/files/resources/files/wada\\_code\\_2003\\_en.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada_code_2003_en.pdf).

159. See WORLD ANTI-DOPING AGENCY, *supra* note 138.

160. Hewitt, *supra* note 157, at 773.

161. See *Evidentiary Standards and Burdens of Proof*, JUSTIA, <https://www.justia.com/trials-litigation/evidentiary-standards-burdens-proof> (last visited Jan. 3, 2019).

Since ancient days, however, criminal law has required a higher degree of certainty to convict and punish, crystallized in the formula of more than two centuries: proof beyond a reasonable doubt.<sup>162</sup>

Legislatures and courts have established an intermediate level of certainty, often called “clear and convincing”—a standard greater than a preponderance and less than beyond a reasonable doubt<sup>163</sup>—for certain serious civil matters, such as removal of parental custody, findings of fraud, or mental incompetence, with quasi-criminal penalties, including damage to reputation.

Again, sport has lagged far behind.

The WADA Code reverses the presumption of innocence. Any athlete found with even a trace amount of a prohibited substance is presumed guilty, and the burden is on the accused by “a balance of probability” to mitigate the suspension by showing blamelessness.<sup>164</sup>

How certain must the fact finder be of an athlete’s guilt? “The standard of proof shall be whether WADA has established a violation to the *comfortable satisfaction* of the hearing panel, bearing in mind the seriousness of the allegation.”<sup>165</sup> “Comfortable satisfaction” strikes me as roughly equivalent to “clear and convincing.” And the Code confirms it: “This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.”<sup>166</sup> A close reading suggests “comfortable satisfaction” as a variable standard within a range. How should the fact finder “bear in mind the seriousness” of the offense? The more serious the offense the greater or lesser level of certainty required?

“Clear and convincing” seems an appropriate standard for deciding and penalizing a player for cheating. Baseball employs “clear and convincing” as the standard for an umpire to change a call on the field after video review.<sup>167</sup> The rules go on, however, to impose a higher threshold of probability than would naturally attach to that standard: “In other words, the original decision of the Umpire shall stand unchanged unless the evidence obtained by the Replay Official leads him to definitively conclude that the call on the field was incorrect.”<sup>168</sup> Can the replay official who believes it eighty percent likely the call was wrong definitively conclude error? College football imposes an impossible standard that nobody can apply literally, requiring a challenged

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162. See Robert Blecker, *Roots, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* 183 (James R. Acker et al. eds., 3d ed. 2014).

163. See *Colorado v. New Mexico*, 467 U.S. 310 (1984) (defining “clear and convincing” as “highly probable,” thus exceeding the “preponderance of the evidence” standard typical of ordinary civil cases).

164. WORLD ANTI-DOPING AGENCY, *supra* note 138, at 25.

165. *Id.* (emphasis added).

166. *Id.*

167. See *Major League Baseball Replay Review Regulations, Section III—Standard for Changing a Call*, MLB, [http://m.mlb.com/official\\_rules/replay\\_review](http://m.mlb.com/official_rules/replay_review) (last visited Mar. 13, 2019) (“To change a reviewable call, the Replay Official must determine that there is clear and convincing evidence to change the original call that was made on the field of play.”).

168. *Id.*

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call to stand unless the reviewing official be convinced by “indisputable video evidence” that the call on the field was incorrect “beyond all doubt.”<sup>169</sup>

Although strict liability seems indefensibly unfair to some defendants, the WADA Code rightly requires guilt of cheating be found to the “comfortable satisfaction” of the factfinder, a level of certainty roughly equivalent to “clear and convincing.”

How unfair, then, that according to the NFL’s collective bargaining agreement, Commissioner Roger Goodell could find Tom Brady guilty as a cheat and suspend him by merely finding it preponderantly probable—more likely than not—that Brady was “generally aware” of a scheme to tamper with footballs.<sup>170</sup>

### XIV. CONCLUSIONS

When it comes to penalties, a jurisprudence of sport can and should draw heavily upon long established legal jurisprudence. Law has always embraced the goal of justice and ordered liberty, effected largely by rules publicly posted and equally applied by officials. Sport seeks its own justice and truth through the superior execution and display of characteristic excellences, primarily physical, but also tactical in the choice of moves to be executed, also largely according to rules publicly posted and equally applied by officials.

#### *A. The Continuum of Penalties in Sport*

For thousands of years, at least since the Code of Hammurabi, penalties have been meant one way and sometimes taken another. Penalties can be designed to operate as pure prices to decrease benefits from chosen options, ranging in probability from certain to never, and in weight from heavy to nominal. At the other extreme, penalties can be designed as pure punishment—retribution to inflict serious pain upon those who deserve to be denounced and made to suffer for their absolutely forbidden behavior. Penalties need not be experienced as they were designed to operate. In sport and in life, players and citizens may experience intended punishments as prices or sometimes experience intended prices as punishments.

Theoretically, punishment follows and fits the crime as an appropriate consequence. Actually, the punishment makes the crime. In sport, the penalty determines the foul—in form and as experienced. The actual experience of a penalty—as price or punishment, as pressure or pain, as option or prohibition, as deterrence, denunciation, or retribution—determines the nature of the violation. We all know playoff basketball, where the refs “let ‘em play” and don’t call penalties they would otherwise call during the regular season. It may be that players will play more physically during the playoffs in any case, which forces the refs to adjust their calling. But it also seems at least as true that the penalties, loosely or tightly called, determine the quality of the play and course of the contest.

Somebody once defined a chicken as “an egg’s way of making another egg.”

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169. NCAA, 2018 NCAA FOOTBALL RULES AND INTERPRETATIONS FR-107 (2018).

170. See Eaton, *supra* note 113.

Human nature features a governing selfishness, as the ancient sophists originally proclaimed and some still praise to this day. Modern utilitarians also see people as rational, calculating pleasure-seekers who balance the benefits from rule violations against the pains from threatened penalties. Holmes pragmatically called us “bad”—and found the reality of law chiefly in how we approach penalties. Law for the bad person really only consists in a prediction of penalties—discounted pressure from burdens officially imposed or threatened by those in power on those otherwise inclined to break the rules.

For those effectively deterred, the threatened penalty acts as a price not worth paying. For undeterred violators on whom officials actually inflict them, penalties should teach the penalized that the price of rule violation was not worth paying or risking. At the same time, the rule maker hopes the penalty as witnessed or imagined will pressure other would-be violators to follow the rules. While legislators traditionally embrace deterrence as their primary goal of punishment, its utilitarian nature, designed to operate best with rational, calculating pleasure-seekers engaging in cost-benefit calculations, suggests a pricing attitude.

Standard theory gets more subtle. Penalties can disincline players to violate while not entirely deterring them, acting as a price ordinarily not worth paying. Some penalties should be high prices, greatly to discourage but not absolutely prohibit rule violation. With other behavior, rightly called violations—double-dribbling, traveling, lost possession of the ball—only slight, if any, moral opprobrium attaches, in the sense that somebody performed some act badly or sloppily.

Penalties as deterrence, then, can represent the fusion of punishment and price. The rule maker and rule enforcer may have designed the penalty to deter, but the individual penalized or other would-be violators may consider it a price worth paying or risking. The violator’s experience of a penalty counts in determining whether the penalty has served or failed its purpose.

The standard “bad man” concerned only with ‘what will happen to me’ approaches all penalties as prices—contingent negative consequences following from optional rule violations. In order to achieve their goals, both law and sport must impose penalties on those who cheat—those who selfishly attempt to gain unfair advantages by deceptively violating rules in order to unjustly or falsely earn rewards that go to winners. We need penalties threatened and imposed to incentivize selfish players to follow the rules. In order to be just and efficacious, these penalties should be proportionate to the harm caused by rule violation, at least to compensate the injured who played by the rules. The penalties should also prevent unjust rewards from flowing to the cheat.

“In order to work, doesn’t society have to be based on respect for property at some level?” I asked a professional thief, probing for any respect he might have for the rules and institution of property. “It’s purely percentages,” he replied. “A certain percentage has to think that way for society to work.” He’s correct: For any system of rule-regulated behavior to succeed and reach its full potential—whether law or sport—key officials, citizens, or players must operate not only as cost-benefit “bad men,” but also from a richer reality with a more complex set of restraints, whether it’s

called “the common good” or “respect for the game.”<sup>171</sup> “When a person’s not stealing because he doesn’t want to lose his hands, there’s something wrong with the system. Same thing with the death penalty. People got to not kill because they care about people.”

Rule formalism only partly explains game reality. Principles, standards, and the ethos transcend written rules and operate as a richer realm, just as the real numbers are to the rationals. In order to work well and reach its fuller potential, in practice, a constitutional plan or sport requires a form of love. Call it patriotism, allegiance, loyalty, or duty, loving attachments produce behavior that cannot be fully explained or experienced as a price. Listen to criminals describe what they do and what restrains them. A richer ethos governs them: Among the old-timers at least, street code strictly prohibits and will punish snitching, although official rules encourage it and authorities reward it.

Athletes, too, feel governed to a great degree by their unwritten codes. But while discounted threats from written rules surely do not exhaust the ties that bind us, it becomes next to impossible to separate the bad men governed solely by selfish appetite and fear from those who act from love or respect, patriotism, or duty, truly embracing an internal point of view. Probe the Holmesian “bad men” in prison and those who confine them, as I have done for decades inside maximum-security prisons. You, too, will discover how difficult it can be to disentangle their intrinsic from their instrumental morality. How difficult it becomes to separate punishment from price, internal from external points of view, illegal but acceptable from unacceptable.

### B. *Athletes’ Mens Rea*

Law has a long-established hierarchy from most to least culpable mens rea and has punished accordingly. All other things equal, intent is worse than recklessness, recklessness is worse than negligence, and accidents which can harm innocents but involve no culpable mental state on the part of the harming agent are least culpable. Within these broad categories, law has, for centuries, recognized more or less serious forms of intent and recklessness. Here, sport lags far behind. Rule books occasionally distinguish intentional from unintentional fouls but very rarely acknowledge recklessness and almost never separate it from negligence.

If sports’ written rules did increasingly base penalties upon transgressors’ recklessness and negligence along with intent, could referees ever assess athletes’ culpable mental states in real time? Law, after all, has the benefit of drawn-out investigations and trials after sustained review of the evidence by prosecution and defense. In law, as in life, culpable mental states almost always must be inferred from the circumstances. We don’t know that the texting driver or other dangerous actor consciously ignored a risk, but we infer it beyond a reasonable doubt and punish it.

Basketball makes it a foul to set a screen within a normal step from an opponent “if that opponent is stationary and *unaware* of the screener’s position.”<sup>172</sup> A free throw

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

172. See Rule No. 12: *Fouls and Penalties*, *supra* note 109 (emphasis added).

shooter “shall not *purposely* fake a free throw attempt.”<sup>173</sup> “Kicking the ball or striking it with any part of the leg is a violation when it is an *intentional* act. The ball *accidentally* striking the foot, the leg or fist is not a violation.”<sup>174</sup> Rule 13 allows for an instant replay where one player “commits a *hostile* act against another player” that results in the offending player being ejected from the game—for example, “when a player *intentionally or recklessly* harms or attempts to harm another player with a punch, elbow, kick or blow to the head.”<sup>175</sup> Unawareness, hostility, purposely, intentionally, recklessly, and accidentally are all mental states the written rules declare a ref should and can infer.

And yet, the basketball rule book defines its most serious fouls—“flagrant fouls,” so called—as “unnecessary contact” (“Flagrant 1”) or “unnecessary and excessive contact” (“Flagrant 2”) which results in foul shots for the fouled player and possession of the ball, plus automatic ejection and later League review with probable suspension.<sup>176</sup> But notice that as misnamed and defined, “flagrant fouls” completely ignore the offending player’s culpable mental state. The worst fouls should be renamed and reconceived as “dangerous foul” when a player intentionally or recklessly unnecessarily exposes another to a substantial risk of physical injury, and worst of all a “vicious foul,” where the transgressor intentionally or recklessly with a depraved indifference exposes the fouled player to a grave risk of serious physical injury. A vicious foul should automatically, upon review, expose the transgressor to suspension for at least a season, and perhaps permanently.

The point is, as criminal law has long known, the violator’s attitude counts in determining the appropriate penalty. Beyond determining proportionality, the correct label can encourage another fairly long-standing justification for penalties in the criminal law: denunciation. Calling it a “dangerous” or “vicious” or “dirty” foul denounces it and might more effectively deter it. Denunciation can act as an effective deterrent for those who care about their reputation among peers or the general public. If teammates as well as opponents denounced dirty play, it would likely reduce such behavior, and were elite athletes to ostracize dirty players, it would likely deter others from following their example, justifiably hurting the dirty player who deserves it.

Law and sport have grossly underutilized denunciation. Denunciation generally has next to no effect on street criminals caught and punished for robbery or murder. The super-wealthy white-collar cheats—or “red collar” criminals as I call them—who dump cancer-causing chemicals into streams, maintain deadly workplace conditions, knowingly manufacture and distribute dangerous toys or cigarettes, and look upon threatened penalties as a price of doing business, often retain their social

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173. See *Rule No. 9: Free Throws and Penalties*, *supra* note 131 (emphasis added).

174. See *Rule No. 10: Violations and Penalties, Section IV—Strike the Ball*, NBA, <https://official.nba.com/rule-no-10-violations-and-penalties/#striketheball> (last visited Mar. 13, 2019) (emphasis added).

175. See *NBA Referee Instant Replay Trigger Outline*, NBA, <https://www.nba.com/official/instant-replay-guidelines.html> (last visited Mar. 13, 2019) (emphasis added).

176. See *NBA’s Misunderstood Rules*, NBA, [http://www.nba.com/nba101/misunderstood\\_0708.html](http://www.nba.com/nba101/misunderstood_0708.html) (last visited Jan. 3, 2019).



status as “successful” despite being caught and penalized with heavy fines and even prison sentences. Society generally continues to attach status to wealth, whether gained legitimately or by cheating.

Although denunciation among elite athletes for violating the ethos can act as a powerful deterrent and retributive source of pain for those who deserve it, denunciation in sport for viciousness and cheating thus far has failed to approach its full potential. Rugby has it right when it calls the penalty box the “sin bin.”<sup>177</sup> But generally, sports have failed to separate rule violations from unnecessary violence and cheating—prices from punishments. For decades the NFL glorified and advertised its games by replaying the most vicious hits of the week. Only gradually has it come to see those as dangerous and vicious fouls. Sport has largely stripped the negative and denunciatory connotations that long attached to the word “foul” itself.

If the penalized don’t feel denounced by it, they don’t feel punished by it; it’s simply a price they pay. Even where a penalty does act as punishment, if its purpose is only to deter—exert pressure by greatly overcompensating for its own discounted value—it still assumes a rational, calculating maximizer who discounts the penalty, as Jeremy Bentham proclaimed, by its certainty, swiftness, and severity.<sup>178</sup>

Only denunciation and retribution truly prohibit behavior and demand Hart’s internal point of view. Retributivists punish and denounce selfishness, not miscalculation. They punish for pricing other people’s misery, or as Kant classically observed, treating people as a means rather than an end in themselves.<sup>179</sup> Sport needs more denunciation, both in the rules that define fouls and attach penalties, and in the ethos that tolerates and even condones unlawful dangerous behavior, especially by teammates in pursuit of victory. Of course, here again it can be difficult to detangle the player’s internal point of view that intrinsically values their well-earned reputation from an external point of view that values financial rewards from endorsements and fears their loss from denunciation.

### C. *What Law Can Teach Sport*

Hopefully this journey into penalties as punishments or prices will cast light in many directions and suggest avenues for a jurisprudence of sport to pursue. So let me close with some observations that the forgoing analysis suggests but does not prove.

Law has much to teach sport, and if authorities learn law’s lessons they will change some rules and enforce others differently to allow sports to more fully reach their potential. When rule books and referees further refine culpable mental states attaching to fouls to isolate, denounce, and sometimes separately penalize by punishing dangerous recklessness, and even negligence, they will diminish dangerous

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177. *When the Sin Bin Calls*, BBC SPORT, [http://news.bbc.co.uk/sport2/hi/rugby\\_union/rules\\_and\\_equipment/4204904.stm](http://news.bbc.co.uk/sport2/hi/rugby_union/rules_and_equipment/4204904.stm) (last visited Mar. 13, 2019) (“[The Sin Bin] is a place you should avoid at all costs.”).

178. See generally Jeremy Bentham, *Principles of Penal Law*, in *THE WORKS OF JEREMY BENTHAM* (J. Browning ed., 1843).

179. See Kant, *supra* note 25, at 87.

and destructive fouls. Carrying forward this insight into a concrete, effective program requires an insight into the intricacies of the best ethos conducive to contesting tactical and physical excellences the sport has been designed to display and test. Only elite coaches and players with vast experience and love for their respective sports can achieve this. But an awareness of possible developments, often drawn from legal jurisprudence, coupled with a self-conscious desire to improve the sport must precede the attempt.

People who price when they should be punished will violate until it's not worth it. If we're sometimes unwilling or unable to do what it takes to deter them, does that mean we should reject all punishment? Penalty as punishment requires retribution and denunciation in order to achieve anything near its full meaning and effect. Professional athletes seem to feel or express too little communal revulsion at dangerous play and dirty fouls. Frequently traded from one team to another, these athletes experience a diminished sense of loyalty to their team or teammates. Because they too often view penalties as prices, dirty fouls continue, "cheap shots" get priced cheaply, and athletes unnecessarily suffer career-ending and life-diminishing injury. Too many professional football players, for example, see brain damage as a price for earning huge salaries, and thus continue to tolerate it. If they saw it as League-inflicted, undeserved punishment, they would rebel and force rule changes.

If athletes themselves learn some lessons from well-operating constitutional systems with public officials and citizens constrained to act for the common good, they, too, will denounce certain behavior—cheating and dangerous dirty fouls, whether by teammates or opponents. Owners and League officials will reconsider and readjust penalties—how they're labeled as well as their operation and effect. Taking a lead from criminal law, "violations" should be reserved for relatively trivial infractions and bring the lightest penalties, and "fouls" for more serious violations that threaten the health of the athletes or attack the integrity of the sport. With encouragement and support from the professional leagues, elite athletes will increasingly adopt Hart's internal point of view, rejecting cheating and gratuitously dangerous moves, refusing to calculate whether they can get away with it. Instead they will ostracize their fellow athletes, isolate and shun them, and tighten the community to better police the sports they love and respect.