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# Foot Faults in Crunch Time: Temporal Variance in Sports Law and Antitrust Regulation

Jeffrey Standen

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# Foot Faults in Crunch Time: Temporal Variance in Sports Law and Antitrust Regulation

Jeffrey Standen\*

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## I. INTRODUCTION

The study of sports law is interesting because sports contests provide a microcosm for the observation of rules in action and a laboratory for experiments in legality. In no setting will this experiment play out on a grander scale than the coming realignment of college athletics. Presenting a myriad of issues, conference realignments will present an important question of antitrust law.<sup>1</sup> Unfortunately for the colleges and conferences, the answer

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\* Dean, Salmon P. Chase College of Law, Northern Kentucky University. Andrew MacKendrick provided excellent research assistance.

1. The annual “March Madness” intercollegiate basketball tournament is the most lucrative annual sports event on the collegiate calendar. Alicia Jessop, *Viewership and Social Media Help*

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*March Madness Beat the Super Bowl in Ad Revenue Generation*, FORBES (April 8, 2013, 5:18 PM), <http://www.forbes.com/sites/aliciajessop/2013/04/08/viewership-and-social-media-help-march-madness-beat-the-super-bowl-in-ad-revenue-generation/>. Aside from pro football's Super Bowl, more money is wagered on this basketball tournament than on any other sporting event in the country. Michael McCarthy, *March Madness Betting Now Tops Super Bowl*, USA TODAY, (Mar. 27, 2012, 4:53 PM), <http://content.usatoday.com/communities/gameon/post/2012/03/march-madness-betting-bigger-than-super-bowl-ncaa-las-vegas-nevada-ncaa-mens-final-four/1#Ujk9VhZ5nzI>. Fueled by this huge financial interest, television revenues from the past ten years totaling close to six billion dollars provide for a disproportionate payday for the qualifying schools and their regular-season conferences. Seana Smith, *March Madness Advertising Mania*, FOX BUSINESS (Mar. 8, 2013), <http://www.foxbusiness.com/industries/2013/03/08/march-madness-advertising-mania/>; see also Chris Smith, *March Madness: A Trip to the Final Four is Worth \$9.5 Million*, FORBES (Mar. 14, 2012, 9:45 AM), <http://www.forbes.com/sites/chris-smith/2012/03/14/march-madness-a-trip-to-the-final-four-is-worth-9-5-million/>.

In light of the obvious popularity of the basketball tournament, universities that excel in football have in a similar fashion taken steps to realign themselves into larger, consolidated conferences. Jerry Hinnen, *Conference Realignment Guide: Where We'll Stand in 2013 and 2014*, CBS SPORTS (Nov. 19, 2012, 12:32 PM), <http://www.cbssports.com/collegefootball/eye-on-college-football/21057704>. Soon, most predict, major college football will be dominated by a few "super leagues" of the most competitive and most profitable programs in the country. Michael Felder, *After All the Realignment Settles, Are 4 Super-Conferences Inevitable?*, BLEACHER REP. (Nov. 29, 2012), <https://bleacherreport.com/articles/1426290-after-all-the-realignment-settles-are-four-super-conferences-inevitable>. Most likely these super leagues will garner the lion's share of broadcast revenue and public attention. See Kristi Dosh, *A Comparison: Conference Television Deals*, ESPN (Mar. 19, 2013, 5:15 PM), [http://espn.go.com/blog/playbook/dollars/post/\\_id/3163/a-comparison-conference-television-deals](http://espn.go.com/blog/playbook/dollars/post/_id/3163/a-comparison-conference-television-deals). Like its men's basketball counterpart, a super league would shower its participating and winning teams with financial rewards several times over the revenue currently enjoyed by most programs. *Id.*

Left out of this cornucopia will be the programs that historically formed the vast middle-class of Division 1, itself already divided into two sub-groups that distinguish the top programs from the rest: the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS). See, e.g., John Feinstein, *College Football: FBA vs. FCS Games Need to Be Limited*, WASH. POST (Sept. 22, 2013), [http://articles.washingtonpost.com/2013-09-22/sports/42299359\\_1\\_savannah-state-fcs-games-fbs](http://articles.washingtonpost.com/2013-09-22/sports/42299359_1_savannah-state-fcs-games-fbs). Like the recent complaints about exclusion from the Bowl Championship Series (BCS), see, e.g., Michael Felder, *College Football 2012: BCS Changes Will Not Stop the Complaints*, BLEACHER REP. (Apr. 4, 2012), <http://bleacherreport.com/articles/1132873-college-football-2012-bcs-changes-will-not-stop-the-complaints>, exclusion from the developing "Super Conferences" will relegate football programs to second-division status. Unlike the BCS, however, the exclusions will not potentially rotate among teams and conferences based on competitive play and order of finish. See, e.g., Heather Dinich, *Playoff Plan to Run Through 2025*, ESPN (June 27, 2012, 1:12 PM), [http://espn.go.com/college-football/story/\\_id/8099187/ncaa-presidents-approve-four-team-college-football-playoff-beginning-2014](http://espn.go.com/college-football/story/_id/8099187/ncaa-presidents-approve-four-team-college-football-playoff-beginning-2014). Exclusion of a football program from a new super conference will mean permanent exclusion from the vast proceeds from the super-conference season and from the season-ending playoff tournament.

The exclusion of traditional competitors will test the limits of antitrust law. Refusals to deal have historically been struck as a per se antitrust violation. See, e.g., *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 290 (1985) ("This Court has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any

to that question is mostly speculative. Antitrust law relies on the “rule of reason”<sup>2</sup> as a touchstone for addressing the legality of anticompetitive conduct,<sup>3</sup> comparing the benefits<sup>4</sup> and costs<sup>5</sup> to consumer welfare<sup>6</sup> with the

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offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Act.”). Disguising the refusal under the umbrella of conference reorganization will not preclude antitrust scrutiny. Even under the more flexible rule of reason, the consumer welfare justification for this business practice seems doubtful, particularly where the participant universities explicitly eschew the proposition that they are in business at all. Much like the nature of the National Football League was at issue in the recent *American Needle* litigation, this “next antitrust case” generated by the advent of the super conferences will require federal courts to plumb the essence of collegiate sports. *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183 (2010).

Under well-known judicial precedents, the National Collegiate Athletic Association (NCAA) has been described as a business participant in the competitive entertainment broadcast market (and thus subject to antitrust restrictions) and as a private association in the labor market (and thus free of antitrust constraints). *Compare Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 90 (1984) (“By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint . . . .”), *with Kneeland v. Nat’l Collegiate Athletic Ass’n*, 850 F.2d 224, 226 (5th Cir. 1988) (“The NCAA is a private association composed of public and private colleges and universities from across the United States.”). Which characterization is the “correct” one will determine the legality of the super-conferences’ exclusionary tactics.

2. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (“[T]his Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful.”); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (“[M]ost antitrust claims are analyzed under a ‘rule of reason,’ according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition . . . .”); *Ariz. v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 343 (1982) (“[T]he rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.”).

3. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (“The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of §1.”); *Cont’l T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977) (discussing the traditional framework of analysis under Section 1 of the Sherman Antitrust Act and how the rule of reason has become the prevailing standard).

4. *See Bd. of Regents*, 468 U.S. at 117 (“Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important[;] . . . [w]e agree . . . .”); *Spanish Broad. Sys. Of Fla., Inc. v. Clear Channel Commc’ns, Inc.*, 376 F.3d 1065, 1071 (11th Cir. 2004) (“Under Eleventh Circuit case law, alleged [antitrust] agreements analyzed under the rule of reason require a plaintiff ‘to prove . . . (2) that the defendant’s conduct has no pro-competitive benefit or justification.’”); *Chi. Prof’l Sports Ltd. v. Nat’l Basketball Ass’n*, 961 F.2d 667, 674 (7th Cir. 1992) (“A court applying the Rule of Reason asks whether a practice produces net benefits for consumers; it is no answer to say that a loss is ‘reasonably small.’”); *Nat’l Bankcard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 596 F. Supp. 1231, 1265 (S.D. Fla. 1984) (explaining that the pro-competitive benefit of VISA offering a VISA card offsets any anticompetitive effects NaBanco could raise.).

change in business practices under review. What is reasonable, or more specifically, what the benefits and costs are to consumer welfare, will perforce be different in different markets<sup>7</sup> and at different times.<sup>8</sup> In other words, the enforcement of antitrust law is subject to temporal variance. The legality of any perceived anticompetitive business arrangement will depend on the timing and circumstances of the market in which the business operates.

The enforcement of rules in sports is also subject to temporal variance. Indeed, many sports fans appear to prefer temporal variance in the enforcement of rules. They think game umpires or referees should not call certain transgressions of the rules of the game at certain times. Calling a “foot fault”<sup>9</sup> in a professional tennis match or a mere “ticky-tack”<sup>10</sup> foul on

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5. See, e.g., *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986) (finding that a reduction in the output of x-rays for dentists constituted a sufficient harm under rule of reason analysis); *U.S. v. Brown Univ. of Providence in R.I.*; 5 F.3d 658, 668 (3d Cir. 1993) (“Market power, the ability to raise prices above those that would prevail in a competitive market[,] is essentially a ‘surrogate for detrimental effects.’” (internal citations omitted)); *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 728 (3d Cir. 1991) (“An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality ‘of goods or services.’”).

6. See *Bd. of Regents*, 468 U.S. at 107 (“A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.”); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.* 61 F.3d 123, 128 (2d Cir. 1995) (“The overarching standard is whether defendants’ actions ‘diminish overall competition . . . .’” (citation omitted)); *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 960 (10th Cir. 1990) (“[W]e must bear in mind that the purpose of the antitrust laws is the promotion of consumer welfare . . . .” (citation omitted)).

7. See *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183 (2010) (attempting to apply a rule of reason analysis while recognizing the unique nature of professional football’s business structure and the necessity of cooperation among competing teams for the success of that business); *Brown Univ.*, 5 F.3d at 668 (“The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets.”); Tim Hance, *Threading American Needle: Defining A Narrow Relevant Market for Rule of Reason Analysis in Sports Antitrust Cases* 11 VA. SPORTS & ENT. L.J. 247, 256–57 (2011) (“[H]ow the relevant market is defined is usually the determining factor for whether a restraint is reasonable under the Rule of Reason.”).

8. See, e.g., *Leegin*, 551 U.S. at 877 (pulling different market restraints out of per se illegality and analyzing them using rule of reason); *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999) (explaining that certain restrictions on truthful advertising do not necessarily have an anticompetitive effect); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (holding that vertical maximum price fixing is not a per se violation of the Sherman Act); *Cont’l T. V., Inc.*, 433 U.S. at 59 (holding that vertical restrictions, in this case a location restriction, should be judged under the traditional rule of reason standard rather than the per se rule); *U.S. v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897) (holding that, by the terms of the statute, any contract that restrains trade is prohibited).

9. INT’L TENNIS FED’N, OFFICIAL RULES R. 18(b) (2009), available at

the basketball court might be acceptable early in the game when plenty of time remains for the players or teams to decide the contest on their own. To call such a foul or fault in “crunch time,” the closing minutes or final set when the call is likely to have an apparent and immediate effect on the game’s outcome, constitutes unjustified “interference” with the game by the referee. The unspoken assumption of those who would decry such a call late in the contest is that certain rule violations should go unpunished in certain circumstances, apparently owing to the gravity of the consequences.

Professor Mitchell Berman’s thoughtful elaboration of sports penalties<sup>11</sup> supplies a cogent “analytical apparatus” to justify this temporal variance.<sup>12</sup> He argues that variance in the enforcement of rules is justified where the infraction causes little or no harm to the opponent’s chances of winning and where the infraction comes late in the contest when the total cost of the uniform penalty is more likely to be outcome determinative and less likely a deterrent.<sup>13</sup> As a result, Berman suggests that certain calls, such as foot faults, should not be made in crunch time.<sup>14</sup> Instead, the contest should be decided based on the “competitive desideratum” inherent in every sport, meaning the essential athletic attributes each game requires and rewards.<sup>15</sup> The rules of a sport that do not precisely articulate or suggest those competitive desiderata should be enforced with some measure of judgment given the nature of the violation and the potential impact of the penalty on the contest.<sup>16</sup>

But surely this justification for temporal variance in the enforcement of

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<http://assets.usta.com/assets/1/15/ITF%20-%20RoT%202010.pdf> (a foot fault occurs when the server, during the service motion, touches the baseline or the court with either foot).

10. In basketball, a “ticky-tack” foul is a foul for minor, incidental contact. See Patrick Harrel, *Are NBA Referees as Bad as They Seem?*, BLEACHER REP. (Mar. 10, 2010), <http://bleacherreport.com/articles/360524-nba-referees-as-bad-as-they-seem>. The term was made popular by Chick Hearn, an announcer for the Los Angeles Lakers, who was also responsible for coining the term “no harm, no foul,” to express the idea that referees should not call minor fouls that do not interfere with the flow of play. See *Lakers Broadcaster Chick Hearn Dies at 85*, ESPN CLASSIC (Aug. 16, 2002), <http://espn.go.com/classic/obit/s/2002/0805/1414492.html>; *Chickisms*, NBA, [http://www.nba.com/lakers/history/chickhearn\\_chickisms.html](http://www.nba.com/lakers/history/chickhearn_chickisms.html) (last visited Oct. 4, 2013).

11. Mitchell N. Berman, “*Let ‘Em Play*”: *A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325 (2011).

12. *Id.* at 6–13.

13. *Id.* at 6, 9, 12–13.

14. *Id.*

15. *Id.* at 17.

16. *Id.* at 17, 20.

rules is wrong, much as temporal variance itself is wrong. Temporal variance in the enforcement of rules is wrong because it defeats the ultimate purpose of rules, wrong because it allows for poorly written rules, wrong because it corrects for (and thereby permits) rules that specify egregious penalties, and wrong because it fails to describe the nature of rules accurately. Most significantly, the justification is wrong because it emphasizes the consequences of the penalty apart from the penalty itself and introduces a foreign and ultimately pernicious set of considerations into the penalty schematic. Temporal variance is wrong in sports, as I suggest it is in the larger arena of antitrust law. “Rules is rules,” Casey Stengel was purported to have said. As usual, he had it right.

## II. TYPOLOGY OF SPORTS RULES

Baseball’s ball/strike rule takes us right to the heart of the matter. Every pitch must be one or the other.<sup>17</sup> If the batter swings and misses, or does not swing but the pitch is within the strike zone, it should be called a strike.<sup>18</sup> A pitch not swung at and outside the strike zone must be a ball.<sup>19</sup> Every strike or ball advances one team closer to victory and the other team further away. The degree or amount by which the outcome of the game is affected by the umpire’s call varies according to the game situation and (typically) the lateness of the inning. Depending on the time of the game, the effect of the umpire’s call may not be uniform. The call of a “ball” might have minimal negative impact on the defensive team where it holds a substantial lead late in the game; the call of “strike” at the same time in a game, however, might impose a more substantial penalty on the offensive team down to its last few at-bats. Even though the impact of the call on each team is not perfectly equal, it is always zero-sum. The umpire’s judgment unavoidably must favor one side and harm the other: every pitch demands an outcome that confers a benefit and imposes a penalty.

To argue that the rules of sport should vary temporally, Berman first classifies sports rules generally, and the ball/strike rule specifically, as an

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17. OFFICIAL BASEBALL RULES R. 6.02(b) (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf) (“If the pitcher pitches, the umpire shall call ‘Ball’ or ‘Strike,’ as the case may be.”).

18. *Id.* at R. 2 (definition of strike).

19. *Id.* (definition of ball).

instance of Hart's "power-conferring" rule category.<sup>20</sup> Hart theorized that some legal rules should be understood not as true rules of law,<sup>21</sup> but rather as mere enabling devices, alerting interested participants to the manner by which they might accomplish a desired legal relationship or create a legal product.<sup>22</sup> For instance, for a person to make a valid will, at least two witnesses are needed.<sup>23</sup> A will must have two witnesses, and so a document that purports to be a will with merely one witness is nothing.<sup>24</sup> A testator who creates a "will" with only one witness does not forego an opportunity to try again, nor does she suffer some other detriment by trying to make a will and failing.<sup>25</sup> Nor does anyone else suffer any detriment from the failure to create a document. In effect, nothing happened. In baseball, a pitcher who throws a "ball" has merely failed in his attempt to throw a strike.

Yet Berman's classification seems to sell the rules short. Failure to fulfill the required conditions for success invariably, if incrementally, leads to a penalty: four balls results in a free base,<sup>26</sup> two unsuccessful attempts at a

20. Berman, *supra* note 11, at 1354–55.

21. See Robert S. Summers, *Professor H.L.A. Hart's Concept of Law*, 1963 DUKE L.J. 629, 635 (differentiating between "primary" rules, which are rules of obligation that impose duties, and "secondary" rules, which confer powers); Herbert Morris, Book Review, 75 HARV. L. REV. 1452, 1454 (1962) (reviewing H.L.A. HART, *THE CONCEPT OF LAW* (1961) and using "[e]very man must take off his hat on entering a church" as an example of a mandatory rule).

22. See John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 PENN ST. L. REV. 119, 192 (2009) ("Legal rules permitting citizens of the state to enter into legally significant arrangements even though they rely on non-state norms such as the law merchant are power-conferring rules."); Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1727 (2008) ("[C]ontract law is what H.L.A. Hart calls a 'power-conferring' rule. It enables persons to create and modify their legal obligations to one another.").

23. See, e.g., OR. REV. STAT. ANN. § 112.235(3) (West, Westlaw through 2013 Reg. Sess.) (requiring "at least two witnesses" for a valid execution of a will); CAL. PROB. CODE § 6110(c)(1) (West, Westlaw through 2013 Reg. Sess.) ("[T]he will shall be witnessed by being signed, during the testator's lifetime, by at least two persons . . ."); N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(1)(C)(4) (McKinney, Westlaw through 2013 Legis. Sess.) ("There shall be at least two attesting witnesses . . .").

24. See, e.g., Barbara Slotnik, *Number of Witnesses Required*, 74 TEX. JUR. 3D. WILLS § 127 ("[A]n instrument that was attested by only one witness will not be probated as a will."); Amy G. Gore et al., *Number of Witnesses*, 31 OHIO JUR. 3D DECEDENTS' EST. § 310 illus. ("A will that had been witnessed and subscribed in the presence of only one witness was defective on its face and not entitled to probate . . ."); W.R. Habeeb, *Competency of Named Executor as Subscribing Witness to Will*, 74 A.L.R. 2d 283 § 1 (1960) ("[I]f a particular will is witnessed by only one person it is, as a matter of substantive law, invalid . . .").

25. See Habeeb, *supra* note 24, at § 1.

26. OFFICIAL BASEBALL RULES R. 6.08(a) (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf). At one point in its early

serve in tennis constitute a double-fault and loss of point,<sup>27</sup> failure to catch a pass in football results in an incompleteness and the end of the down.<sup>28</sup> It makes no sense to describe an incomplete pass as a mere failure to meet the required conditions of a completed pass, as if nothing were lost by the failure. In sports, all game actions count, one way or the other.

Temporal variance in the enforcement of rules is never costless. Every decision by an umpire or referee not to call the touch foul in basketball or foot fault in tennis due to the closeness of the game or the consequential importance of the penalty saves the offender from paying the penalty. At the same time, the non-call disgorges the competitive benefit from the opponent. This is unjust. The batter who has refrained from swinging at the pitch outside the strike zone has completed an athletic act that the rules of baseball explicitly identify as one of the actions that is supposed to confer a benefit on the batter.<sup>29</sup> The batter's "good eye," perhaps in combination with his batting prowess, the fatigue he and his teammates have occasioned on the pitcher by their patient approach to batting, and so forth, has resulted in an accomplishment that should, under the conditions of the game, incrementally improve his team's chances of success. The gain might appear small, and the penalty large, should the pitch comprise "ball four."<sup>30</sup> Should an umpire who practices temporal variance in enforcement call pitches outside the strike zone "strikes" if the offensive team is ahead? Or call a strike a ball if the team is behind? In other words, should the umpire call the pitch, or should he "referee the score?" Temporal variance results in umpires adjudicating the game with one eye on the scoreboard. All game rules convey penalties that either advance or frustrate victory. No rules of a sports contest are merely "power-conferring."<sup>31</sup>

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history, organized baseball awarded a free base only after nine balls. DAVID NEMEC, *THE OFFICIAL RULES OF BASEBALL ILLUSTRATED* 22 (2006). It doesn't matter how many balls form the permitted limit as long as some limit is specified. However, one can attempt to write a will as many times as one wishes with impunity.

27. INT'L TENNIS FED'N, *OFFICIAL RULES* R. 24(a) (2009), available at <http://assets.usta.com/assets/1/15/ITF%20-%20RoT%202010.pdf>.

28. *OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT'L FOOTBALL LEAGUE* R. 8, § 1, art. 4 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>.

29. *OFFICIAL BASEBALL RULES* R. 6.08(a) (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf).

30. *Id.*

31. Berman, *supra* note 11, at 1354–55.

*A. Trivial Rules*

Professor Berman concedes that umpires should not engage in temporal variance on calls of balls and strikes,<sup>32</sup> or whether or not a tennis ball is in or out.<sup>33</sup> These rules are too close to the specified athletic desideratum of each sport and the rules' demands (to throw a strike or locate a serve) are the fundamental athletic skills the game is designed to measure.<sup>34</sup> But when game rules do not bear so directly or essentially on the fundamental athletic demands of the sport, there lies a sensible opportunity for the game judge to vary enforcement, or to "let one go," in order to preclude an outsized penalty that might go too far in determining the outcome of the game.<sup>35</sup> It is these power-conferring rules, specifically those that appear trivial in their importance but convey a substantial penalty, that Berman argues should be enforced with regard to the context of the game.

Rules that fit this bill are hard to find. Arguably some sports have none. For instance, in professional golf every rule is enforced vigorously and invariably, even those that are routinely disregarded in casual play.<sup>36</sup> If a ball moves after it has been addressed, no matter how slight or inconsequential that move, a penalty must be invoked.<sup>37</sup> Game designers are careful to clarify that violations of tournament rules that do not affect play, such as adherence to the dress code, do not result in a game penalty.<sup>38</sup> Sometimes the question of whether or not a violation should result in a game-affecting penalty remains controversial.<sup>39</sup> While no experienced

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32. *Id.* at 1355.

33. *Id.* at 1357.

34. *Id.* at 1358–59.

35. *Id.* at 1362–63 (arguing for the distinction between rules that reinforce the nature of the athletic challenge of a sport, "true rules," and those that do not, "rulified standards," and describing the circumstances under which "rulified standards" may be disregarded: when enforcing the rule would produce unusually high costs, and when disregarding the rule would incur low costs on the dimensions, like predictability, that justified making it a rule in the first place).

36. See Wendy Uzelac, *The Ruling that Rocked Golf: Tiger's Loose-Impediment at '99 Phoenix Open*, USGA (Jan. 21, 2009), <https://www.usga.org/news/2009/january/10-Years-After-Tiger-s-Loose-Impediment-Ruling-At-Phoenix-Open/>.

37. USGA RULES OF GOLF R. 18-2(b) (2012), available at <http://www.usga.org/uploadedfiles/usgahome/rules/completerogbook.pdf>.

38. See, e.g., *Tournament Policies*, S. FLA. PGA, <http://www.sfpagolf.com/events/tournament-policies/> (last visited Oct. 3, 2013) (stating that violations of the dress code at any South Florida Section PGA event will result in a \$50.00 fine).

39. See, e.g., John Strege, *Media: A Trifecta of Tiger, Masters, Controversy*, GOLF DIGEST (Apr.

golfer would demur from the proposition that a stray shot coming to rest within a water hazard should ordinarily result in a penalty, unless the ball is played as it lies within the hazard,<sup>40</sup> many might argue that signing an incorrect scorecard—a correctable and often inconsequential error—should have no repercussions at all, much less complete disqualification.<sup>41</sup> Golfers might also disagree over the magnitude of the penalty: Certainly the onerous “stroke and distance” penalty for a lost ball should be reconsidered.<sup>42</sup> Yet differences over the proper labeling and consequences of a rule do not mean that some rules are trivial and not reflective of the game’s core athletic demands. It only means that the game designers need to be careful in writing the rules. Attaching serious game penalties to non-essential or trivial rules virtually demands temporal variance and thus is a drafting error.

Deciding what is trivial and what is essential is easy. The game designers tell us. Any rule that results in a penalty that impacts the probability of victory is presumptively non-trivial. In other words, it is the penalty—not the rule—that determines significance. It is the decision not to enforce a rule, trivial or not, that is problematic. For a game judge to decline to enforce the stipulated penalty on account of the scoreboard or game situation reflects a tacit recognition that something outside the rules should influence, if not determine, how the game is officiated. The game context, not the rules themselves, determine how the rules are interpreted and

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13, 2013), <http://www.golfdigest.com/golf-tours-news/blogs/local-knowledge/2013/04/-by-john-strege-follow.html>. Golf analysts criticized the two-stroke penalty assessed against Tiger Woods for an illegal drop at the 2013 Masters, arguing that he should have been disqualified. *Id.*

40. USGA RULES OF GOLF R. 26 (2012), available at <http://www.usga.org/uploadedfiles/usgahome/rules/completerogbook.pdf>.

41. In response to multiple incidents of disqualification, the R&A and the United States Golfing Association (USGA) revised the rules in 2011 to allow golfers who breach a rule because of “facts that he didn’t know and could not reasonably have discovered prior to returning his score card” to no longer be subject to disqualification for signing for an incorrect score. See Ryan Herrington, *USGA, R&A Soften Incorrect Scorecard DQ Rule*, GOLF DIGEST (Apr. 7, 2011), <http://www.golfdigest.com/golf-tours-news/blogs/local-knowledge/2011/04/usga-ra-soften-incorrect-scorecard-dq-rule.html>. Of course, many also argue the opposite. See Strege, *supra* note 39 (citing golf analyst and former PGA player, Nick Faldo: “My instincts as a pro from my era, and I know some of my fellow pros would agree, that if you break the rules, sign an incorrect scorecard[,] you’re disqualified or you disqualify yourself. But we’re in a new era now under new rules. . . . I know myself, and some of the old pros, we have to accept that now.”).

42. See USGA RULES OF GOLF R. 27(c) (2012), available at <http://www.usga.org/uploadedfiles/usgahome/rules/completerogbook.pdf> (stating that if a player cannot locate his ball within five minutes, he may, “under penalty of one stroke,” play a ball “as nearly as possible at the spot from which the original ball was last played”).

enforced.

Often, proponents of temporal variance describe this “outside influence” as the “culture” or “spirit” of the game.<sup>43</sup> Judging from the frequency with which it is discussed, players and close fans of particular games appear to believe that each sport does indeed have a spirit attached to it.<sup>44</sup> This spirit or cultural aspect can be described concretely. For example, all would say that cheating lies outside the spirit of a game, but pretending to be fouled in a basketball game<sup>45</sup> or hit by a pitch in a baseball game apparently lies within.<sup>46</sup> Both are very common occurrences that, although certainly deceitful, nonetheless are an accepted practice. As a result, game referees, who are typically people steeped in the game’s history and culture, will bring that cultural knowledge to bear when they vigorously enforce certain rules (such as whether or not a serve is “in”) right to the last shot, while declining to enforce others (foot faults) in momentous situations. They will overlook the baseball batter crying in pain and shaking his hand to feign being hit by an inside pitch, while severely penalizing a pitcher for throwing a “spit ball.” The first deceit is part of the game; the latter is cheating.<sup>47</sup>

Reliance on unstated and unwritten cultural understandings is problematic for obvious reasons. Separating the trivial from the essential and doing so in the heat of the moment appears a large task—one in which even experienced, knowledgeable people will differ. But even assuming a shared understanding of the contours and specifications of the unwritten

43. See Howard Wasserman, *Home-Field Advantage and the Umpire Analogy*, PRAWFSBLAWG (Jan. 17, 2011, 9:07 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/01/home-field-advantage-and-the-umpire-analogy.html>.

44. See, e.g., USGA RULES OF GOLF p. 11 (2012), available at <http://www.usga.org/uploadedfiles/usgahome/rules/completerogbook.pdf> (“The game of golf should be played in the correct spirit . . .”).

45. The National Basketball Association (NBA) created new penalties in 2012 for “flopping” (intentionally deceiving the referee to call a foul on another player after little or no physical contact) because it had become such an accepted practice in the sport. See *NBA to Crack Down on Flopping*, ESPN, [http://espn.go.com/nba/story/\\_/id/8457259/nba-establishes-new-anti-flopping-penalties-fine-players](http://espn.go.com/nba/story/_/id/8457259/nba-establishes-new-anti-flopping-penalties-fine-players) (last updated Oct. 4, 2012, 12:16 AM).

46. See, e.g., Phil Rogers, Peter Schmuck, Kevin Baxter, & Juan C. Rodriguez, *Was It OK for Jeter to Fake Getting Hit by Pitch?*, CHI. TRIB. (Sept. 16, 2010), [http://articles.chicagotribune.com/2010-09-16/sports/chi-100917-four-corners\\_1\\_umpiring-derek-jeter-lance-barksdale](http://articles.chicagotribune.com/2010-09-16/sports/chi-100917-four-corners_1_umpiring-derek-jeter-lance-barksdale) (praising Derek Jeter’s “acting skills” for pretending to be hit by a pitch as “smart baseball”).

47. OFFICIAL BASEBALL RULES R. 8.02(a)(6) (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf).

spirit of the game, the question remains why that spirit-influenced understanding should regulate and indeed override stated rules. To be relevant, the spirit of the game, if there is one, must indicate or describe conduct and practices that are not explicitly regulated or prescribed by the rules of the game. The spirit of the game must address extra-legal behavior. For example, the spirit of the game might justify violence. A wild high and inside pitch in baseball is thought to justify retaliation from the opposing team;<sup>48</sup> instigating a fight with a small, scoring player in hockey merits a response from the team's enforcer;<sup>49</sup> dirty play similarly reproduces itself in basketball<sup>50</sup> and football.<sup>51</sup> The spirit of the game might also encourage small acts of sportsmanship, such as the post-game handshake or helping a fallen opponent to his feet. The spirit of the game demands certain behaviors. Players on the bench in a basketball game are to remain visibly interested in the game action; players on the court or field are to act respectfully toward the referees and the opponents; players in all sports are not to fake injuries for competitive advantage.

In no instance, however, does the "spirit of the game" countenance violations of the rules of the game.<sup>52</sup> A free throw never counts for more or

48. See, e.g., Jason Turbow, *Padilla's Lesson: Selfish Retaliation Doesn't Make Friends*, BASEBALL CODES (July 19, 2010, 7:09 AM), <http://thebaseballcodes.com/2010/07/19/padillas-lesson-selfish-retaliation-doesnt-make-friends/> (noting that "[t]he ability to appropriately retaliate is a vital part of a pitcher's resume, giving his teammates confidence that not only will he offer support should they be thrown at, but that he'll . . . make sure it doesn't happen again").

49. See, e.g., Rob Tychkowski, *Best Fighter: Laraque*, ESPN, <http://sports.espn.go.com/nhl/news/story?page=BOE/fighter> (last updated Jan. 8, 2004, 8:45 PM) (discussing the history of the role of the enforcer for the Edmonton Oilers, which includes Dave Semenko, best known as Wayne Gretzky's bodyguard, and Georges Laraque, who was voted one of hockey's best fighters).

50. See, e.g., Brian Windhorst, *Flagrant Foul Upsets Dwayne Wade*, ESPN, [http://espn.go.com/nba/truehoop/miamiheat/story/\\_id/8575140/dwyane-wade-miami-heat-calls-flagrant-foul-boston-celtics-rajon-rondo-punk-play](http://espn.go.com/nba/truehoop/miamiheat/story/_id/8575140/dwyane-wade-miami-heat-calls-flagrant-foul-boston-celtics-rajon-rondo-punk-play) (last updated Oct. 31, 2012, 12:11 PM) (describing the "bad blood" between the Miami Heat and the Boston Celtics, including a comment by Wade hinting at retaliation against Rajon Rondo for a flagrant foul).

51. See, e.g., *Bowen: Bears Need to Retaliate Against Allen*, CBS CHI. (Nov. 27, 2012, 10:26 AM), <http://chicago.cbslocal.com/2012/11/27/bowen-bears-should-retaliate-against-allen/> (former NFL player Matt Bowen calling for retaliation against the Minnesota Vikings' Jared Allen for a questionable tackle that injured the Bears' Lance Louis).

52. The rules of golf expressly define the spirit of the game of golf:

Golf is played, for the most part, without the supervision of a referee or umpire. The game relies on the integrity of the individual to show consideration for other players and to abide by the Rules. All players should conduct themselves in a disciplined manner, demonstrating courtesy and sportsmanship at all times, irrespective of how competitive they may be. This is the spirit of the game of golf.

less than one point; a touchdown is a touchdown no matter the quarter or the score; a foot fault results in a faulty serve, no matter the situation. The spirit of the game might prescribe informal codes of conduct for aspects of the game not covered by the rules, but it does not amend the rules.

It is difficult to articulate an instance where the spirit of the game should countermand the rules of the game. Variance in the enforcement of rules makes most sense in the one-sided, “blowout” game where the game’s outcome is beyond practical doubt. Umpires will expand the strike zone; basketball officials will figuratively swallow their whistles. Following the same practice in close contests creates a strange marriage: certain rules will be ignored in blowouts and in tight games, but not in between. No single description of the game’s culture or spirit would dictate that result. If the rules of the game with respect to foot faults or touch fouls are so needless that they should be invoked only when they are relatively inconsequential, but not too inconsequential as in a blowout, then arguably they should not be rules at all. Professor Berman suggests that the rule on foot faults could be restated as a standard, requiring players to strike the serve from somewhere around the baseline, without reference to whether or not the foot touches the line before the ball is contacted.<sup>53</sup> Indeed, sports rules do include some standards, such as the rule in football that requires the ball carrier to try to make progress toward the opposing goal line, lest play be whistled dead.<sup>54</sup> Game designers know how to express a game rule at the level of a standard when they desire.<sup>55</sup> The foot fault rule is not a standard.<sup>56</sup> Players have the option of essentially converting the rule into a standard by serving from a position several feet behind the line, allowing plenty of room for the forward movement of their feet.<sup>57</sup> Like golfers, they need not initiate play from the most advantageous position possible.<sup>58</sup> Moving forward to the very front

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USGA RULES OF GOLF § I (2012), available at <http://www.usga.org/uploadedfiles/usgahome/rules/completerogbook.pdf>.

53. Berman, *supra* note 11, at 1359.

54. See OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT’L FOOTBALL LEAGUE R. 7, § 2, art. 1 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>.

55. Compare *id.* at R. 7, § 2, art. 1 with INT’L TENNIS FED’N, OFFICIAL RULES R. 19(a) (2009), available at <http://assets.usta.com/assets/1/15/ITF%20-%20RoT%202010.pdf> (simply stating that a foot fault is considered a service fault).

56. See Berman, *supra* note 11, at 1354–56, 1362.

57. See Berman, *supra* note 11, at 1359–61.

58. See USGA RULES OF GOLF R. 11 & pp. 12, 33 (2012), available at

edge of the territory permitted for a tennis serve or a tee shot in golf gives the player the utmost advantage in terms of angle and distance. The decision also carries with it a substantial risk of penalty should the tennis player's feet, or the golfer's tee location, be deemed too far forward.<sup>59</sup> The game allows this advantage-taking while also imposing a risk on those who would chance it. The professional tennis player's challenge is to practice and perfect a service technique that will take maximum advantage of the rules, resulting in the maximum advantage from the serve.<sup>60</sup> This technique is a practiced, athletic act that lies at the core of the game.<sup>61</sup> A lines official who chooses not to enforce this rule in crunch time is not converting a rule into a standard, but instead is converting one standard into another.

### *B. Harmless Fouls*

Part of the felt need to let violations of the rules go unpunished toward the end of close games is the sense that certain violations cause no harm.<sup>62</sup> Game judges should not impose penalties for conduct that has not altered, or has barely altered, the respective probability of victory.<sup>63</sup> For instance, during crunch time in basketball, the effect of even one foul call and subsequent free throws can be outcome determinative.<sup>64</sup> Thus, referees should reserve their calls for egregious, impactful violations of which they are most certain. Earlier in the game, when each team has plenty of time left to overcome bad calls, referees can exercise greater latitude. Imposing

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<http://www.usga.org/uploadedfiles/usgahome/rules/completerogbook.pdf> (stating that a golfer may play a tee shot from “within the *teeing ground*”—up to two club lengths behind the front line of the tee markers).

59. See *id.* at R. 11(b) (stating that a golfer risks disqualification for teeing outside the teeing ground); INT'L TENNIS FED'N, OFFICIAL RULES R. 19(a) (2009), available at <http://assets.usta.com/assets/1/15/ITF%20-%20RoT%202010.pdf> (stating that a foot fault is considered a service fault).

60. See Berman, *supra* note 11, at 1356–57.

61. See *id.*

62. See Berman, *supra* note 11, at 1354.

63. Berman, *supra* note 11, at 1349 (“When a penalty would have . . . a substantial expected effect on the game's outcome and when the unpenalized infraction would not have an effect of roughly similar magnitude, we might think that the game goes better—is fairer and more satisfying—if the play on the field stands.”).

64. Berman, *supra* note 11, at 1350 (“[T]he expected outcome-affecting magnitude of an outcome-affecting event is greater toward[] the end of a contest, holding closeness of contest constant, because there are fewer opportunities to counter the impact of that event.”).

penalties earlier in the game may also serve a deterrent function, reining in rough play and setting the tone for the more intense interactions toward the end of the game.<sup>65</sup> Calling the game as tightly in crunch time would create little deterrence.<sup>66</sup> In a sense, there is no future to affect at that point. Thus, the penalty imposed by the rule would seem grossly overcompensatory.<sup>67</sup> It would award the opposing team or player a significantly increased probability of victory, cost the guilty team a commensurately sizable diminished probability, while stripping the penalty of any chance it might have to shape future behavior.<sup>68</sup> No harm, no foul.<sup>69</sup>

This is false. In sports, if there is a foul, there is harm. Harmless fouls are not fouls at all. Consider the hockey rule proscribing interference,<sup>70</sup> or the basketball rule on fouls against the ball handler,<sup>71</sup> or the football rule on pass interference.<sup>72</sup> All of these rules, like the rest of the rules, require harm: that the defensive player's movement or touching of the offensive player actually and to a substantial degree impeded the movement of the offensive player. Football even adds the requirement that the pass itself, had the offensive player not been impeded, be "catchable."<sup>73</sup> "No harm, no foul" is a tautology.

The "harmless foul" of sports is not analogous to the "harmless error" rule of trial practice. The harmless error rule operates to excuse judicial

65. See Berman, *supra* note 11, at 1341.

66. See Berman, *supra* note 11, at 1341.

67. Berman, *supra* note 11, at 1336 ("[I]nsofar as penalties are designed to serve a compensatory or restitutionary function, we have reason not to impose them when they would work substantial overcompensation.") (emphasis removed).

68. Berman, *supra* note 11, at 1341 ("[N]on-enforcement might be warranted if, for context-specific reasons, enforcement of a penalty in a particular case would be unusually costly to the rule breaker (or to other interests), or if non-enforcement of the penalty on this occasion would weaken the deterrent force of the rule to an unusually small degree.").

69. Berman, *supra* note 11, at 1340 ("'No harm, no foul' is often invoked to urge that a penalty not be imposed even when the relevant rules provide that harm is not required for the foul or for the consequent penalty . . .").

70. NAT'L HOCKEY LEAGUE, OFFICIAL RULES § 7, R. 56 (2012), available at [http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13\\_RuleBook.pdf](http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13_RuleBook.pdf).

71. OFFICIAL RULES OF THE NAT'L BASKETBALL ASS'N R. 12(B), § I (2012), available at [http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13\\_NBA\\_Rule\\_Book.pdf](http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13_NBA_Rule_Book.pdf).

72. OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT'L FOOTBALL LEAGUE R. 8, § 5 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf> (explaining the ten-yard penalty).

73. *Id.*

mistakes where the mistake did not appear to impact the outcome of the trial.<sup>74</sup> The harmless error rule thus promotes the goal of finality, precluding needless re-trials in the pursuit of procedural perfection.<sup>75</sup> However, this excused error is available only upon appellate review—it cannot generally be invoked in the midst of trial.<sup>76</sup> A trial judge may not overrule a proper objection to witness testimony because the testimony, though impermissible, will not substantially affect the outcome of the trial.<sup>77</sup> At that moment, the trial judge cannot precisely ascertain the error’s ultimate effect on the verdict. It is only on appeal that another judge, assessing the trial as a whole, can declare with some certainty that the error was in fact harmless or not.<sup>78</sup>

In sports, all rulings happen in the midst of the game. A seemingly inconsequential decision, like calling “ball four” in the second inning with two outs and no runners on base, could in retrospect have been the call that initiated a five-run inning. A touch foul in the first quarter of a basketball game may begin the eventual process of disqualifying a key player, or it may ignite a rally that gives one team an insurmountable lead.

“You never know, even when you know,” Yogi tells us. The concept of “harm” cannot be used in the same sense in sports as it is used in the harmless error doctrine. Harmless error examines the effect of the error on the outcome of the trial, or in some other review capacity.<sup>79</sup> Harm in sports, because it must be assessed during play, refers to the conduct’s harm to the game itself. The rules of the game define what “harm” is in the game sense. Harm is already encapsulated in the game rules, where it must be.

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74. 28 U.S.C. § 2111 (2012) (judicial procedure harmless error rule); *see also* FED. R. CIV. P. 61 (harmless error rule).

75. *See* United States v. Lutwak, 344 U.S. 604, 619 (1953) (“A defendant is entitled to a fair trial but not a perfect one.”).

76. *See* 28 U.S.C. § 2111 (2012).

77. *See* FED. R. EVID. 402 (irrelevant evidence is inadmissible).

78. *See* FED. R. CIV. PRO. 61 (harmless error rule); *e.g.*, Arizona v. Fulminante, 499 U.S. 279, 297 (1991) (“Our review of the record leads us to conclude that the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the admission of [the] confession . . . was harmless error.”).

79. *See, e.g.*, Rose v. Clark, 478 U.S. 570, 577 (1986) (“Despite the strong interests that support the harmless-error doctrine, . . . some constitutional errors require reversal without regard to the evidence in the particular case.”).

*C. The Myth of the Clutch Hitter*

Temporal variance in referee decisions is suspect along another dimension. To the outsider, the late-game foul or other mishap is outcome determinative.<sup>80</sup> “He cost us the game,” fans lament. But players will often publicly correct that misapprehension, stating that improved play or better results along any number of dimensions would have been just as impactful on the team’s chances of victory.<sup>81</sup> “Win as a team, lose as a team,” as the coach will say. These sentiments are more than just empathy; they are true. People tend to view the last event as the causal event.<sup>82</sup> We think the straw that broke the camel’s back must be one heavy piece of straw.

Games can be lost at any juncture, which is why starting pitchers in baseball earn salaries significantly larger than relief pitchers, even those “closers” who specialize in working only the final innings of close games.<sup>83</sup> Nonetheless, baseball teams do pay a premium for ninth-inning specialists.<sup>84</sup> Even allowing for the premium paid to top-level starting pitchers, it is likely that professional baseball teams pay more on a per-inning basis for the ninth inning than for any other single inning. Team leaders seek to avoid the psychological harm to their players that flows from gut-wrenching losses, where leads are surrendered at the latest moment. Aside from psychology, the innings should all be the same. Mathematically they are. Allowing the opponent to score three runs is as damaging to a team’s prospects at victory whether it takes place in the first inning or the fifth or the ninth.

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80. See Berman, *supra* note 11, at 1346 (“[G]enerally speaking and all else equal, events have greater impact on the outcome of a game—good things contribute more to victory, and bad things are more costly—when they occur later in close contests.”).

81. See, e.g., Sekou Smith, *One Play Can’t Cost You a Game . . .*, NBA HANG TIME BLOG (May 15, 2012, 10:01 AM), <http://hangtime.blogs.nba.com/2012/05/15/one-play-cant-cost-you-a-game/> (Kevin Garnett was called for an offensive foul on a moving screen with ten seconds left to play in a game where his team was down by three points. After initially stating, “I just thought in that situation you let the players decide the game,” he conceded that his mistake was one of many that led to the final outcome.); see also Berman, *supra* note 11, at 1344–45.

82. See, e.g., Barbara Barker, *Lavonte David’s Personal Foul Penalty Costs Buccaneers Dearly*, NEWSDAY, <http://www.newsday.com/sports/football/jets/lavonte-david-s-personal-foul-penalty-costs-buccaneers-dearly-1.6034254> (last updated Sept. 8, 2013, 8:52 PM).

83. See *Baseball Salaries for 2013*, NEWSDAY, <http://data.newsday.com/long-island/data/baseball/mlb-salaries-2013/>.

84. See *id.*; Tyler Kepner, *The Closer: Not Quite as Important as You Think*, N.Y. TIMES (Sept. 5, 2013), [http://www.nytimes.com/2013/09/06/sports/baseball/theres-rivera-and-theres-everyone-else.html?\\_r=0](http://www.nytimes.com/2013/09/06/sports/baseball/theres-rivera-and-theres-everyone-else.html?_r=0).

This proposition flies in the face of conventional wisdom. Some baseball teams pay premiums for gutty closers “immune to pressure.”<sup>85</sup> Basketball stars develop reputations for “taking the big shot.”<sup>86</sup> Some athletes perform best when the pressure is on, on the biggest stage, in the clutch, and so forth. Yet (allowing for small sample sizes) modern mathematical analysis disproves the convention.<sup>87</sup> Players perform according to their abilities regardless of game conditions.<sup>88</sup> The mediocre batter who nonetheless produces a high number of runs batted in (RBI’s) is not a superior clutch hitter: he is merely a mediocre hitter who is lucky to bat when his teammates are on base.<sup>89</sup> A pitcher’s earned run average is more a product of the team’s defense and luck on balls in play than the pitcher’s skill.<sup>90</sup> The entire “Moneyball” era is built on the proposition that “clutchiness” is a fiction and that an athlete’s performance can be assessed only by treating all game events, no matter when they occur, as a trial indistinguishable from any other.<sup>91</sup>

Referees need to catch up with modern mathematical analysis. When they swallow their whistles at the end of games, or decline to call fouls in order to “let the players decide the game,” they are treating the ninth inning differently from the first. They do not want to decide the game, yet the fact that they made calls that benefitted one team earlier in the contest but fail to make those same calls later on, when they might benefit the opponent, does decide the game. A pass-interference call in the end zone or a “spot” foul

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85. See, e.g., Jeff Bradley & Curry Kirkpatrick, *The Late*, ESPN, <http://sports.espn.go.com/espn/magazine/archives/news/story?page=magazine-20011112-article52> (last updated July 10, 2012, 1:56 PM) (describing closer Mariano Rivera as “immune to pressure”).

86. See, e.g., Jason King, *King’s Court: The Perfect Player*, ESPN (Feb. 13, 2013), [http://espn.go.com/mens-college-basketball/story/\\_id/8942622/how-build-perfect-player-college-basketball](http://espn.go.com/mens-college-basketball/story/_id/8942622/how-build-perfect-player-college-basketball) (describing Tim Hardaway Jr. as the perfect shooting guard for always “[t]aking the big shot”).

87. “Moneyball theory” is based on “sabermetrics,” the mathematical and statistical analysis of baseball records, which favors rigorous statistical analysis in evaluating a player’s probability of success over subjective indicators often employed by league scouts, such as quickness and mental toughness. See generally MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003); BILL JAMES, *THE BILL JAMES BASEBALL ABSTRACT* (1983) (“The subject of the book is sabermetrics; SABR for the Society for American Baseball Research, Metrics for measurement, with an extra “e” thrown in so you can pronounce it.”).

88. See generally LEWIS, *supra* note 87.

89. *Id.*

90. *Id.*

91. *Id.*

that awards the offensive team with the ball at the spot of the foul (or at the one-yard line if it occurred in the offensive end zone)<sup>92</sup> confers on the offense a very substantial gain and leads to a near-automatic touchdown.<sup>93</sup> Such a call that nearly always has a large impact on the game, no matter when it occurs. Referees need to treat the entire game equally, lest their increased leniency in the game's closing stages changes the statistical probabilities that were in play throughout the contest.

Sports law is a great teacher. The reasons that suggest sports rules cannot be easily temporized or contextualized by the game's situation cast some doubt on the contextualization of antitrust law. The modern resort to "rule of reason" analysis promises temporal variance in the application of the Sherman Act's prohibition on conspiracies in restraint of trade.<sup>94</sup> A business arrangement that is legal in one product market at one point in history might be illegal in another market at the same time or at another time.<sup>95</sup> The comparison of positive and negative effects on consumer welfare of a rearrangement of market competitors will vary according to the vulnerability of that consumer welfare in any particular market. For example, a business merger in a market where consumers exhibit elastic demand for complementary goods will have a distinctly different effect on consumer welfare than will that merger in a market where consumer demand is relatively inelastic across few complementary goods.<sup>96</sup>

In short, the rules of antitrust law share the characteristics of sports rules in that neither should be enforced depending on the "game's" context. Antitrust law is not a trivial rule that is inconsequential to the competitive desiderata of the economy; it is as fundamental to the game, so to speak, as

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92. OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT'L FOOTBALL LEAGUE R. 14, § 1, art. 5 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf> (explaining the ten-yard penalty).

93. See, e.g., Bob Baum, *Lions Taper Off After Solid First Half, Lose 25–21 on the Road to Cardinals*, NEWSER (Sept. 15, 2013, 8:04 PM), <http://www.newser.com/article/da8r5id00/lions-taper-off-after-solid-first-half-lose-25-21-on-the-road-to-cardinals.html>.

94. See 15 U.S.C. § 1 (2012).

95. See, e.g., *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For*, DEPT. OF JUSTICE, available at <http://www.justice.gov/atr/public/guidelines/211578.pdf> (last visited Oct. 4, 2013) (noting that as of 1890, the Sherman Act prohibited competitors from fixing prices—an act that was once legal); see Bradley W. Crandall, *The DirectTV NFL Sunday Ticket: An Economic Plea for Antitrust Law Immunity*, 79 WASH. U. L.Q. 287, 292 (2001).

96. See generally Peter Kilby, *An Entrepreneurial Problem*, 73 AM. ECON. REV. 107, 108 (1983) (explaining the effect of elastic and inelastic demands).

is the definition of a strike in baseball. Antitrust law provides the most basic rule of a free-market economy, stipulating that there will be open competition and trading unhindered by monopolies or conspiracies in restraint of trade.<sup>97</sup> As with sports law, no readily discernible outside principle or “spirit” should be imported to modify its basic commands. Antitrust law does not rely on a culture apart from its provisions; instead, its provisions express a culture—one that favors free and open competition as a means to ensure the supply of goods and, most likely, a significant degree of political liberty.<sup>98</sup> Violations of antitrust law should not be regarded as “harmless,” and those charged with enforcing antitrust laws should not wait for the “straw that breaks the camel’s back” before imposing liability or a conviction. Judges refereeing antitrust disputes are in the middle of the game.<sup>99</sup> They cannot know if their decision to permit or prohibit a certain business arrangement will have a large or small impact on a national or even an international industry going forward any more than an umpire in the second inning of a baseball game can predict if his call of “safe” will lead to a rally that puts a close game out of reach.<sup>100</sup> In short, nothing inherent in the rules of sport or in antitrust law suggests that temporal variation in the application of those rules is what the game designers had in mind. Instead, the categorical expression of sports rules and antitrust laws suggests the opposite.

### III. WHAT IS A PENALTY?

Apart from arguing that the nature of sports rules favors their varied application, proponents of temporal variance also cite the inflexibility of penalties<sup>101</sup> and their uneven impact on the game as a reason for officials to referee with an eye on the scoreboard.<sup>102</sup> Every offensive holding penalty in

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97. See 15 U.S.C. § 1 (2012); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 288 (1989) (“[T]he debates appear to indicate a widespread congressional commitment to the long-established ideals of economic opportunity, security of property, freedom of exchange, and political liberty, and considerable hope that antitrust law might prove to be an effective vehicle for their substantial, simultaneous realization.”).

98. See May, *supra* note 97.

99. *Id.*

100. *Id.*

101. See Berman, *supra* note 11, at 1359–61 (discussing the rigidity of tennis service rules).

102. See Berman, *supra* note 11, at 1346.

football exacts a ten-yard penalty and loss of a down, no matter the score, the time on the game clock, or the importance of the game, and no matter the result of the lost down.<sup>103</sup> A ten-yard penalty and loss of a down might mean little in a lopsided contest; it matters hugely if the result is to negate a long pass completion for the winning touchdown in the closing minutes of a game. Famously, NFL referees overlooked repeated and blatant holding by the offensive line during the New York Giants' improbable but thrilling last-minute drive to win the Super Bowl in 2008 against the New England Patriots, most notably on the fourth-down play resulting in David Tyree's famous "helmet catch."<sup>104</sup> Had the officials been willing to call what seemed obvious to disinterested viewers, the great play would have been negated, and the Giants' attempt at a comeback would have been seriously impaired.<sup>105</sup> The game officials likely chose not to make a call that they probably would have made earlier in the game, perhaps out of fear of intense criticism for not "letting them play" in the clutch game moments.<sup>106</sup> Uniform penalties, it is argued, simply have a nonuniform impact on the game.<sup>107</sup> Consequently, game officials need to vary their enforcement of those rules in order to iron out that nonuniformity.

This complaint is not new to fans of a more serious game, namely criminal sentencing. Sentences vary according to the nature and severity of the crime and its effect on victims.<sup>108</sup> In sports, fouls also vary along a

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103. See OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT'L FOOTBALL LEAGUE R. 12, § 1, art. 3 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf> (explaining the ten-yard penalty).

104. See Bill Simmons, *Searching for Silver Linings in Indianapolis*, GRANTLAND (Feb. 6, 2012), [http://www.grantland.com/story/\\_/id/7547184/searching-silver-linings-indianapolis](http://www.grantland.com/story/_/id/7547184/searching-silver-linings-indianapolis).

105. See *id.*

106. When game officials have called penalties or fouls in the game's clutch moments, player and media criticism has been intense. See Kelly Dwyer, *Kobe Bryant Fouls Ricky Rubio on the Game's Final Possession, No Whistle Is Blown, Lakers Win!*, YAHOO SPORTS (Mar. 28, 2013, 12:10 PM), <http://sports.yahoo.com/blogs/nba-ball-dont-lie/kobe-bryant-fouls-ricky-rubio-game-final-possession-161328117--nba.html>; Zack Pumerantz, *The 20 Worst Calls in Sports History*, BLEACHER REPORT (Aug. 16, 2012), <http://bleacherreport.com/articles/1300188-the-20-worst-calls-in-sports-history/page/6> (roughing the passer call on Ray Hamilton); see also Berman, *supra* note 11, at 1326–27 (giving the example of the infamous "foot fault" call on Serena Williams in the 2009 U.S. Open).

107. See Berman, *supra* note 11, at 1346–51.

108. See, e.g., U.S. SENTENCING GUIDELINES MANUAL (2012), available at [http://www.ussc.gov/Guidelines/2012\\_Guidelines/Manual\\_HTML/index.cfm](http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_HTML/index.cfm) (establishing presumptive sentencing ranges, which are based on the seriousness of the crime and the offender's criminal history, among other things).

similar dimension. Basketball's routine personal foul can, if more severe, be recharacterized as a "flagrant" foul, and a particularly severe foul can bring an immediate game ejection.<sup>109</sup> An inside pitch in baseball can be called a mere ball, but if deemed intentional, it can merit an umpire's warning, and if severe enough, it can even result in an immediate ejection.<sup>110</sup> In football, a defender who makes intentional contact with a punter can be called for merely "running into the kicker," worth five yards, or "roughing the kicker," worth fifteen.<sup>111</sup> In short, the nature of the offense and the harm it causes to the victim can instigate differing levels of punishment.

But in the world of criminal sentencing, the ultimate effects of a sentence on the perpetrator are not considered.<sup>112</sup> The costs of the punishment, so to speak, are not typically made an explicit consideration in assessing that punishment.<sup>113</sup> Nonetheless, these costs to the offender are real and measurable. A single year's incarceration will likely cost a high-salaried lawyer or stock-broker far more in lost income, future lost job prospects, and even disbarment than that same year will cost a menial worker who earns a low wage.<sup>114</sup> Yet the greater impact of the penalty on the wealthy lawyer or stock-broker is not regarded as legitimate grounds for varying the penalty.<sup>115</sup> If the crime merits a year's incarceration, then all pay that price, regardless of income, family status, or other considerations.<sup>116</sup>

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109. OFFICIAL RULES OF THE NAT'L BASKETBALL ASS'N R. 12(B), § IV (2012), available at [http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13\\_NBA\\_Rule\\_Book.pdf](http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13_NBA_Rule_Book.pdf).

110. OFFICIAL BASEBALL RULES R. 8.02(d) (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf).

111. OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT'L FOOTBALL LEAGUE R. 12, § 2, art. 9 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>.

112. See, e.g., 18 U.S.C. § 3553(a) (2012) (Criminal Procedure: Factors to be considered in imposing a sentence).

113. See, e.g., *Sentencing Guidelines*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 711 (2011) (describing the use of the U.S. Sentencing Guidelines and noting the factors that courts must consider in crafting a sentence); see also 18 U.S.C. § 3553(a) (2012).

114. See John R. Lott, Jr., *Should the Wealthy Be Able to "Buy Justice"?*, 95 J. POL. ECON. 1307 (1987), available at <http://www.sfu.ca/~allen/buy.pdf>; see also Jeffrey S. Parker & Raymond A. Atkins, *Did the Corporate Criminal Sentencing Guidelines Matter? Some Preliminary Empirical Observations*, 42 J.L. & ECON. 423, 426–27 (arguing that incarceration may not even be the primary method of punishment for "white-collar" criminals due to collateral consequences).

115. See U.S. SENTENCING GUIDELINES MANUAL (2012), available at [http://www.ussc.gov/Guidelines/2012\\_Guidelines/Manual\\_HTML/index.cfm](http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_HTML/index.cfm).

116. See *id.*

Impacts or consequences external to the crime itself are ignored.<sup>117</sup> On the civil side, damages are imposed in a similar fashion. It is not ordinarily a defense to a civil judgment that its collection will be ruinous.<sup>118</sup> Even impoverished defendants can suffer large, adverse judgments.

One reason why these “collateral consequences” from sanctions are not considered when imposing the sanction is because the penalties would vary according to highly contestable factors. In criminal sentencing, considering the financial effects of incarceration would result in the comparatively wealthy suffering but a few months’ imprisonment (or just a large fine) while the comparatively poor spend years in jail—all for the same crime.<sup>119</sup> In civil damages, the refusal to award damages against a bankrupt defendant would essentially allow the defendant to escape the stigmatic effect of a large award.

Similarly in sports, varying the penalty according to the game situation typically penalizes the team that has built a lead playing by the rules. Almost by definition in any late-game, clutch situation, one team enters that time period with a lead. The team has built that lead during the long portion of the game played under the normal enforcement of the rules. If referees vary the enforcement of the rules in crunch time, they unilaterally institute a new, different game. The team that gained a lead under the stipulated rules of the game might lose its lead under the new, “crunch time” rules, which might allow for rougher play or more generous definitions of success. By definition, the new, crunch-time rules cannot militate in favor of the leading team; they can only help the trailing team, or (if the lead is not overcome) at least be neutral in effect.

In short, were the matter to be put to a vote, every team with a lead entering the fourth quarter or the final minutes would favor retention of the same game conditions under which it has so far prevailed. Every trailing team would by the same logic vote to change game conditions, searching for a contest at which it might prevail.

It is the fear of asymmetric, disparate impact that leads society to disfavor the consideration of consequential matters in criminal sentencing or civil

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117. *See id.*

118. *But see* *State v. Huyck*, 49 Or. App. 1087 (1980) (vacating an order compelling payments because the record established that the defendant was financially unable to pay restitution and costs).

119. *See* John R. Lott, Jr., *Do We Punish High Income Criminals Too Heavily?*, 30 *ECON. INQUIRY* 583 (1992), available at <http://home.fau.edu/kjakee/web/L&E/PDFs/Lott-DoWePunishHighIncCrimsMore-EcInq-92.pdf>.

remedies. Certain offenders, namely those who would suffer large consequences from a criminal sentence, would unilaterally benefit from the consideration of collateral consequences. Varying the enforcement of game rules according to the time and score of the game carries a similar unidirectional, disparate impact: it always favors the team that trails in the score, and thus always tends to change the identity of the winner.

Further, such decisions to enforce special “crunch time” rules will likely impose costs at least as great as any predicted benefits. Fans of the Giants might have been delighted to learn the referees decided against calling obvious holding fouls in order to allow their team to catch up; fans of the Patriots likely felt the opposite, in equal measure. The imposition of sports penalties always creates immediate winners and losers. Unlike the vague “society” that is collectively injured by a miscarriage of criminal justice, the interests of sports fans are highly concentrated. Every decision to swallow the whistle creates pleasure and pain. In the waning moments of a Super Bowl, the pain and pleasure likely even themselves out. The referees do not minimize pain when they fail to make a call.

Antitrust penalties mirror sports penalties in that they also will vary in their severity according to the harm caused by the antitrust violation.<sup>120</sup> But like sports penalties and criminal penalties more generally, antitrust penalties vary only according to the harm imposed on others, not according to the penalty’s harm on the culpable defendant.<sup>121</sup> As far as the defendant is concerned, the penalty structure of antitrust law is inflexible. Every criminal violation leaves the offender liable for the maximum statutory penalty or prescribed guideline sentence; every civil penalty is measured by the damages caused, trebled by statutory requirement.<sup>122</sup>

By design, antitrust penalties are substantial.<sup>123</sup> They are imposed without regard to their effect on the offender. For some defendants, a sizable antitrust penalty might end its business; for others, business will continue unabated. Much like with large sports penalties in close games or in blowouts, sometimes the penalties will determine the outcome, and

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120. See, e.g., William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983); William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445 (1985); Roger D. Blair & William H. Page, “Speculative” Antitrust Damages, 70 WASH. L. REV. 423 (1995).

121. See 15 U.S.C. §§ 1–2 (2012).

122. See 15 U.S.C. §§ 1–2, 15 (2012); U.S.S.G. § 2R1.1 (2013).

123. See 15 U.S.C. § 2 (2012).

sometimes they will not matter. Neither situation provides grounds for the penalty to be modified or revoked. The decision to engage in temporal variance, specifically to decline to impose a uniform penalty where its application would be devastating to the offender, or in sports to the offender's chances of winning, itself carries substantial consequences.

In sports, the "lucky" offender gets to keep playing, and might, as in the case of the Giants, actually win a Super Bowl it "should" have lost. In business, offenders can get lucky too. A business owner who engages in conspiratorial anticompetitive conduct in an industry with thick markets and elastic supply will get away with his misconduct because of the explicit contextualization of antitrust law brought about by the rule of reason.<sup>124</sup> Yet again, this temporal variance is a mistake. There was harm, if not in the relevant market, then in the competitive economy more generally, as investments, inputs, and labor are marginally drawn to a business or industry that should have suffered a substantial antitrust penalty, but for its luck.

#### IV. TEMPORAL VARIANCE IS REVERSED AFTER REVIEW

Finally, proponents of temporal variance make another mistake. They perceive variance in the application of rules as an advance in jurisprudence. For instance, the common story of antitrust law discusses its evolution or development from the "per se" rule of application to the more modern, sophisticated, highly contextual "rule of reason" approach, with the suggestion that the development represents a positive jurisprudential development.<sup>125</sup> Arguably, the movement from rule to standard represents a regression. Again, think of sports.

In the world of sports, it appears that temporal variance, a subset of official discretion, is on its way out. Recent years have witnessed the dawn of technological refereeing.<sup>126</sup> Instant replay corrects mistakes. Notably, the "mistakes" caught by instant replay are defined as a violation of the written rules, without variance for the circumstances of the particular game: the

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124. See generally Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009).

125. See Stucke, *supra* note 124, at 1387–1410, 1416.

126. See George Schweitzer, *The Birth of Instant Replay*, CNET (Dec. 7, 2011, 7:45 AM), [http://reviews.cnet.com/8301-19727\\_7-57337961-10170017/the-birth-of-instant-replay/](http://reviews.cnet.com/8301-19727_7-57337961-10170017/the-birth-of-instant-replay/) (noting the Army–Navy football game televised on CBS on December 7, 1963, as the first time instant replay was used in a sports broadcast in the United States).

replay machine does not factor in the score. Although replay was initially used mostly for those umpire judgments that were more objective in nature, increasingly replay review is employed for calls that involve more judgment and discretion.<sup>127</sup> In professional football, instant replay is used to determine whether or not a “catch” was made.<sup>128</sup> Replay is used in basketball to decide whether or not shots were launched in time before the shot clock expires.<sup>129</sup> In baseball, replay is employed to determine catches on trapped balls.<sup>130</sup> How long until technology replaces the human eye for such important, yet routine, calls such as balls and strikes in baseball, ball spotting in football, and the charge call in basketball?

Instant replay reversals show the harshness of penalties. In the NFL, the replay system for most of the game is triggered by a coach’s decision to challenge a call.<sup>131</sup> Since the coach is given only three opportunities to challenge in a game,<sup>132</sup> coaches reserve those challenges for the plays that are most impactful, such as a large gain in yardage or a touchdown. As a result, any reversal of a call due to instant replay review is likely to be most “unfair”; a minute mistake or misstep by the one team can cost it significantly.<sup>133</sup> The challenge-replay system thus, in effect, increases the

127. See, e.g., *MLB Considering Wider Expansion of Instant Replay*, CBS SPORTS (Nov. 8, 2012, 12:29 AM), <http://www.cbssports.com/mlb/story/20875664/mlb-considering-wider-expansion-of-instant-replay> (discussing the expansion of the use of instant replay in baseball).

128. See OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT’L FOOTBALL LEAGUE R. 15, § 9 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>.

129. See OFFICIAL RULES OF THE NAT’L BASKETBALL ASS’N R. 13 (2012), available at [http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13\\_NBA\\_Rule\\_Book.pdf](http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13_NBA_Rule_Book.pdf).

130. See David Lennon, *Bud Selig Set to Expand Instant Replay for 2013 Season*, NEWSDAY (Oct. 27, 2012, 8:35 PM), <http://www.newsday.com/sports/columnists/david-lennon/bud-selig-set-to-expand-instant-replay-for-2013-season-1.4160758> (discussing current instant replay rules and proposed expansion).

131. The fact that, during the key last two minutes of a game, all replays, without limitation, are instigated by a neutral official provides greater evidence that the aim of instant replay is to eliminate mistakes, even intentional mistakes, that might be the product of temporal variance. The NFL does not want its officials to vary from any part of the rulebook during crunch time. See OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT’L FOOTBALL LEAGUE R. 15, § 9 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>.

132. See *id.*

133. See, e.g., Calvin Watkins, *Dez Bryant on Wiped-Out TD Catch: “My Heart Just Dropped,”* ESPN (Oct. 28, 2012, 9:39 PM), [http://espn.go.com/blog/dallas/cowboys/post/\\_id/4700371/dez-bryant-on-the-wiped-out-td-catch-my-heart-just-dropped](http://espn.go.com/blog/dallas/cowboys/post/_id/4700371/dez-bryant-on-the-wiped-out-td-catch-my-heart-just-dropped) (reporting that the Dallas Cowboys’ otherwise game-winning touchdown was reversed because part of the receiver’s hand touched out of bounds before he landed with possession of the ball).

impact of uniform rules and penalties. It actually exacerbates the effect of invariance in sports officiating. It cannot be said, given the increasing popularity of technological umpiring, that the supposed preference for “letting them play” in crunch time reflects the popular trend.

Why would game designers want to exacerbate the effect of uniform penalties? Why would the NFL even create a special rule for the last two minutes of every game that makes “booth review” automatic regardless of a coach’s desire to challenge a call, thus guaranteeing absolute temporal invariance at the very moment proponents of temporal variance would most expect to witness its employment?

To understand the very strong commitment of the NFL, and increasingly other professional sports leagues, to the ideal of temporal invariance in the strict application of the rulebook, we need to attempt a general taxonomy of game penalties in sports. Much like legal sanctions, sports penalties serve several purposes. They discourage or deter rule violations by imposing a sufficient cost. They exact retribution against the guilty. Through player disqualification, they even incapacitate the recidivist. Sports penalties serve all the standard functions and purposes of criminal sanctions.<sup>134</sup>

Yet sports penalties also have to perform all the necessary remedial functions of civil remedies as well. Like tort remedies, sports penalties sometimes compensate the innocent team by restoring the status quo ante—for instance, by awarding the offensive basketball team the ball at the point to which it advanced before the foul.<sup>135</sup> Sports penalties also mirror contract remedies by awarding the victim who has suffered a broken promise with an “expectancy” that replaces the fulfilled promise—for instance, where defensive pass interference in football awards the offensive team with possession of the ball where it would have been spotted had the interference not occurred.<sup>136</sup> Finally, sports penalties sometimes serve a restitutionary goal, stripping a team of its enrichment acquired through “unjust” means—such as when a “block in the back” is called, the penalty is measured from the spot of the foul.<sup>137</sup> So even if a kickoff return was run all the way down

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134. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 69–75 (2005).

135. See OFFICIAL RULES OF THE NAT’L BASKETBALL ASS’N R. 10 (2012), available at [http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13\\_NBA\\_Rule\\_Book.pdf](http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13_NBA_Rule_Book.pdf).

136. See OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT’L FOOTBALL LEAGUE R. 8, § 5, art. 4 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>.

137. See *id.* at R. 12, § 1, art. 3, A.R. 12.2.

the field for a touchdown, the ball is placed where the foul occurred. Thus, the rule separates legitimate gains from illegitimate ones, much like the “tracing” rules courts follow with civil restitution remedies.<sup>138</sup>

If we understand the advent of instant replay review as a quest for perfection in umpiring as well as a subtle negation of temporal variance in referee decision-making, then it is remarkable to see which remedial purpose instant replay (so far) appears designed to promote. Of the various remedial functions of sports penalties, it is the restitution interest on which replay focuses.<sup>139</sup> As noted above, the “challenge” system currently used in the NFL provides the coaches with an incentive to further the restitution interest.<sup>140</sup> Because coaches are allotted only two initial challenges per game (a third challenge is awarded if the prior two challenges were successful)<sup>141</sup> and because a “wrongful” challenge results in a penalty of loss of timeout on the challenging team,<sup>142</sup> coaches are wise to throw the red challenge flag only where the potential gain from a reversed call is worth it. Depending on the coach’s certainty that a bad call was made, a challenge will obviously be more valuable the more the previous play helped the opposing team. Coaches commonly challenge the spot of the ball on a key first down, or the “catch” ruling on a big gain, or a “non-catch” ruling that might be impactful. Until this season, challenge flags were routinely thrown on questionable calls that resulted in touchdowns. The NFL now automatically reviews all scoring plays, meaning the NFL now will review every “enrichment” to see if it was “unjustly” acquired, with an eye to disgorging the benefit.<sup>143</sup> Similarly, baseball umpires will resort to replay to review home runs,<sup>144</sup>

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138. Just like legal penalties, sports penalties often serve more than one remedial interest. See Berman, *supra* note 11, at 1341; L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 52–54 (1936) (discussing the principal purposes in awarding contract damages).

139. See OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT’L FOOTBALL LEAGUE R. 15, § 9 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>.

140. See *id.*

141. See *id.*

142. See *id.*

143. See *id.*

144. *GMs Vote 25–5 to Use Replay to Aid Home Run Decisions*, ESPN, <http://sports.espn.go.com/mlb/news/story?id=3096923> (last updated Nov. 7, 2007, 2:23 AM); Jack Curry, *Baseball to Use Replay Review on Homers*, N.Y. TIMES (Aug. 26, 2008), [http://www.nytimes.com/2008/08/27/sports/baseball/27replay.html?\\_r=0](http://www.nytimes.com/2008/08/27/sports/baseball/27replay.html?_r=0).

basketball referees will check the monitors to see if a last-second, game-winning shot left the shooter's hands in the nick of time.<sup>145</sup>

The focus for perfection in sports officiating—namely the focus on the prevention of unjust gain, and less so on penalties that would merely restore the status quo ante, vindicate a “promise,” or punish a wrongdoer<sup>146</sup>—supplies a telling refutation of “temporal variance” school: restitutive remedies are the most “unfair.” They are the most likely to elicit an outraged response from fans. They are the most “intrusive” call for a referee.

For instance, a call that merely awards the football team a chance to replay the down, or the basketball team a chance to inbound the ball from its last point of advancement, draws comparatively little ire. But when a football referee calls a catch in the offensive end zone, awarding the offensive team a touchdown, fan response and announcer commentary can be highly negative if the call is reversed. The new, restitutive call of “incomplete” via instant replay can be “unfair”: a comparatively slight or barely perceptible amount of movement of the ball in the hands of the receiver can result in a huge disgorgement of gain.<sup>147</sup>

The desire of officials to supplant the highly specific rules for a more general standard, a standard that recognizes substantial compliance with the requisites of a “catch” and that makes allowance for the game clock and the scoreboard, is thwarted by the replay system.<sup>148</sup> The replay procedure empowers officials to reverse difficult calls on the closest of considerations, no matter the hometown fan reaction. Notions that might cabin legal remedies, such as materiality, do not hinder sports adjudicators. Even the slightest variance from the rule can carry outsized consequences.

The fact that the NFL and, increasingly, the other professional sports

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145. See OFFICIAL RULES OF THE NAT'L BASKETBALL ASS'N R. 13, § II(a)(1) (2012), available at [http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13\\_NBA\\_Rule\\_Book.pdf](http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13_NBA_Rule_Book.pdf).

146. Replay is also sometimes used in service of the “incapacitation” goal (to prevent the offender from committing future offenses). See, e.g., OFFICIAL RULES OF THE NAT'L BASKETBALL ASS'N R. 13, § II(a)(3) (2012), available at [http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13\\_NBA\\_Rule\\_Book.pdf](http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13_NBA_Rule_Book.pdf) (allowing officials to use replay technology to assess flagrant fouls that might result in extraordinary penalties or even game suspensions). This practice suggests that game designers recognize the unique punitive nature of incapacitating penalties.

147. See, e.g., Watkins, *supra* note 133.

148. See Berman, *supra* note 11, at 1360–64 (proposing that foot faults in tennis be treated as a standard rather than a “hard-edged” rule under certain circumstances).

leagues are turning to instant replay—and focusing that replay in an effort to disgorge unjust enrichments—does not by itself preclude temporal variance by referees on other, less important umpiring calls. In the NFL, for instance, referees still call pass interference penalties without replay review,<sup>149</sup> and those decisions can certainly be highly impactful on the teams' respective probabilities of winning. In the NBA, calls on the “charge/block” game action are not replayed;<sup>150</sup> nor are baseball “safe/out” calls.<sup>151</sup>

Technological limitations, the leagues' interests in a speedy game, and even an allowance for human error all might (so far) have combined to restrict replay to the most objective and consequential calls.<sup>152</sup> Yet the advent and growing popularity of replay review do suggest that the trend in game design is toward less, not more, discretion in officiating. Game referees may often heed the call to “let them play” in the waning minutes of a close game to make sure that the magnitude of the consequences is roughly proportional to the magnitude of the violation. It is precisely that tendency on the part of the referees, however, that replay review seems designed to preclude.

Thus, sports rules and instant replay suggest that the modern position favors the enforcement of rules with little regard to their consequences. Antitrust law's evolution appears retrograde in comparison.

#### V. IN FAVOR OF INVARIANCE IN SPORTS AND ANTITRUST OFFICIATING

A sport can be a multi-billion-dollar business, or a sport can be nothing more than a game that children make up in the yard. In either case, sports are pure inventions. It is no more necessary that three strikes make an out

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149. See OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT'L FOOTBALL LEAGUE R. 15, § 9 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>.

150. See OFFICIAL RULES OF THE NAT'L BASKETBALL ASS'N R. 13 (2012), available at [http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13\\_NBA\\_Rule\\_Book.pdf](http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13_NBA_Rule_Book.pdf).

151. OFFICIAL BASEBALL RULES R. 9.02(a) (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf) (“Any umpire's decision which involves judgment, such as, but not limited to, whether a batted ball is fair or foul, whether a pitch is a strike or a ball, or whether a runner is safe or out, is final.”).

152. See *MLB to Expand Instant Replay in 2014*, ESPN, [http://espn.go.com/mlb/story/\\_/id/9570618/mlb-expands-instant-replay-2014-include-manager-video-challenges](http://espn.go.com/mlb/story/_/id/9570618/mlb-expands-instant-replay-2014-include-manager-video-challenges) (last updated Aug. 15, 2013, 9:04 PM) (noting that one of Baseball Commissioner Bud Selig's main concerns with expanding instant replay was the possible slowing of games).

than it is that a first down requires ten yards. All sports rules are ultimately arbitrary. They have no meaning or purpose apart from the game itself. It is not “wrong” to serve outside the boundary in tennis in any sense other than in reference to tennis. The rules of law are obviously different. They capture moral intuitions and societal norms. Violations can impact non-participants and even cause volatility in social harmony. It makes sense that sentences should be individualized in criminal dispositions, where personal harm typically stems from both the violation and from the remedy.<sup>153</sup>

Both the rule of law and the rules of sport are justified in part by the consent of the participants. In sports, the rules of the game represent the formal limits of that consent. Participants agree to play the game as it is defined by the rules. If the rules permit body checks, as in ice hockey for example, then a participant will not have legitimate grounds to complain, or to sue, for an injury resulting from a legal body check.<sup>154</sup> The rules thus form part of a contract to which the player’s tacit agreement will be legally enforceable, typically in a tort case where an assumption of the risk defense is raised.<sup>155</sup>

Temporal variance in the enforcement of the rules implies a degree of subjectivity and ambiguity, which is in tension with the idea of consent. Many sports rules are designed to ensure player safety, especially in the more violent contact sports. The rules define how a player may permissibly do bodily harm to his opponent, such as by tackling or body checking or boxing out. For game officials to vary the enforcement of the rules according to the score and time of the game sends a signal over time to participants that the rules designed for their safety may not be enforced uniformly at all times. In crunch time, illegal body checks or overly aggressive tackling will be permitted so that the game is not unduly affected by referees’ decisions. Of course, the game is being affected by a refereeing decision, specifically the decision to let a game-changing violation of the

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153. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957 (1991) (discussing proportionality review under the Eighth Amendment of the U.S. Constitution).

154. See generally Daniel E. Lazaroff, *Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition*, 7 U. MIAMI ENT. & SPORTS L. REV. 191 (1990).

155. See, e.g., *Avila v. Citrus Cmty. Coll. Dist.*, 38 Cal. 4th 148, 166 (2006) (noting that “the boxer who steps into the ring consents to his opponent’s jabs; the football player who steps onto the gridiron consents to his opponent’s hard tackle; the hockey goalie who takes the ice consents to face his opponent’s slapshots; and, here, the baseball player who steps to the plate consents to the possibility the opposing pitcher may throw near or at him”).

rules go unpunished. With respect to the legal fiction of consent, typified in tort law by an assumption of the risk, the decision to vary the rules along an explicitly subjective dimension erodes the claim that the participants understood the risks to which they were exposing themselves.

In fact, game designers appeared to be aware of the tendency of game officials to engage in temporal variance in officiating. In some instances, the designers enacted rule changes aimed directly at minimizing or eliminating that discretion, as discussed above with reference to instant replay in sports.<sup>156</sup> In other instances, like the following examples, the designers were more subtle, long ago implementing rules that would have the effect of precluding or at least discouraging temporal variance in officiating.

A. “*And One*”

Basketball has an odd rule on shooting fouls. A player who is fouled while shooting the basketball gets to try a free throw, even if his shot attempt was successful.<sup>157</sup> This is odd. Other sports waive the foul if the attempt succeeds. In football, for instance, a defensive holding call will be declined by rule if the result of the play was a touchdown.<sup>158</sup> Even if the result was less than a touchdown, the offensive team has an option to decline the penalty in most circumstances.<sup>159</sup> In hockey, a delayed whistle on an infraction allows the victimized team a quick chance to pull its goaltender and put an extra skater on the ice.<sup>160</sup> If the result of the delayed call is a goal

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156. See *supra* notes 135–43. One could also understand the modern trend to “codify” common law subjects as efforts to restrain judicial discretion. For example, the Federal Rules of Evidence were enacted precisely for this purpose, among others. See, e.g., FED. R. EVID. 102 (“These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”).

157. See OFFICIAL RULES OF THE NAT’L BASKETBALL ASS’N R. 12, § I(e)(3) (2012), available at [http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13\\_NBA\\_Rule\\_Book.pdf](http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13_NBA_Rule_Book.pdf).

158. See OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT’L FOOTBALL LEAGUE R. 14, § 1, art. 14 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>.

159. See *id.* R. 14, § 6 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>.

160. See NAT’L HOCKEY LEAGUE, OFFICIAL RULES 25.3, (2012), available at [http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13\\_RuleBook.pdf](http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13_RuleBook.pdf); see also, e.g., James O’Brien, *NCAA Considers Delayed Penalty Rule Change; Should the NHL Alter Penalty Shots?*, NBC

for the victimized team, then the penalty is waived.<sup>161</sup>

Yet basketball both enforces the call (with a single foul shot, exactly half the penalty) and counts the result of the foul if it favors the victimized team (if the shot goes in). If the shot misses, then the result is also counted, in that no points are awarded, but the victimized team is now awarded two free throws.<sup>162</sup> This whole approach to shooting fouls is odd, not seen elsewhere in major American sports.<sup>163</sup>

This odd rule in basketball suggests that the game designers want the referees to ignore consequences in calling shooting fouls. The shooting attempt is probably the most consequential single act on the basketball court; thus the decision about whether or not to call a shooting foul stands among the most important of a referee's decisions. While most sports have a specific rule that allows officials to waive a penalty, there is no such rule for shooting fouls in basketball.<sup>164</sup> The shooting foul is supposed to be called and a penalty shot awarded regardless of the result of the play.

Presumably this unique rule furthers the deterrent function of sports penalties and serves as a punishment for rough, illegal play. For game officials to look to the result of the shot to determine whether or not to award free throws frustrates this function. Similarly, for game officials to look at

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SPORTS (June 16, 2010, 11:35 AM), <http://prohockeytalk.nbcsports.com/2010/06/16/ncaa-considers-delayed-penalty-rule-change-should-the-nhl-alter-penalty-shots/>.

161. See NAT'L HOCKEY LEAGUE, OFFICIAL RULES R. 15.2 (2012), available at [http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13\\_RuleBook.pdf](http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13_RuleBook.pdf).

162. See OFFICIAL RULES OF THE NAT'L BASKETBALL ASS'N R. 12, § I(e)(4) (2012), available at [http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13\\_NBA\\_Rule\\_Book.pdf](http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13_NBA_Rule_Book.pdf).

163. Penalties in football that happen on touchdowns or on extra points that are assessed on the ensuing kickoff do operate like the shooting foul rule in basketball, as the victimized team gets both the benefit (or the burden) of the results of the scoring play while the penalty is nonetheless assessed. See OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT'L FOOTBALL LEAGUE R. 14, § 1, art. 14 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>. This rule in football, however, is seldom in play, at least as compared to the ubiquitous shooting foul in basketball, and typically is reserved for actions that are not part of the scoring play itself, but stem from it, like the excessive celebration penalty. *Id.* As for penalties on the defensive team on extra points, the rule requiring assessment on the ensuing kickoff is the only practical way to disincentivize defensive penalties on extra points, lest the defense simply risk running offside every time in the hopes of timing the snap exactly and blocking the extra point. So that rule appears to be a special case.

164. See generally OFFICIAL RULES OF THE NAT'L BASKETBALL ASS'N (2012), available at [http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13\\_NBA\\_Rule\\_Book.pdf](http://www.nba.com/element/mp3/2.0/sect/podcastmp3/NBA/PDF/2012-13_NBA_Rule_Book.pdf). Indeed, according to Tommy Heinsohn, in recent years some NBA referees appear to be delaying their foul calls, waiting to see if the attempted layup goes through the hoop. Heinsohn, a former NBA player and current play-by-play analyst for Celtic broadcasts, finds this outrageous.

the scoreboard or the clock before calling a penalty also frustrates this function. The game designers want fouls called regardless of the consequences to prevent rough play.

Participants should be able to expect rough play to be penalized, and indeed may claim to expect penalization as a condition of their assumption of risk if they are injured. With plenty of examples in other sports, basketball's designers could easily have created a rule that required the referee to waive the foul if the shot attempt succeeded. That they chose not to reflects a particular commitment of basketball to eliminate rough play. Temporal variance in calling the game does not further the unwritten "spirit of the game"; allowing rough play in close games likely thwarts it.

### *B. The Infield Fly Rule*

No rule of baseball has attracted more attention and adulation from law professors than the Infield Fly Rule (IFR).<sup>165</sup> The IFR is a bit complex as compared to most sports rules.<sup>166</sup> It is counterintuitive, has a strange history,

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165. See OFFICIAL BASEBALL RULES Rs. 2.00, 6.05(e) (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf); see also, e.g., Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975); Mark W. Cochran, *The Infield Fly Rule and the Internal Revenue Code: An Even Further Aside*, 29 WM. & MARY L. REV. 567 (1988); Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*, 5 FED. SENT'G REP. 96 (1992); Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L.J. 227 (1994); Neil B. Cohen & Spencer Weber Waller, *Taking Pop-Ups Seriously: The Jurisprudence of the Infield Fly Rule*, 82 WASH. U. L.Q. 453 (2004); Anthony D'Amato, *The Contribution of the Infield Fly Rule to Western Civilization (And Vice Versa)*, 100 NW. U. L. REV. 189 (2006).

166. OFFICIAL BASEBALL RULES R. 2.00 (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf):

[An infield fly] is a fair fly ball (not including a line drive nor an attempted bunt) which can be caught by an infielder with ordinary effort, when first and second, or first, second and third bases are occupied, before two are out. The pitcher, catcher and any outfielder who stations himself in the infield on the play shall be considered infielders for the purpose of this rule. When it seems apparent that a batted ball will be an Infield Fly, the umpire shall immediately declare "Infield Fly" for the benefit of the runners. If the ball is near the baselines, the umpire shall declare "Infield Fly, if Fair." The ball is alive and runners may advance at the risk of the ball being caught, or retouch and advance after the ball is touched, the same as on any fly ball. If the hit becomes a foul ball, it is treated the same as any foul. If a declared Infield Fly is allowed to fall untouched to the ground, and bounces foul before passing first or third base, it is a foul ball. If a declared Infield Fly falls untouched to the ground outside the baseline, and bounces fair before passing first or third base, it is an Infield Fly.

presents an unessential appendage to the otherwise necessary rules of the game, and, most important of all, is a rule that mitigates the competitiveness of the game.<sup>167</sup> It has no parallel. Serious legal articles have discussed the IFR as it pertains to baseball rules, legal theory, federal taxation, and criminal sentencing.<sup>168</sup>

Some rules in baseball are necessary, such as the rules defining “out,” “fair ball,” “strike,” and so forth. A baseball game could not take place without such elementary concepts defined. But without the IFR, the game could go on. The infield fly rule applies with fewer than two outs and runners are on first and second base or on first, second, and third base.<sup>169</sup> In these situations, if a fair fly ball is hit that, in the umpire’s judgment, is catchable by an infielder with ordinary effort, the batter is out regardless of whether the ball is actually caught before it hits the ground.<sup>170</sup>

As every baseball fan knows, the purpose of the rule is to prevent the infielder from allowing the ball to fall to the ground in order to make a double play on two of the base runners.<sup>171</sup> The implicit assumption is that the runners could not reach their next base before being forced out. The rule prevents this “gamesmanship” and was implemented in response to some sharp practice in the formative years of the sport.<sup>172</sup> But, if the rule were eliminated, baseball would go on, albeit with the occasional “unsporting” double play. In other words, we could still play baseball; the IFR is not an “essential” rule to the game.

If the IFR were abolished, base runners would respond accordingly. Assume runners on first and second, one out, and the batter hits a pop-up directly to the shortstop. Today, with the IFR, the runners jog back to their bases, the batter is “out,” and the runners will not advance (unless the pop-up is dropped or they choose to run after tagging up following the catch<sup>173</sup>).

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167. See generally Cohen and Waller, *supra* note 165.

168. See, e.g., Cochran, *supra* note 165 (IFR & federal taxation); Cohen & Waller, *supra* note 165 (IFR & legal theory); Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239 (1998) (IFR & baseball rules); Berger, *supra* note 165 (IFR & federal sentencing).

169. OFFICIAL BASEBALL RULES R. 2.00 (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf).

170. *Id.* at R. 6.05(e).

171. See *The Common Law Origins of the Infield Fly Rule*, *supra* note 165, at 1478.

172. See *The Common Law Origins of the Infield Fly Rule*, *supra* note 165, at 1475–79.

173. OFFICIAL BASEBALL RULES Rs. 2.00, 7.08(d) (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf).

With no IFR, on a pop-up base runners would lead off the base, maybe a third of the way, in order to prevent the purposeful drop and double play. The shortstop could potentially complete the double play by catching the ball and throwing quickly to second or first. But the shortstop could most likely never complete the double play by allowing the ball to drop and then throwing to third with the relay to second base. The base runner on first would get to second base before the throw.<sup>174</sup> Certainly the batter would reach first base safely.

The point is that the IFR evolved from the old “trapped ball” rule to prevent players from missing the pop-up on purpose to get a double play: it was thought unsporting or ungentlemanly for a fielder to miss a catch on purpose to gain an advantage.<sup>175</sup> But if the IFR were abolished and runners could travel down the baseline on pop-ups, the only way a fielder could get an advantage would be to catch the ball and then double the runner off the base. In many cases, the pop-ups would be too hard to catch to make a quick throw feasible. But regardless, the fielder would benefit only by fielding the ball to the best of his ability.<sup>176</sup> With the IFR, baseball’s designers defined a valid, skilled baseball play, the catch and throw, to constitute illegal gamesmanship. The aim of the IFR is to remove the gain from that gamesmanship.<sup>177</sup>

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174. Undoubtedly, some routine pop-ups could result in routine double plays, especially after the players develop skill at judging the hop and making the quick throw. Routine ground balls similarly result in routine double plays. If anything, a pitcher should be rewarded for inducing the pop-up. Many routine double play ground balls are hit pretty hard. In fact, the soft grounder (the lesser hit) is less likely to result in a double play. Pop-ups are the weakest hit, better only than a strikeout. Of all hits, short of the strikeout, the pop-up “should” be the one batted ball that imparts the largest potential penalty to the offensive team and the one that gives the commensurately largest potential gain to the defense.

175. See Cohen and Waller, *supra* note 165, at 1474, 1477–79.

176. One argument in favor of the IFR differentiates a pop-up from other batted balls, such as grounders, that might result in double plays. If the IFR were eliminated, teams could essentially choose which runners it wanted on base. There really is no other way for the defense to get this choice except in an infield fly situation. In other situations, the defense has to take positive action to decide which player to force out. Infielders are also prohibited from intentionally dropping line drives in an attempt to draw a force out. See OFFICIAL BASEBALL RULES R. 6.05(l) (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf).

177. We might honestly wonder why a double play on an infield pop-up is considered unwelcome gamesmanship. Certainly a fielder, with runners on base, can glove a ground ball and turn two; indeed, this defensive play was prevalent even from the game’s founding, and was thus well known to the drafter of the rules, Alexander Cartwright, founder of the New York Knickerbockers. Roger I. Abrams, *Two Sports Torts: The Historical Development of the Legal Rights of Baseball Spectators*,

But baseball's IFR is the only rule of sport that limits or precludes a competitive play that involves athletic activity, namely catching and throwing, that lies at the heart of the skills the game requires. In other contexts, even in baseball, players may use the rules to their full advantage, and may even act anticompetitively if they perceive an advantage. For example, baseball teams customarily issue "intentional walks" by purposely pitching four consecutive balls outside the strike zone, beyond the reach of the batter. Basketball teams often foul intentionally in the game's closing minutes to increase the number of offensive possessions: those fouls will be visited upon the opposing team's poorest foul shooter. A few seasons ago, college football implemented a rule that required the game clock to keep running during kickoffs.<sup>178</sup> The rule had the unintended consequence of allowing the kicking team to run out the clock in a tight game by purposely going offside.<sup>179</sup> In golf, Tiger Woods declared a 400-pound boulder a "loose impediment" and had six men roll it out of his way.<sup>180</sup> In pro football, Bill Belichick once ordered his team to take an intentional safety by hiking the ball out of bounds rather than punt the ball from the end zone.<sup>181</sup>

All of these examples are more typical of modern sports play. Smart players and coaches may employ the rules to their competitive advantage, and may even violate the so-called competitive spirit of the game to further their chances of winning.<sup>182</sup> No one called Tiger Woods or Bill Belichick a

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38 TULSA L. REV. 433, 435 (2003). A batter who, with runners on base, hits a hard grounder to an infielder will often be part of a double play; so too will a batter who hits a line drive right at a first baseman with a runner on first. All of these double plays are "unfair" in some sense, since a well struck hit results in two outs. In both cases, good fielding is rewarded; so too would smart fielding be rewarded were there no IFR to preclude a double play on a pop-up.

178. See *Kickoff, Change of Possession Rule Changes Made*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=2835266> (last updated Apr. 12, 2007, 9:01 PM).

179. Famously, Penn State's Joe Paterno had a fit on the sideline when Wisconsin surprised the football world by running out the first half clock by repeatedly going offside. See Jack Carey, *Wisconsin Finds Loophole in Speed-Up Rule*, USA TODAY, [http://usatoday30.usatoday.com/sports/college/football/2006-11-06-clock-loophole\\_x.htm](http://usatoday30.usatoday.com/sports/college/football/2006-11-06-clock-loophole_x.htm) (last updated Nov. 7, 2006, 1:32 PM).

180. See Uzelac, *supra* note 36.

181. See *Snap Decision by Belichick Is a Case of Numbers in Safety*, N.Y. TIMES (Nov. 5, 2003), <http://www.nytimes.com/2003/11/05/sports/snap-decision-by-belichick-is-a-case-of-numbers-in-safety.html>.

182. For the record, there is no "spirit of the game." There is the game, it has rules, a beginning and an end, and that is it. Where the spirit of the game comes from escapes me. Why is it "proper sportsmanship" to replace an embedded ball but not good sportsmanship to declare an unembedded boulder a loose impediment? Both are permitted by the rules of golf. Although the rule on the latter issue is titled "loose impediment" and connotes loose pebbles, the definition fairly encompasses

bad sport, nor do people say that about the baseball coach who calls an intentional walk.<sup>183</sup> Even fakery is common in competitive play.<sup>184</sup> In the 2010 baseball season, Derek Jeter pretended to be hit by a pitch.<sup>185</sup> Fakery is ubiquitous on the NBA court.<sup>186</sup> NFL defenders will feign injury to slow the pace of the offense. In short, all sports leagues do allow athletes to read the rules sharply, employ anticompetitive tactics, and even feign harm, all in an unbridled effort at victory. Sharp practice in competitive play seems to be the competitive norm.

The IFR stands as the singular rule that explicitly precludes sharp

large boulders. Thus the rule could be restated to say that large, unembedded boulders can be moved, even if it takes a team of weightlifters to do it. That is the rule. There is no “spirit” apart from that rule. What the “spirit” people mean is that there are some outcomes to certain applications of rules that they did not think of, and so when they find out that someone else has thought of an application they did not, they charge unfairness, or sharp practice, or poor sportsmanship.

183. Woods was not called a bad sport, but I was for proposing a similar deed. Years ago I wrote columns for *Legal Times*, a lawyer newspaper. Shortly after the golfer Jean Vande Velde choked away the British Open with a disastrous final hole, I wrote in a semi-serious tone that Vande Velde could have won had he manipulated the rules on “lost balls” to his advantage. USGA RULES OF GOLF § 1 (2012), available at <http://www.usga.org/uploadedfiles/usgahome/rules/completerogbook.pdf>. If he only had a lawyer, I mused. The piece drew roughly fifty emails in response; nearly all of them basically accusing me of arguing in favor of bad sportsmanship. Even a USGA rules official wrote me just to call me a bad sport. No one said I was incorrect in my interpretation of the rules or commented on my suggestion that the rules needed to be changed lest some future competitor figure out what I had figured out. Apparently it was good form for Vande Velde just to lose the Open rather than apply a clear rule to his situation. This rule of golf (the lost ball definition) is just as much a rule as the one defining “stroke,” “hole,” or “loose impediment.” Are some rules meant to be applied literally and some not? Which ones? Could someone please tell the nerdy people so we can be careful not to counsel bad sportsmanship and generate angry emails?

184. The long-practiced deception of “flopping” in the NBA is just recently being penalized. See e.g., Stuart Miller, *League’s Action Reduces Acting*, N.Y. TIMES NBA BLOG (Feb. 14, 2013, 2:22 PM), available at <http://www.webcitation.org/mainframe.php>; Brian Windhorst, *LeBron James Sees Point to Flopping*, ESPN, [http://espn.go.com/nba/playoffs/2013/story/\\_id/9317929/2013-nba-playoffs-lebron-james-says-not-flopper-sees-advantage-flopping](http://espn.go.com/nba/playoffs/2013/story/_id/9317929/2013-nba-playoffs-lebron-james-says-not-flopper-sees-advantage-flopping) (last updated May 29, 2013, 2:26 PM). The NHL and all soccer leagues will penalize “taking a dive,” although the practice remains prevalent. NAT’L HOCKEY LEAGUE, OFFICIAL RULES § 9, R 64.1 (2012), available at [http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13\\_RuleBook.pdf](http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13_RuleBook.pdf); see FÉDÉRATION INTERNATIONALE DE FOOTBALL ASS’N, LAWS OF THE GAME 12 (2013), available at <http://www.fifa.com/mm/document/footballdevelopment/refereeing/81/42/36/log2013en%5fneutral.pdf>.

185. See Stephen Smith, *Derek Jeter “Hit” by Pitch: Savvy Play or Cheap Trick?*, CBS NEWS (Sept. 17, 2010, 9:26 AM), [http://www.cbsnews.com/8301-31751\\_162-20016785-10391697.html](http://www.cbsnews.com/8301-31751_162-20016785-10391697.html).

186. See *A Night at the Flop-Era*, SLATE (April 18, 2013, 12:30 PM), [http://www.slate.com/articles/video/slate\\_v/2013/04/nba\\_flops\\_the\\_best\\_dives\\_of\\_the\\_season\\_set\\_t\\_o\\_music.html](http://www.slate.com/articles/video/slate_v/2013/04/nba_flops_the_best_dives_of_the_season_set_t_o_music.html) (“As of the beginning of this week, 19 players on 13 teams had been cited for a total of 24 infractions, with five players being fined \$25,000 each for excessive flop-itude.”).

play.<sup>187</sup> It represents one of the very few attempts of a sports league to prevent a team from benefitting from what would otherwise be a correct play.<sup>188</sup> The fact that the IFR stands in such sharp contrast to other rules suggests that the competitive spirit of the game lies elsewhere: in the literal and exact enforcement of the rules. In other words, when the game designers wanted to countermand the competitiveness that the rules of sport require, they knew how to do so—with another rule.

The fact that the IFR is singular and an outlier suggests that game officials should be very hesitant to refer to the spirit of the game or other considerations in imposing additional singularities. They should hesitate to mitigate the competitive nature of games. But like the IFR, nearly all temporal variances in sports officiating are anticompetitive. Although the game officials might understand themselves to be promoting “fair competition,” in reality they are putting a thumb on the scale to promote the probability of a result that undisturbed competition might not have produced. Referees who “let them play” are really giving the trailing team an improved chance at victory. Line judges who refuse to call a foot fault in crunch time are mitigating the harsh competitive effect that would be occasioned by the normal application of the rule.

Because players use the rules to their advantage, referees need to call the rules strictly in order to reward the team that tries to take advantage of the rules and succeeds or to penalize that same team when it fails. Basketball players who commit fouls should be whistled for those fouls. They seek a competitive advantage by trying to impede the offensive player by contacting him as close as possible to the “line” of permissible conduct. When the line is crossed, the opposing team’s competitive reward under the same set of rules is to gain the benefit from the call. When referees refuse to

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187. The only situation where the rules allow the defense to intentionally misplay a pop-up is on a bunt. See OFFICIAL BASEBALL RULES R. 2 (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf). The rule makers believe that with a bunt, the offense has already gained an advantage by moving the defense out of position, so the sharp practice is permitted. A bunted pop-up does not tend to stay in the air very long, so the play is rare.

188. Baseball has another rule, seldom invoked, that similarly precludes strategic behavior: if a runner on base deliberately gets hit by a batted ball because he thinks it will keep his team out of the double play, the umpire can award a double play. See OFFICIAL BASEBALL RULES R. 7.09(f) (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf). Baseball has this rule on intentional conduct, but paradoxically permits the intentional walk. See OFFICIAL BASEBALL RULES Rs. 8.05(l), 10.14(b), 10.16 (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf).

call rule transgressions because games are in crunch time instead of furthering the competitive norms of the game, they impede the competition. Players compete over game rules.

### C. *Elbowing*

A vexing and pervasive legal issue involves the optimal degree of specificity with which statements of law should be expressed.<sup>189</sup> Laws can be written with great precision and particularity, or they can be expressed in more general terms, leaving some judgment and discretion to the enforcer to define the exact contours of the law in a particular case.<sup>190</sup> In shorthand, the problem is presented as a choice between a “rule” and a “standard.” The same predicament faces designers and league officers who create rules for professional sports. They must decide to what degree of specificity the rules of the game should be expressed.

Certainly the basic prescriptions of antitrust law are written as standards.<sup>191</sup> But standards need not be enforced subjectively. Standards are no more amenable to temporal variance than more precise rules are.

Many sports rules are similarly written as standards; indeed, standards work better in sports. The best-refereed contests among the four major professional sports leagues are NHL games. Although the pace of the game is very fast, referees in that sport seem to avoid the constant controversy over difficult calls that plagues the NBA with its charge/block decision; the

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189. See generally Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); see also *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 973 n.10 (1983) (White, J., dissenting) (“While Congress could write certain statutes with greater specificity, it is unlikely that this is a realistic or even desirable substitute for the legislative veto. ‘Political volatility and the controversy of many issues would prevent Congress from reaching agreement on many major problems if specificity were required in their enactments.’” (citation omitted)); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

190. See Kaplow, *supra* note 189.

191. See 15 U.S.C. § 1 (2012) (“Every contract . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”); see also, e.g., *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) (using general standards and goals to determine antitrust problem); Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 698 (1991) (“The truth is that the legislative history is remarkably fuzzy about the standards Congress expected judges to use in policing restraints on competition. Indeed, the statements of congressmen in debating the Sherman Act repeatedly evidence an express intent to delegate the formulation of such standards to the courts.”) (citations omitted).

MLB with ball/strike and out/safe calls; and the NFL with pass interference, touchdowns, ball spotting, and in-bounds catches. NHL games proceed much more smoothly. Not coincidentally, most of the NHL's rules are written as general, nonspecific standards. For example, "charging" is defined as "the actions of a player who, as a result of distance traveled . . . violently check[s] an opponent in any manner."<sup>192</sup> This rule leaves plenty of room for referee discretion. All body checks are violent and involve some distance traveled before initiation. How violent a check must be and how much distance must be traveled to constitute charging is implicitly left to the judgment of game officials. Other NHL rules are similarly expressed as standards: "hooking" is "the act of using the stick in a manner that enables a player to restrain an opponent,"<sup>193</sup> and "elbowing" is "the use of an extended elbow in a manner that may or may not cause injury."<sup>194</sup> These simple and brief rules comprise significant rules for the sport of hockey that are regularly applied. Notably, the rules of hockey seldom change,<sup>195</sup> allowing players and referees to develop a vocabulary to denote conduct that will violate the restrictions on elbowing or charging.

In contrast, highly specific sports rules are typically inapt. My case in point will be the rules of the NFL. The NFL's rules are so highly specific and so often amended that the NFL has until recently refused to make public its rulebook.<sup>196</sup> Instead, for many years the league only posted online a summary of its rules,<sup>197</sup> raising a suspicion that the NFL did not want its rules closely examined. Close examination would doubtless have brought to light inconsistencies, loopholes, ambiguities, and errors. For example, here

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192. See NAT'L HOCKEY LEAGUE, OFFICIAL RULES § 6, R. 42 (2012), available at [http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13\\_RuleBook.pdf](http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13_RuleBook.pdf).

193. See *id.* at § 7, R. 55.

194. See *id.* at § 6, R. 45.

195. Cf., e.g., Kristina M. Gerardi, *Tackles that Rattle the Brain*, 18 SPORTS LAW J. 181, 209–11 (2011).

196. Cf., e.g., *NFL Rulebook: Unnecessary Roughness*, ESPN (Oct. 19, 2010, 11:46 AM), [http://espn.go.com/blog/nflnation/post/\\_id/29969/nfl-rulebook-unnecessary-roughness](http://espn.go.com/blog/nflnation/post/_id/29969/nfl-rulebook-unnecessary-roughness) (posting an entire section of the NFL rulebook in a 2010 article rather than linking to any online version). It appears that the first online version of the rulebook that the NFL posted to their website was the 2011 rulebook. See OFFICIAL PLAYING RULES & CASEBOOK OF THE NATIONAL FOOTBALL LEAGUE (2011), available at [http://www.nfl.com/static/content/public/image/rulebook/pdfs/2011\\_Rule\\_Book.pdf](http://www.nfl.com/static/content/public/image/rulebook/pdfs/2011_Rule_Book.pdf).

197. *Rule Book: Digest of Rules*, NFL, <http://www.nfl.com/rulebook/digestofrules> (last visited Oct. 2, 2013).

is the rule for a “catch”:

A player is in possession when he is in firm grip and control of the ball inbounds . . . . To gain possession of a loose ball that has been caught, intercepted, or recovered, a player must have complete control of the ball and have both feet or any other part of his body, other than his hands, completely on the ground inbounds . . . . If the player loses the ball while simultaneously touching both feet or any other part of his body to the ground or if there is any doubt that the acts were simultaneous, there is no possession. This rule applies in the field of play and in the end zone.<sup>198</sup>

Note 1, the “going-to-the-ground” clause, adds:

A player who goes to the ground in the process of attempting to secure possession of a loose ball (with or without contact by an opponent) must maintain control of the ball throughout the process of contacting the ground, whether in the field of play or the end zone. If he loses control of the ball, and the ball touches the ground before he regains control, there is no possession. If he regains control prior to the ball touching the ground, it is a catch, interception, or recovery.<sup>199</sup>

Seldom are legal rules expressed with the kind of specificity the NFL employs throughout its rulebook.<sup>200</sup> When we do see such specific rules, for example, in the Internal Revenue Code<sup>201</sup> or laws regulating ultrahazardous substances, we also see large numbers of lawyers and administrators employed drafting the rules at the legislative or regulatory level—applying them, critiquing them, and challenging them.<sup>202</sup>

There are good reasons why very few rules in sports are expressed with

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198. OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT’L FOOTBALL LEAGUE R. 3, § 2, art. 7 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>.

199. *Id.* at R. 3, § 2, art. 7, note 1 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>.

200. See Lance W. Rook, *Laying Down the Law: Canons for Drafting Complex Legislation*, 72 OR. L. REV. 663, 666–68 (1993).

201. *Id.*

202. *Id.*

the kind of specificity the NFL routinely employs.<sup>203</sup> It is very difficult to write such rules successfully.<sup>204</sup> Highly specific rules cannot account for every possible situation.<sup>205</sup> Inevitably, the rule-writers find themselves adding qualification after qualification, rendering the rule lengthy and unmanageable.<sup>206</sup> Further, in the sports world, unlike in federal taxation or transportation of hazardous materials, rules have to be applied instantaneously by referees under stress. With tax compliance or other highly specific rules of law, lawyers bill by the hour in resolving intricate puzzles. Yet the NFL takes hundreds of words to define a “catch”—a determination children playing backyard football seem to make easily.

One consequence of the NFL’s preference for highly specific rules is that NFL games increasingly have extended moments of tedium with replay review, lengthy chatter about technical definitions and their application, and the occasional absurd outcomes.<sup>207</sup> Calvin Johnson’s obvious touchdown catch was reversed because he flipped the ball to the referee while getting up off the ground.<sup>208</sup> The replay failed to display “indisputable video evidence” that Miami came up with Ben Roethlisberger’s goal-line fumble even after the replay showed a Miami player handing the referee the ball.<sup>209</sup> A small measure of common sense and NHL-style standards would have made these calls easy. Instead, a tortured, lawyerly reading of the rulebook led NFL officials, after the games, to claim these calls were “correct” in that the officials applied the written rule correctly.<sup>210</sup>

203. In fact, a study has shown that a typical NFL game consists of only eleven minutes of actual football action. David Biderman, *11 Minutes of Action*, WALL STREET J. (Jan. 15, 2010), <http://online.wsj.com/article/SB10001424052748704281204575002852055561406.html>.

204. See Rook, *supra* note 200, at 666–68.

205. *Id.*

206. *Id.*

207. See Biderman, *supra* note 203.

208. *Calvin Johnson Touchdown Catch Overturned on Controversial Call*, HUFFINGTON POST (Sept. 12, 2010), [http://www.huffingtonpost.com/2010/09/12/calvin-johnson-touchdown-\\_n\\_713897.html](http://www.huffingtonpost.com/2010/09/12/calvin-johnson-touchdown-_n_713897.html).

209. *NFL: Officials Made Right Call on Ben Roethlisberger’s Fumble in Steelers’ Win vs. Dolphins*, USA TODAY (Oct. 28, 2010), <http://content.usatoday.com/communities/thehuddle/post/2010/10/nfl-officials-made-right-call-on-ben-roethlisbergers-fumble-in-steelers-win-vs-dolphins/1#.UPN-U7Z1FR4>.

210. See Michael David Smith, *NFL Uses Calvin Johnson Non-TD in Video Explaining Rules to Players*, NBC SPORTS (Aug. 12, 2011, 5:19 PM), <http://profootballtalk.nbcsports.com/2011/08/12/nfl-uses-calvin-johnson-non-td-in-video-explaining-rules-to-players/>; *Ex-NFL Exec: Refs Handled Call Right*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=5726781> (last updated Oct.

Undoubtedly the NFL, with then-exclusive access to its rulebook, was correct about the content of its rules. Yet the conclusion suggests that if the referees were not wrong then the rules are wrong. They are written to cover every situation, but appear to lead in some situations to absurd, probably unintended, and patently unjust results. Games have been won and lost because the written rules were inadequate to meet the question presented.<sup>211</sup>

It is the style of the rules, namely the choice to write detailed rules, that implicitly encourages game officials to practice temporal variance in their enforcement decisions. Highly specific, technical rules combined with uniform, prescribed penalties present a recipe for absurd results and unjust outcomes. Referees undoubtedly feel the need in a close contest to try to prevent, on an ad hoc basis, outcomes that are at variance with the competitive norms of the sport.

In football, instant replay review has minimized the opportunity for variance, although referees retain discretion in assessing holding or interference penalties.<sup>212</sup> On the last-second “Hail Mary” pass, however, it appears that blatant pass interference is characteristically overlooked.<sup>213</sup> Notably, pass interference decisions are not reviewable by replay; referees exercise temporal discretion in one of the few instances available.<sup>214</sup>

Outside of the ball/strike decision, umpires in baseball do not have many occasions to make close calls, and the game situation or inning does not present a clear indication by itself that they should vary their decisions on those close ones. In other words, the fact that a team is behind in the last inning does not mean a runner who is out should be called safe. Commonly, however, home plate umpires will tighten the strike zone at key moments, on the view that a “called strike three” should not be assessed on borderline pitches in the later innings of a close game.

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25, 2010, 6:39 PM).

211. See, e.g., *Ex-NFL Exec*, *supra* note 210.

212. OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT'L FOOTBALL LEAGUE R. 15, § 9 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>.

213. Josh Katzowitz, *Replacement Refs Tell “Inside the NFL” They Were Told Not to Call Pass Interference on Hail Marys*, CBS SPORTS (Oct. 4, 2012, 10:50 AM), <http://www.cbssports.com/nfl/eye-on-football/20452480/replacement-refs-tell-inside-the-nfl-they-were-told-not-to-call-pass-interference-on-hail-marys>.

214. OFFICIAL PLAYING RULES & CASEBOOK OF THE NAT'L FOOTBALL LEAGUE R. 15, § 9 (2012), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2012%20-%20Rule%20Book.pdf>.

In basketball, it seems clear that referees do “swallow their whistle” in crunch time. In short, game officials seem to use discretion, when available, to vary calls consistent with the closeness and lateness of the contest.

But in the NHL, the broad standards of most of the rules<sup>215</sup> give game officials the latitude to set a tone for the game, letting the players adjust accordingly and providing a uniform standard throughout the game, the series, and beyond. Problematically, the same latitude makes the NHL officials most often subject to charges of bias, a claim seldom heard with respect to NFL referees slavishly applying the technicalities of the rulebook. But NHL referees do not need to watch the scoreboard and game clock to make an alteration in their adjudicating. A game can be officiated in its entirety in a consistent manner. Crunch time presents no new or especially problematic set of circumstances; discretion imbues every call from the opening face-off.<sup>216</sup> The entire game can be refereed to “let them play” or to

215. One exception to the NHL’s broad standards is the new rule on interference. NAT’L HOCKEY LEAGUE, OFFICIAL RULES § 7, R. 56 (2012), available at [http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13\\_RuleBook.pdf](http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13_RuleBook.pdf).

216. Hockey’s revision of the rule on “interference” provides a case in point. The NHL’s traditional rule prohibiting interference was expressed as a standard, characteristic of the league’s preferred style. Interference constituted “impeding an opponent who does not have the puck.” See, e.g., *Hockey Rules!*, NHL LA KINGS, <http://kings.nhl.com/club/page.htm?id=41369> (last visited Oct. 3, 2013). Because NHL referees apparently were unwilling to enforce this penalty often enough, NHL games had become slow-moving affairs, favoring lumbering defensive players interfering with more mobile and athletic skaters. The NHL may have revised the penalty to overcome the referees’ collective, unconscious decision to allow interference. Regardless, the NHL made the prohibition on interference much more specific and lengthy.

Rule 56 of the Official Rules of the NHL by all appearances would fit comfortably into the NFL’s rulebook. It cautions that “a strict standard on acts of interference must be adhered to in all areas of the rink.” NAT’L HOCKEY LEAGUE, OFFICIAL RULES § 7, R. 56.1 (2012), available at [http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13\\_RuleBook.pdf](http://www.nhl.com/nhl/en/v3/ext/pdfs/2012-13_RuleBook.pdf). Interference is also defined in several ways, depending on the type or manner of the interference. *Id.*

**Body Position:** Body position shall be determined as the player skating in front of or beside his opponent, traveling in the same direction. A player who is behind an opponent, who does not have the puck, may not use his stick, body or free hand in order to restrain his opponent, but must skate in order to gain or reestablish his proper position in order to make a check.

A player is allowed the ice he is standing on (body position) and is not required to move in order to let an opponent proceed. A player may “block” the path of an opponent provided he is in front of his opponent and moving in the same direction. Moving laterally and without establishing body position, then making contact with the non-puck carrier is not permitted and will be penalized as interference. A player is always entitled to use his body position to lengthen an opponent’s path to the puck, provided his stick is not utilized (to make himself “bigger” and therefore considerably lengthening the

“keep it clean.”

What this suggests is a complex relationship between the specificity of the game rule and the temporal variance in its enforcement. The more specific a rule and its resultant penalty, the more the referee will be inclined to vary from the rulebook in game situations where enforcement would bring about a result that seems to violate the competitive norms of the game. As a result, the appearance of temporal variance in sports officiating should not be explained solely as a desirable response to the time and score of the game. A third factor, the specificity of the game rules, appears relevant.

Rules written in the form of standards, imbued with unmistakable discretion, require no temporal shenanigans. Such a rule requires reasoned application, including a judgment about the advantage gained from the infraction and the harm to be imposed on the guilty team’s chances at victory. Temporal variance is in part a response to the game designers’ efforts to preclude judgment; a response to overly specific rules, not game

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distance his opponent must travel to get where he is going); his free hand is not used and he does not take advantage of his body position to deliver an otherwise illegal check.

Possession of the Puck: The last player to touch the puck, other than the goalkeeper, shall be considered the player in possession. The player deemed in possession of the puck may be checked legally, provided the check is rendered immediately following his loss of possession.

Restrain: The actions of a player who does not have body position, but instead uses illegal means (e.g. hook with stick; hold with hands, trip with the stick or in any manner) to impede an opponent who is not in possession of the puck. Illegal means are acts which allow a player or goalkeeper to establish, maintain or restore body position other than by skating.

Pick: A “pick” is the action of a player who checks an opponent who is not in possession of the puck and is unaware of the impending check/hit. A player who is aware of an impending hit, not deemed to be a legal “battle for the puck,” may not be interfered with by a player or goalkeeper delivering a “pick.” A player delivering a “pick” is one who moves into an opponent’s path without initially having body position, thereby taking him out of the play. When this is done, an interference penalty shall be assessed.

Free Hand: When a free hand is used to hold, pull, tug, grab or physically restrain an opponent from moving freely, this must be penalized as holding. The free hand may be used by a player to “fend off” an opponent or his stick, but may not be used to hold an opponent’s stick or body.

Stick: A player who does not have body position on his opponent, who uses his stick (either the blade or the shaft, including the butt-end of the shaft) to impede or prevent his opponent from moving freely on the ice shall be assessed a hooking penalty.

*Id.*

conditions. That referees should at times resort to temporal variance in enforcing the rules does not justify temporal variance, except as it is a response to the absurd outcomes of highly specific rules.

Antitrust law, involving slow-moving business people, presents no special justification for temporal variance. Its broad legal standards<sup>217</sup> actually militate in favor of invariant application, as “unreasonable” restraints of trade can be distinguished from reasonable ones along a principled dimension that does not depend so heavily on the relevant product market conditions. That antitrust law should have evolved in precisely the opposite way,<sup>218</sup> to a point where temporal variance is the norm and not the exception, appears damaging to the creation of legal principles that would, over time, promote the vigorous market competition that antitrust law supposedly furthers.

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217. See, e.g., Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 55–56 (2007).

218. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (“The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of §1.”).

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