

“WE WERE ROBBED!”: PRAGMATIC INSTRUMENTALISM AS A LEGAL FRAMEWORK FOR DISCRETION IN PROFESSIONAL SPORTS

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Autumn is a time of year that resonates with sports fans on a deeply emotional level. As the crisp air sets in, the majesty of Major League Baseball and college football intersect in a way that is impossible to ignore. Against the backdrop of nature’s stunning display of vibrant fall foliage, the passion and fervor of sports allegiances are put to the ultimate test, igniting a fire within the hearts of fans that defies all reason. Lazy summer weekends are replaced by early-morning tailgates, raucous in-stadium crowds, and highlights on ESPN. Sports talk radio, internet message boards, and social media blare as every pundit and fan welcomes their role as the undefeated Monday-morning quarterback. Players and coaches are lauded and lamented in equal measure; team paraphernalia is purchased and then heralded or discarded for reasons of superstition; and expensive season tickets are torn up in effigy when hysterical fans declare much too early that the season is lost. Wins usher in dreams of championships and losses demand a house-cleaning. Most fans realize there is an ocean of variance between aspiration and attainment, but it never clouds the sentiment that “this is going to be our year” because, well, it might be.

This paper endeavors to understand the relationship between sports leagues and legal systems and, more specifically, how rules

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and discretion function within different sports leagues. Part I of this paper discusses professional sports leagues in the context of professional legal systems. Part II considers how rules function in a professional sports league. Part III analyzes the jurisprudence of sports. Part IV considers Professor Mitchell Berman's theory of "temporal invariance" in the context of discretion. Part V offers a reconsideration of Berman's theory based on the notion of "pragmatic instrumentalism" and proposes a new framework for approaching discretion in professional sports.

PROFESSIONAL SPORTS LEAGUES AS LEGAL SYSTEMS

Before embarking on an overview of the functionality of rules in professional sports, it is worth considering this declaration: "sports leagues plainly constitute distinct legal systems."² At first glance, the declaration makes sense. Having played and watched sports all my life, and also engaged in the understanding of legal systems, it is indisputable that both are "formal, rule- governed practices."³ There are rule-making bodies, acceptable social practices that inform written norms, unwritten norms both of which implicate issues of discretion, adjudication, and appeal. Many sports leagues define their rules as "laws"; in Major League Baseball it is known as the "Major League Constitution."⁴

A. Professional Sports Leagues And Municipal And County Legal Systems.

Many municipalities and counties across the United States have adopted a form of government that involves an elected council and an appointed city manager. The concept of government is rooted in two strengths: the elected power of the board and the administrative prowess of the manager.⁴ The council serves as the legislative body, while the manager, in addition to employing her administrative expertise, makes policy recommendations to the council.⁵ While power is centralized in the council, the manager

² Mitchell N. Berman, "Let 'Em Play": A Study in the Jurisprudence of Sport, 99 GEO. L. J. 1325 (2011).

³ *Id.* at 1330.

⁴ MAJOR LEAGUE BASEBALL, MAJOR LEAGUE CONSTITUTION (Feb. 21, 2020), <https://www.documentcloud.org/documents/6784510-MLB-Constitution.html>

holds the authority to hire staff, establish budgets, provide advice to the council, and carry out the directives of the council.⁶ Within this system, there are boards and commissions that provide recommendations and advice.⁷ The council establishes rules in the form of ordinances consistent with the municipal charter.⁸ This legal system is not germane to the United States. Internationally, similar systems can be found in Canada, Australia, New Zealand, the Netherlands, Honduras, Chile, and Brazil.

Sociologists James Frey and Stanley Eitzen determined that “sport is an arena of patterned behaviors, social structures, and interinstitutional relationships.”⁹ The National Football League (“NFL”) is the most profitable professional league in all of worldwide sports.¹⁰ It is governed by a Commissioner and an Executive Committee, with a Representative for each of the 32 teams in the league.¹¹ According to NFL operations, “Any change in game rules, league policy or club ownership or other modification to the game must be approved by at least three-fourths of the committee. Without consensus, nothing will pass.”¹² The Commissioner maintains a significant amount of influence, but still must seek the approval of the Executive Committee.¹³ To develop policies and accomplish objectives, the Commissioner works with more than two-dozen people inside the NFL.¹⁴ Administratively, the NFL maintains an operations “bible” consisting more than 200

⁵ See William A. Sommers, *Council-Manager Government: A Review*, 11 WEST. POL. Q. 137 (1958); Kathy Hayes & Semoon Chang, *The Relative Efficiency of City Manager and Mayor- Council Forms of Government*, 57 SO. ECON. J. 167 (1990); Gordon P. Whitaker & Ruth Hoogland DeHoog, *City Managers Under Fire: How Conflicts Lead to Turnover*, 51 PUB. ADMIN. REV. 156 (1991); Douglas J. Watson & Wendy Hassett, *Long-Serving City Managers: Why Do They Stay?*, 63 PUB. ADMIN. REV. 7 (2003).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ James H. Frey & D. Stanley Eitzen, *Sport and Society*, 17 ANN. REV. SOC. 503, 503 (1991).

¹¹ Garrett Parker, *10 Sports Leagues that Bring in the Most Money*, MONEY INC., <https://moneyinc.com/sports-that-bring-in-the-most-money-worldwide/> (last visited Mar. 22, 2024).

¹² NATIONAL FOOTBALL LEAGUE, *Integrity of the Game*, <https://operations.nfl.com/inside-football-ops/nfl-operations/integrity-of-the-game/> (last visited Mar. 22, 2024).

¹³ *Id.*

¹⁴ *Id.*

pages of procedures and policy.¹⁵ It is one of three manuals that “govern the conduct of both clubs, to ensure they protect players, coaches and football staff and provide the conditions for a fair and fan-friendly contest. Clubs may face fines and other penalties for noncompliance.”¹⁶ The “Rules of the Game” also exists in written form, and the NFL maintains a systematic and consensus-oriented process to change the rules.¹⁷ Similar to municipalities, the NFL bargain with a union, the NFL Players’ Association, which establishes a code of conduct as well as process for compliance, fines, adjudication, and appeals.¹⁸ Professor Berman has argued that sports and municipal systems confront many of the same challenges.

For example, each domain must decide: to what extent to guide conduct by “formal” written norms as opposed to “informal” social norms, and, if the former, by rules or by standards; when to delegate discretion to the adjudicators (judges, juries, referees), and how best to constrain that discretion; how to respond to the problem of epistemic uncertainty; whether to provide a right of appeal from unfavorable decisions and, if so, how to structure appellate review; how to conceptualize, deter, and sanction “cheating”; how to identify and rectify the gaps that inevitably arise between “the law in the books” and “the law in action”; when to tolerate ties and how to resolve them when they should not be tolerated; how to analyze and craft optimal sanctions; and so on and so forth.¹⁹

MORALITY AND DISPARATE AIMS AMONG SIMILAR LEGAL SYSTEMS.

What moral implications are there, if any, that sport and law have different aims? What I mean is that the aim of sports, at least in my view, is the pursuit of individual or team excellence, stakeholder (owner and sponsor) profits, and customer satisfaction. The aim of a government legal system is quite different, although I

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ NATIONAL FOOTBALL LEAGUE, *supra* note 11.

¹⁸ *Id.*

¹⁹ NATIONAL FOOTBALL LEAGUE, *Accountability: Fines and Appeals*, <https://operations.nfl.com/inside-football-ops/rules-enforcement/accountability-fines-appeals/> (last visited Mar. 22, 2024).

do not believe that matters. In other words, we are able to illuminate our understanding when we compare the manner in which a legal system functions among broader considerations of autonomy and discretion. This is particularly true as between sports leagues and municipal governments.

It is important to address the intersection of law and morality, albeit briefly. It has been well-stated among philosophers that law and morality are extrinsically linked, and yet philosophers have argued for some time that questions of law are distinct from questions of morality.²⁰ However, others have noted that law is imbued with moral content.²¹ In this context, Professor Lon Fuller's concepts of "morality of duty" and the "external morality of law" assist in conceptualizing law and morality. In Fuller's mind, the "morality of duty" demands of the individual that which is required for there to be an orderly functioning of society.²² The "external morality of law" considers the substantive rules of law which are provided to the arbiter making a decision.²³

The rules of sports, like law generally, are constructed with an aspect of morality in mind. In the case of sports, that is perhaps best explained by the understanding that winning cannot be achieved by cheating or breaking the laws of the game in such a manner as to unfairly advantage an individual player or team. While there are rules against cheating, as I will later explain in the context of baseball, there are also unwritten rules that complement the broader rules of the game that, while not authorizing cheating, inform other ways to obtain an edge.²⁴ Of course, in law, it functions relatively the same, at least according to Professor H.L.A. Hart. Laws provide a specific answer to questions, however when they do not, standards of morality fill the gaps.²⁵ To that end,

²⁰ Berman, *supra* note 1, at 1330.

²¹ Jerome E. Bickenbach, *Law and Morality*, 8 Law & Phil. 291 (1989).

²² Lon Fuller, *The Morality of Law*, 45-92 (1964).

²³ *Id.*

²⁴ *Id.*

²⁵ Jenna West, *MLB Issues Historic One-Year Suspensions to Astros' A.J. Hinch and Jeff Luhnow for Sign Stealing*, SPORTS ILLUSTRATED (Jan. 13, 2020). (Sign stealing is nothing new in Major League Baseball, however in 2017 the Houston Astros relied on a blend of technology and sound to achieve a historic advantage that resulted in dramatic punishments for the ballclub. They used the centerfield camera to steal the catcher's signs and then relied on a drum to bang out notifications to the batters. After being caught, the Astros were fined \$5 million, the maximum allowed under the Major League

sports systems work as a legal system beyond the structural similarities. The degree with which

they do often come down to the quality of the lawyers, which precisely how it functions in sports.

PART TWO: DEVELOPING AND UNDERSTANDING RULES OF THE LEGAL SYSTEM.

Is it habit that, in the game of tennis, the ball is to be called in if it touches any aspect of the line – even a fraction of an inch – where more of the surface of the ball was out? Or is that a rule? What about if my racquet crosses onto the other side of the net, to my opponent's side, and I benefit by winning the point? Of course, any relatively serious tennis player who is familiar with the International Tennis Federation *Rules of Tennis* may look these questions up and locate an answer.²⁶ But before we understand how that answer came into effect, that is to what was the authority that gave rise to the rule itself, I would like to discuss the nature of rules themselves and how they function in relation to habits.

HABITS AS COMPARED TO RULES.

Professor H.L.A. Hart, in *The Concept of Law*, believed that saying a rule exists “means only that that a group of people, or most of them, behave ‘as a rule’ *i.e. generally*, in a specified similar way in certain kinds of circumstances.”²⁷ But Hart was careful to note that even this definition is suspicious because convergent behavior is not enough to establish a rule. Hart notes the distinction between people agreeing to go to the cinema every weekend and a man being required to remove his hat in church.²⁸ The latter is habit-forming, which is to say that it is not mandatory: There is no requirement

Constitution. The general manager and manager of the Astros were suspended by Commissioner Rob Manfred for one year and then subsequently fired. Boston Red Sox manager Alex Cora, who was the bench coach for the Astros at the time, was implicated in a sign-stealing scandal one year later, in 2018. He was fired by the Red Sox only to be hired back a year later.)

²⁶ See Hart, *infra* note 27, at 79-99.

²⁷ INTERNATIONAL TENNIS FEDERATION, *Rules of Tennis* 2021, <https://www.itftennis.com/media/4421/2021-rules-of-tennis-english.pdf>.

²⁸ H.L.A. HART, *THE CONCEPT OF LAW* 9 (Paul Craig, ed., 2012).

that people go attend the cinema every weekend; “deviations are not met with punishment or even reproof.”²⁹

Rules function quite differently. In Hart’s observation, “In the case of legal rules it is very often held that the crucial difference (the element of ‘must’ or ‘ought’) consists in the fact that deviations from certain types of behavior will probably be met with hostile reaction, and in case of legal rules punished by officials.”³⁰ Key to the analysis, in Hart’s mind, is the internal aspect of a rule that distinguishes it from habit. This is regular uniform behavior that is regarded as standard for all.³¹

Let’s think about tennis and the example of and the ball barely touching the line. It is right that anyone who has been raised on the rules of tennis is aware that all that the ball must do is touch the line in any degree to be called *in* or *good*. For the sake of discussion, my opponent is fully aware of the rules, and yet he calls a ball that barely touches the line *out*. I, as the technical winner of the point, would be very hostile to that determination, and rightly so, because I am operating in accordance with a uniform behavior that is standard for all rather than a matter of feelings.³² I would be within my rights to challenge the call, to be critical of it, and even if to say, within the appropriate manner of tennis decorum, “It’s not right to call a ball that touches the line, even barely, out.” It is not my *feeling* that defines my view, but rather that it is a *rule* as determined by a social practice.³³ At least this is how it might function in Hart’s world of the union of primary and secondary rules.³⁴

²⁹ *Id.* at 10.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 56-57.

³³ *Id.* at 57. Hart considers this issue in the game of chess. He observed, “Each not only moves the Queen in a certain way himself but ‘has views’ about the propriety of all moving the Queen in that way. These views are manifested in the criticism of others and demands for conformity made upon others when deviation is actual or threatened, and in the acknowledgement of the legitimacy of such criticism and demands when received from others. For the expression of such criticisms, demands, and acknowledgements a wide range of ‘normative’ language is used. ‘I (You) ought not to have move the queen like that’, ‘I (You) must do that’, ‘That is right’, ‘That is wrong’.”

RULES AS COMPARED TO PRINCIPLES.

But is social practice the only way to understand rules? Professor Ronald Dworkin did not believe so. There is already ample discussion of the Hart-Dworkin debate, and I do not need to revisit it in substantial detail here.³⁴ However, Dworkin has something to say about rules that is worth considering. In Dworkin's view there are rules and there are also principles and embedded within that construct is the necessary consideration of morality.³⁵ Rules, Dworkin believed, "functioned in an all-or-nothing fashion. If the facts a rule stipulates are given then either the rule is valid, in which case the answer it supplies must be accepted, or it is not and it contributes nothing to the decision."³⁶ According to Dworkin's conception, if an official acknowledges the

³⁴ *Id.* Hart notes that this internal aspect of rules is often misrepresented as a "mere matter of feelings in contrast to externally observable physical behavior." However, Hart is careful to note that feelings, or "psychological experiences" are not necessary or sufficient for the existence of binding rules. Hart goes on to say, "What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard and this should display itself in criticism (including self-criticism), demands of conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative technology of 'ought', 'must', and 'should,' 'right' and 'wrong'."

³⁵ *Id.* at 101-02. The rule of recognition is often not easy to identify. As Hart acknowledged, "For the most part the rule of recognition is not stated, but its existence is shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers." He continued, "In this respect, as in many others, the rule of recognition is like the scoring rule of a game. In the course of a game the general rule defining the activities which constitute scoring (runs, goals, etc.) is seldom formulated; instead it is used by officials and players in identifying the particular phases which count towards winning."

³⁶ Professor Scott Shapiro observed, "Dworkin is often criticized for having ascribed to Hart a highly implausible view, namely, that the law consists solely of rules, never of principles. When Hart spoke of legal rules, it is usually pointed out, he did not mean to single out only "all or nothing" standards that cannot conflict and lack the dimension of weight. He simply intended to refer to standards that are binding in a particular legal system and have as their function the guidance and evaluation of conduct." See Scott J. Shapiro, *The Hart-Dworkin Debate: A Short Guide for the Perplexed, Public Law and*

rule and imposes it consistently, she cannot later make a decision in contravention of the rule.³⁷

NORMATIVE FUNCTION OF RULES.

It is important, as we consider the relationship between sport and legal systems, to re-affirm that Hart viewed legal systems as the union of primary and secondary rules.³⁸ Hart's analysis came in the now-well-known response to John Austin, who argued that law was merely the command of the sovereign.³⁹ Dworkin eventually enters the picture and, arguing that the notion of morality, notably moral principles, is a supplemental explanation in relation to Hart for the proper functionality of legal systems.⁴⁰ Other perspectives have also been offered. For example, Professor Scott Shapiro suggested, "Dworkin's argument appears to be this: the legal impact of a principle's institutional support on its legality and weight is itself determined by principles, namely, those relating to institutions and their authority."⁴¹ For the purposes of this paper, it is easy to discard Austin's perspective; there is no command of the sovereign that dictates and amends the rules of sport. The game of tennis appears, to a degree, to align Hart and Dworkin on the concept of hard-and-fast rules, however two critical questions remain unanswered. First, are rules binding because of their social practice or because of their moral imperative? Second, what role does discretion play in making determinations that affect outcomes? For the purposes of this immediate exercise, I am much more interested in the latter, in significant part because, as stipulated previously, the former is at the core of a confusing, lengthy, and ultimately misguided, at least in the view of scholars, jurisprudential debate between Hart and Dworkin.⁴²

Legal Theory Working Paper Series, Working Paper No. 7, MICHIGAN LAW SCHOOL (Mar. 2007).

³⁷ *Id.* at 25.

³⁸ *Id.*

³⁹ Hart, *supra* note 27, at 79-99.

⁴⁰ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (David Campbell & Philip A. Thomas eds., 1998) (1832).

⁴¹ RONALD DWORKIN, *LAW'S EMPIRE* (1986).

⁴² *Id.* at 17. Shapiro argued, "As we can see, the debate between Hart and Dworkin does not concern whether the law contains principles as well as rules. This cannot be *the*

PART THREE: THE JURISPRUDENCE OF SPORTS.

In 1979, John Weistart and Cym Lowell published *The Law of Sports*, which acknowledged the pervasive nature of sports into the American fiber.⁴³ Their book pioneered the understanding of sports law at the time; today classes on the topic are taught at law schools across the United States.⁴⁴ It is convenient to think about sports law in the context of antitrust predominantly, but the law impacts contracts, intellectual property, labor and employment, dispute resolution, first amendment, public health, criminal, torts, and much more. This is also true in a comparative international law context.⁴⁵

OVERVIEW.

In 2018, a national law review symposium issued on the philosophy of sport occurred at N.Y.U. School of Law.⁴⁶ Professor Robert Blecker, who endured, unfortunately, the professional humiliation of having his dissertation on this top topic rejected many years before thereby leading him to quit philosophy in favor

issue of the debate because it was never *an* issue of the debate. Contrary to Dworkin's interpretation, Hart never embraced the model of rules, either explicitly or implicitly. Nor would it be accurate to claim that the core issue of the debate revolves around the question of judicial discretion. To be sure, Hart and Dworkin did disagree about whether judges have strong discretion in hard cases. Yet this dispute is a derivative one: both sides take their positions on judicial discretion because of their very different theories about the nature of law."

⁴³ JOHN WEISTART & CYM LOWELL, *THE LAW OF SPORTS* (1979).

⁴⁴ See Mitchell N. Berman, *Why Sport Illuminates Law (and Vice Versa)*, 63 N.Y.U. L. REV. 235, 238 (2018) ("For several years, I have been teaching a three-credit law school elective (first at the University of Texas, now at the University of Pennsylvania on just this topic using a set of draft materials co-authored with my friend and colleague Rich Friedman of the University of Michigan. I have given the course different names over the years. It began life as "The Jurisprudence of Sport"; these days it is called "Sport and Law in Comparative Perspective.")

⁴⁵ See RICHARD PARISH, *SPORTS LAW AND POLICY IN THE EUROPEAN UNION* (2003); Jeffrey Standen, *The Manly Sports: The Problematic Use of Criminal Law to Regulate Sports Violence*, 99 J. CRIM. L. & CRIMINOLOGY 619 (2009); James A.R. Nafziger, *Dispute Resolution in the Arena of International Sports Competition*, 50 AM. J. COMP. L. 161 (2002); Neville Cox, Book Review, *Modern Sports Law: A Textbook*, 45 IRISH JURIST 246 (2010).

⁴⁶ Robert Blecker, *A Prologue: A Jurisprudence of Sport, referencing What Can Law Teach Sport and Sport Teach Law(ers): A Symposium on the Jurisprudence of Sport*, 63 N.Y.U. L. REV. 115, 116 (2018).

of law, wrote a brief but passionate prologue of the matter to reward the utility of studying sport and jurisprudence.

Berman observed the limited scope of the academy similarly.

There are reasons to believe that jurisprudential attention to the sporting domain is particularly likely to contribute to our understanding of the phenomena and dynamics shared in common. First, because the rules and practices of sports have long been viewed as unworthy of serious philosophical and theoretical investigation, even low-hanging fruit has yet to be harvested. Second, as we will see, sports supply a vast range of examples for the generation of hypotheses and against which to test our theories. And third, our judgments and intuitions about certain practices—such as, to take the present topic, the propriety of (one type of) context-variant enforcement of rules—are less likely in the sports courts than in the courts of law to be colored or tainted by possibly distracting substantive value commitments and preferences.⁴⁷ Irrespective of the academy's general attitude towards studying the jurisprudence of sports, the very nature of sports has deep roots in the law. Consider, for example, that law, like sports, is often contextualized by wins and losses. This adherence to the “sporting theory of justice” did the law a disservice, according to Roscoe Pound.⁴⁸ Compare that perspective to the Chief Justice of the United States, John Roberts, described the role of a judge this way,

Judges and Justices are servants of the law, not the other way around.⁴⁹ Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.

THE INTERSECTION OF INTERPRETATION IN LAW AND DISCRETION IN SPORTS.

This is a natural segue to the question of interpretation, which in relation to sports, has much to do with discretion. As we have examined, in brief fashion, the differences between Hart and

⁴⁷ Berman, *supra* note 1, at 1331.

⁴⁸ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906), reprinted in 8 BAYLOR L. REV. 1, 24-25 (1956).

⁴⁹ Charles Fried, *Balls and Strikes*, 61 EMORY L. J. 641, 642 (2012).

Dworkin, it is apt to examine, also briefly, the matter of interpretation through the lenses of the late Justice Antonin Scalia and his colleague, Justice Stephen Breyer.

Scalia argued that the role of the Court is to consider the words of the statute alone.⁵⁰ In his landmark essay, *Common-Law Courts in a Civil-Law System*, he opined, “It is the *law* that governs, not the intent of the lawmaker.”⁵¹ Justice Breyer, on the other hand, saw the role of the judge as being more collaborative with the aims of the legislative branch, which is to say it was often necessary to look beyond the statute to intent derived by considering its legislative history.⁵² He noted, “A court that looks to purpose is a court that works in partner with Congress. It is a court that helps make the Constitution work better in practice. And it is court that achieves results that the general public should find easier to accept – even if the court’s conclusions are, as is inevitable, sometimes wrong.”⁵³

Let us stick with the baseball metaphor invoked by Justice Roberts. In baseball, there is a strike *zone*. Although technology has permeated the game, that zone remains at the discretion of the home plate umpire, at least somewhat. He is aided only his vision, experience, and presumed expertise at being able to correctly identify when a ball arrives across home plate and in the zone.⁵⁴ Technology has diminished our attitude for discretion somewhat.⁵⁵ If you watch a game today, television networks include a digital strike zone of their own to inform viewers which way the pitch should have been called. It doesn’t influence the umpire, yet, but it has the effect of informing viewers and has raised the stakes of whether we should continue to rely on discretion in this way.⁵⁶ This is not the only way. Major League Baseball still employs umpires at first and third base in order to judge issues like whether

⁵⁰ Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997).

⁵¹ *Id.* at 17.

⁵² STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 100-02 (2010).

⁵³ ⁵⁴ *Id.* at 102.

⁵⁴ In Major League Baseball, the strike zone is defined as “That area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow beneath the kneecap.” See MAJOR LEAGUE BASEBALL, *Official Baseball Rules* 162 (2019).

⁵⁵ See generally Tom Gatto, *Angel Hernandez is bad at his job again; When will enough be enough?*, SPORTING NEWS (May 6, 2021).

a player is safe or out,⁵⁷ or whether a ball hit down the baseline is fair or foul. It also employs, since 2014, the limited use of replay review.⁵⁸ If replay reviewed is invoked, the final decision is not made on the field, but in a studio in New York City.⁵⁹ In those cases, the human element of judgment takes a backseat to cornucopia of cameras, angles, and sensors.

As Shapiro observed,

According to Hart, judicial discretion is a necessary byproduct of the inherent indeterminacy of social guidance. It is impossible, Hart argued, to transmit to others standards of conduct that settle every contingency in advance. Guidance by precedent is imperfect because, although the exemplar is identified, the relevant standard of similarity is not. Although common sense will eliminate certain similarity standards as inappropriate, there will always be a healthy number of conflicting standards that will seem more or less reasonable. Whereas guidance by legislation might settle some of these doubts, Hart maintained that the use of general terms in statutes cannot eliminate them all.⁶⁰

I could go on about replay review, but when it comes to baseball there are many other aspects of discretion that influence the game. These are known as baseball's "unwritten rules," which cover all manner of things – from conduct on the field, to retaliation, to cheating.⁶¹ As Turnbow and Duca noted, For more than a century, ballplayers have built the unwritten rules to cover everything from trivial clubhouse interactions between teammates to all-hands melees between bitter rivals. The rules are in a constant state of

⁵⁶ Jacob Bogage, *Baseball's Robot Umpires are Here. And You Might Not Even Know the Difference*, WASH. POST (Jul. 10, 2019); Zach Helfand, *Invasion of the Robot Umpires*, NEW YORKER (Aug. 23, 2021).

⁵⁷ John Sonderegger, *Royals Pull Off Another Miracle*, ST. LOUIS POST DISPATCH, D1 (Oct. 27, 1985) (discussing the infamous blown call by first base umpire Don Denkinger).

⁵⁸ MAJOR LEAGUE BASEBALL, *Replay Review* (last viewed: Nov. 21, 2021), <https://www.mlb.com/glossary/rules/replay-review>.

⁵⁹ *Id.*

⁶⁰ Shapiro, *supra* note 35, at 16.

⁶¹ JASON TURBOW & MICHAEL DUCA, *THE BASEBALL CODES: BEANBALLS, SIGN-STEALING, & BENCH-CLEARING BRAWLS: THE UNWRITTEN RULES OF AMERICA'S PASTIME* (2010).

development and evolution and nearly every section of the proverbial code book has both supporters and detractors. When enough players and coaches eschew a given rule for a long enough period of time, it simply falls by the wayside, often to be replaced by something new.⁶²

That sounds something like the American common law, which afforded judges broad discretion in shaping law with the aid of lawyers. In baseball, the players are doing more of the shaping, but the umpires are aware of the rules and enforce them all the same, even if it is by looking the other way as players on opposing sides settle their grievances, whether immediate, long-standing, consequential, or trivial.

Scalia took issue with the common law as a mode of lawmaking. In questioning the verisimilitude of the common law, he offered this, from James C. Carter,

[t]he question is, shall this growth, development and improvement of the law remain under the guidance of men selected by the people on' account of their special qualifications for the work or be transferred to a numerous legislative body, disqualified by the nature of their duties for the discharge of this supreme function?⁶³

We can ask the same question in baseball, which both underscores its presence as a functioning legal system as well as provides lessons on the matter of discretion. Of course, when thinking about discretion in a legal system, it is imperative to ask: At what point is discretion consequential? Put another way, at what point does discretion cause *major* harm? Let's consider this in the context of criminal law. Recently, a case came before a judge in Niagara County, New York. The defendant, a 20- year-old male, had been accused of and later pled guilty to the rape and sex abuse of four women. He was sentenced to eight years of probation and required to register as a sex offender. He avoided prison.⁶⁴ Reflection on the decision not to sentence the offender, the judge

⁶² *Id.* at 8.

⁶³ Scalia, *supra* note 51, at 12-13 *citing* JAMES C. CARTER, THE PROPOSED CODIFICATION OF OUR COMMON LAW 87 (1884).

⁶⁴ Haley Yamada, *Judge sentences admitted rapist to probation, no prison time*, ABC NEWS (Nov. 18, 2021).

said, “I’m not ashamed to say that I actually prayed over what is the appropriate sentence in this case because there was great pain. There was great harm. There were multiple crimes committed in the case.”⁶⁵ An attorney for the victims acknowledged that one of his clients “threw up in the ladies room following sentencing.”⁶⁶

The criminal statutes in New York afforded a sentence of up to eight years in prison, although there was no explanation for why the statutes were ignored in favor of probation.⁶⁷ In Breyer’s mind, one of the trade-offs of looking beyond the statutes is the notion that a judge needs to “write an opinion explaining his or her reasons for reaching a conclusion” in order to guard against misinterpretation.⁶⁸ That is not going to happen in the aforementioned case since the judge is not required to do so which frustrates the virtue of discretion for those, like me, who argue for it. The victims, too, are left bewildered. It goes without saying that there is no offense in baseball in the universe of the heinous acts performed by the accused in the case above. However, I raise the example to underscore how discretion can have extraordinary effects on the outcome. Perhaps there is a reasonable explanation why he would avoid prison for his crimes, although the public, but more importantly the victims, are unlikely to ever know.

In sports, discretion can have profound effects on the outcome. And to players who have spent their entire lives perfecting the game, including forfeiting normalcy in childhood, compelling the re-allocation of time and financial resources of their families, and enduring relentless physical and mental strain, a discretionary determination by an umpire can alter the course of their professional life in an instant. This is not hyperbole.

PART FOUR: BERMAN’S THEORY OF TEMPORAL INVARIANCE.

I have said a lot about rules and how they function in a legal system as well as in sports, which I have argued is its own type of

⁶⁵ *Id.*

⁶⁶ Elisha Fieldstadt, *Judge says prison sentence ‘inappropriate’ for New York man who sexually assaulted four teens*, NBC NEWS (Nov. 18, 2021).

⁶⁷ Ed Shanahan, *Judge Spares Man in Teen Rape Case: ‘Incarceration Isn’t Appropriate*, N.Y. TIMES (Nov. 18, 2021).

⁶⁸ Breyer, *supra* note 53, at 101.

legal system. And I have considered how discretion operates, in at least an unsatisfactory context, as it pertains to judicial decision-making. I believe this can all tell us about the role of umpires, but first, I want to consider Dworkin's "One Right Answer" thesis.

In the *Model of Rules*, Dworkin argued, in response to Hart, that there is no open texture in law and that even in hard cases there is one right answer.⁶⁹ He believed that law consisted of rules and principles. Rules either applied or did not, but principles functioned differently: they carried the benefit of weight and could serve as reasons for decision-making.⁷⁰ Dworkin's position was that judges had a duty to incorporate rules and principles into an entire legal system.⁷¹

Dworkin offered some clarity in what he meant.

The difference between legal rules and legal principles is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.⁷²

More to the point, Dworkin maintained that it the judge had the capacity to reach "the right answer" when considering a case even if the case is not covered by rule.⁷³ Dworkin observed, "the judge's duty . . . to discover what the rights of the party are, not to discover new rights."⁷⁴ She does this through a process Dworkin describes as "discovery" of the principles that underlie the settled law.⁷⁵ I raise this in light of Berman important essay, which set forth the thesis that the imposition of rules in sports demands "resolute temporal invariance": the rules of the game should

⁶⁹ Dworkin, *supra* note 36, at 22.

⁷⁰ *Id.* at 22-23.

⁷¹ *Id.*

⁷² *Id.* at 25.

⁷³ *Id.* at 27.

⁷⁴ *Id.*

⁷⁵ *Id.* at 29.

followed rigidly no matter the period, set, inning, and so forth.⁷⁶ Berman acknowledges that determining whether this is optimal for any given sport is “devilishly hard.”⁷⁷

Perhaps Berman is right that there are no easy cases when it comes to how this should function; although I am sure that advances in technology, from replay review in baseball to the inclusion of the Hawk-Eye in professional tennis, are likely to render many, if not all, of these issues moot before too long. Why? Because I believe, as in law, there is a push away from discretion in sports. Consider, for example, in non-contact sports involving a unique relationship with boundaries, like tennis, table tennis, and volleyball, the necessity of having umpires is negligible at best if technology can do all the work.⁷⁸ Similarly, and at the other end of the spectrum in golf, the foundation of the game is built on an honor system of calling penalties on oneself.⁷⁹

Should rules of sport be enforced with greater laxity towards the end of close contests? Berman views this as a complicated question. If the purveyors of sports permitted the rules, as written, to change, without additional rule-making, the uncertainty and opaqueness of the acknowledged “rules of the game” would have little to no meaning. In other words, and not dissimilar from Berman’s thesis, sports officials are capable of achieving Dworkin’s

⁷⁶ Berman, *supra* note 2, at 1327.

⁷⁷ *Id.* at 1333.

⁷⁸ *Id.* at 1326-27. Among his examples, Berman highlights Serena Williams’s infamous foot-fault at the 2009 U.S. Open and the events that followed that ultimately cost her the match against Kim Clijsters and certain reactions to it, including John McEnroe’s belief that the fault should not have been called. But it is not the foot fault that cost Williams the match, rather her behavior in the few critical minutes following. More to the point, she had also committed a racket violation earlier in the match that put her in the present position of, in accordance with the rules, being subject to a point-penalty. This is not a distinction without a difference. If Williams is not the greatest female tennis player of all time, she is certainly the second, behind Stefi Graf, and has won innumerable matches throughout her career after being down one or more match points. The foot-fault was indisputable. Williams lost her temper, by no means the first tennis player to do so, and experienced the consequences of that action. “I swear to God I’ll fucking take the ball and shove it down your fucking throat,” she said to the chair umpire. To that end, I wonder if Berman should have focused more on discretion in that context: Did the umpire, presumably trained to deal with outbursts of this sort, need to call the second conduct violation which actually cost Williams the match?

⁷⁹ United States Golf Association, *Rules of Golf*, 1.3(b), USGA <https://www.usga.org/content/usga/home-page/rules/rules-2019/rules-of-golf/rule-1.html>.

desire of “one right answer.” Berman does believe that the attitudes adopted by supporters of “temporal variance,” or, colloquially, the “let them play!” crowd, are persuasive. There are no recognizable norms, customs, or conventions that substantiate variance from the rules in the final minutes of close contests other than what fans expect, which almost always has its genesis from the biased perspective of what advantages their team in the moment.⁸⁰ Alternatively, there is ample evidence to justify adherence to the rules for in-game play, rigidly.⁸¹

This is to say, I do not believe Berman is on shaky ground, but that ground may not be perfectly stable either. There will always be a cacophony of voices – journalists, pundits, coaches, Twitter enthusiasts – that voraciously believe, particularly in baseball, basketball, football, and soccer, the officials should not influence the outcome in the final minutes of a close game. But that is a silly idea and hard to justify on an intellectual plane for obvious reasons, but also because it disregards the probability that the officials, in these discretionary games particularly, may have already played a heavy hand in ushering the game to its point of closeness.⁸² In other words, I am uncertain whether it is the closeness of the game that should be determinative, or the game itself.⁸³

This does nothing to Berman’s thesis. His argument is persuasive to a point, and while my endeavor at this stage is not to refute him entirely, I do take exception to temporal invariance as

⁸⁰ Berman, *supra* note 1, at 1331.

⁸¹ There is an obvious exception to this idea, which is the role of the professional sports league commissioner and the way they exercise punishment. See Matthew B. Pachman, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VIRGINIA L. REV. 1409 (1990); Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 MARQ. SPORTS L. J. 65 (1995).

⁸² See Ross Dellenger, *The SEC Grapples With Officiating in the Age of Outrage*, SPORTS ILLUSTRATED (Jun. 6, 2019) (“The SEC is studying more and better ways to communicate with the public and media on officials’ fouls, so we all can understand the holding call that brought back a touchdown or the targeting flag that negated a third-down stop”).

⁸³ This is not intended to diminish Berman’s focus on the end of the game. The NBA clearly believed something was amiss when, in 2015, it began issuing “Last Two Minute Reports,” which review calls of officials in the last two minutes of close games. See Nat’l Basketball Assoc., *Last Two Minute Reports*, <https://official.nba.com/nba-officiating-last-two-minute-reports-archive/>.

an approach and offer a reconsideration based on a framework I have outlined below. But first, Berman writes,

The puzzle, then, is this: given that rule makers know how to draft rules so that their violation does or does not require harm, and know how to specify that a harmless violation should incur no penalty, why would the nonrealization of harm be thought to warrant non-imposition of a penalty even in cases where the rule does not require harm?⁸⁴

...

If prescribed penalties should sometimes not be enforced against the violator of a rule that is itself defined without regard to harm, when and because that particular violation caused *no* harm, does it also follow that there will be some occasions (albeit fewer) in which the penalty should not be enforced because the particular rule violation caused only *minor* harm?

PART FIVE: RECONSIDERING BERMAN BASED ON “PRAGMATIC INSTRUMENTALISM”: A NEW FRAMEWORK FOR DISCRETION

To conclude this essay, I briefly consider what Professor Robert Summers described as “pragmatic instrumentalism.”⁸⁵ Summers described it this way, “Most instrumentalists reacted against formalism, conceptualism, and narrowness in analytical jurisprudence and in substantive law. They conceived of law not as a formal system or as an inert matter but as a goal-directed activity designed to resolve or alleviate problems of group life. So viewed, law is far more than a source of structural or conceptual issues on which jurists of the analytical school may deploy their tools.

...

The philosophy is “instrumentalist” in that it conceives of law not as means-goal complexes but merely as means to external goals. It is “pragmatic” in several ways. It focuses

⁸⁴ Berman, *supra* note 1, at 1340.

⁸⁵ Robert S. Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433, 433 (1978).

on law in action and the practical difference law makes. It stresses the role of legal actors and their technological “know-how.” It is experimentalist. It is pragmatic, too, in its professed contextualism – its reliance on time, place, circumstance, interests, wants, and the assumed malleability of reality rather than on theories, general principles, and the “nature of things” as sources of ends and means.⁸⁶

With this in mind, and without going into too much unnecessary detail about its background, including the myriad influences, I believe there is an opportunity to reconsider Berman’s temporal invariance theory based on Summers’ broad description. Instrumentalists, after all, believed that government was a government by men through law.⁸⁷ To that end, and to inform my argument about how pragmatic institutionalism might inform an understanding of our approach to the rules of sports, let’s consider a new framework that absorbs many of the concepts discussed throughout this paper and that also introduces an additional, new concept to the mix. As it pertains to discretion in sports, I propose a framework that affords for the limited use of discretion. It functions this way:

A professional sports league is a municipal-like legal system;

That maintains the ideal of a liberal, pluralistic order;

Is interested in outcomes achieved in a justifiable manner based on the conduct of officials who are well-versed and maintain the intellectual capacity to apply the rules as stated, and agreed upon by the players and umpires, consistently and instantaneously regardless of external influences;⁸⁸

⁸⁶ *Id.* at 435.

⁸⁷ *Id.* at 447.

⁸⁸ It is not only the closeness of a game that one can gripe about discretion in sports. For as long as sports have existed there has been an undercurrent that certain players or teams “get all the calls.” See generally Peter Dawson, Stephen Dobson, John Goddard & John Wilson, *Are Football Referees Really Biased and Inconsistent?: Evidence on the Incidence of Disciplinary Sanction in the English Premier League*, 170 J. ROYAL STAT. SOC. 231 (2007); Kendall M. Thu, Kelly Hattman, Vance Hutchinson, Scott Lueken, Nathan Davis & Elmer Lindbloom, *Keeping the Game Close: “Fair Play” Among Men’s College Basketball Referees*, 61 Hum. Org. 1 (2002).

Whose determinations occur without regard for the spectator's enjoyment of the action; and

Is void of necessity of discretion due to the certainty of rules, the mode of fairness (as a moral principle); and the lack of norms and conventions suggesting adverse behavior except in cases where the discretion does not cause *major* harm to the outcome or to the future application of the rules.

Here I have introduced a new concept that I describe as *major* harm. What do I mean? Let us compare two scenarios. Angel Hernandez has long been regarded as the worst umpire in Major League Baseball. Statistically, his ability to make correct calls from behind the plate or in the field rates the lowest among all baseball umpires. In a notably in an infamous game in 2013 between the Cleveland Indians and Oakland Athletics, Hernandez failed to reverse a disputed tying home run in the ninth inning with the Indians leading 4-3. According to the rules of replay, the crew chief, the position Hernandez occupied that night, had sole discretion to reverse an error. The Indians won the game 4-3, aided by the error. That season, the Indians qualified for the second wild card playoff position by 1 game over the Texas Rangers. It can be argued that Hernandez's decision not to overrule what later the Commissioner's Office said was an error cost the Rangers a place in the playoffs.

Don Larsen pitched a perfect game in the 1956 World Series. Twenty-seven batters, twenty-seven outs. It is the only perfect game in post-season play in Major League Baseball history. The called third strike against Dale Mitchell remains one of the most disputed calls in the history of baseball.⁸⁹ His final pitch, a called strike, was perhaps outside of the strike zone. Accounts from players, viewers, and historians suggest that perhaps it was borderline. The pitch is available online, and even I will admit I am not absolutely sure. After all, the strike zone was larger in 1956 than it is today. Nevertheless, the umpire, Babe Pinelli called the pitch a strike and Gibson achieved his perfect game. Not only were the Yankees likely to win Game 5, that alone did not secure the

⁸⁹ Well-known writer, pundit, and baseball enthusiast, George Will, once said Larsen's pitch was "a foot and a half high and probably outside. He [Pinelli] was so eager to get the game over." See ABC News, *This Week with Jake Tapper* (Jun. 6, 2010).

Series (the Yankees won Game 5, 2-0, but did not secure the World Series until winning Game 7, 9-0).⁹⁰

These scenarios offer a glimpse into what I mean about *major* harm. With the magnitude of history consuming the game that day, it is not, in my view, offensive to the rules that the umpire may have exercised some discretion, if any at all, in Larsen's case. Pinelli could have honestly believed it was a strike by 1956 standards. But if that is not right, and he did exercise discretion, what was the *major* harm? And how does that harm the game when balanced against the benefit that has come to Major League Baseball as a result of that perfect game? On the other hand, Hernandez made the wrong call, had the opportunity to exercise his discretion and chose not to, and disrupted the remainder of the Major League baseball season beyond a single game as a result.

CONCLUSION.

My endeavor was not to refute Berman entirely, but to reconsider his approach through a simpler lens. This was merely a beginning to that endeavor. Working with many of the jurisprudence theories established by Hart, Dworkin, Fuller, Shapiro, Summers, Scalia, Breyer, and others, we can begin to see the existence of a framework that allows for discretion in certain instances without jeopardizing the system as a whole. This, in turn, allows for an exception to Berman's theory of temporal invariance. There is, of course, much more work to be done in this arena, but as scholars continue to evaluate sports leagues as legal systems and not merely as anecdotes to illustrate concepts, many of these ideas, and others, will fill the void.

⁹⁰ Babe Pinelli never called another game from behind home plate. The batter, Dale Mitchell, a pinch hitter in Game 5, was at the end of his career and only played two more games after that. Hernandez, on the other hand, continues to umpire baseball games with controversy.