

CALLING THE GAME IN ACCORDANCE WITH ITS TENOR

CALLING THE GAME IN ACCORDANCE WITH ITS TENOR:  
CHALLENGING FORMALISM, THE SPORTS ADJUDICATION MYTH

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**Abstract**

*In this paper my ambition is to contribute to what's been called 'the jurisprudence of sport'. Within that potentially broad spectrum, my focus here lies on the topic of sports adjudication, and the question of if and when sports officials can be justified in choosing to not apply a, or the plain meaning of a, rule. Herein I propose to follow J.S. Russell in his denial of formalism as a reliable and sound thesis for sports officials to try to practice, given the way this notion has been challenged and overcome in the philosophy of law. Russell's thought is that we can follow the philosophy of law in overcoming formalism, and in thus developing normative theories of sports adjudication to replace it. In this, we agree. But my normative account for sports officials (i.e. my account of what I think officials ought to do, instead of always strictly and mechanically applying the rules, all the time) is informed by first the descriptive, and then the normative, theory of inclusive legal positivism, rather than by R. Dworkin's integrity theory of law, as Russell's account is. I argue that sport's inclusive positivism, as I call it, reliably parlays stable ground as a form of internalism (a theory of the normative content of sports), and can therefore give birth to a reasonable, non-Dworkinian, – and more importantly – non-formalist, normative account for sports officials. In other words, my argument will be that sports officials don't always have to apply the rules. That is because other perfectly legal standards may be relevant in this context (in the context of rule application, i.e. within a game). One such standard, I contend, is that officials should apply the rules in accordance with the tenor of the game, so as to try to secure what are often the game-specific interests and values that distinctively pertain to sports, and their adjudication.*

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I would first like to warmly thank my family and friends for encouraging me in the writing of this paper, encouragement which was most often manifested in an interest in the novelty of my topic – no doubt an encouraging sign for a philosophy student. I also owe a special thank you to McMaster University’s philosophy department, and all its constituent parts, for overseeing my development in academic philosophy to this point; and especially to my supervisor Wil, for offering me the opportunity to pursue this line of thought and for giving me the freedom to determine my philosophical contribution to it, while nonetheless offering thoughtful and insightful comments regarding my argument when the time was right. Finally, I would be remiss not to mention in gratitude all the individuals I have ever officiated a ball, or hockey game with, or anyone with whom I have ever had a discussion about sports adjudication – the most important of whom is my father, who got me started as an official and who has worked alongside me for many years: it is those experiences and conversations that stand as the motivation for my writing this essay.

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## Chapter 1

### *Preface*

To begin, a few confessions and an anecdote are in order. I am a part time sports official (hockey in the winter, softball – fast pitch – in the summer) and I write this paper due to my interest in adding to the discourse that surrounds both professional and amateur sports officials alike, and to do so from the – distinctly philosophical, I hope – perspective of a member of one of those groups. In this paper (between the next few pages and the conclusion), however, for the sake of remaining consistent with the academic discussions that have preceded it on this topic, I will frame my discussion almost exclusively in terms of professional sports officials (of course, this should not stop my conclusion from being reasonable, and potentially optimal, in reference to amateurs as well).

Now, I have a friend named Duke. Duke is a fellow official of mine (I won't tell you in which sport, so as not to break confidence – the point is the same regardless) that I have worked with for a number of years. Unfortunately, even though Duke's a nice enough fellow generally, not many people find him all that popular when he dons his officiating apparel. You see, the reason Duke is not very much liked by players, fans, or even some of his peers, is because for the most part, he does not call a great game. Let me explain what I mean by that.

When you become an amateur official for the first time you are taught by the veteran officials the rules of your game, the basic official's positions and procedures that you need to understand in order to do your job (how to start a game, say; or how to make the most necessary calls for your game – e.g. how to call a strike in baseball), and what to

wear. Usually, you are also required to perform some kind of exam to show that you have a competent understanding of the rules (within reason given your lack of experience in reading and applying them). Over time, of course, these instructions from superiors become more advanced and complex, and so do the tests of one's knowledge of the rules. But, as many will likely appreciate, fundamentally the way one develops skill in calling a game as an adjudicator is by actually officiating games. In game, there are numerous things you learn over time that you would only have marginally learned in a clinic, or from an exam: like viable ways of communicating with your teammates – the other officials – and the participants; like viable places to position oneself on the field to be able to adequately judge the contest; like your style as an official, etc. Perhaps one of the most important of the things one learns through experience as an official, though, is a sense of one's role within the game. It is (perhaps most) often said that part of the official's role is to be impartial, for example: one of the roles the official must fulfil, it is said, is to be an unbiased observer of a match, and apply the rules to whomever should so deserve it, no matter the team they are playing for. In this way in particular, a large part of the official's job is thought of in terms of his or her application of the rules. Indeed, as an official, a particular sense of one's role – sufficiently refined over time and with experience – is often reflected in the way in which one makes use of the rules of the game. Customarily, we use a binary to describe the way in which an official uses the rules: as a so-called formalist, or as one who just lets'em play, titles that are meant to generally represent two ends of a certain kind of spectrum – a spectrum of how, and in what ways (i.e. in what contexts, or in what manner), the official in question applies the

rules. The formalist *v.* let'em play opposition I am suggesting spans the gap between officials who seem strict rulists on one hand, and liberalists (so to speak) on the other, in the way in which they interpret, and apply the rules; namely, in the way they call the game.

What I think the issue with poor Duke is, is that he seems to conceive the part of officiating that has to do with calling the game, and applying the rules, as the only, and most important role he is supposed to fulfill over the course of the game. My guess is that as a result, he believes, though he might not know it, that his duty is to be a formalist official, i.e. one that, in most cases, calls the game primarily on the basis of a strict and literal reading of the rules. This is not to say that Duke blindly and without hesitation commits to the precepts of the plain meaning of the rules alone, without concern for the context in which he will be applying them to match-participants, or for other potentially important normative standards that he may want to consider. What it is to say is that he does not seem to give sufficient deference to these latter types of considerations – considerations that might sometimes lead him to let'em play – which makes him appear formalistic in practice, and which is perhaps why he struggles as an official. Unfortunately, my sense is that Duke has not fully grasped the reasons which weigh in favour of such considerations, and in favour of taking them more seriously when we undertake it to officiate a game. If I am right, then I would like to use Duke as an example of the kind of official that could most benefit from being taught the foremost lesson of this paper. That lesson is that it stands to reason that the role of sports officials within a game has to do with more than their mere power to apply the rules of the game. Indeed,

my argument will depend on the idea that it is also part of the role of sports officials to be facilitators for allowing the conditions in which it is possible to play a game optimally to obtain (applying the rules is not irrelevant here, of course). Much of their role, therefore, has to do with understanding, and giving due consideration to, the peculiar context in which they may be, and most likely are, situated.

Thus, the over-arching theme of the reflections that follow here is that of sports adjudication; their undercurrent, however, is to defend an argument to which Duke, if I am right about him, may consequently be wise to pay heed: an argument in defense of calling the game in accordance with its tenor, and the anti-formalist premises upon which it stands.

Introduction

This paper, following the lead of Mitchell Berman, aspires to make a valuable contribution to the jurisprudence of sport. In fact, its guiding motivation is to respond to Berman's claim that sports officials, at least in some instances, are justified in just 'lettin' em play.' That is, I will respond to the idea, as defended by Berman, that sports officials may be, and perhaps often are, justified in apparently not applying the rules *simpliciter* of sports games in a formalistic, all-or-nothing manner; and that sometimes, the non-application of clearly written rules may be fully justified by other, more important considerations.

Though I follow Berman's lead in identifying the over-arching theme of this paper, it is worth explicitly noting that the method I will employ in order to arrive at my response does not necessarily mirror Berman's. The jurisprudence of sport, as conceived by Berman, is a domain of philosophical thought the central themes and concerns of which are shared by the philosophy of law. This point is worth emphasizing, as it constitutes a strong justificatory reason for the adoption of the following methodology. Given the approach used by J.S. Russell in 'Are Rules All An Umpire Has to Work With',<sup>1</sup> it does not seem unreasonable to think that specific legal-philosophical theories could serve as useful tools for explaining, and evaluating, sports. My goal, as such, will be to show how parts of Wilfrid Waluchow's inclusive legal positivism might be borrowed from the jurisprudential literature and used in a sports context. Part of the purpose of this method is to lend new ideas, concepts and arguments to the discourse on

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<sup>1</sup> Russell, J.S. 'Are Rules All an Umpire Has to Work With?'. *Journal of the Philosophy of Sport* 26 (1): 27-49, 1999.

sports adjudication, ones that may seem common, even inauthentic in the legal-philosophical domain, but that are not often voiced in discussions about sports officials. More prominently, however, this method is conceived as one whose value will lie in its ability to shed new light on that old cliché, ‘let’em play.’

As I referred to above, J.S. Russell has introduced an interesting account of sports adjudication, one that takes as its foundation some of the fundamental insights of Ronald Dworkin’s jurisprudence. To put it briefly, Russell’s account of sports adjudication is founded on the same kinds of arguments once proposed by Dworkin in books like *Taking Rights Seriously* and *Law’s Empire*, arguments that figure prominently in the latter’s establishing his Integrity Theory of Law. Part one of this paper shall consist in an examination of, a reflection on, and what I take to be a progression past, Russell’s view. In the first section, I offer an overview of Russell’s account, and a brief comment on the value of integrity as it pertains to the way sports officials ought to adjudicate. In section two I turn to examinations of the works of Graham McFee and Mitchell Berman – works that have more or less been written as direct responses to Russell’s view. What we will find is that McFee and Berman offer what I take to be reasonable criticisms of Russell’s account, criticisms that will be useful to us as we embark upon the project of laying the groundwork for an account that can reasonably answer the ring of the ‘let’em play’ bell.

In part two, my ambition will be to show how the theoretical apparatus of inclusive legal positivism, as it is conceived by Waluchow, can be both enlightening, and convincing when considered in relation to the relevant concerns of our sports adjudication dialogue. This chapter will more directly engage with the philosophy of law than the first,

as it will attempt ultimately to show how inclusive legal positivism, as opposed to Dworkin's integrity theory of law or exclusive legal positivism, can provide plausible reasons in support of the view that sports adjudicators should not feel required to commit to formalistic approaches to adjudication. Thus, though I will maintain an agreement with both Berman and Russell *vis.* the notion that formalism in sports adjudication is not to be desired, in part two I will offer the foundations for a novel manner of justifying non-formalistic adjudicative practice in sport, which stems from some familiar features of inclusive legal positivism. To achieve this end, I present an argument for the normative content of sport, as Berman would call it, which is grounded in inclusive legal positivism. I begin by offering potential criticisms that might be raised regarding the rough application of Dworkin's theory of law in a sports context. My attention then turns to the topic of how legal positivism has thus far been framed in the sports adjudication dialogue. What we will find here is that when it comes to discussions on sports, legal positivism is generally only conceived in terms of its exclusive version – an unfortunate fact. I will claim that in order to do legal positivism justice, we must give some consideration to inclusive positivism and how it may help us in establishing what has been called 'internalism': the view that the normative content of sports may involve more than the mere promulgated rules. If inclusive positivism is found to be reasonable as a potential theory for explaining the normative content of sports, then I will conclude that we may also be justified in contemplating and pursuing the kind of adjudication theory for sports officials to which it might give birth.

In the third part, I will begin arguments in defense of the view that sports officials may let'em play at more points throughout the course of a match more than just its concluding moments. The first part of this chapter will consequently converge with Berman's account in 'Let'Em Play: A Study in the Jurisprudence of Sport'. My claim here will be that Berman's account privileges one understanding of the way in which the let'em play idea is used: as an appeal made at the late stages of matches. What it fails to appreciate, I suggest, is that let'em play need not be understood as a temporally relative appeal, and that for this reason we should perhaps consider how the claim could be justified in multiple contexts during a game. In order to show how it might be so justified, I will lean once more on the work of Waluchow, but this time on the normative adjudication account he puts forth in chapter 8 of *Inclusive Legal Positivism* in particular. Ultimately, I will argue that sports officials can be justified in just lettin'em play throughout the course of a game, and if/when they ought to let'em play may in large part depend on the tenor of the game in which they find themselves. As such, I offer the suggestion that sports officials should use to their advantage the secondary guidance rule of calling the game according to its tenor.

## Chapter 2: Surveying The Diamond

In this chapter we will examine our playing field (or, in an umpire's terms, we will survey the diamond). That is, it will be our goal in this chapter to examine works within the philosophy of sports adjudication in order to determine if they serve as suitable foundations upon which we may proceed in developing a novel account in this domain. Section one of this chapter will be devoted to an examination of the work of J.S. Russell in 'Are Rules All an Umpire Has to Work With?' Having examined the core of Russell's view, I will present a few brief comments toward the end of section one regarding how we might immediately criticize it. Following this brief critique, in section two I will offer an explanation of two accounts that have followed Russell's and that seek to make amendments to his project, or make improvements on his arguments. The utility of these critical accounts is that they serve to clarify and strengthen the discourse surrounding the philosophy of sports adjudication; the hope of these accounts is to prevent future theoretical inquiries in this field from suffering the same setbacks apparent in Russell's theory. Drawing on the lessons presented by Russell's critics, we will be in a position to make a positive and reasonable contribution to the philosophy of sports adjudication beginning in the third chapter of this essay.

### Russell's Account

In 'Are Rules All an Umpire Has to Work With?' J.S. Russell advances what he calls "a theory of the exercise of discretion by umpires in sport,"<sup>2</sup> in order to fend off certain pernicious ideas that tend to pervade our common understanding of sports as rule

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<sup>2</sup> Ibid. 27.

governed systems; and, more generally, our common understanding of law as a rule governed system. In particular, the main idea with which Russell is here concerned is the apparent commonplace in discussions surrounding sports – for Russell, especially baseball – that rules are in fact all an umpire has to work with. This typical, and perhaps uncritical, understanding of the role and duties of umpires is, according to Russell, nothing more than a myth. Russell thinks it is a view that informs what he calls “the ideology of games”<sup>3</sup> – the idea that because games or sports are generally well-defined and perspicuous rule-governed systems, rules alone determine the proper conduct of the subjects to whom they apply and, more importantly, determine the decisions of those who apply them, leaving no room for the possibility that sports officials could ever need to make use of their discretion. According to the ideology of games, decision-making in sports is unlike legal and moral decision-making in a ‘real-life’ context because the former can be completed in a very mechanical fashion as a result of the precise, clear and determinative nature of sports rules. We like to think of sports in this way, Russell thinks, because in so doing we create, in sports, a “refuge” for ourselves, one that is separate from the difficulties, confusions and costs of the social rules that are supposed to guide our conduct in “our real lives and real choices.”<sup>4</sup> For Russell, however, the ideology of games, and the corollary notion that rules are all an umpire has to work with, is not a thesis to which we should ascribe as keen and interested observers of sport, and of society more generally. Not only does the ideology of games not permit any strong arguments in its defense, it perpetuates the noxious idea, often imported to other decision-making

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<sup>3</sup> Ibid. 27.

<sup>4</sup> Ibid. 27.

contexts (judicial, moral, etc.) that rules, and the conduct they purport to determine, always function free of any indeterminacy.

The central claim that Russell will defend as part of (what I will call) his theory of sports adjudication, is that

“umpires can legitimately use their authority to clarify and resolve ambiguities in rules, to add rules, and even at times to overturn or ignore certain rules, and that the exercise of such discretion is governed by principles underlying the games themselves and by an ideal of the integrity of games.”<sup>5</sup>

There are two parts to this thesis, both of which we will subject to closer examination. The first part of Russell’s claim, that umpires possess, and are justified in their use of discretion with respect to rules that are either unclear, indeterminate, in need of revision/improvement, or that ought to be disregarded entirely in some instances, is an idea that, to some extent, he borrows from the philosophy of law. Russell describes four exemplary “hard cases”<sup>6</sup> with which Major League Baseball umpires have been confronted over the course of the game’s history, and he notes that what most of these cases bring out (sometimes in accordance with, sometimes in spite of the way they were resolved on the field of play), is that “rules governing games cannot always be relied upon as definitive guides to the regulation of conduct,”<sup>7</sup> because in these cases the rules alone were insufficient for properly responding to the way players behaved: in these cases

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<sup>5</sup> Ibid. 28.

<sup>6</sup> Ibid. 28.

<sup>7</sup> Ibid. 30.

the rules, as it turns out,<sup>8</sup> gave somewhat uncertain guidance to the umpires regarding how to regulate the players' behaviour. To those familiar with law, or with the nature of rules generally speaking, this claim may not seem particularly surprising. However, Russell is keen to emphasize this point since it is a view often challenged by legal – and sports – formalists. According to the formalists, “law consists of a body of rules and nothing more” and, as such, “judges have no genuine discretion whatsoever...they merely apply the rules mechanically to the facts of the case to which the relevant rules were meant to apply.”<sup>9</sup> Formalism seems to suppose that the rules will always be able to accurately cover any fact-situation with which adjudicators are presented, and that therefore there should be no need for them to exercise discretion, or appeal to any other sorts of standards in arriving at a decision. In a sporting context, formalism is manifested in the attitude that rules are all an umpire has to work with, and it is in the domain of sports, Russell thinks, that this central “vice of legal formalism”<sup>10</sup> thrives.

So conceived, formalism appears as both a descriptive and a normative thesis: on one hand it appears to describe what the normative content of sports' legal systems is (merely rules), and on the other it appears to purport that sports officials should *only* use rules in order to adjudicate games, rather than any other kind of normative standard (were such standards to constitute part of the normative content of a sport's law). I will seek to

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<sup>8</sup> Especially in the George Brett case, since the umpire's original ruling was eventually overturned by the MLB. Russell cites ‘The Pine Tar Incident’ at pg. 30. For a loose overview of the incident, the ruling, and its aftermath, see Wells, Adam. ‘Remembering The George Brett Pine Tar Incident, 30 Years Later’. bleacherreport.com. Jul. 24, 2013. Retrieved from <<http://bleacherreport.com/articles/1713655-remembering-the-george-brett-pine-tar-incident-30-years-later>> on Aug. 13, 2014.

<sup>9</sup> Ibid. 31.

<sup>10</sup> Ibid. 31.

address both sides of this view in this paper by first following Russell in proposing that its descriptive aspect is subject to criticism, and by extension that its normative aspect is therefore not the most reasonable thesis to ascribe to. For now I will continue to focus on Russell, before expanding on his view to both denounce formalism as a normative thesis for sports officials, and produce my own normative claim for these kinds of adjudicators later on.

In order to demonstrate why formalism is just as mistaken in a sports context as it is in a legal context, Russell turns to arguments proposed by H.L.A. Hart in *The Concept of Law*<sup>11</sup> that are espoused in order to show the absurdity of formalist adjudication. To start, Hart distinguishes between two kinds of cases in which we may think a legal rule is applicable: “plain cases [which are] constantly recurring in similar contexts [and] to which general expressions are clearly applicable;” and cases that are “variants on the familiar” where “no firm convention or general agreement” is established regarding the use of the general terms that constitute a legal rule (what we might call the hard case).<sup>12</sup> The former do not generally present any difficulty to adjudicators, for they are easily resolved by the simple and often mechanical application of the written rules. But when the latter arise, it is at this point that we would expect, due to the indeterminacy of the language that constitutes the rules in question, judges to simply make a choice about whether or not to classify the fact-scenario with which they are presented as one that legitimately falls under the purview of the general terms of the rules they are expected to

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<sup>11</sup> Hart, H.L.A. *The Concept of Law: Second Edition*. Oxford University Press, 1994. 126. Hart’s discussion of Formalism runs from pgs. 124-136.

<sup>12</sup> Ibid. 126-7.

apply, and thereby exercise their judicial discretion. Hard cases like these arise, Hart thinks, because standards that are constituted by general terms as most of our legal rules are, have an “open texture.”<sup>13</sup> they have the feature of being sufficiently general that it is highly unlikely that all the peculiar legal cases which may arise, to which these rules may apply, will straightforwardly lie within their scope. It is in this sense that in most legal systems, where rules constituted by general terms abound, there exists a penumbra of uncertainty: a realm of uncertainty with respect to the application of rules which is a product of our inability, as human legislators, to anticipate all the possible cases to which a rule may, or may not, apply. Along with this uncertainty comes some level of indeterminacy regarding the aims or purposes of rules, in Hart’s view. Until such cases have arisen, it will be impossible to say completely what exactly the aim of our rules is, for these cases will often mould our conception of the reasons for having the rule in place to begin with. When indeterminacy of aim is an issue, it will again be up to judges to use their discretion and choose “between the competing interests in the way which best satisfies us.”<sup>14</sup> Just as in law, as Hart pointed out, Russell believes that in sport the uncertainty and indeterminacy “of rules themselves will force choices on us” and that for this reason, “the exercise of discretion is both *a practical and moral necessity*” for sports officials, whose role as authority figures is, in Russell’s view, both to uphold the rules of their game, and to preserve the integrity of the sport which they officiate.<sup>15</sup>

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<sup>13</sup> Ibid. 128.

<sup>14</sup> Ibid. 129.

<sup>15</sup> Russell, 33.

With respect to Russell's view that sports officials are the types of adjudicators that will inevitably be forced to make discretionary decisions, I have very little to say to the contrary. I accept the Hartian line concerning the limits of the language of rules and the potential indeterminacy of their aims, and agree with Russell that approaching a theory of sports adjudication from a strictly formalist perspective is likely misguided for these basic reasons. This is where the descriptive side of the formalist view begins to break down. If we agree with Hart – as I do – that the open-texture and the potential indeterminacy of the aims of rules is a feature of general rules that we cannot escape, due to our human limitations, then it is unreasonable to claim that, as it stands, the only kind of normative standard that exists within legal systems are rules: for there must exist standards outside of rules that can be applied when rules are no longer of use. Claiming that sports officials ought to understand their practice as nothing more than an exhibition of clean, unreflective and non-deliberative rule application would thus apparently betray our best understanding of how legal decision making is carried out: because rules are not the only kind of normative standards to which legal systems give rise, and thus are not the only kinds of standards to which judges may appeal in arriving at legal decisions. And it is on the basis of this premise – Hart's idea that it is a necessary feature of legal systems, due to the nature of rules, that judges will have to exercise their discretion from time to time (when the language of rules runs out, or their aims are indeterminate) – that Russell will build his sports adjudication account. From the denial of the descriptive side of the formalist thesis (that rules are all officials have to work with), generated by Hart's necessity argument, Russell proceeds to offer his own prescriptive thesis about how

discretion in sports adjudication should be used. Russell's central prescriptive claim is that the exercise of the discretion of sports officials is, or at least ought to be, governed by principles that serve to maintain and bolster the integrity of sports. In the philosophy of law, the corresponding theory that takes as its basis a very similar claim about law, and adjudication, is the jurisprudence of Ronald Dworkin.<sup>16</sup> Indeed, Russell's explicitly stated end is to use Dworkin's theory as a rough outline for a theory of sports adjudication since he believes Dworkin's is "the most careful theory of the exercise of judicial discretion"<sup>17</sup> that general jurisprudence has to offer. It is this view in particular which disconcerts me. My goals now will be to first outline how Russell employs some of the fundamental Dworkinian theses to furnish his theory of sports adjudication, and then to evaluate the merit of this account.

Russell develops his theory of sports adjudication by first outlining two central themes that run through Dworkin's jurisprudence. First, Russell appeals to Dworkin's idea "that a body of moral principles is part of law in addition to its rules."<sup>18</sup> For Dworkin, the rules of a legal system are not exhaustive of the possible sources judges might, and do draw upon in order to determine answers to hard cases in law.<sup>19</sup> Because judges often appeal to legal principles as a means of resolving legal disputes, Dworkin believes this is evidence of the fact that law is comprised of more than just rules. Second, Russell points us to Dworkin's view that in using legal principles to decide hard cases,

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<sup>16</sup> Dworkin, Ronald. *Taking Rights Seriously*. Harvard University Press: 1977, 1978.;  
Dworkin, Ronald. *Law's Empire*. Harvard University Press: 1986.

<sup>17</sup> Russell, 34.

<sup>18</sup> Ibid. 34.

<sup>19</sup> *Taking Rights Seriously*. 22.

judges must use them in a way “that best reflect[s] the point of those principles,”<sup>20</sup> or in a way that best justifies their use in conjunction with rules over the course of a legal system’s history. Only when principles are used in such a manner that they offer the best possible justification for pre-existing legal practice do decisions in hard cases serve the end of fostering the “supreme virtue”<sup>21</sup> of legal systems, which Dworkin claims is integrity. On the basis of these two fundamental Dworkinian claims Russell proceeds to form the foundations of his theory of sports adjudication.

As Russell understands it, according to Dworkin’s theory of adjudication, law ought to be interpreted such that it most adequately reflects “some single comprehensive vision of justice”<sup>22</sup> or, in other words, such that it is able to readily reflect its essential ideal, integrity. There are two obligations a judge must fulfil in order to serve this end. First, a judge must interpret the rules and principles of her legal system in such a way as to give them a principled, and justified rationale, one that contributes to an understanding of their function as part of the law of their community, and that – by extension – portrays legal practice in its best moral light. Second, and as a result, when faced with deciding a hard case, a judge’s decision must be grounded in the ideal of integrity, which means that a judge’s job is to make a decision within a finite realm of possible choices. That is just to say that, despite possessing the ability to employ her discretion – as inevitably she must in hard cases – on Dworkin’s view a judge who takes the value of integrity seriously is bound to “regard as law what morality would suggest to be the best justification of...past

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<sup>20</sup> Russell, 34.

<sup>21</sup> Ibid. 34.

<sup>22</sup> Ibid. 34. See also, Dworkin. *Law’s Empire*. 134.

[judicial] decisions,”<sup>23</sup> and to decide hard cases based on that interpretation of their society’s political morality. For Dworkin, respecting integrity in law requires that judges,

“identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness...[A]ccording to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”<sup>24</sup>

In this way, when faced with hard cases, on Dworkin’s theory the extent to which judges may use their discretion to arrive at a decision is limited: because using their discretion in such cases means judging which decision among those they may choose from is most justifiable given their best interpretation of judicial decisions in – and thus their best interpretation of the law of – their community (in other words, the interpretation which puts the law in its best moral light, i.e. which optimally aligns it with the values of justice, fairness, and procedural due process). Making decisions in this sort of principled manner, Dworkin believes, allows judges to preserve the integrity of the legal system in which they operate, and thus is the strategy he thinks judges ought to use in deciding hard cases.

Russell’s contention is that these general comments about the role of judges in law provide useful insights for establishing a theory concerning the use of discretion by umpires and referees in sports. In order to make Dworkin’s theoretical claims fit within a sports framework, however, Russell provides a short list of “Principles of Adjudication in Sport”<sup>25</sup> that will inform, and ultimately govern, how sports officials ought to make decisions in hard cases. Russell’s proposed principles are as follows:

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<sup>23</sup> *Law’s Empire*. 120.

<sup>24</sup> *Ibid.* 225.

<sup>25</sup> Russell, 35.

1. *Rules should be interpreted in such a manner that the excellences embodied in achieving the lusory goal of the game are not undermined but are maintained and fostered.*
2. *Rules should be interpreted to achieve an appropriate competitive balance.*
3. *Rules should be interpreted according to principles of fair play and sportsmanship.*
4. *Rules should be interpreted to preserve the good conduct of games.*<sup>26</sup>

For our purposes, principle #1 is the one that will end up interesting us most, so I would like to spend a bit of time explaining it. What is meant by the “lusory goal of the game” here is the specific “obstacles or inefficiencies”<sup>27</sup> which are in large part constitutive of games, obstacles and inefficiencies that the game’s participants must succeed in overcoming in order to be successful in the game.<sup>28</sup> In so far as principle #1 asks officials to interpret rules so as to promote the sport-relative lusory goals of each match, and the athletic/cerebral excellences necessary to circumvent them, Russell thinks that what is in fact being asked is that sports officials interpret the rules with an eye to promoting the integrity of their games. Russell believes this is “implied”<sup>29</sup> by principle #1. Given the overarching aim of sports to create a setting in which the lusory goals are established, and in which players compete to navigate them, interpreting the rules such that these goals are upheld to the greatest extent (or, “to best effect”<sup>30</sup>) is tantamount to upholding the integrity of sports. Russell is thus arguing that by making use of the principles he has offered – especially #1 – and potential others just like them, sports officials will be in a better position to interpret the rules in such a way that when they must use their discretion

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<sup>26</sup> Ibid. 35-36.

<sup>27</sup> Ibid. 35.

<sup>28</sup> Like shooting the puck into the net in hockey, or shooting the ball in the hole in golf.

<sup>29</sup> Ibid. 38.

<sup>30</sup> Ibid. 38.

to decide hard cases they may yet arrive at good, reasonable decisions, and also preserve the integrity of their sport in so doing. But on the whole and for now, following Dworkin Russell believes he has offered an account of sports adjudication that, in highlighting the central role that principles should have in governing sports officials' decisions in hard cases (cases in which the language of the rules runs out, or the aims of the rules are indeterminate), and showing how their use may contribute to the safeguarding of the integrity of their sport's legal system, provides a rational alternative to the formalist approach to sports adjudication – an approach that, in the same way it does in law, does not seem to stand on the basis of good reason because it neither recognizes the possibility that other kinds of normative standards, aside from rules, may exist for sport, nor recognizes that officials could sometimes be justified in making use of such standards, were it indeed true that they constituted part of a sport's normative content, or law.

The main comment I am inclined to offer in response to Russell's view is that, in so far as he has aimed at providing the beginnings of a theory of umpire's discretion in sports, or a theory of sports adjudication (where this involves providing prescriptive claims about how officials ought to adjudicate in sports), Russell has perhaps not concentrated his efforts in the right direction, because he only offers a passing comment on what I would think should be a crucial element of such projects: namely, a discussion of how sports officials ought to respond to the difficult, 'easy' cases in sports. Russell has correctly pointed out that according to Hart, not only is discretion a necessary feature of legal systems in order to resolve hard cases, judicial discretion is a desirable feature of those systems as well. But in so far as these arguments are meant to show the necessity

and desirability of judicial discretion due to the fact of *hard* cases in law, as they stand they seem incapable of establishing the legitimacy of umpire's discretion in the kinds of cases in which authoritative primary rules do dictate apparently certain results, but in which other values at the same time argue in favour of judges deviating from, or not applying, those rules (in other words, in the 'easy' cases in sports). The idea in the legal context is that judges will sometimes be presented with cases in which adhering to the plain meaning of the language of the authoritative primary rules that apply, would produce what are manifestly suboptimal and undesirable results (they are called difficult, but 'easy cases', because they elicit concerns about the justifiability of rule application, even though little to no interpretation of the rules is required – given that their meaning is in these cases straightforward and clear). In some such cases, it is reasonable to think that it is better that judges be allowed to use their discretion and decide whether or not to deviate from the rules in making their decision, potentially making it instead on the basis of the underlying values the rules are meant to secure (like their social aims or purposes, for example), rather than be obligated to adhere to a rule and make a decision that will potentially lead to absurd consequences, as formalism would, without exception, appear to have it.<sup>31</sup> These types of cases, I am inclined to conjecture, should be as much, if not more, the focus of theories of sports adjudication as hard cases, since sports' legal systems are indeed generally well-defined, perspicuous and somewhat closed systems, where a judge's decision to apply or not apply a rule's plain meaning is more likely to be the source of contention on a regular basis, than decisions which involve officials' having

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<sup>31</sup> This is an argument of Waluchow's that we will return to in more detail in Chapter 3 of this paper.

to fill in the gaps of the rules are likely to be, since these are fairly rare.<sup>32</sup> I am critical of Russell's view primarily because he only offers a short comment on the kinds of cases to which I am referring.<sup>33</sup> Though it is not a fatal shortcoming, it is one of the facets of Russell's view that we should seek to clarify and strengthen: for without sufficient commentary on how 'easy' cases ought to be decided in sports, or on when it is justifiable for sports officials to deviate from clear and generally authoritative rules in suboptimal-result cases, the project of introducing a theory of sports adjudication, understood in terms of the framework that Russell has erected (one influenced by the insights of the philosophy of law), will remain incomplete.

Now, to be fair, we should point out that what Russell does say about rules with plain meanings that are already commonly overlooked by sports officials in favour of other considerations is that we may "expect or require systematic disregard or modification of certain rules [like the rule for the strike zone, or for hooking in hockey, say] to the extent that it usefully helps to create the context for the exercise of sport-related excellences, since the rules may only achieve this imperfectly," and that this kind of practice can be justified if it is pursued in order to ensure that "the skills that are

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<sup>32</sup> That Russell only cites four hard cases from the long history of Major League Baseball may be evidence of the fact that hard cases in sports are indeed fairly rare in comparison to easy cases – cases which result in our questioning the official's application of, or deviation from, a rule's plain meaning.

<sup>33</sup> Russell, 39. Russell's examples of rules that tend to lead to such cases include the rule for the strike zone in baseball, or the obstruction and interference rules in sports like hockey and basketball (and probably football too). These are indeed the right kinds of rules to point to – since these are the ones whose plain language would probably produce suboptimal results were they strictly adhered to, and since it seems officials do tend to disregard, or deviate from them most often – but my claim is that more can be said about these kinds of rules, and how they are to be treated by officials when they would produce undesirable or unreasonable results.

contemplated by the game actually have a genuine chance to be exercised and play a role in the game.”<sup>34</sup> But in order for a theory of sports adjudication to be complete, I would think that we should expect more in terms of an explanation regarding how this practice can be optimally carried out, and shaped, and I am skeptical of Russell’s view that his “account of principles of umpire discretion and of integrity...helps to guide [such a practice].”<sup>35</sup> This follows because it is likely that there are various kinds of normative standards outside of *principles* of adjudication – and in particular Russell’s principles of adjudication – that games and sports engender that serve to guide officials, or to which officials may appeal, in attempting to arrive at the most optimal decision in easy cases (like secondary rules of adjudication for example, or something similar<sup>36</sup>). For hard cases, the list of principles of adjudication that Russell has offered may indeed be instructive, because these principles offer directives on how to go about interpreting the rules so as to make decisions that best reflect the spirit of the rules and the underlying values of the sport in question when the language of the rules runs out, or their aims are indeterminate, and the gaps in the sport’s law need to be filled in. But in the cases in which application, not interpretation, of the primary rules – and their plain meaning – is at issue, these principles (which instruct officials on how to interpret the rules, not apply them) would apparently be of little to no utility, and it is reasonable to think that other diverse kinds of standards can – and should – influence and justify officials’ decisions to either apply a

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<sup>34</sup> Russell, 39-40.

<sup>35</sup> Russell, 39.

<sup>36</sup> Hart introduces the notion of rules of adjudication in his discussion of the secondary rules that modern legal systems commonly engender. For more on rules of adjudication in particular, see his discussion at pgs. 96-98 of *The Concept of Law*.

rule, or decline to, in their stead. I am inclined to conjecture therefore that a thorough theory of sports adjudication, as Russell's account is meant to be a precursor to, would be cognizant of this fact, and might even attempt to articulate some such standards of its own. When it comes to easy cases in sports, Russell has not offered us enough of an account of the way normative standards other than principles of adjudication might serve to guide the decisions of officials. We should expect from a theory of sports adjudication some commentary on these kinds of standards, and how they might be formulated so as to best serve sports officials who must actually put them to use.

But one might yet respond: "shouldn't saying that officials should decide easy cases by attempting to show the game in its best light, as Russell has,<sup>37</sup> be sufficient for explaining how these cases ought to be responded to, and for providing some guidance to officials who must respond to such cases?" To this I would say that appealing to the idea of integrity, or the idea of showing the game in its best light, indeed takes us part of the way, but drawing the picture in the way Russell has leaves unresolved a subtle ambiguity. As Russell is right to refer to,<sup>38</sup> in the major professional sports (and indeed, in almost any other formal, organized sports setting) it is, I would agree, a vital aspect of the prosperous administration and adjudication of these institutions that its officials strive to promote the integrity of the game. However, it is not always necessarily clear what we mean by our use of the expression 'the game' in this context. It seems we could sensibly mean either of the two following propositions: P1) Officials ought to be concerned, in deciding easy cases, with promoting the integrity of the game writ large, understood in

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<sup>37</sup> Russell, 39-40.

<sup>38</sup> Ibid. 35.

terms of the integrity of the league (or closed legal system), and that league's brand of game, within which they are working (the MLB or the NFL, for example); or P2) Officials ought to be concerned, in deciding easy cases, with promoting the integrity of the game *in which they are the adjudicator*: a game that is played within the context and framework of a more general and complex legal system, but which has peculiar nuances and characteristics that distinguish it, in isolation, from any other. The assumption one might make given Russell's presentation of the idea is that P1 is always true, because it seems logical that in response to the question of how we are to understand what Russell means by invoking the value of integrity in sport, he would answer that we should understand it as Dworkin might (within the context of the latter's theory of law). That is, the implication one might draw from Russell's view is that an official's appealing to integrity, and deviating from the plain meaning of primary rules in order to create the contexts for athletic excellence to be displayed, is justified so long as the appeal fits and reflects, to an appropriate degree, the normal judicial practices of that sport and the 'legal system' that it is engaged to. We might imagine Russell saying that an official's decision in response to an easy case must have "general explanatory power,"<sup>39</sup> or the ability to reflect the way the lusory goal(s) of that sport are commonly interpreted, and the athletic excellences necessary to achieve them are routinely facilitated (in so far as officials do indeed facilitate them). And upon some deep engagement with the idea, I would imagine this is what most people would think of when they think about what promoting integrity means in sport. Staying within the literature, however, this view – if it is indeed a view

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<sup>39</sup> Dworkin, 228.

we can attribute to Russell – is merely a consequence of Russell’s marriage to Dworkin’s theory of law, and is therefore not a proposition to which we must also necessarily be tied. In sports, despite the unarguable and fully justified weight and influence of a standard like P1 for many scenarios, in a wide range of easy cases a standard like P2 is likely to be equally optimal. That is because in sports promoting the integrity of the game does not always have to do with protecting the general interests of the sport as a whole, but for officials instead often means protecting and eliciting the values associated with that individual game, from a) the game’s beginning (e.g. “what do we want this game to be like? how do we want it to be played?”), to b) its unfolding and its conclusion (e.g. “how do we want it to continue to be played given what has happened to this point in the contest?”). This follows because unlike in law, where integrity is predominantly related and tied to systemic values like justice and fairness, in sports integrity may be related to other values as well (e.g. values that speak specifically to the contexts of individual games). This does not mean of course that justice and fairness are not relevant when it comes to discussing integrity in sports: it just means that sports ‘legal systems’ may not be symmetrical with typical, state-based legal systems in the way they value justice and fairness, and that for sports, other values may be relevant. My claim is that deciding easy cases, or deciding if/when to decline to apply the plain meaning of an authoritative primary rule, should in part be a function of showing the game – understood as: ‘this game in particular, in which I – as official – am adjudicator’ – in its best light, and of considerations of a more systemic conception of integrity when called for. In an attempt to help buffer and improve upon the philosophical presentation of normative instruction

for sports officials that Russell has spearheaded in ‘Are Rules All an Umpire Has to Work With?’ the guidance rule I will offer toward the end of this paper attempts to account for this premise.

Russell’s Critics

However, before we move to the positive section of this paper, we must first make a detour into the literature of the philosophy of sport, at least as it pertains to Russell’s account, for this is our primary focus in this chapter. In this section, we will concentrate on understanding how the critics (though few and far between) have specifically responded to the possibility of a theory of sports adjudication, and how, in evaluating that possibility, they have argued for amendments to Russell’s proposals, and to his general argumentative scheme. In so doing, we will put ourselves in a better position to offer an account within the philosophy of sports adjudication that best aligns with the philosophical discussion that has followed in Russell’s wake.

For our purposes, the critical works of two thinkers in particular are worth bringing to bear on this discussion. Those works are Graham McFee’s ‘Fairness, Epistemology, and Rules: A Prolegomenon to a Philosophy of Officiating?’<sup>40</sup> and Mitchell Berman’s ‘On Interpretivism and Formalism in Sports Officiating: From General to Particular Jurisprudence.’<sup>41</sup> We will deal with McFee’s account first and then reflect on how Berman’s account either matches, or diverges from it in different respects. What is

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<sup>40</sup> McFee, Graham. ‘Fairness, Epistemology, and Rules: A Prolegomenon to a Philosophy of Officiating?’. *Journal of the Philosophy of Sport* 38 (2): 229-253, 2011.

<sup>41</sup> Berman, Mitchell. ‘On Interpretivism and Formalism in Sports Officiating: From General to Particular Jurisprudence’. *Journal of the Philosophy of Sport* 38 (2): 177-196, 2011.

worth pointing out at the outset, however, is that both of these thinkers share Russell's ambition to argue against a narrow formalist understanding of the role of sports officials, one where written rules are, and ought to be, all officials can draw on to make decisions; but neither thinker will agree whole-heartedly with Russell's manner of overcoming the formalist challenge.

First, McFee offers a critique of what would appear to be, in Russell's work, the goal of providing the groundwork for what might be called a "philosophy of officiating." As McFee sees it, Russell's hope is to furnish a philosophy of officiating by "supplying, to officials, advice...that will apply to their adjudications in *all* contexts (that is, exceptionlessly); and will do so independently of the context of application."<sup>42</sup> By proposing principles of sports adjudication, McFee thinks Russell has attempted to offer a general normative theory for sports officials across *all* sports; a theory that, since it relies on something like universal principles, seems to undermine the potential importance of the varying contexts in which officials would ever have to put such principles to use. McFee does not think it necessary to provide a "philosophy" – so-called – for officiating sports, nor does he think officials ought to make decisions according to principles of sports adjudication. Consequently, though he ultimately agrees with the notion that "there *is* room for discretion"<sup>43</sup> when it comes to explaining the role of sports officials, McFee is interested in shifting the focus of this discussion: his interest lies in discussing the adjudicative practices of sports officials in a way that need not be so rigidly tied to the goal of offering a general theory of umpire discretion, or in my terms, a general theory of

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<sup>42</sup> McFee, 229.

<sup>43</sup> Ibid. 234.

sports adjudication. McFee’s motivation for so changing the terms of this discourse springs from the intuition that even if we accept the existence of something like principles that can play a role in aiding sports officials in decision-making, any principles that might be used in a particular game must “reflect the particular sport”<sup>44</sup> in which they are being used. So, rather than reflect some general or universal facts about sport as such, McFee thinks that any principles of adjudication in sports are restricted, at best, to reflecting the sport-specific values and norms that they are designed to protect. As such, our goal should not be to develop a fully general normative theory for adjudicators in all sports, even if we want to provide a normative adjudicative account as I do. Rather, our focus should be on providing normative accounts that are sensitive to the possible peculiarities of diverse sports and, to the extent that it is possible, to the circumstances or contexts in which they might be put to use.

McFee’s dissatisfaction with Russell’s principles of adjudication in sport has as much to do with the generality, or proposed scope of those principles, as it has to do with their practical utility for sports officials in real situations. In other words, part of the reason McFee is not satisfied with Russell’s principles is because, in response to the question of whether or not such principles could be genuinely helpful for sports officials that have to make live, in-game decisions, McFee cannot answer affirmatively. In so far as Russell’s principles of sports adjudication fail to offer any concrete details about decision-making in particular sports, McFee thinks the principles are “abstracted from actual decisions; and thus do not in themselves facilitate coming to officiating

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<sup>44</sup> Ibid. 235.

decisions.”<sup>45</sup> McFee points out that in terms of the actual decision-making process, it is not entirely clear how the first principle of sports adjudication, say, would influence it. This follows, he thinks, because in order to decide which decisions are the best ones for me to make as a hockey referee, for example, I must have a “sport-specific conception” of, in this case, the lusory goals of hockey that help to determine when and why certain conduct by players and/or coaches, serves to realize the end of promoting the game’s lusory goals. Though I may invoke something like the first principle if I were asked to justify my decision after the fact,<sup>46</sup> this does not necessarily mean that in making a decision in real time, often in a fraction of a second, I am therefore contemplating how my chosen rule application accords with the first principle, and deciding on that basis. To the extent that the first principle can be used as a means to justifying in game decisions *ex post facto*, perhaps it can be used to serve some practical end; however, McFee is unconvinced that it, or any other principle like it, would be useful in arriving at decisions at the time of making rule determinations in difficult cases. For this reason he is wary of the practical utility of philosophies of officiating in sports, so conceived.

Thus, though McFee is happy to acknowledge the need for the use of discretion by sports officials, and though he recognizes the fact that Russell has rightly identified hard cases as bearing important consequences for a so-called philosophy of officiating, he remains dissatisfied with the general theory of sports adjudication, and the set of principles of sports adjudication that follows from it, that Russell has offered. Moving

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<sup>45</sup> Ibid. 238.

<sup>46</sup> See McFee, 239 where he says that in fact, the relevant principle “is simply derived after the fact as a summary from principled decisions.”

forward, McFee would have us recognize the arguments regarding sports officials, and regarding general theories of sports officiating, that he has thus explained, but he would also have us attend to the fact that,

“we neither *need* such an account analyzing principles of adjudication [like Russell’s] nor *benefit* from it. For any actual adjudications cannot *depend on* the principles in their most abstract formulation since ultimately that formulation is abstracted from those adjudicative decisions.”<sup>47</sup>

Though perhaps we need not go all the way with McFee here, we can at least recognize – and hopefully agree on – the insight that his view has generated: that adjudicators ought only to be concerned with principles such as Russell’s to the extent that those principles do not override, or impair their ability to continue making contextually relevant decisions throughout the course of a game, for it may in fact be contextual considerations that lead to optimal adjudicative practices in certain cases, as much as anything else.<sup>48</sup>

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<sup>47</sup> Ibid. 249.

<sup>48</sup> I would like to point out that in certain respects I appreciate the arguments McFee has offered, in so far as they are useful preliminary comments for evaluating Russell’s account. However, I am not convinced on one hand that we cannot make some general comments about sports adjudication, and the way rules ought to be applied in a general sense across sports (either formalistically or not), even if we can’t build a complete theory for sports adjudication that cuts across all sports. The fact that there are sport-specific values, which will in large part dictate the way a game should be adjudicated, does not mean that there cannot also be general sport-related values that should influence adjudicative practices in sports. A second point to make in response to McFee’s view would be that even though principles may sometimes be too general to be able to properly account for circumstance when decisions must be made, the same could be said of rules, and many other normative standards relative to adjudication as well. This should not stop us from trying to formulate standards officials can put to use, however: it just means that we (and officials themselves) ought to bear in mind the caveat that in certain cases, deviation from, or modifications to, generally authoritative standards can be fully justified and desirable.

Let us turn now to Berman's critique of Russell's account. As we will see, Berman's arguments, though distinct from those that McFee has offered, end up yielding a very similar result as McFee's in some respects. Again, the conviction shared by Russell and McFee, that arguments for formalistic officiating in sports are to be questioned in theory and avoided in practice, is one that Berman more or less accepts, given a few important qualifications. And it is worth noting that these qualifications are crucial. For it will not be Berman's thesis that no sport should ever be officiated in a formalistic manner, without exception, as it would perhaps appear that Russell (for example) would contend. Rather, Berman's claim will be that "some degree of formalism in sports officiating may often be supported by good reasons"<sup>49</sup> and that these reasons will be furnished by the different values that each individual sport holds in high esteem, one of which might be, for the sake of argument, ensuring that each contest is played according to a strict and literal reading of the rules. Yet, in spite of his defense of this caveat, Berman maintains that his account should not be taken as "a brief for formalism."<sup>50</sup>

So why think formalism reasonable at all? Before answering this question, there are a few distinctions Berman makes that we ought to review. The first distinction Berman draws is one between "a theory of legal content...[and] a theory of adjudication or officiating."<sup>51</sup> This distinction is not one that is necessarily novel; in fact, it is a distinction that is also made in the philosophy of law. Simply put, the distinction would have us remain sensitive to the fact that claims about the nature or the content of law (in

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<sup>49</sup> Berman, 178.

<sup>50</sup> Ibid. 182.

<sup>51</sup> Ibid. 180.

any rule-governed system), ought to remain in a conceptually distinct class from claims made about how adjudicators relate to, and ought to apply, the law. That is just to say that the exercise of providing a prescriptive, normative account of the way judges should interpret and apply the law, should not be confused with the exercise of providing descriptive-explanatory accounts of rule-governed social systems. Conversely, we are entitled to make conceptual arguments about the nature and function of law, or rules in general, without committing ourselves to any theses about how judges can best fulfil their role within legal systems. All in all, these two types of theories (of law, and of adjudication) can be conceptually distinct, though of course interplay between the two is to be expected. This premise becomes crucial if we are to understand the definitions of certain positions within the philosophy of sport that Berman offers.

Within theories of the legal content of sports (i.e. theories of the normative content of sports), Berman understands the central debate to be one between two primary antagonists: the internalists and the positivists. According to internalism, and those who subscribe to it, “the law of a sport consists of principles in addition to [its] promulgated rules.”<sup>52</sup> Russell, for example, would thus be properly called an internalist, given his arguments in favour of understanding the so-called law of baseball (and, as we have seen, of sports more generally) as consisting of not merely the written rules of the game, but also of principles that govern the interpretation of those rules. On the other hand, Berman believes that positivists subscribe to the view that “rules alone comprise the content of a

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<sup>52</sup> Ibid. 179.

sport's law."<sup>53</sup> Though followers of this line of thought are often referred to as formalists, Berman wants to save that name for a camp of thinkers within adjudication theory. The positivists, as Berman sees it, would reject the internalist's claim that a sport's law consists of anything more than its promulgated rules, and it is for that reason that they are often associated with the formalist notion that officials have nothing else to draw on in their decision making process other than those rules. But again, on Berman's account, formalism is a position within adjudication theory, and he believes it need not be conceived as strictly as Russell and McFee seem to want it. That is, formalism need not be thought of as a position that necessarily rejects the idea that sometimes adjudicators will be required to make decisions that involve their discretion. Rather, formalism, as Berman understands it, merely contends that officials should not "invoke uncodified principles when interpreting posited materials, let alone...effectuate interpretations that run contrary to a rule's 'plain' or 'clear' language."<sup>54</sup> Opposed to this type of adjudicative formalism are the interpretivists who, along with Russell, believe that officials may justifiably draw on the "abstract principles that are part of the law governing a sport" in order to arrive at the best decision they can under the circumstances they face, principles which are "determined by reflection on the values and purposes that best cohere with the institutional history of the sport and show it in its best light."<sup>55</sup> So on Berman's account, we must be careful to distinguish views about the legal or normative content of sports from theories about the best adjudicative strategies sports officials ought to adopt in

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<sup>53</sup> Ibid. 180.

<sup>54</sup> Ibid. 180.

<sup>55</sup> Ibid. 177.

arriving at decisions in the moment. Without so clarifying our discussion, we may fall victim to muddying our arguments in favour of a certain kind of position within the philosophy of sports adjudication.

Now, what all the theses we have just introduced share in common, Berman thinks, is that they would all be properly classified as theses within general sports jurisprudence.<sup>56</sup> In other words, what each of these theses provide, whether they are theses of the legal content of sports, or theses about adjudication in sport, are claims about sport in general, and that would presumably hold for sports in *all* cases. Berman leaves open the possibility that it might be fine to theorize about general claims for sport, and sports officiating, and that it may perhaps even be beneficial. However, Berman is apt to point out that “officiating is necessarily a sport-particular endeavour, not a sport-general one,”<sup>57</sup> and as such, it would be wise to amend our discussions surrounding sports adjudication such that they can account for the fact that when it comes to officiating an individual sport, there may be certain features peculiar to the task of officiating that sport *in particular* that will have a hand in determining the best normative account for sports adjudicators within the given sport which we are discussing. Berman’s underlying goal in this paper then, is to insist that when it comes to theories of sports adjudication, we “must pay careful attention not only to the general jurisprudence of sport, but to the particular jurisprudence of individual sports as well.”<sup>58</sup>

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<sup>56</sup> Ibid. 179.

<sup>57</sup> Ibid. 179.

<sup>58</sup> Ibid. 179.

To this end, Berman provides two arguments that show how formalism could indeed be a legitimate and reasonable thesis for adjudicators *of a certain sport* to put into practice: for one, it is possible that principles of sports adjudication might actually endorse strict enforcement of the plain meaning of the rules. This just means that even though there may be some merit to the interpretivist’s idea that adjudicators ought to draw on the uncodified principles of sport in order to make decisions, this does not preclude the possibility that one of those very principles may, for certain sports, ask officials to apply the written rules, understood in a literal way, without necessarily referencing other values or considerations. Principles may require, in other words, “a relatively literalist approach to the meaning or import of a rule-like text,”<sup>59</sup> if this is a value embraced by the sport in question. Next, it should not be assumed that simply because the legal content of a certain sport includes principles, the role that sport conceives for its officials necessarily involves them interpreting and making use of such principles when they adjudicate. It is a question unique to each sport to what extent it would have its officials make use of principles in game; that is, “it is a question of institutional design”<sup>60</sup> that will lead us to an answer about whether or not, or how often, officials can draw on principles when arriving at decisions, rather than simply using the rules *simpliciter* of their sport to facilitate decision-making. In these ways, formalism, though it may be of little appeal as a general thesis about how sports adjudicators ought to go about their business, should not be simply dismissed in the same way it would appear that Russell would have it. This follows because of the potential plausibility of the formalist line to be one that some

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<sup>59</sup> Ibid. 178.

<sup>60</sup> Ibid. 178.

sports go to great lengths to defend and preserve, given the values to which they, as distinct legal systems, are deeply committed.

To summarize this section then, the first thing we could say is that both McFee and Berman are committed to rejecting a strict, generally formalist, understanding of the role of sports adjudicators. In this sense, they do indeed side with Russell to some extent. Where they begin to diverge from Russell's thinking is with respect to the notion that a sound theory of sports adjudication could be formulated without reference to specific sports. Rather than conceive the project of the discourse on sports adjudication as attempting to provide a universal account for all adjudicators in all sports, these thinkers want to place an emphasis on restricting our discussion to one that focuses on providing accounts of the roles of adjudicators within particular sports, since it seems reasonable to think that given the peculiarities of each of the diverse types of sport, those roles may not be invariable. Though I think it fair to call this the common ground shared by McFee and Berman, it is worth pointing to at least one of the inconsistencies between the two views. First and foremost, it is clear that where McFee is deeply skeptical of the practical utility of principles for adjudicators, Berman is not. Berman, that is, is prepared to accept the possibility that principles may in fact figure in to the content of a sport's law (or its normative content) and that such principles may have some practical import for sports officials. McFee, on the other hand, is not so certain. What Berman does caution though, is that simply because principles have a hand in constituting the law of any given sport, this does not rule out the possibility that what certain sports may want from their officials is a seemingly formalist approach to their task. In short, for Berman, it is neither

unreasonable to think that individual sports may value a strict and literalist interpretation, and application, of the rules by their adjudicators, nor to think such formalism a (potential) direct consequence of a sound interpretation of the various principles certain sports promulgate.

### *Is It Playable?*

In this chapter we have explored three related accounts in the philosophy of sports adjudication, and we have covered some interesting ground. The question now is: is it ground upon which we may safely endeavour to formulate a novel account? My answer is yes. Though none of the accounts described above fit as a perfect model for our discussion in what follows, they certainly provide a few crucial insights worth bearing in mind as we proceed, insights that help to frame our discussion. Here is a series of related lessons to be learned from the preceding:

1. The possibility of applying jurisprudential method to sport in order to improve our understanding of sports adjudicators is real; and to do so is highly provocative.
2. There is room for movement in the overall philosophical discourse on sports officials (i.e. we need not be tied to any authoritative account in this context).
3. Establishing a theory of sports adjudication in general terms is possible, but establishing a theory of *a sport's* adjudicators could be a task of equal merit as well.
4. Any such theory would appear to require a corresponding account of the values of sports generally, or of the sport under examination in particular.

5. Though integrity may be one such value, there is reason to think that the way it is invoked in practice in order to show sports' legal systems in their best light may be different from the way it would be in a legal setting, since for sports it may be associated with values outside of justice and fairness – and may in fact be closely associated with the values that are relative to a particular game.
6. Though rules, principles and other normative standards may constitute part of a sport's law, officials should use such standards to facilitate decision-making only to the extent that they are not thereby forced to abstract unreasonably far away from the context in which decisions/determinations are required.

With these considerations in mind, we forge ahead now to the second chapter, where I set the descriptive-explanatory groundwork for a general normative proposal for adjudicators in the four major professional North American sports, one which is grounded in the general justifiability of deviating from the plain meaning of any sport's promulgated rules when adhering to that meaning would otherwise produce undesirable results.

### Chapter 3: Establishing The Ground Rules

In the last chapter we examined one of the dominant accounts of sports adjudication that the philosophy of sport has to offer in the work of J.S. Russell. That Russell's account provides an interesting framework for understanding the nature of sports rules and the role of sports officials should by now be clear; that Russell's account may be criticized and improved upon should also by now be evident. Building on the latter remark, the argument I would like to begin to develop in this chapter is that though Russell's account certainly is provocative, we need not necessarily deem it *the* authoritative account within the discourse on sports adjudication. In other words, though Russell has offered us a very distinct and novel manner of understanding sports officials, in so far as it tries to characterize the practices of sports adjudicators in terms of a Dworkinian conception of sport (which follows from a more general Dworkinian conception of law), we should not restrict ourselves to elaborating on this discussion in identical terms as these. That is, we should not be compelled to try to understand sports adjudicators solely through the lens of Dworkin's theory of law; for, as will become clear, Dworkin's is not the only account of the nature of law worth pausing to consider, nor is it necessarily clear that his is "the most careful theory of the exercise of judicial discretion," as Russell supposes. In this chapter I offer the proposition that there may be multiple alternative jurisprudential means of theorizing about sports adjudicators outside of that which Russell has proposed. I will argue that we might benefit substantially from crafting a normative account for sports adjudicators that flows from the pertinent features of a legal positivist's descriptive-explanatory theory of law. Thus, in this section it will be my

task to demonstrate how we might expand the discussion that surrounds theories of the legal content of sport(s) by importing legal positivism to the sports context. In particular, my claim will be that we would do well to philosophize about sports in general through the lens of *inclusive* legal positivism, and that by doing so, we position ourselves well to formulate a rich and reasonable normative account to which sports adjudicators ought to pay heed.

*Worries Surrounding The Internalism v. Positivism Debate*

Toward the end of the last chapter, I introduced us to a distinction that Berman makes between theories of legal content and theories of adjudication: the former purport to tell us something about the normative structure of legal systems generally speaking, whereas the latter suggest what the legal practices of officials within certain systems ought to be. When it comes to theories concerning the legal content of sports, recall that Berman framed the debate as one that generally occurs between two diametrically opposed parties: the positivists and the internalists. Positivism, as Berman has described it in the sports context, supports the idea that promulgated rules of the type that one would find in a rule book, and those rules alone, are what make up the content of a sport's law, and are thus more or less the sole resource that officials have to draw on while adjudicating. By contrast, according to internalism, rules alone do not exhaust the potential sources of normative force within a given sport's legal system, because in addition to rules, a sport's law might – and probably often does – include principles. According to this view, if and/or when adjudicators appeal to principles to decide 'hard cases' in sport, they are not appealing to extra-legal sources, because principles just are a

part of the corpus that constitute that sport's legal, and normative, content. Indeed, such principles, though perhaps obscure to the untrained eye, are among the primary resources at the disposal of officials whose role it is to uphold the law of a sport to the best of their abilities, given that without them, such a task would by implication be impossible. As Russell endorses it, internalism appears to follow directly from Dworkin's understanding of the different forms of standards that law admits. One of the most distinctive features of Dworkin's theory of legal content, as he opposes it to that of a legal positivist like Hart, is that it supposedly accounts for the fact law ought not to be understood merely in terms of standards that "function as rules," but instead ought to be conceived, given modern Western legal practice, in terms of "principles, policies, and other sorts of standards," which operate in a manner altogether distinct from the manner in which rules function.<sup>61</sup> The difference between these two forms of standards is that whereas "rules are applicable in an all-or-nothing fashion," and thus supposedly immediately determine decisions in cases to which they apply, principles simply state reasons that point in favour of deciding one way or another, rather than determining a particular decision to a given case.<sup>62</sup> To a certain extent then, it is in Dworkin's claims concerning the existence of various forms of legal standards that Russell's internalism for sport finds its motivation. Russell builds his internalist picture by noticing how Dworkin's theory, which is supposed to adequately reflect an understanding of law that is not ignorant of the types of moral principles to which legal practitioners regularly appeal, might be equally plausible taken in the context of the discussion on sports adjudication.

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<sup>61</sup> Taking Rights Seriously, 22.

<sup>62</sup> Ibid. 24-26.

However, it seems to me that the internalism v. positivism debate, as it has been formulated here, stands in need of clarification, and that we might make a few modifications to the labels we have accorded these theoretical stances. First, it should be reiterated that not all adherents of internalism, understood as a thesis about the normative content of sports, must be committed to the kinds of claims or propositions that constitute Dworkin's integrity theory of law.<sup>63</sup> That is, it should not be necessary that in order to accept internalism we must accept Dworkin's as the model theory of law for explaining how rules of sport function, and how they are applied by officials. As it has been framed to this point, it is true that the best defense of internalism does lie in the acceptance of interpretivism,<sup>64</sup> a Dworkinian thesis about how principles of the interpretation of rules are generated and what their normative effect is – but this does not mean that internalism is only intelligible if one also accepts interpretivism. Indeed, I would suggest that defending internalism, and defending interpretivism, if ultimately we seek jurisprudential clarity regarding the nature of sports rules, and sports adjudicators, ought to be distinct endeavours. What appears to have taken place in Russell's account is that he seems to have not given due consideration to the distinction introduced in the last chapter, widely accepted in the philosophy of law, between theories of law and theories of adjudication. That is, Russell wants to offer a theory of adjudication, but he does not take as a separate task an explanation of the normative content of sport. Rather, his theory of adjudication,

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<sup>63</sup> Berman acknowledges that he would like to affirm internalism without committing himself to all of Dworkin's "claims and assumptions," (177) despite the way in which Russell has framed that view (i.e. as one which hinges on interpretivism).

<sup>64</sup> Ibid, 177. In addition to Russell's account, see as well Simon, Robert L. 'Internalism and Internal Values in Sport'. *Journal of The Philosophy of Sport* 27: 1-16, for a strong defense of this form of internalism.

interpretivism (founded on Dworkin’s integrity theory of law), informs his theory of the normative content of sport (internalism), and the latter is said to be true as a result of the former. But this appears backward. It would seem reasonable to seek an answer first to the question of what the normative content of sports is, based on the ‘legislative’ texts they admit, and the practices of their officials, and then provide guidance or normative suggestion to adjudicators once internalism has been established, or not. Diverging from Russell’s methodology, I will attempt to employ this kind of strategy here.

Thus, since Russell is an example of an internalist committed to interpretivism (without which it appears that internalism on his account just would not work), and since his account is among the more persuasive defenses of the internalist view, I will argue against internalism to the extent that it is understood in terms of a position that must be influenced and supported by Dworkinian interpretivism (as is Russell’s). In this way, it is not in my agenda to discard internalism entirely, if that position is constituted at its core by the claim that a sport’s normative content may include more than mere promulgated rules. In fact, I will end up defending internalism as a general thesis about the normative content of sport, but to do so I will appeal to positivism. Discarding the conventional understanding of positivism (or perhaps more specifically, the understanding of positivism that Berman provides), I will suggest that *inclusive* legal positivism provides strong theoretical ground for aligning ourselves with internalism, and that it can do so without our having to commit to any of the Dworkinian claims that (roughly) constitute the basis for interpretivism.

Before showing how internalism might be a more reasonable view were it supported by a thesis other than interpretivism, however, we should pause to consider an argument for the view that internalism which hinges on interpretivism is problematic. An internalist that is committed to defending that view on the basis of Dworkinian interpretivism is, in a general sense, committed to the thesis that “abstract principles are part of the law governing a sport” and that in order to determine which principles actually are part of the law governing a sport, some time must be devoted to decide which practices show that sport, and its institutional history, in its best light.<sup>65</sup> In the same way that Dworkin would argue for this view with respect to law, it seems that ‘sports interpretivists’ would have us believe that the principles which govern adjudication are those that most adequately justify the settled rules of a game and the values they are supposed to protect. As such, we might suppose it safe to say that interpretivists would agree that, “the grounds of [a sport’s] law lie in an interpretive, fundamentally normative theory of the [sport’s] settled law.”<sup>66</sup> Hence, in order to determine what the grounds of a sport’s law actually are, an interpretivist would be inclined to pursue an interpretation of those grounds that can explain and justify the practices of that sport’s officials via arguments regarding the values and purposes that the sport in question is itself fundamentally committed to. As it is on Dworkin’s integrity theory of law, on the interpretivist picture the exercise of explaining the grounds of a sport’s law, or determining them (i.e. determining, in part, the principles of adjudication that sport admits), must inevitably dovetail with the exercise of justifying the practices of the

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<sup>65</sup> Berman, 177.

<sup>66</sup> Waluchow, Wilfrid. *Inclusive Legal Positivism*. Oxford University Press, 1994. 11.

officials that adjudicate it, and showing them in their best light, for only in so doing may the integrity of that sport's legal system be fully demonstrated and exemplified.

One potential concern with this methodology, however, is that it does not demonstrate why it should be *necessary* that either a theorist attempting to explain the normative content of a sport's law, or an official attempting to adjudicate a game with principles of adjudication at his disposal, needs to commit himself to any such justificatory exercise in order to legitimately complete these tasks, as interpretivism seems to demand. Why should it be necessary, in other words, that either a theorist or a practitioner of the law of a certain sport be concerned with making their object of examination or interpretation the best it can be? Why should description and application be “fundamentally governed, not merely motivated, by the goal of justification?”<sup>67</sup>

Perhaps an answer to this question can be formulated on the basis of the reason we even embarked upon a discussion of this subject: namely, to show how the internalist view that a sport's law can consist of more than just promulgated rules, and therefore, that rules are *not* all an umpire has to work with, is reasonable. The argument might be that the only way in which an appeal to anything other than the rules *simpliciter* of a game can be warranted is when it is made against the backdrop of a fully rationalized, value-laden interpretation of that sport's objectives and purposes. Without this kind of a rational framework, one might argue, a philosopher of sport has no grounds for claiming that there may be, and perhaps often are, other reasonable considerations outside those directly promoted by the sport's promulgated rules to which officials may appeal in arriving at

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<sup>67</sup> Ibid. 16.

rule determinations, and moreover in the absence of such a conception an official has no basis for using anything other than the rules to impose restrictions on the actions and behaviour of his game’s participants. This response has an element of legitimacy. It may perhaps be true that in order to furnish the anti-formalist notion that most of us find appealing, that there are tools in an umpire’s shed outside of the rules, what is necessary is the explanation and defense of arguments that hinge on morally charged assertions about the values that sports in general, or sports in particular, ought to embody or already do embody. That this concession, however, yields the interpretivist conclusion that a non-formalist adjudicative approach requires a robust appeal to the integrity of games, and as such requires an argument that shows the adjudicative practices of sports in their best light, is far from a stable conclusion. What interpretivism fails to appreciate is the fact that we may explain, in theoretical terms, what kinds of legal resources legitimately lie in the hands of adjudicators to determine answers to difficult cases without necessarily engaging in a discussion of why they are justified in having access to, or using, those resources. And there is no reason to think that part of our explanation in this regard could not involve showing that such resources include abstract principles of adjudication, or considerations the basis for which lie in the lusory goals of a game. To put the idea another way, we should not be worried to provide, in conjunction with an explanation of the normative content of a sport’s law, “a true or adequate moral justification” of that content.<sup>68</sup> These two tasks can be separated from one another, at least on the theoretical

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<sup>68</sup> Ibid. 27.

level. And if this is right, then there is no reason to believe that internalism can only be defended in terms of interpretivism.

On the contrary, my suggestion is that internalism ought to be conceived in terms of a general thesis about the normative content of sports, one which seeks to explain the way rules and other normative standards generally function in sport, but which does not necessarily stand only so long as it is propped up beside a morally loaded justification of a sport's rules, standards, and principles, and the practices of the officials who apply them. What we ought to seek, before justification, is a "morally neutral, detached description"<sup>69</sup> of the legal resources that are habitually put to use by officials in various legal systems in order to determine just what those resources actually are. If, after engaging in this endeavour, we decide that it is reasonable to believe that the normative content of sports are generally constituted by more than just the promulgated rules of each sport, then we will be secure in our conviction that internalism is a reasonable thesis about the normative content of sports generally speaking. Alternatively, if after engaging in this endeavour we choose to impose moral purpose or value on those materials, or if we choose to provide an interpretation of the moral purposes and values that those materials are supposed to embody, I would contend, as others have before me, that we are choosing in this case to embark on something of a separate project from the one just described. Therefore, I am inclined to conclude that though internalism has thus far been conceived in the philosophy of sport in terms of a thesis whose viability depends on interpretivism, it need not necessarily be so conceived. I would suggest that defending the

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<sup>69</sup> Ibid. 14.

idea that the normative content of sports may consist of more than mere promulgated rules requires no exercise in justifying that content, nor need that content be shown in its best light in order to be legitimate. That this suggestion is at least theoretically plausible serves as reasonable motivation for my introduction in the next section of a discussion, and refinement, of the use of legal positivism in the sports adjudication dialogue, one that will, perhaps counter-intuitively (at least, based on the way Berman has framed this debate), result in the establishment of much firmer ground for a defense of internalism.

#### *Doing Legal Positivism Justice*

Now that we have focused some energy towards critiquing the use of Dworkin's theory of law in a sports context, it is worth spending some more time thinking about how, and to what extent, legal positivism is being utilized as a theoretical apparatus in discussions on the normative content of sports, and whether it is being characterized fairly in these dialogues. My fear is that, on one hand, legal positivism is not being given as much attention in the philosophy of sport that it perhaps deserves, and that on the other, when it has been given any attention in this regard, it is fatally misconstrued. My hope is that we can begin to resolve these areas of concern here.

If it is fair to say that Russell's is among the most important works in the philosophy of sports adjudication, and we agree that Russell is an internalist, then it is fair to say that one side of the so-called 'internalism v. positivism' debate for sport already has a strong and well-articulated account in its corner. What of the other side, however? We might reasonably wonder: has anyone defended a positivistic account of sport and sports adjudicators? Unfortunately, it seems that, by and large, the answer to the latter

question is no. Though it may seem painfully obvious that one serious strategy that one could adopt in attempting to overcome some of the difficulties of Russell's account, or in attempting to re-frame the discussion entirely, is to pursue a positivistic line with respect to sport and sports adjudicators, it is just as painfully evident that very few thinkers have seriously traversed this path. This is not to say that no thinker has considered the possibility of using legal positivism as a means for reflecting about the decisions that sports adjudicators must make, however. The fact that Berman has offered us the framework for an 'internalism v. positivism' dialectic in sports is, at the very least, support for this weaker claim. In fact, stronger support for that proposition is found in the literature on the philosophy of sport, where there is indeed one account that accords legal positivism a prominent role in a discussion on sports officials. In 'A Sporting Dilemma and Its Jurisprudence'<sup>70</sup> Patrick Lenta and Simon Beck argue that one means for achieving clarity concerning what the duty of a cricket umpire might be in attempting to resolve dilemmas that are produced by the rules *simpliciter* of that sport is to consider the matter in a legal positivist's terms, rather than, and in contrast to, Dworkin's. So there is at least one sophisticated application of a few of the central theses of legal positivism to sport, but unfortunately that single example may be all there is to offer in this regard. If so, then two primary questions for this section should immediately concern us: do Lenta and Beck, two of the few thinkers who have provided some positivistic reflection on sport, do a good job characterizing legal positivism in the brief sample of their work on this topic that we are able to analyze? Notwithstanding our response to the first question,

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<sup>70</sup> Beck, Simon and Lenta, Patrick. 'A Sporting Dilemma and Its Jurisprudence'. *Journal of the Philosophy of Sport* 33 (2): 125-143, 2006.

can we articulate a positivistic account of the normative content of sport – and thus sports adjudicators – that is specifically suited to overcoming the difficulties that we have found in the Dworkinian approach to this subject?

We must begin an answer to the first question with an overview of Lenta and Beck’s core claims concerning how legal positivism might resolve their example of a dilemma for sports adjudicators. They offer a scenario from cricket in which, due to a few pesky rules, and the problem of epistemic uncertainty with respect to what has actually happened on the field of play, an umpire is forced to make one of what appears to be two equally unappealing decisions: one which is fair but that he cannot justify on the basis of the rules *simpliciter*; or one which is unfair because, though it follows from a strict and literal reading of the rules, it is evident (to all observers) that what actually happened on the field of play calls for a different result. The model dilemma offered here mirrors one that is often offered as a typical dilemma for legal adjudicators.<sup>71</sup> The dilemma lies in the adjudicator’s either having to choose between deciding the case on the basis of what appears to be the morally correct decision in spite of the clear and determinate language of the rules of the legal system, and deciding on the basis of what that legal language requires even though the consequence of so choosing is bound to lead to a (morally) suboptimal result for one or more of the parties involved. It is often thought that such dilemmas are in part a consequence of the fact that “in law, judges swear to apply the

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<sup>71</sup> See the famous New York State civil court case of 1889, *Riggs v. Palmer* for a leading example of such a problematic case:  
<http://www.law.berkeley.edu/faculty/rubinfeld/LS145/riggs.html>.

valid rules of the legal system.”<sup>72</sup> And though most sports do not require their officials to take such an oath, it is nonetheless often true that they value rule-based decision-making, for any number of potential reasons (some sports like cricket, as Lenta and Beck point out, go so far as to explicitly entrench this value in a rule for its adjudicators). So what is an umpire to do in such a situation? What is the most reasonable course of action for the umpire to take, assuming we approach the issue from the perspective of legal positivism?

The first thing worth noting is that, on the conventional view, legal positivism would probably not classify this type of scenario as a ‘hard case.’ This follows since in the proposed dilemma, the language of the rules with which the umpire is working is both clear and determinate, and dictates a certain result, namely the one that appears grossly unfair to most informed observers of the match. In conjunction with the standard view that, according to legal positivism, adjudicators have a “*pro tanto* duty to apply the law in easy cases,” it follows that “the judge must decide between applying the rule despite the injustice or absurdity and doing what he thinks is morally correct.”<sup>73</sup> Legal positivism, as it is painted on this picture, is a school of thought that holds the values that are protected by following rules in very high esteem. On this view of positivism, values of no insignificant legal consequence such as fairness, certainty, and efficiency for example, are often best served by officials’ simply following and applying the rules *simpliciter* of their legal system, and this is generally a sufficient justification for claiming that except in the

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<sup>72</sup> Ibid. 130.

<sup>73</sup> Ibid. 138. It is important to note that this is a normative view that Lenta and Beck ascribe to positivists, rather than one that positivists who are concerned to describe the nature of legal content would hold. I will challenge shortly the likelihood of Hart, and thus legal positivism broadly speaking, actually accepting this position as a sound adjudicative thesis.

most flagrant of morally outrageous suboptimal-result cases, officials should follow the rules in making legal decisions. In other words, for a legal positivist, “the existence of a valid rule is always a reason for applying it.”<sup>74</sup> Thus, if we are tackling the issue from what appears to be the fundamental legal positivist perspective, it seems that the answer to the question of how the umpire ought to act is that he must decide in accordance with the rules, unless he can justify departing from the rule on the strength of an argument which establishes that the absurdity of the injustice produced by following the rule in this case actually overrides or outweighs the values that would be promoted by following it in this case.

Is there anything in this account of a legal positivist’s response to the umpire’s dilemma that should give us reason for concern? My sense is that there is. The reasons I have for saying this are twofold: 1) because Lenta and Beck have seemed to attribute to Hart, the legal positivist *par excellence* to whom they refer, a theory of adjudication which it is not at all clear Hart would have actually supported; 2) because it would appear that Lenta and Beck have, in their explanation of what legal positivism would require from the umpire in such a case, privileged – perhaps unknowingly – a version of legal positivism to which we need not necessarily be committed. Starting with the first objection, it seems there could be a problem in committing Hart to the claim that when the language of a legal rule is relatively clear and determinate, the judge is duty-bound to apply it. As Wil Waluchow is apt to point out, “nowhere does Hart suggest this theory of adjudication, nor is there anything in his theory of law which commits him to that

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<sup>74</sup> Ibid. 138.

position.”<sup>75</sup> Waluchow grounds this interpretation of Hart’s theory in a distinction between law, and the institutional forces of law. Where the law might simply be seen as the legal resources at the disposal of a judge who is bound to decide the outcome to a case, the institutional force of law “is a function of [a] person’s legal power (if any) to alter existing law so as to nullify its effect upon a decision.”<sup>76</sup> The point to take away here is that even in cases where it seems that the plain language of a rule appears to undeniably commit a judge to a certain decision, there may be other factors of equal weight and merit which contribute to determining whether in fact a judge must decide a case in precisely this way. Important factors of this kind often include adjudication rules – rules that serve to guide decisions of judges but that are not determined by the content of primary legal rules – for example. Now, in the case of cricket, it might be true (as Lenta and Beck point out) that one of the adjudication rules of that sport asks officials to strictly adhere to the rules *simpliciter* in making their legal decisions. This, if true (I am not familiar enough with cricket to say), might lend some plausibility to their assumption that in the umpire’s dilemma as they have presented it, they can say that Hart would recommend, as a legal positivist, that the rules *must* be followed in deciding this case. The argument would go that since the language of the written rules is clear and determinate, and the institutional force of cricket’s adjudication rules provide no strong reason to think that the rules should be dismissed in this case, the umpire, if he is adopting the legal positivist’s methodology, should simply apply the rules, despite the apparent unfairness of so doing. This might be a fair argument in defense of Lenta and Beck, but it is not one that I am necessarily

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<sup>75</sup> Waluchow, 65.

<sup>76</sup> *Ibid.* 39.

attempting to object to here. The claim I would like to establish here is that, if we are to use Hart's as the paradigm example of a legal positivist's account, for the general purpose of explaining the normative content of any sport's law, along with proposing certain theoretical recommendations for that sport's adjudicative practices, there is no reason why we should conceive him as being committed to the unreasonable view that "whatever is identified as valid law via a rule of recognition must always be applied by judges."<sup>77</sup> To so interpret Hart is to muddy the waters that surround legal positivism, as a descriptive-explanatory theory of law, and its implications for adjudicators in whichever legal system our discussion might place them.

My second objection to Lenta and Beck's use of positivism above is that, as I understand their argument, in portraying legal positivism as a general jurisprudential theory which can provide insight into how adjudicators can best decide difficult cases, they have privileged the exclusive version of legal positivism, as opposed to its inclusive brother. The latter, I will contend, is a form of positivism we should certainly not overlook, and it is this form of the theory that I think we ought to adopt as the most viable framework for describing the normative content of sports, all things considered.

What is the basis for a distinction between these two camps? Well, on one hand, exclusive legal positivism espouses the thesis that "the existence of a valid legal rule is solely a function of whether it has the appropriate source in legislation, judicial decision or social custom, matters of pure social fact, of pedigree, which can be established independently of moral factors." On the other hand, inclusive legal positivism posits the

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<sup>77</sup> Ibid. 66.

idea that “moral values and principles count among the possible grounds that a legal system might accept for determining the existence and content of valid laws.”<sup>78</sup> So, where exclusive positivism wants to strictly limit the possible sources for valid law to the legal sphere alone, inclusive positivism is open to the possibility that sometimes, in some cases, moral values and principles are among the possible resources adjudicators might use in arguments seeking to establish the validity of a legal rule, or what it means. The reason I have for thinking that Lenta and Beck have adopted exclusive positivism in their article is because they do not seem to make room for the possibility that inclusive positivism seeks to embrace, namely that adjudicators may appeal to moral considerations in attempting to understand the proper application of a legal rule, without thereby departing from the rule itself (in other words, without appealing to some “extralegal”<sup>79</sup> consideration). In claiming that the umpire in the umpire’s dilemma can only act in one of two mutually exclusive ways – by either choosing to follow the rule, or depart from it in taking the moral route – Lenta and Beck have forsaken, or perhaps not even considered, the theoretical possibility that inclusive legal positivism offers us, and more importantly, that it offers adjudicators. In short, they have apparently not recognized that the umpire may legitimately have at his disposal the potential to interpret the rules with which he must work in such a way as to arrive at the morally sound result, without flouting or abandoning the rules he is duty-bound to enforce.

It is for this reason that I would contend that, in order to do legal positivism justice with respect to its application to sport, we ought to at least pay some attention to

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<sup>78</sup> See Ibid. 82, for further explanation of this distinction.

<sup>79</sup> See Beck and Lenta, 138.

the arguments in favour of inclusive positivism, so that we are more suitably positioned to determine just how legal positivism ought be used in these sorts of discussions (and perhaps more generally). Having said that, I would like to conjecture that it is not necessarily any fault of their own that Lenta and Beck conceive legal positivism simply in terms of its exclusive version. For one thing, it is clear that Dworkin conceives legal positivism in terms of exclusive positivism, and that it is this form of the theory that he targets in his attack on the “model of rules.”<sup>80</sup> Due to Dworkin’s status in the philosophy of law then, it perhaps should not be terribly surprising that legal positivism is often conceived in this manner, especially when it is framed in terms of the Hart/Dworkin debate, as it is in Lenta and Beck’s work. In other words, given the dominant (Dworkinian) interpretation of legal positivism which reduces that theory to nothing more than its exclusive off shoot, perhaps it should not shock us that Lenta and Beck think through the umpire’s dilemma via the mechanism of exclusive positivism. We, however, would be remiss to make the same mistake.

So far as I can tell, there are no insurmountable arguments that show why it could not at least be possible, as inclusive legal positivism contends, that “there are legal systems...in which accepted tests for legal validity...include a distinctly moral dimension.”<sup>81</sup> Why, one might wonder, shouldn’t that same point be at least conceptually possible for sport? Well, that’s moving a touch too quickly. Strictly defending the idea that legal systems like the ones inclusive positivism imagine are conceptually possible, it is sensible to consider a couple of arguments that purport to demonstrate that we should

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<sup>80</sup> Ibid. 9-10; 118-119. Also, see Dworkin. *Taking Rights Seriously*, chapters 2 & 3.

<sup>81</sup> *Inclusive Legal Positivism*, 102.

in fact believe just the opposite. In what follows we consider how Waluchow responds to a few such arguments. Upon revealing how these concerns are answered, we turn to the question of how well inclusive legal positivism could serve as a descriptive-explanatory theory for the normative content of sports.

There are two kinds of arguments that purport to show the superiority of exclusive positivism as a thesis about the nature of law that are relevant for us to consider in particular if we are to proceed to defend inclusive positivism as a sound theory for the normative content of sports. Those arguments are: causal/moral arguments and arguments from function. Each will be considered and rebutted in turn, though no strongly sustained defense of inclusive positivism, as a general theory of law, will be offered here.

Beginning with causal/moral arguments, these claim that what proves that exclusive positivism is a better theory of the nature of law than inclusive positivism is the fact that our adopting inclusive positivism is likely to lead to the acceptance of certain morally pernicious attitudes toward law, specifically anarchist or reactionary attitudes.<sup>82</sup> Supposedly, “a person who adopts inclusive positivism will...confusedly and fallaciously arrive at a morally unacceptable stance towards law,” in so far as she will be lead to believe that it is within her abilities as a legal subject to, when she so chooses, criticize the law morally, and thus either disrespect it, or disregard it entirely if her morals incline her to. This, were it a true statement of the facts about the effects of inclusive positivism, would likely seem to many to be one of its more problematic features. But does it follow that simply in virtue of these potentially unfortunate effects of inclusive positivism, that

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<sup>82</sup> Ibid. 86-88.

theory must be discarded, or rejected entirely? Not according to Waluchow. An important reason for thinking we should not accept causal/moral arguments against inclusive positivism, even if it were true that morally problematic stances do result from its acceptance, is one made by the enlightenment thinker David Hume. To summarize, the point Hume proposes is that any argument that attempts to establish the philosophical falsity of a theory, perspective, or opinion by means of demonstrating that the consequences that follow from it are morally repugnant, is not an argument we should be overly concerned to refute.<sup>83</sup> In other words, as a matter of logic, it is not at all clear that by arguing against a theory's practical effects, we make at the same time a strong argument against the philosophical content of the theory. On Hume's view, it is no knock against any theory, philosophically speaking, that it leads to consequences with which we are uncomfortable: that, perhaps, is a knock against the practical application of that theory; or, maybe more to the point, against the people who are in the practice of applying it. Until there are demonstrable reasons for thinking that the theory under examination ought to be dismissed because it is conceptually or logically flawed, without regard to how it is practically applied, we are at the very least able to say that it is still plausible and potentially reasonable on a strictly theoretical level. Given that this remains to be the case with inclusive positivism, or at least so long as it remains the case that no arguments have

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<sup>83</sup> Hume, David. *A Treatise of Human Nature*. Ed. L.A. Selby-Bigge. Oxford: Clarendon Press, 1896. Book II, Part III. 24-27.

shown it not to be, we must agree that causal/moral arguments pose no threat to the viability of inclusive positivism as a jurisprudential thesis about the nature of law.<sup>84</sup>

Arguments from function, on the other hand, attempt to demonstrate the incoherence of inclusive positivism, and therefore the soundness of exclusive positivism, in a slightly different manner. First, arguments from function require that we accept a primary premise about the very function of law, namely that law exists in order to facilitate access to “the standards of behaviour required for social co-operation.”<sup>85</sup> If we agree with this proposition, then the argument goes that exclusive positivism appears immediately as the most reasonable theory concerning the nature of law because of the way it conceives the possible sources of valid law. In limiting the sources of valid law to social sources (i.e. sources that exclude confusing and often troublesome moral arguments), exclusive positivism aligns itself with the idea that what the law should primarily concern itself with is providing its subjects with clear, determinate and transparent rules and standards for living in a social and political context. In so far as inclusive positivism betrays an inability to so limit the potential sources for valid law in any given legal system, it fails to adequately provide a theory of law that is attentive to the fact that it is a function of the law to avoid the kind of confusion and controversy that often accompanies moral language and moral considerations. Waluchow responds to this

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<sup>84</sup> Even though I am not able to discuss them further here, as that would take us too far away from the main concerns of this paper, it should be noted that there are legal theorists who think that causal/moral arguments can be used to evaluate the merit of legal grounds theories (theories of the grounds of law, like legal positivism – inclusive or exclusive). For an example of such a line of thought, see Murphy, Liam. ‘The Political Question of the Concept of Law’. *Hart’s Postscript: Essays on the Postscript to the Concept of Law*. Ed. Coleman, Jules. Oxford University Press, 2001.

<sup>85</sup> Ibid. 117.

argument in two ways: 1) by challenging the accepted premise that the law ought to be so concerned with providing easily accessible guidance regarding the standards of social cooperation as this argument would have it; and 2) by challenging the idea that, were this indeed the function of law, law that emanates from social sources alone more readily meets this requirement than law that is rooted in moral concepts and moral language.

In terms of the first point, Waluchow is not convinced that positivists need to be committed to the idea that the only, or most important, function of law is to provide “certainty, determinacy and predictability” regarding how it ought to be, and how legal rules will be, applied.<sup>86</sup> Though it is true that these may be values we want law to embody on the majority of occasions, this is not sufficient reason for thinking that they must necessarily be the defining features of law. In fact, laws are often written in “loose, open-textured terms” that require careful interpretation and consideration, and oftentimes “the absence of clearly defined boundaries is of no unreasonable hindrance to the effective working of law.”<sup>87</sup> Thus, despite their often being conceived as defining features of law, certainty, determinacy and predictability – as the ordinary citizen would conceive these terms in relation to law – certainly need not be among the qualities that count as necessary features of law, without which law simply would not exist as such. If they were, much might be sacrificed in terms of our ability to use law in order to arrive at reasonable and just legal decisions.

Next, why should we agree that law that emanates from social sources is more apt at actually meeting these proposed standards of certainty, determinacy and predictability,

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<sup>86</sup> Ibid. 121.

<sup>87</sup> Ibid. 121.

to which law should supposedly aspire, than law that is not? What reason is there for thinking that law that finds its foundations in purely social sources actually ends up doing a better job at providing certainty, determinacy and predictability than law that is sometimes determined on the basis of moral considerations? On Waluchow's view, there isn't one. The matter of the fact is that "pedigreed rules...[are] often subject to considerable controversy over their proper interpretation," and that conversely, "moral questions sometimes admit of easy resolution."<sup>88</sup> Without a doubt, it may often be the case that the opposite is true: that well-established pedigreed rules are easily interpreted and determined and that moral questions are the ones that seem intractable. But so long as we can agree that there exist scenarios in which it is true that pedigreed rules do not immediately point to clear and determinate answers to legal questions – in which there exists, for pedigreed rules, something like 'penumbras of uncertainty' – and that there are scenarios where the answers to moral questions are hardly subject to reasonable dispute, we must concede the possibility that law which emanates from social sources is not always decisively superior at promoting the values listed above. And so long as this possibility is recognized, then inclusive positivism is able to answer the question of how law that is founded in moral language and moral argument can embody the proposed function of law which would have it "serve as a dependable public standard,"<sup>89</sup> since there is no logical or practical reason to think such legal rules are any less able to fulfil this role than legal rules grounded purely in social sources.

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<sup>88</sup> Ibid. 122.

<sup>89</sup> Ibid. 122.

We have reviewed the arguments above in order to demonstrate the fact that inclusive legal positivism need not be immediately judged an incoherent, implausible or unreasonable thesis regarding the nature of law. I am inclined to think that this goal has been achieved, to the extent that I am able to pursue it. Now it is due time to begin developing the line of thought that brought us to those arguments, namely the proposition that we ought to consider inclusive positivism as a viable means of conceptualizing the normative content of sport, and by extension, the kinds of dilemmas discussed earlier in which sports officials may routinely be asked to make an adjudicative decision despite apparently having no chance of reaching a result everyone would be happy to accept. The rest of this chapter will be devoted to offering an argument in favour of inclusive positivism as a conceptual apparatus for describing the normative content of sport, given the dominant interpretation of that content that we find in the philosophy of sport. In other words, in accordance with the prevalent view that the normative content of sports often involves considerations the source of which are the lusory goals of games, inclusive positivism will be presented as a means for coherently explaining the philosophical relationship between a sport's rules *simpliciter* and the lusory goals they are designed to embody.

If Berman is correct in claiming that philosophers of sport have increasingly converged on the acceptance of the internalist position,<sup>90</sup> then it is reasonable to believe that convergence on an inclusive positivistic account of sports should not be overly difficult to procure in philosophical circles. In other words, if Berman is right in thinking

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<sup>90</sup> Berman, 177.

that there is general convergence among philosophers of sport on the notion that sports ought to be evaluated, and officiated, according to the values certain sports embrace and the lusory goals they foster, and thus normative standards outside the promulgated rules alone, I think we need only take a small step further to firmly plant inclusive positivism at the forefront of this dialogue. Recall that the mere claim we need to agree on in order to accept inclusive legal positivism, as a viable theory of law, is that “sometimes in some jurisdictions the existence and content of valid laws depend on moral considerations.”<sup>91</sup> So long as we can agree on the legitimacy of this minimal claim, we align ourselves with the proponents of inclusive positivism. Now, even though I would accept this claim as a general statement about most modern legal systems, the argument over the validity of this thesis in the legal context is not one I would like to engage in here: that is a topic for jurists to debate. However, the argument I would like to put forward is that the basic claim of inclusive legal positivism, given the current philosophical discourse on the normative content of sports, could be especially viable in the sports context. In other words, I would like to defend the proposition that something like the following is most likely true: sometimes in some jurisdictions the existence and content of valid *sports rules* depend on ‘lusory considerations’.<sup>92</sup> In short, I would advocate the view that inclusive

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<sup>91</sup> Waluchow, 155.

<sup>92</sup> What are “lusory considerations?” My proposal is that we think of lusory considerations in the sports context in the same sort of way we might think of moral considerations in the legal context; namely, in terms of considerations the sources of which are substantive normative standards intended to promote values outside those which the rules *simpliciter* alone can always account for. For sports, these standards, and the considerations to which they give rise, will be the products of a shared understanding of the values that sports (individually, and even perhaps generally) embrace, and the goals that they erect in order to elicit athletic excellence and competitive intrigue. Though there

legal positivism's framework for understanding the nature of legal rules is one that readily applies to sport as well, given the general agreement in the philosophical community on the view that rules of sport are not the only normative means available for sports adjudicators to legitimately appeal to in their decision-making process; that sport-specific values and conceptions of the lusory goals of games are considerations whose weight does, and should, bear directly on the interpretation and application of that sport's rules.

One immediate difficulty with this position might be apparent, however. In order to bring out the idea that moral considerations do influence the identification and determination of valid law, inclusive legal positivists like Waluchow will point to the fact that in constitutional/charter societies like the United States and Canada, constitutional documents which serve to protect supposedly fundamental moral rights of individual citizens are used to inform an understanding of what is, or is not, valid law for that jurisdiction. In legal systems such as these, a constitutional document is a tool that is used to determine if and when a law meets the criteria necessary to be dubbed legally valid, or one that serves to help determine what the proper understanding or interpretation of a law ought to be – a tool the rationale of which is to safeguard individuals from infringements of their moral rights by the state, or by fellow citizens. As such, when challenges to legal validity or the application of legal standards are made on the basis of a claim to the rights

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will necessarily be more to say about what such normative standards will involve across varying sports contexts, and who should be allowed to influence their content, this general definition is enough to bring out my main point: that there can be normative standards outside of the promulgated rules that can be appealed to by sports officials in order to help engender optimal competition, entertainment, and recreation in any given match, game or event.

of individuals enshrined in constitutional documents like the Canadian *Charter of Rights and Freedoms* or the U.S. *Bill of Rights*, judges will almost inevitably be forced to engage in moral argumentation, and determine the answers to these legal questions after pausing to give thought to some distinctly moral considerations. For inclusive positivists like Waluchow, this fact is sufficient evidence of the validity of their philosophical thesis about the nature of law. But if this is indeed one of the primary means according to which inclusive positivists defend their view in the legal context, how would we defend that thesis in a sports context, where oftentimes nothing like a constitutional document exists alongside the legal system's promulgated rules, and we rarely speak of the 'rights' of individual players? Wherein would we find evidence to believe that the existence and content of sports rules really could depend on so-called 'lusory considerations' as I have suggested – considerations officials would be in the practice of appealing to, and basing their rule determinations on, as a systemic fact – if sports in general do not admit anything similar to constitutional documents?

The beginning of an answer to this question lies in our simply having to accept and affirm the fact that sports, as 'legal systems', do not, nor need not, possess anything similar to a constitutional document in order for us to reasonably conclude that the rules each sport promulgates can have a very intimate and important relationship with the lusory goals of games, and the sport-specific values from which they arise. Though they may not be entrenched and promulgated in the same way in sports as moral rights, and thus moral considerations with respect to the law, are entrenched and promulgated in charter societies, lusory considerations may yet be among those that sports officials

appeal to – and should appeal to – as integral components of a sport’s normative structure. Moreover, answering this question is made easier if we come to accept that, though we may choose to use a thesis from the philosophy of law in order to facilitate and improve discussion surrounding sports, there is no reason to believe that in order for this methodology to be viable, sports must exhibit the same complex systematic characteristics (like, for example, charters or bills of rights) as those we would expect to find readily observable in most modern, well developed, legal systems. The analogy between sports and law is helpful because, given the salient common qualities of each of these two types of rule-governed system, pausing to consider how they reflect, and differ from one another, can serve to improve our understanding of either, or both. But we should be careful not to over-analogize the two. The fact that sports and law probably diverge in as many areas as they converge, as approaches to regulating behaviour and empowering individuals under rules, is what allows for an interesting and provocative interplay between the two – seeking perfect symmetry in this regard would likely be misguided, and probably shouldn’t be desired anyway. To use a legal-philosophical thesis about law to help to explain sports, as rule-governed systems, is to recognize that the similarities between law and sports are there ready for us to examine and inspect more closely, but it should leave open the possibility that both philosophically and practically, sports may have much to offer us that is unique in its own right, given the context in which sport is framed, as opposed to law.

Since law and sports are two distinct kinds of rule-governed systems then, we need not expect them to display precisely the same kinds of features as one another – like

constitutional documents, for example – in order to say that a thesis about the way the rules of law function and the way they are used by officials, might also make sense, given the proper qualifications, in sport. The question remains, though, of what the possible sources or grounds for adjudicative decisions that are made by appealing to lusory considerations could be. There might not necessarily be a correct answer to this question, which means that seeking a reasonable one should be our focus instead. As such, one thing we might say, following the lead of Andrei Marmor, is that though playing (or officiating) sports may have much to do with following rules, following the rules of a sport should not be thought to be the sole defining feature in terms of which we might say someone is playing (or officiating) a sport. Thinking about the fact that social practices in which rules are applied (like chess for example) may consist in a number of different kinds of other, more subsidiary conventional practices, Marmor notes that,

“[t]he game of chess does not consist in the practice of following its rules, though it is certainly constituted by it. People can sit down in front of a chessboard and follow the rules of chess without actually playing the game. Chess is a very complex social practice; it is an elaborate social interaction that embodies certain conceptions of winning and losing, values related to what counts as a good game and a bad one or an elegant move or a sloppy one, and so forth. Following the rules is only part of this complex interaction. To be sure...the game is made possible by following its rules...[:] *the rules* actually constitute the practice. But they do not exhaust it. The relation between the rules and their emergent social practice is not one of identity. There is no practice without the rules, and if the rules were different, the practice would be different as well, but there is more to the practice than just *following* its rules.<sup>93</sup>

What Marmor’s view amounts to is the idea that though the rules of chess must exist in order to create the possibility of playing chess – in order to coordinate its players – the practice of playing chess need not consist in the mere practice of following its rules. This

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<sup>93</sup> Marmor, Andrei. 359.

is because following the rules of chess (and, I would contend, the rules of games and sports in most cases) is just one among the many conventions that we might follow in playing a game of chess. Shared values concerning what should count in the playing of a game are relevant in this regard, and an understanding of these values, and the conventions which protect and safeguard *them*, can hold normative force for an individual partaking in the game. In other words, rules are not the only standards with normative force within the context of games, in so far as these games are, at bottom, social interactions. And if so, then just as importantly for our purposes, it is reasonable to think that adhering to the rules of sports (subject to some extent, of course, to the context in which we are making this claim) is just one among the possible conventions officials might pay heed to in partaking in the practice of adjudicating a particular match. Such conventions, I propose, can include following ‘lusory standards’, and thus the lusory considerations to which they give rise may legitimately be among those that officials appeal to in order to determine the optimal content of a written rule, in response to certain kinds of fact-situations.

And yet a question remains: if lusory considerations are among the considerations that may legitimately influence the interpretation and application of the rules of sport, how and when can we be sure that decisions which involve such considerations are justified? I will attempt to provide a specific answer to this kind of question in the next chapter; but for now, generally I would urge that perhaps it is just to our philosophical discourse on sports that we must turn in order to answer such a query. That is, my sense is that it is through philosophical discussion on sports that arguments for various competing

conceptions of the lusory goals and values of individual sports – and thus standards which embody them – can be established, evaluated and ultimately agreed upon. Owing to the fact that nothing like constitutional documents exist for sports, but that it seems true that the interpretation and application of the rules of sports sometimes do hinge to some extent on lusory considerations, perhaps what philosophers may be particularly well suited to provide in order to further concretize the justifications for appealing to lusory considerations in adjudicative decision-making, are the beginnings of philosophical discourses on individual sports, the lusory goals they foster, and the values they do, or should, promote. Engendering, and engaging in, perspicuous, well-articulated and informative philosophical argument surrounding the normative structures of sports (either in particular, or in general<sup>94</sup>) may well be among the primary means through which accurate and concise accounts of the kinds of lusory considerations that should count as considerations of weight in officials' decision-making, can arise. I will attempt to offer just such an argument in the next chapter.

*Sport's 'Inclusive Positivism'*

The central insight of inclusive legal positivism is viable in the sports context because, whether you have accepted internalism or not, it seems true that very few sports are always adjudicated with no reference whatsoever to anything other than the clear and determinate language of the promulgated rules. Any official who has ever called a game wouldn't be likely to disagree with this claim;<sup>95</sup> nor, I take it, would most intelligent

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<sup>94</sup> I will defend the latter claim to a certain extent in the next chapter as well.

<sup>95</sup> In this regard I speak from my personal experience as a Hockey and Softball official, working and talking with other amateur officials like myself over the course of my twelve

observers of sports who are relatively competent with respect to their knowledge of the rules. Sometimes the plain meaning of the rules of the game is all that officials appeal to, but sometimes – and this is, of course, enough to warrant our claim that the existence and content of rules may sometimes be determined by lusory considerations – they are not. My intuition is that if we pay close attention to the evidence provided by games and matches, and follow the prevailing philosophical trend in this regard, internalism will appear increasingly reasonable as a thesis about the normative content of sport. But in order for internalism to remain reasonable moving forward, it is not necessary to commit to any Dworkinian theses such as interpretivism. This follows because it is at least conceptually possible that we may explain the fact of internalism in a morally detached, neutral manner; in a way such that explanation and justification of the facts as they stand need not overlap with one another. If we accept the insight of inclusive legal positivism, my claim is that we lose the need for the interpretivist view. Through inclusive positivism we can explain the way in which rules and lusory considerations relate, which is the foremost motivation for positing interpretivism, and avoid conflating this task with the attempt to justify this relation, which is the foremost pitfall of interpretivism. Though it may be true that there is currently something of a privation of the quasi-legal material according to which adjudicative *decisions* based on lusory considerations in sports could be explained and justified, this should not give us reason to abandon inclusive legal positivism as a potential thesis about the normative content of sports altogether. It does our positivist thesis no harm to say that lusory considerations arise from standards that are

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years of officiating experience, and discussing these matters with NHL Officials at the Don Koharski Officiating & Development Camp in Burlington, Ontario in 2012.

conventionally paid attention to by adjudicators officiating a game – namely, lusory standards. If we choose to seek justifications for these decisions, my suggestion is that we should begin to ask more philosophical questions about sports, and take a more philosophical approach to answering them. Since adjudicative theories for each individual sport must inevitably be supplemented by sport-specific conceptions of the values and lusory goals that each sport ought to promote, philosophically minded analysts should have a central role in buffering the discourses that surround individual sports, and how their lusory standards ought to be conceived. Once this task is started, and continues to grow over time, the means for identifying justifications for adjudicative decisions based upon lusory considerations should become increasingly available.

In conclusion, in this chapter we have accomplished a few tasks. First and foremost we considered the possibility that our general jurisprudential theses about the normative content of sports could be reconceived. Since there are potential issues with the way both the internalist and positivist views have been framed, I have suggested amendments to these terms in the sports context in order to clarify this debate. My first claim was that internalism ought not to be conceived solely in terms of a thesis the grounds for which must lie in Dworkinian interpretivism. The problem that we encounter when we try to posit interpretivism as a way of stabilizing internalism is that interpretivism appears to lead us to confuse the project of explaining the facts about the normative content of sports and the adjudicative practices that follow from them, and justifying those facts. This is a problematic feature of Dworkin's integrity theory of law, and thus it should be no surprise that we encounter the same sort of difficulty with

interpretivism, taken in the context of the discussion on the normative content of sports. Next, we reviewed how positivism has been framed within the context of the sports adjudication discourse. What we discovered in that section of the chapter is that thus far, positivism seems only to have been framed in terms of its exclusive version, with no heed paid to the possibility that its inclusive version may be just as viable, or better, theoretically speaking. I argued there that moving forward, inclusive legal positivism ought to be kept in mind when we use the label ‘positivism’ to answer questions regarding difficult cases that face sports adjudicators. But in fact, the main thesis I defended in this chapter ended up being much stronger. Ultimately my contention was that inclusive legal positivism could be extremely helpful in attempting to explain and theorize the relationship that internalism posits, between the rules of sports and other normative standards to which sports give rise. This follows because inclusive positivism recognizes the fact that sometimes, in some cases, the existence and content of rules may depend on considerations that do not stem merely from the plain meaning of the rules themselves. Rather, it recognizes that the validity and meaning of legal rules may depend in certain cases on moral considerations, and so I have suggested that perhaps an analogous claim may be made with regard to sports: that sometimes the validity and meaning of sports rules may hinge on lusory considerations.<sup>96</sup> If this intuition is valid,

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<sup>96</sup> We might wonder how the validity of a rule can be challenged in sports, in the same way it can be in law. This is an interesting question, and it is one to which I can only offer a partial answer here. My sense is that players, or the primary subjects to whom the rules are being applied do not often – if ever – have a chance to formally challenge the validity of a rule within a game. If anything, it seems that the officials are likely to be the only individuals responsible for deciding on the validity of a rule when it might conflict with lusory considerations. Even then, these kinds of challenges to the validity of a rule seem

then the conclusion I would urge us to recognize now is that inclusive legal positivism may actually be the best means according to which we can make sense of internalism, as a jurisprudential notion. That is, rather than frame the debate as one which occurs between the internalists and the positivists, we should give serious consideration to the possibility that internalism and (inclusive) positivism can legitimately support the same conclusion in the sports context, and that any challenger of internalism, so conceived, has either to reject inclusive positivism in favour of exclusive positivism – and thus demonstrate that the latter view is superior to the former – in order to maintain this binary opposition, or forego the title of ‘positivist’ altogether. All in all, my hope is to have shown in this chapter how we might expand our discussion surrounding the normative content of sport such that we may address the topic of formalist adjudication, or the catchphrase which opposes it – ‘let’em play!’ – from a distinct, yet equally plausible perspective as that which we considered in chapter one.

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far less developed than they would be in a legal setting, and perhaps for this reason we should spend more time considering how the ‘validity’ side of my proposed inclusive positivism thesis for sports can be cashed out, if at all.

## Chapter 4: Calling The Game

We have now given consideration to a variety of arguments on a couple of different fronts. On one hand, we have reviewed accounts the authors of which share the conviction that formalism is not a thesis sports officials should ascribe to in carrying out their practice. This follows, say these thinkers, because the promulgated rules are not the only normative means at the disposal of sports officials for making adjudicative decisions. Instead, internalism appears to offer a more reasonable approach to take when it comes to deciding what kinds of means are at the disposal of sports officials. On this view, sports officials ought to appreciate the fact that different kinds of norms like principles and other varying standards both exist, and should influence the way sports are adjudicated. On the other hand, we therefore considered how internalism has been conceived in the philosophy of sport literature to this point, and how it might be conceived alternatively. My argument in the last chapter was that we ought to do away with the binary opposition of internalism *v.* positivism, since inclusive legal positivism can actually provide reasonable and stable theoretical ground for establishing the internalist thesis in sport. Thus, I argued that the conceptual possibility that inclusive positivism offers our dialogue on the normative content of sport, that the existence and content of the rules may sometimes depend on lusory considerations, can give us reason to accept internalism without denying positivism, or running the risk of paradox in affirming both views.

Now, however, I propose that we tackle a slightly different question: namely, given that there is good reason to think that the normative content of sports is more

complex than the non-internalist would have us think, how should officials call the game? Can we begin to provide normative accounts of optimal sports adjudication practices, either in loose and general terms (which can be tweaked later to suit the interests of individual sports, and to perhaps generate a normative theory for *a* sport's adjudicators) or in more sport-specific terms if necessary? My answer is that we can, and in this regard I follow the lead of Berman once more, who has offered a persuasive and provocative account of when sports officials, in various sports, might be justified in just lettin'em play; of why sports officials might have good reasons to avoid adjudicating formalistically, and applying the rules *simpliciter* invariantly or mechanically.<sup>97</sup> Remaining sensitive to the point that Berman has stressed in other works, and that we reviewed in Chapter One however, nothing proposed here should be taken to constitute a theory of a sport's adjudication, for as we have seen, this kind of discussion would probably need to focus entirely on one sport alone in order to account for the special nuances that are necessarily relative to the optimal adjudication of any individual sport. Nonetheless, though it might be right to say that a theory of sports adjudication should revolve around *a particular sport* to remain reasonable, I think it may yet remain profitable to begin to discuss, in general terms (as Berman has in 'Let'Em Play'), what good reasons there may be for saying that adjudicators in various sports settings may, in making adjudicative decisions, overlook the plain and clear language of the written rules in favour of other considerations when only absurd results would result from adhering to that plain language. In this sense, I side with Berman in so far as my discussion in the rest

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<sup>97</sup> Berman, Mitchell. 'Let 'Em Play: A Study in the Jurisprudence of Sport'. *U of Texas Law, Public Law Research Paper No. 182*, 2010. 1325-1369.

of this chapter should not be understood as a conclusive and final theoretical argument for all competing varieties of sports adjudication.<sup>98</sup> Of course, since my discussion in this chapter will not be peculiar to a specific sport, I will accept the possibility that in some sports, in some cases, my propositions will not necessarily have force for officials. Though this is a concession I am willing to accept, I do not think that it in any serious way undermines the potential benefits that can be gleaned from continuing to build on the sports adjudication dialogue from the novel, though still general, philosophical approach that I am proposing, nor do I think that it undermines the argument that I will offer here.

In what follows, I will provide a brief summary of the way Berman has defended the idea of temporal variance of rule enforcement, more commonly understood in terms of the catch-phrase, “let’em play!” Though I do not mean to challenge Berman’s argument (since it seems reasonable as he has presented it), I will offer a different spin on how the let’em play notion is invoked, and how it can perhaps be justified. My focus will be on seeking an answer to the question of whether or not there can be a less temporally restrictive justification for lettin’em play. So, rather than seek to justify the practice of officials’ deviating from the rules *simpliciter* toward the end of matches, as Berman does, I will attempt to demonstrate a possible justification for the practice of officials’ lettin’em play throughout the course of a whole match, without any necessary regard for the time when such deviation occurs. To do so, I will once again appeal to inclusive legal positivism, except in this context in terms of the adjudication theory Waluchow has put forward. Thinking through this proposed adjudicative approach in the sports context, I

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<sup>98</sup> Ibid. 1333.

will argue that sports officials ought to apply the rules in light of the tenor of the game in which they prepare to, and subsequently presently adjudicate.

Conceiving 'Let' Em Play' Anew

In 'Let'Em Play', Berman provides a *pro tanto* argument in favour of the view that sports adjudicators should apply the rules in a temporally variant manner. In particular, Berman believes that there are two central reasons that lend credence to the suggestion that sports officials can be justified in just lettin' them play toward the end of sporting matches. The first lies in the fact that, occasionally, sanctions – in any kind of legal system – can compensate victims in a way that is disproportionate to the amount of wrong done by the violator who has committed an infraction of the rules. That is, in some context-specific scenarios, general legal rules may prescribe penalties that are “unusually costly to the rule breaker.”<sup>99</sup> This can occur, for example, in cases where the wrong done inflicts a negligible amount of harm on the victim of the wrongdoing, but the legal rule yet demands a very severe penalty for the perpetrator. Common sense might lead us to believe that the wrongdoer in these instances ought simply to resign himself to the consequences of his actions and accept his penalty, no matter how severe, for in having committed the crime he assumed responsibility for whatever penalty he might incur.<sup>100</sup> But Berman is not so sure. He notes that there is a history of legal cases in which judges have, in some sense, deviated from the law in order to avoid enforcing penalties that seem

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<sup>99</sup> Ibid. 1341.

<sup>100</sup> Ibid. 1342.

too heavily weighted for the crime committed and the wrong done.<sup>101</sup> The idea then, is that in legal cases where the wrong committed by the guilty party in fact causes much less harm than that which the general written rule is meant to account for, there is at least some tendency to avoid “awarding windfall remedies,”<sup>102</sup> where this means awarding too much compensation to victims of wrongdoing.

Perhaps, then, the same sort of reasoning could be applied to sporting scenarios in which an infraction of the rules causes little to no tangible harm to the victim, but whose consequent penalty serves a very significant disadvantage to the offending player/team. Berman thinks that it could be – at least, given a temporality condition. He suggests, and defends by means of a mathematical equation, the idea that “events have greater impact on the outcome of a game...when they occur later in close contests.”<sup>103</sup> As such, penalties that are applied by officials in the late stages of sporting matches have a much higher potential to decide who wins and loses than do those penalties that are applied by officials early on in matches. But sports fans generally do not want to see officials decide the outcome of the game – they want the players to do so. The idea here is that sports fans want, insofar as it is possible, for the players’ talents and skills to decide the outcome of the game, rather than the officials’ enforcement of rules.<sup>104</sup> Thus, Berman believes that in those cases where minimally harmful violations of the rules occur late in matches,

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<sup>101</sup> See Berman’s discussion at 1342-44. Here he cites one civil law suit, and the “‘harmless error doctrine’ governing appellate review...especially as applied to criminal defendants,” to bring out his point. He notes that sometimes well-settled legal practices (in civil or criminal law) demand that “victims of wrongdoing...simply lump it when the harm they have actually incurred is too slight.” (1342)

<sup>102</sup> Ibid. 1344.

<sup>103</sup> Ibid. 1346.

<sup>104</sup> Ibid. 1348-49.

officials ought not to strictly enforce the rules since the disadvantage enforcement imposes upon the violator is likely decidedly more outcome-affecting than the actual violation of the rules that occurred, and because it is preferable to allow the players to decide the outcome of the game, rather than the officials.<sup>105</sup> As a result, he believes he has found at least one reason to think sports officials can be justified in applying the rules in a temporally variant manner, allowing us to safely conclude that he thinks that in certain contexts, sports officials can legitimately – and probably *should* – deviate from the written rules of the sport in question, as games get closer to their end.

Berman’s explanation of the second reason for thinking that temporal variance of rule enforcement in sports might be acceptable begins with a minor puzzle. As explained above, the first reason for thinking that temporal variance is defensible is because some rules, at certain points in sporting matches, confer too great a competitive advantage on the offended, and too great a competitive disadvantage on the offender, given the actual harm done, which ultimately detracts from the ability of the players to determine the outcome of the game. But what are we to say about rules that do not necessarily impose sanctions for non-compliance? Are there not certain rules that focus not so much on compensating victims of wrong doing, but concentrate instead on defining different kinds of actions, determining how we ought to classify them, and what the effect of such actions will be? For example, consider the rules that define balls and strikes in baseball. These rules do not carry with them any penalty for non-compliance – indeed, it would be strange to even speak of non-compliance in relation to these rules, since to partake in the

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<sup>105</sup> Ibid. 1348-51.

game of baseball just means having a player of one's team pitch for balls and strikes, if one is to partake in the sport at all. Now, according to the rules a pitch simply is or is not a strike, depending on where it is thrown by the pitcher: if it is not a strike, given the dimensions of the strike zone, then it is a ball. There is no penalty imposed upon the pitcher if his pitch is not a strike – he just has not done everything necessary to have a strike called in such cases, and so his pitch is a ball. Given then, that these kinds of rules – rules that do not impose penalties, but instead define actions, etc. – exist not only in baseball but in other sports too, could officials be justified in enforcing *them* in a temporally variant manner, in the same kind of way as sanction imposing rules? Can we justify an umpire's calling more, or fewer strikes than he has called throughout the course of a match toward the end of a close game?

Berman's response to this issue begins with a distinction in relation to the form of norms – namely, that between rules and standards. On the accepted view, the difference between rules and standards is this: “rules turn upon factual predicates that are sharper edged, whereas standards require those who apply them to exercise evaluative judgment.”<sup>106</sup> Berman notes that though this distinction holds, many standards are “rulified” because there are “good institutional reasons to codify [them] in bright-line terms,” producing what we might call “rulified standards.”<sup>107</sup> Such reasons may include officials' efficiency in making determinations, greater ease in arriving at tough decisions, etc. However, simply because a standard is codified in the form of a rule does not provide a necessary reason for thinking that in every case, that rule should be adhered to by

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<sup>106</sup> Ibid. 1361.

<sup>107</sup> Ibid. 1362

officials. True, we may want officials to adhere to the rule in the majority of cases, and indeed, this is probably why the standard has been codified in the first place (e.g. we define balls and strikes in concrete terms so that the general contours of the strike zone remain roughly the same from umpire to umpire, game to game). But this fact does not commit us to saying that there are *never any* scenarios in which following a codified standard might actually produce suboptimal and undesirable results, and thus that there are never any scenarios in which one ought not to deviate from it. How well certain rules in fact allow the officials to arrive at an optimal result, given the underlying standards the rules are meant to bring out, is a question that will almost always depend on context and circumstance, and is one that officials might always have reason to pause and think about.<sup>108</sup> Therefore, it is within reason to believe that even rules that are meant to embody underlying standards in law and sport (rules perhaps analogous to those governing balls and strikes in baseball) need not be adhered to in all cases, without exception. As such, deviation from such “rulified standards” may, in some contexts – perhaps *especially* near the game’s end, when we want the players to decide its outcome – be justified.

Now, Berman’s account in ‘Let’Em Play’ appears to derive from a certain interpretation, or understanding, of the let’em play cliché. Berman’s goal is to attempt to show how the let’em play claim can be justified taken in the context of the late stages of matches, the points in the game where it seems that whatever happens matters most, especially when contests are close. On Berman’s understanding of the idea, ‘let’em play’ is an appeal made to officials that is commonly invoked toward the end of a game, when

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<sup>108</sup> Ibid. 1363.

everything is on the line, and we, as sports fans, would prefer to see the outcome of the game determined by the players, rather than the referees or umpires. But in my view, this particular interpretation of the let'em play cliché merely speaks to one context in which this phrase is used, for the late stages in games are not the only contexts in which we hear appeals to the officials to 'put away the whistle'. One way in which I understand let'em play is as a more general, less temporally restrictive notion. Sports students often hear fans or participants urge officials early on in, or partway through a match, to be less strict with their enforcement of the rules. Or, sometimes we hear commentators like TV or radio broadcasters remark, at no particular point in the game – early, late, or somewhere in between – that “the officials are doing a good job just lettin' them play tonight,” or something to that effect.<sup>109</sup> Given that the let'em play appeal is sometimes invoked at varying points in matches, from varying perspectives, I would suggest that we should allow that there could be a number of ways in which we might be able to justify that claim. Moreover, if there exists the possibility that officials' lettin'em play can be justified at more points in a match other than 'crunch time' alone, then it should follow that there need not necessarily exist any temporal restriction on when this idea can

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<sup>109</sup> In fact, a good example of this type of discussion occurred between CBS commentators Jim Nance and Phil Simms in the 2014 AFC Championship game. In the first quarter, with the Broncos driving and in the red zone, Broncos quarterback Peyton Manning threw a pass to the left side of the end zone, which fell incomplete with no flags on the play. Denver's coach John Fox was apoplectic that no pass interference was called since, as Nance and Simms rightly noted, the Denver wide receiver was held by the New England defensive back in an attempt to catch the ball. Simms explained the fact that the players and coaches would have to make an early adjustment to this standard of rule enforcement – in effect, a standard according to which the officials would try to keep their “flags in their pockets,” as Simms related; or just let'em play, as Nance noted a few minutes later – given the gravity of the game.

legitimately be invoked, or appealed to, even though the idea is perhaps most commonly invoked at certain times in a game (like its late stages). In fact, I would urge that it can often be favourable for the ability to decide whether or not to ‘let’em play’ to routinely lie within the discretion of sports officials, and that so deciding can indeed be justified in more scenarios than just those in which it seems that everything is on the line.

In what follows, therefore, I will also defend the view that there is good reason in officials just lettin’em play, but I will defend this claim by making use of an argument distinct from Berman’s, in an effort to hopefully widen the scope of the let’em play, and thus the sports adjudication, discourse. Berman has shown that there can be good reason *pro tanto* for advocating temporally variant rule enforcement in sports; I will argue that there is good reason for sports officials to sometimes appeal to lusory standards and the considerations to which they give rise, in determining if and when the plain language of the promulgated rules should be adhered to or deviated from. To establish this argument, I propose first that we return once more to the jurisprudential literature, in particular to Waluchow’s inclusive legal positivism. Reviewing the normative theory of adjudication that Waluchow has presented in Chapter 8 of *Inclusive Legal Positivism*, and coupling it with a few crucial insights that seem relevant to the sports adjudication dialogue, we will be left with what I hope is an insightful analysis of how sports officials can be justified in lettin’em play at different points throughout the course of an entire match, not just its late stages.

*Adjudicating, From The Perspective of Inclusive Legal Positivism*

In Chapter 8 of *Inclusive Legal Positivism*, Waluchow sets out “to defend a fully normative theory regarding what our legal practices concerning the application and interpretation of legal rules should be.”<sup>110</sup> In keeping with his account of the nature of law, the theory of adjudication Waluchow presents accords a central role to the standards of political morality that are in some cases determinative of the existence and content of valid legal rules. This theory purports to demonstrate that judges can be justified in interpreting and applying legal rules in light of the “objects which [they] are introduced to protect.”<sup>111</sup>

To make sense of Waluchow’s adjudication theory, we must recall to memory the Hartian line, introduced in the first chapter of this work, that due to the nature of the language we use to craft legal rules, judges will sometimes be presented with cases in which it is unclear whether or not the law properly applies, and in which the rules are indeterminate with respect to the legal response that ought to be given. On Hart’s view, this is an inescapable feature of rules that are constituted by general, open-textured terms. Because rules have this peculiar quality, Hart thinks, judicial discretion is an inescapable feature of legal systems, since when such problematic, hard cases arise, someone (presumably judges) will have to make a free choice among the possible interpretations of the rules that could reasonably determine its outcome, none of which are necessarily prescribed by authoritative primary rules. Waluchow is skeptical that this necessarily follows, however. He notes that in order to establish the conclusion that discretion is a

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<sup>110</sup> Waluchow, 233.

<sup>111</sup> Ibid. 233.

necessary feature of legal systems, a few assumptions must be made explicit, and defended. They are:

1. That general classificatory terms are open-textured and therefore sometimes indeterminate;
2. That if the meaning or scope of a general legal rule is indeterminate the law is therefore indeterminate and a presiding judge must consequently make a free choice among legally open alternatives;
3. That the meaning or scope of a general legal rule is exhausted by the meaning or scope of its general classificatory terms.<sup>112</sup>

Waluchow does not take issue with the first two of these assumptions, so we need not review how he defends them here; but since he does take issue with (3), and since his argument for rejecting (3) is central to his theory of adjudication, it merits closer attention.

To challenge assumption (3), Waluchow argues that since the meaning or scope of a general legal rule might not be exhausted by the meaning or scope of its general classificatory terms,<sup>113</sup> it is not just the plain meaning we accord these general terms that can determine the way a judge ought to respond to a legal question. This is just to say that it is not unreasonable to believe that the meaning of legal rules, and therefore answers to legal questions, may in some cases be determined by “factors in addition to the general meaning of [the rule’s] general terms.”<sup>114</sup> Even though legal rules are often constituted by

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<sup>112</sup> Ibid. 239.

<sup>113</sup> Ibid. 239.

<sup>114</sup> Ibid. 244.

general terms that are open-textured to a certain extent, so that they may relatively easily deal with a wide range of cases and so that judges are not made to face the absurd legal consequences of close-textured rules, this should not, without qualification, be reason to believe that when the meaning of those general terms appears not to determine an answer to a given case, the law cannot answer it either. This is because laws, and rules in general, can be and often are interpreted and applied in terms of the purposes or aims that they are in place to help secure. Their meaning is therefore, according to Waluchow, “a function of an interpretive background of common beliefs and values,”<sup>115</sup> which can be expressed in a variety of legal standards, not merely in promulgated primary rules constituted by general classificatory terms. If we follow inclusive positivism in affirming the possibility that the existence and content of legal rules are sometimes determined by moral considerations, there is no reason to think that without the plain meaning of the general terms which are often primarily used to express laws, judicial discretion must be a necessary feature of legal systems, because there are other legal standards that can help to determine the meaning of the rules *simpliciter*. That legal rules are often understood, and applied, in terms of the reasons they were crafted in the first place, or the moral values they might be reasonably be said to protect, gives us good reason to think, in fact, that discretion is not nearly as necessary as Hart perhaps believed.

If and when such moral considerations will be invoked, in the application of a legal rule, will largely depend, Waluchow thinks, on “secondary interpretation rules, or

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<sup>115</sup> Ibid. 245.

what are often called ‘canons of interpretation’.”<sup>116</sup> Secondary interpretation rules exist in different jurisdictions so that when the plain and clear meaning of the language of a rule *simpliciter* does not determine an answer, there are legal resources at the disposal of the judge which she can make use of to avoid having to make a free choice between open alternatives, or having to make a discretionary choice. As such, we should not be led to believe that when judges are presented with hard cases, in which the general classificatory terms of the system’s legal rules appear to be of no utility in arriving at a judicial decision, there is no other option open to the judge but to make a choice the rationale for which the law does not provide; for the interpretive background according to which legal rules are designed and implemented may often help to provide precisely the kind of legally valid response we would want judges to arrive at in such cases.

Waluchow’s analysis does not end here, however, for he also offers a modification to Hart’s argument that not only is judicial discretion a necessary feature of legal systems, in fact it ought to be cherished, since judicial discretion is an attractive and desirable feature of modern legal systems. Hart’s view here is that we ought to appreciate the fact of judicial discretion, because legislators, or other rule-crafting individuals, cannot be expected to be able to anticipate all the possible cases to which the general rules they create may apply. Rules are created using general, open-textured terms so as to avoid the possibility that in unanticipated cases, the language of the rule is so rigid that it dictates that a judge must decide a case in a way that will lead to absurd or morally intolerable results. In unanticipated cases, which may sometimes lie, therefore, in the penumbra of

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<sup>116</sup> Ibid. 246.

uncertainty,<sup>117</sup> it is better for a judge to be able to consider the best result of the case using her discretion, rather than be forced to adhere to a rule that clearly only produces suboptimal results. Indeed, even if we could construct legal rules in logically close-textured terms, Hart thinks that the penumbra of uncertainty would still be a feature of rules that we should strive to maintain, so that we could avoid “blindly committing ourselves to unreasonable results in unanticipated cases.”<sup>118</sup> Waluchow is concerned though, that this argument actually does not take us quite far enough. What of the case, like the umpire’s dilemma that Lenta and Beck discuss, or *Riggs v. Palmer*, where the plain and clear meaning of the language of the rule dictates an obvious result, but one that is clearly unjust, or morally repugnant? Should it follow that simply because this kind of case does not fall within the penumbra of uncertainty – because the rules which govern this type of case have a plain meaning that is clear and obvious to most informed observers – that the rules therefore have to be applied according to their plain language, and ordinary meaning, despite the suboptimal result so deciding will produce? Is adhering to a rule always necessary when its plain meaning dictates an answer? Can the negative consequences of adherence not provide good reason for thinking that in some cases, judges should be allowed to deviate? In response to this last question, Waluchow responds affirmatively. It is his view that when a rule with a plain meaning dictates a plainly unjust result, it should be within the discretion of a judge to disregard that plain meaning, and decide the case on the basis of the meaning of the rule to which the interpretive background of the legal system gives rise.

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<sup>117</sup> See Hart’s discussion on the penumbra generally at 126 of *The Concept of Law*.

<sup>118</sup> *Ibid.* 253.

Of course, many might find this position highly contentious, and extremely troubling. Some might argue that allowing judges “room to manoeuvre,”<sup>119</sup> in plain meaning cases is to allow for the possibility of a legal system full of ‘rogue’ adjudicators. If judicial discretion were allowed in all plain-meaning cases, when would judges ever have to adhere to the law? How would we protect against the possibility that judges could simply choose not to apply the rules *simpliciter* whenever they felt like it, without rhyme or reason, thereby undermining the institutional force of the rules entirely?<sup>120</sup> The response to this question lies in trying to find the middle ground. Simply because we might allow for the possibility of judicial deviation in some plain-meaning cases does not mean that there would, as a result, remain no cases whatsoever in which judges must adhere to the law. The appeal of condoning and expecting judicial deviation in relation to plain meaning cases is that it gives judges the opportunity to avoid making decisions that would lead to absurd and unjust results in certain very suboptimal-result cases. This does not mean though, that judges would thereby be granted the ability to simply disregard the law whenever they so choose. All things being equal, it is likely that the majority of fact-situations presented to the average judge will not be ones in which the plain meaning of the language of the rules that apply to them requires grossly suboptimal results: in such cases, judges should indeed be expected to apply the plain meaning of the rules. But for those that do, it seems reasonable to think that granting judges the ability to overlook the plain meaning of the rules in order to produce what are optimal results – or at least, not suboptimal results – in such cases, would not be a bad thing. Indeed, given that “we can

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<sup>119</sup> Ibid. 253.

<sup>120</sup> Ibid. 259.

rationally restrict the range of factors which place a plain-meaning case outside the scope of a legal rule,”<sup>121</sup> there is no good reason to think that there may not be certain plain-meaning cases in which judicial deviation is desirable, and ought to be exercised.

If we combine the two arguments Waluchow has presented as modifications to Hart’s theory of adjudication, we arrive at something like the following – what might be called the ‘inclusive positivist’s adjudication account’. Even if it is true that judicial discretion is a necessary feature of legal systems, judges should not think that invoking their discretion is necessary whenever they are presented with a case in which the plain meaning of the language of the relevant legal rules that apply to it does not determine an answer. This follows because legal rules can have meanings, permit answers, and determine results to fact-situations that do not emanate from the general classificatory terms that constitute them. Instead, answers and results to legal questions may often be the product of an understanding of the ends that the rule was crafted to foster, such as its social purposes or aims. The argument proceeds that it is desirable that judges should have the institutional power to deviate from the plain meaning of a rule, since the possibility exists that a legal rule’s plain meaning may sometimes demand a morally absurd or unjust result, one that is directly at odds with the aims and purposes the rule is supposed to uphold. We should want judges to take part in the “interpretive practice of not considering a rule applicable”<sup>122</sup> when it is clear that the plain meaning of the rule in question can do nothing but produce suboptimal results. In short, Waluchow would have us believe that the meaning of a legal rule can depend on more than the plain meaning of

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<sup>121</sup> Ibid. 262.

<sup>122</sup> Ibid. 253.

its general terms, and that when adhering to the plain meaning of rules is likely only to produce grossly unjust, absurd or undesired results, it should be within the institutional power of judges to deviate from applying that meaning to the case at hand, and to decide the case instead in accordance with the interpretive background which in part forms the inner fabric of their legal system.

*The Tenor of the Game As A Reason For Lettin' Em Play*

For the rest of this paper, my goal will be to argue in favour of a similar kind of adjudicative practice for sports officials, one that therefore finds its motivation in the normative adjudication theory that Waluchow has provided. Of course, as I alluded to earlier in Chapter Two, this does not mean that we should expect our discussion in the sports context to mirror the discussion to which it directly relates (that which is framed in the legal context), for each framework has given rise to these legal-adjudicative questions in its own way, and each therefore presents peculiar nuances which ought to be appreciated by jurisprudes of sport, rather than conceived as potential pitfalls of the proposed methodology. One such nuance in the sports context might be that, since a sport's rules may sometimes be interpreted and applied in terms of lusory standards, not just in terms of moral considerations, there may be considerations outside the mere purpose or aim of the rules that will help to determine optimal adjudicative responses to plain meaning cases from game to game. I would affirm the view that since the plain meaning of rules may sometimes lead to undesirable results, sports officials, like legal officials, can justifiably appeal to considerations outside that plain meaning in making adjudicative decisions. This is a premise of Waluchow's that I think translates well from

law to sports. My sense is that in sports, however, such considerations may be unique in comparison to those that often play a role in the legal context (i.e. moral considerations). Lusory considerations, as I have called them, are considerations that have developed within a sport's legal system which inform the officials' understanding of the kinds of qualities which that sport's games ought to demonstrate, considerations which stem from the lusory standards accepted and practiced as conventions within that same legal system. They can be grounded in arguments regarding the aims or purposes of the rules, but they can also be grounded, for example, in arguments about the ways in which the actual lusory goals of the game themselves can be understood and interpreted diversely, in light of the context in which they are being analysed. And it is just such arguments that sports officials may justifiably appeal to in deviating from the plain meaning of a promulgated rule, if so doing can help to avoid undesirable results in plain meaning cases.

Yet, now a question arises: what can legitimately be called an undesirable result in the sports context? Well, my sense is that we should be careful to point out immediately the way in which the answer to this question, and therefore the answer to the question of how officials should respond to suboptimal plain meaning cases, may justifiably differ from Game A to Game B. For instance, the answer to the question of how referees should respond to suboptimal plain meaning cases may differ significantly from game one of the NHL regular season to game seven of the Stanley Cup Playoffs; or, the answer to that question may be conceived in a manner wholly unique if we are considering it in the

context of a Mite boys Softball game, rather than an ISC World Championship game.<sup>123</sup> The point is not that in these contrasting contexts, the rules of each respective game have changed, or even that the lusory goals of the game have themselves changed – indeed, that they are still called the same sport despite these differences in context likely speaks to the fact that its rules and its lusory goals have not changed. Rather, the point is that what changes in these divergent cases is the way officials should interpret what it means for the game to create obstacles the competitors must overcome in order to achieve success in the match, interpretations which will almost inevitably be bound by the context in which they are being made. In the Mite boys Softball game, we are likely to allow that the strike zone we want the umpire to enforce ought to be much more charitable to the pitcher than in an ISC Championship game, given that in the former case the skill of the pitcher to be able to throw the ball in a pre-defined area can, for obvious reasons, be said to be much lower than the skill of the pitcher in the latter case to achieve that same goal; and that for that reason, we would produce clearly suboptimal results were we to restrict the strike zone in the former case to the same extent that we would be inclined to in the latter. In this proposed example, what changes from the former context to the latter is not the lusory goal of trying to pitch the ball in the strike zone to get the batter out; what changes is the degree of difficulty the umpire chooses to set for the competitors to overcome that obstacle, or challenge. And this choice, one that could potentially be made

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<sup>123</sup> Mite is the first tier of competitive Softball in Ontario for girls and boys. Usually the players are 7-8 years old, and are still very much learning the game and developing basic skills. The International Softball Congress World Championship tournament, on the other hand, attracts many of the greatest adult male fast pitch players in the game from all across the globe, and is widely agreed to be one of the top competitions in the sport.

for many of the lusory goals of a sport and the rules which correspond to them, can be grounded in a host of factors: as in the given example, it could be grounded in the development and skill level of the players playing the game; perhaps in the kinds of conditions in which the game is being played (like poor weather); perhaps in the point in the campaign at which the game occurs (e.g. regular season v. playoffs; round robin match v. championship match); it seems sensible even to say that the history between the teams playing the game should influence these kinds of decisions.<sup>124</sup> Building on this premise is just how I think we can answer the question of how lettin’em play may be justified at more junctures throughout the course of a game outside of crunch time, or game’s end. That is, we can answer that question by pointing out the fact that in light of the relevant lusory standards that inform our conceptions of what it means to take part in the practice of participating (as a player, coach or official) in a specific game, rules may

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<sup>124</sup> An excellent example of the way in which a rivalry between bitter foes influenced (rightly, I think) the way a game was officiated occurred when Canada and the U.S.A.’s women’s hockey teams met for a showdown in the 2014 Olympic games. Squaring off against one another in round robin play in Sochi, the two teams went at it in what would otherwise be considered an *extremely* physical match for women’s hockey: in which, according to the rules, it is technically not permissible to use body checking in the same way it is in men’s hockey. The rules did not keep these players from playing with a notable physical edge (given their animosity for their opponents), however; nor did they keep the referee from allowing the game to proceed in this vein, apparently: CBC commentators Mark Lee and Cassie Campbell-Pascall made note early in the first period of the extent to which the referee was interpreting the body checking rule rather liberally, clearly putting to use no small amount of “discretion” in her application of this rule. For more on that match, see Macgregor, Roy. ‘Team Canada beats U.S. 3-2 in women’s hockey’. [theglobeandmail.com](http://www.theglobeandmail.com/sports/olympics/megan-agosta-marciano-has-three-points-to-leads-canada-over-us-in-womens-hockey/article16825529/). February 12<sup>th</sup>, 2014. Retrieved from <<http://www.theglobeandmail.com/sports/olympics/megan-agosta-marciano-has-three-points-to-leads-canada-over-us-in-womens-hockey/article16825529/>> on February 12<sup>th</sup>, 2014.

in fact produce extremely undesirable and suboptimal results at any time within the game in question.

To return to my first example, we often hear commentators make mention of the fact that officials are just lettin’em play throughout a given game, especially when it happens to be a ‘big game’ scenario, as was the case when Jim Nance and Phil Simms referred to that fact in the 2014 AFC Championship game.<sup>125</sup> These kinds of commentaries can be heard in analyses of most of the major professional North American sports, not just the NFL. What this indicates, I would suggest, is that for the so-called ‘big game’, there exists standards about what that game (as an athletic contest; as a form of entertainment, etc.) should consist in that can often clearly conflict with the requirements of the plain meaning of the rules. Especially with respect to the major North American professional sports (such as Football, Hockey, Basketball, and perhaps even Baseball to some extent), the accepted convention is that the athletic obstacles<sup>126</sup> that these sports create, which must be overcome in order to be successful within the game, ought to be increasingly challenging as teams proceed toward the end goal of winning championships. The idea is that because winning a championship ought to be one of the most difficult feats in a professional athlete’s career, it is generally accepted that the closer one gets to winning a championship, the more difficult should be the athletic challenges, especially physical, that one has to overcome in order to achieve success, as

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<sup>125</sup> See note 109 above.

<sup>126</sup> By athletic obstacles, primarily what I am thinking of here are the physical challenges ordinarily engendered by the rules, manifested by players to defeat one another, which serve to promote and exemplify high calibre athleticism (for example, body contact, or the use of the body in order to frustrate opponents in achieving their ends; or, perhaps like pitching a ball in a pre-defined area in Baseball).

an individual or as a team. This is why, late in these sports' regular seasons, or in their playoffs, we should expect to see much more physically demanding matches: because it is understood that there is an inverse relationship between proximity to achieving 'the ultimate goal' and the athletic demands teams, and therefore individuals, must be able to withstand in getting there. My contention is that the existence of lusory standards such as this one can serve as a reason for why officials can be justified in lettin'em play throughout the course of a whole game: because that whole game may fall within a context in which the game-specific conception of the athletic obstacles which should be overcome for players and teams to achieve victory is understood to be one in which the plain meaning of the rules *simpliciter* may not be reasonable, or produce optimal results, in all cases to which they may apply.

Thus, I would like to propose the following guidance rule for sports adjudicators: apply the rules with an eye to the *tenor of the game* in which you will be applying them.<sup>127</sup> By the 'tenor of the game' what I mean is its relative significance in comparison to other games, which can be determined by a host of potential factors (the history of the two teams playing in it, or as in our second example above, the proximity of the match to the achievement of championship victory, etc.). For example, late-round games in the

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<sup>127</sup> For "tenor" here, perhaps we could substitute "feeling" or "spirit" of the game. My sense is that sports officials are often in touch with the way a game feels from the moment it begins to the moment it ends, and that this impacts – and should impact – the way they officiate. For an example of what could be meant by the "tenor of the game", see this article from the Baltimore Sun in 2013 describing the "tenor" which surrounded the matchup between the Ravens & Colts before their opening round tilt in the playoffs: Steve Eastman. '1. What will the tenor of this playoff game be like?'. Baltimore Sun. Jan. 16, 2013. Retrieved from <<http://www.baltimoresun.com/sports/ravens/ravens-insider/bal-afp-getty-155854977329478-20121109,0,146442.photo>>, Feb. 5, 2014.

playoffs are often conceived in terms of fierce battles or fiery competitions, a feature largely reflected in the general tenor the game exhibits from its commencement. As such, officials' decisions in such games ought to be, to a certain extent, influenced by this fact: in other words, officials should bear the tenor of the game in mind in adjudicating what degree of athletic difficulty the players will be forced to withstand in order to be victorious. Having said that, as I am conceiving it here, the tenor of the game is only one among a number of possible features of a game that could justifiably influence adjudicative decision-making. Therefore, my proposed adjudication rule is not meant to be one that necessarily overrides all other considerations. I say adjudicators ought to apply the rules 'with an eye' to the tenor of the game, because I would like to leave open the possibility that there are other luscious considerations that also ought to be borne in mind in applying the rules, some of which may in certain circumstances outweigh the significance of the tenor of the game when it comes to making actual decisions in real-time. It is worth noting that there will also be games in which it appears there is no tangible tenor whatsoever, where teams are perhaps not familiar enough with one another to have developed animosity toward one another, or where there seems to be little at stake. Even so, in such cases, there is no reason to think that a game cannot develop a certain tenor as it proceeds, which will influence the way the rules ought to be applied. Or, for games whose tenor is tangible and apparent at the onset, officials ought to be aware of the ways in which the dynamics of the game as it develops can lead to alterations in the tenor that the game exhibits, and ought to be ready to adjust accordingly. Remaining sensitive to the tenor of the game, from its onset and/or as it develops in game,

I would contend, can serve to keep officials in touch with a firm feeling for when lettin’em play is optimal.

But the question may yet be asked, what reason is there for thinking that officials *should* apply the rules according to the tenor of the game? How can this practice be justified? Perhaps it has to do with the fact that this type of practice already appears to exist, and is more or less understood as commonplace in discussions of sports adjudication. The argument might be that since it is customary for officials to be much less strict about applying the rules in terms of their plain meaning, at least when it comes to games that have certain tangible tenors (like playoff games), there is good reason for officials to continue adjudicating in this way: since it is already a well-established practice that seems to work fairly well in the majority of cases, sports officials should continue applying the rules according to the tenor of the game. This, however, is not a sufficient response for two reasons. First, it is no strong justification of a practice, one that would provide evidence and grounds for believing that it ought to remain central (in this case, to adjudication), that it is currently the norm, or that it has been for an extended period of time. Just because a practice, like adjudicating in terms of the tenor of the game, seems to clearly exist, does not mean that the practice is justified. In order to establish that conclusion, we need arguments in favour of the practice that lend us good reasons in defense of its continuation, not citations of its existence.<sup>128</sup> In other words, we ought to seek arguments according to which the practice can itself be supported, without invoking

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<sup>128</sup> Notice that, above, I cited the existence of this practice as a reason for thinking that there are likely lusory standards that exist which give weight to a game’s tenor. Now I would like to defend the view that officials’ taking such standards seriously is justifiable.

the fact that it is currently a custom among officials. If such arguments exist, and if they are indeed reasonable, then there will be rational grounds for claiming the practice ought to be maintained. Furthermore, appealing to the current prevalence of the practice would unnecessarily narrow the potential scope of the proposition. Notice that, as it currently stands, the general practice of applying the rules of sports according to the tenor of the game only tends to be most apparent in certain situations: like in the playoffs, or in heated rivalries, say. But justifying the claim by pointing to the way it is already practiced would seem to ignore the possibility that there may be many other contexts in which it would be appropriate, and justified, for officials to adjudicate according to the tenor of the game. For example, officials may well be compelled to use their judgment of the tenor of the game as a reason for lettin' em play, or even adjudicating more formalistically, in games that appear to have no immediately tangible consequence, outside the way it will affect the win/loss column.<sup>129</sup> That is, in game 5, or even game 53 of the NHL season, where victory of the Stanley Cup is still but a relatively distant and remote ideal to achieve and where no tangible tenor is perceptible at game's beginning, a tenor may develop throughout the course of the game due to the way it unfolds, and the referees could therefore have good reason for overlooking the plain meaning of the rules (or not, as the

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<sup>129</sup> In a matchup between the Toronto Maple Leafs and Dallas Stars on January 23<sup>rd</sup> 2014, with Dallas leading 7-1 near the end of the game, Nazem Kadri and Antoine Roussell were given ten-minute misconducts when the two players got testy after the whistle. This particular use of the rules is a good example of the way in which it might make sense for officials to sometimes, if the game's tenor calls for it, decide to officiate formalistically (in this case in order to preserve control in the game, and make sure things didn't get ugly as the Leafs were embarrassed in Dallas). For a recap of that game, see Siegel, Jonas. 'Leaf Win Streak Ends With A 'Thud' In Big D'. *TSN.ca*. January 24, 2014. Retrieved from <[http://www.tsn.ca/nhl/teams/story/?id=442046&hubname=nhl-maple\\_leafs](http://www.tsn.ca/nhl/teams/story/?id=442046&hubname=nhl-maple_leafs)> on February 6, 2014.

case may be – the tenor of the game may sometimes provide reason to adjudicate in a more formalistic manner: but this will vary from game to game) when those meanings will, given the circumstances of that particular game, produce undesirable results. That possibility should, at the very least, be left open. Justifying our proposition that officials should apply the rules according to the tenor of the game by appealing to the fact that this practice appears already to be prevalent in certain contexts may, I would warn, lead us to overlook the fact that this practice could be justified in more contexts than that in which it is currently most often discoverable.

My strategy instead is to defend this proposed guidance rule on the basis of the inclusive positivist's adjudication account, modified adequately to fit the sports adjudication discourse. Worth noting once more (recall chapter one's discussion) is that in the context of sports adjudication, especially as it surrounds the let'em play idea, generally our discourse focuses on plain meaning, or 'easy' cases. Though Russell offered his view as one that could help adjudicators overcome 'hard' cases in sports, cases where it appears that the plain meaning of the rules *simpliciter* provides no determinate answer to settle the legal question at hand, it nonetheless remains true that in the vast majority of our discussions on sports officials, and their application of the rules, we are concerned with plain meaning cases: the umpire's dilemma in Lenta and Beck's work, along with the Serena Williams example from the U.S. Open that Berman has appealed to,<sup>130</sup> are just two examples of this fact. In all but the odd case, like the ones that Russell has identified from the long and storied history of baseball, the plain language of the rules of sports do

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<sup>130</sup> Berman. 1326.

appear to be fairly determinate with respect to the question of how officials ought respond to certain fact-situations.<sup>131</sup> In this way, it seems unnecessary to focus for too long, in this section, on any prolonged discussion of Hart's necessity argument for judicial discretion, and Waluchow's amendments to it – since the list of *hard* cases in sports would appear to be much shorter than that which might be produced in a discussion of law. However, as I have already hinted at, what is worth taking away from Waluchow's discussion of Hart's necessity argument is the importance of the notion of an interpretive background, and secondary interpretation rules, according to which judges may justifiably make adjudicative decisions. The idea is just that there can exist, for any system of rules, a shared understanding among adjudicative practitioners about the values which underlie the rules *simpliciter*, an understanding which can sometimes serve to supplement, or supplant, the decisions that the plain meaning of the rules would appear to often dictate. In sports, such values may find a unique expression within the context of individual games, where the stakes of victory might be unusually high; or where antipathy between teams is particularly poignant, to take a few examples. If so, then it is fair to think that the interpretive background against which sports officials adjudicate is one in which the tenor of the present game can be a weighty, and legitimate, consideration.

Though we might not need to spend too much time worrying about Waluchow's discussion of Hart's necessity argument, Waluchow's extension of Hart's desirability argument to plain-meaning cases is very important to our endeavour here. This follows primarily because, as mentioned, our discussions on sports adjudication generally tend to

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<sup>131</sup> Which is perhaps why formalism often appears such an attractive thesis within the sports adjudication discourse.

revolve around plain-meaning cases and the way officials react to them. As Waluchow has pointed out, in those plain meaning cases where the rules *simpliciter* would “call for a clearly absurd, manifestly unjust, or *otherwise undesirable*, result,”<sup>132</sup> it is highly desirable for judges to exercise their discretion and choose to decide the case not in accordance with the plain meaning of those rules, but instead on the basis of considerations the source of which is the interpretive background that supplements the rules *simpliciter*, in order to avoid results of this kind. And it seems fair to think that roughly the same kind of claim can be made for sports. Though perhaps how we would classify “clearly absurd” results in sports is not always clear, what does seem clear is that there is a consensus among sports participants, analysts and fanatics (at least, when partiality is not an issue), that the plain meaning of many of a sport’s rules *simpliciter* can, in certain contexts like playoff games or games between bitter rivals (or as I have also suggested, when the skill level of the players differs substantially from one game to the next<sup>133</sup>), dictate results to certain fact-situations that are indeed highly undesirable. This follows in so far as these plain meanings cannot properly account for the fact that in contexts like these, what is desired from athletes is an exposition of their ability to overcome athletic obstacles much more challenging than those which are presented in an average, run of the mill contest. As such, it is not unreasonable to think that in response to fact situations that, given the plain meaning of the rules *simpliciter*, are likely only to lead to results that would not be valued generally speaking, we should want, and expect,

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<sup>132</sup> Waluchow, 253 (emphasis added).

<sup>133</sup> This may be more relevant to the amateur, who might officiate a broad range of games, each with players of varying skill levels, rather than the professional official who works within a closed system of similarly skilled players.

officials to deviate from the plain meaning of the rules and to appeal instead to the interpretive background of their sport's legal system. The kinds of considerations the interpretive background of a sport's legal system engender may legitimately accord some level of significance to the tenor of the game, so that sports officials may arrive at results which, though perhaps still imperfect, more closely attend to the context-specific features of the game than would those that are dictated by the plain meaning of the rules. What following this kind of adjudicative practice might often translate to – though it need not necessarily – is a more anti-formalistic adjudicative approach, one where players are allowed to just play, if so allowing them serves the end of fostering the appropriate degree of athletic excellence expected to be displayed from the victors of such contests. If I am right, then I take it that many sports enthusiasts of all stripes would agree that this can indeed be a desirable approach for sports adjudicators to take up, and that consequently, the use of discretion can be a desirable feature of a sport's 'legal' system, and its adjudicative practices, even in relation to so-called plain-meaning cases.

Though I should once again stress that this analysis is not meant to be either conclusive or final, I hope that it has shown one potential way in which officials' just lettin'em play can be defended at more points throughout the course of a match outside merely its concluding moments. By postulating that the interpretive background of a sport's legal system may include the shared understanding that in certain contexts, the tenor of an individual game may be such as to justify applications of the rules that fit common assumptions about the way in which such a game ought to present certain kinds of athletic challenges to be overcome by the players involved, we provide the framework

for the view that when plain meaning cases arise throughout the course of a match that appear to require undesirable results, sports officials can be justified in using their discretion to appeal to this interpretive background, thereby giving themselves the opportunity to circumvent the unappealing results the rules *simpliciter* would seem to straightforwardly call for. Having at their disposal the secondary guidance rule of applying the rules with an eye to the tenor of the game, I hold, is one strategy for making sure that a game's tenor is properly accounted for by sports adjudicators, even if it is not the exclusive lusory consideration that may conceivably help them to procure optimal results during an individual game; moreover, it is one further way in which they can be justified in just lettin' em play.

## Chapter 5

### Conclusion

Piecing together some of the dominant themes of this paper, I think we can reach a reasonable philosophical conclusion regarding sports adjudication, and perhaps even on adjudication more generally. If anything, I think what we should be able to agree on, if we share the conviction of many of the thinkers we have discussed here (and mine), is that when it comes to officiating sports, there is certainly an important sense in which context matters: the context of the sport which is being officiated; the context of the individual game that is being officiated, for example – these are considerations that often do, and should bear weight. In this paper I have urged that it does not seem unreasonable to think that the contexts in which rules are being applied ought to be reflected in the subsequent applications of those rules. Indeed, the meaning of rules would often appear absurd, and would produce absurd results, were they to be applied absent reflection on the context in which they are being used. Where a theory of sports adjudication such as Russell's can err is in failing to appreciate these facts: that sports adjudication is not necessarily a universal topic, one that can without qualification be generalized for all sports, as McFee and Berman pointed out; or that for sports officials, it should not be necessary that they concern themselves solely with promoting or safeguarding the integrity of their sport, understood as the integrity of their legal system, irrespective of the integrity of the particular game they are adjudicating. My view is that instead, in calling a game, they should find, alongside systemic considerations of integrity, room for considerations the source of which is a conception of the integrity of *that* game. Though

we should expect sports officials to be cognizant of a general conception of integrity for their sport when they officiate, and to make use of such a conception, it can be of equal importance (to fans, participants, and other types of officials within their legal system) that sports adjudicators remain cognizant of the peculiar details of the games in which they find themselves, and therefore that they remain in touch with, and officiate according to, a conception of integrity which might be intelligible only within the context of that game – one which is grounded in the values associated with that game in particular. In this way, there is reason to think that just lettin’ players play can often be grounded in good reason, and can be justified generally speaking – because trying to promote integrity may often mean that officials’ deviation from the plain meaning of the written rules is fully warranted, depending on circumstance. For sports adjudicators then, understanding that the rules are not all they have to work with – that other kinds of normative standards can exist for sports outside of the rules alone, standards that can conceivably make context an influential factor in determining the meaning of a rule – can indeed be tantamount to success. If a similar claim can legitimately be made for legal adjudicators as well is a question the answer to which we may justifiably decide to spend more time pursuing.

Looking ahead then, when it comes to the dialogue on sports adjudication, it seems that some thought should be devoted to determining what kinds of contextual considerations can promote optimal adjudicative practices. Here I would only like to offer a short argument to this effect, one that identifies one kind of consideration that ought *not* to count in this regard.

In 2014, the Toronto Raptors made the NBA playoffs for the first time in six years. The Raptors, a young and inexperienced team, met the wily Brooklyn Nets in the first round. Much of the narrative that surrounded this series – even weeks before it began, in anticipation that it might happen – involved the conviction that the Raptors (a team whose youth made the experienced Nets look like *real* dinosaurs) would be at a serious competitive disadvantage when it came to ‘the whistle’; or the officials’ calling of fouls in their favour. The reason for this conviction – widely held among senior NBA analysts across the board – was that NBA officials are known to ‘treat’ certain players better than others; that veteran players, ‘who have been there before’, are going to be given the benefit of the doubt with respect to foul calls, especially when they are playing against other players who have yet to really prove themselves to the league. Such officiating was on no greater display than when the officials failed to call even one foul on the Nets in the fourth quarter of game one against the Raptors, a feat that is as rare as it is surprising in a game as physical as NBA basketball is in the playoffs, and almost surely had to do with the veteran status of the Nets. Whether or not this style of officiating is suggested to the officials and encouraged by the NBA, to my mind, allowing this kind of consideration to influence one’s approach to adjudicating, as an official, is to officiate in bad faith – and here’s why.

Though I have argued in this paper that contextual considerations may legitimately be a kind of lusory consideration that ought to be among those which influence the adjudicative approach, and decisions, of sports officials, I do not think that the status of the players playing the game ought to fall into this category. That is, I do not

think that the players' status – as stars or not – provides, on its own, a good reason not to subject them to the mandates of the rules, as the official is making use of them. If officials want to avoid absurd results in applying the rules, the question of whom they are applying them to, or not, should only be of secondary importance, if that.<sup>134</sup> But let me be clear: I do not mean to say that the conduct of a player, *over the course of any individual game*, cannot justify having to endure harsher applications of the rules in that game – for he must be judged, to some extent at least, on his conduct in that context. I do mean that a player's reputation, or status – good or bad – should not immediately constitute a reason either to “throw the book at him” or let'im play – where that decision is pre-determined, or made before a game even begins. For to think in this way as an official is to unnecessarily bias one's judgment toward certain players, and in so doing, perhaps not allow the relevant lusory considerations that may pertain to be properly borne out – by all players – over the course of a game.

*Advice For Duke:*

In closing, to return to old Duke, my suggestion to him would be this:

“Think further about the way in which your role as an adjudicator need not be conceived merely in terms of the individual entrusted to apply the rules. In so doing, give further thought to the idea that a game of a sport, situated in a particular context, played out by certain kinds of individuals, may be expected in diverse ways to

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<sup>134</sup> To avoid contradicting myself, I do need to make a minor distinction here. The distinction is that in my view, for amateur officials, it will often make sense to treat certain players differently on the basis of their skill level, or the kind of league they are playing in, etc. So as I mentioned earlier, an amateur official that is charged with umpiring a senior men's softball game one week, and a mite boys game the next, can be justified in applying the rules, and understanding their meaning, differently in either context. The point I am making here is that for professional officials, who tend to work only within the confines of one closed system, the reputation of players within that league is not a good reason for either applying, or declining to apply, the rules to them.

showcase values associated with athletic feats, or even cheats, outside of those which the rules allow, engender, or condone; moreover, consider seriously the manifest absurdities that can result from a presumption of formalism, or a predisposition to defer, *ipso facto*, to a literal, and unnecessarily narrow, reading and execution of certain rules.”

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