ARTICLES

GAMESMANSHIP AND CRIMINAL PROCESS

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ABSTRACT

We first learn formal structures of rules, procedures, and norms of conduct through games and sports. These lessons illuminate and inform human behavior in other contexts, including the adversarial world of criminal litigation. As critiques of the legitimacy and fairness of the criminal justice system increase, the philosophy and jurisprudence of sport offer a comparative legal system to examine criminal litigation. Allegations of gamesmanship—the aggressive and strategic use of rules that violate some sense of decorum or culture yet remain within the formal rules of engagement—cut across both contexts. This Article examines what sports can teach us about gamesmanship in criminal litigation.

After distinguishing gamesmanship from cheating, this Article compares several examples of gamesmanship in sport and criminal litigation. These examples address the Crawford right of confrontation, the Brady obligation to disclose favorable evidence to the defendant, and the Batson prohibition against using race in jury selection. This Article uses the jurisprudence of sport to propose a framework within which to view these claims in the criminal justice context. Recognizing the asymmetrical nature of the adversarial criminal justice system and the dual role of prosecutors as advocates and ministers of justice, this Article argues that prosecutorial gamesmanship poses a different and more acute danger to the legitimacy of the criminal adjudication system than does such behavior by defense lawyers.

This Article concludes that gamesmanship is not only an inevitable part of any rule-based adversarial contest but also a positive and productive phenomenon that forces those invested in a system to define which values and objectives are fundamental to that system. Only when an instance of gamesmanship is inconsistent with these broader values or objectives should it be regulated or eliminated.

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INTRODUCTION

We first learn formal structures of rules and norms of conduct through games and sports. Notions of fair play, sportsmanship, and cheating are developed from an early age on basketball courts, playgrounds, and soccer fields. Today, as many critique the legitimacy of the American criminal justice system in several different respects, those who care about the integrity of the criminal justice system can learn from ideas and philosophies of fairness and cheating in the sports context. Specifically, the idea of "gamesmanship" in criminal procedure has fruitful analogies in the world of sport. In the adversarial world of American criminal adjudication, prosecutors and defense attorneys occasionally accuse each other of "playing games" instead of playing fair. But what one person would characterize as gamesmanship, another would characterize as zealously using the rules to the advantage of one's client or cause. And whereas "cheating" (in the sense of violating the constitutional or statutory rules that govern criminal practice) provides relatively clear lines of acceptability, the more interesting and difficult questions instead involve the aggressive use of rules that might violate some sense of decorum or culture, but stay within the formal rules of engagement.

The concept of gamesmanship is notoriously tricky to define, but one useful definition from the *Journal of the Philosophy of Sport* is "a strategy designed for

winning regardless of athletic excellence."[1] Translated to the criminal litigation context, this idea might imperfectly be expressed as "a strategy designed for winning regardless of the factual and legal merits of the case." Such a definition resonates with the negative connotations of the term in litigation: one side may use it to accuse the other side of engaging in tactics that have nothing to do with the true goal or ultimate systemic objective of the litigation. Others looking at the concept of gamesmanship from a philosophical angle have found a meaningful distinction between "the rules of the game" and "the code of fair play."[2] The code of fair play, which is an unwritten set of shared expectations among the participants about the range of acceptable behavior, overlaps but is not co-extensive with the official rules of the game.[3] Some actions do not violate the rules but would offend notions of fair play, while other actions that violate the rules would not be seen as outside of the code of fair play.[4] One such example is the intentional foul in basketball, which is against the rules of the game but is in no way seen as violating notions of fair play. Conversely, some litigators take the position that objecting during an opponent's opening statement or closing argument to a jury violates some shared expectation or norm of conduct, although doing so is certainly within the official rules of engagement and in fact might be necessary to enforce those formal rules.

Although usually invoked in a pejorative sense in sport and in criminal practice, gamesmanship can serve an important and productive purpose. By clarifying the boundaries of acceptable practice and by bringing into stark relief the limitations of existing rules, gamesmanship forces us to establish and defend which objectives are essential and which values are central to a system. Only where a practice of gamesmanship subverts or undermines an overarching goal is it problematic.[5] The overall professed goals of the criminal justice system are familiar: the ascertainment of truth and application of just verdicts within a system that protects individual rights and human dignity.[6] If gamesmanship subverts these ends, it should be discouraged in criminal litigation. But the prescription depends entirely on how one defines the goals of the system within which gamesmanship is deployed. Often, what appears to be gamesmanship may be perfectly aligned with a broader goal and so should not only be tolerated but also encouraged.[7]

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1. Leslie A. Howe, *Gamesmanship*, 31 J. PHIL. SPORT 212, 212 (2004).

2. DAVID PAPINEAU, KNOWING THE SCORE: WHAT SPORTS CAN TEACH US ABOUT PHILOSOPHY (AND WHAT PHILOSOPHY CAN TEACH US ABOUT SPORTS) 54 (2017).

3. *See id*. at 54 (defining the code of fair play as "the expectations that the athletes have of each other, their sense of what is and is not acceptable behaviour" and noting that fair play is "often consistent with breaking a game's rules").

4. *See generally* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991) (discussing the difference between norms and rules).

5. *See* Howe, *supra* note 1, at 216, 218.

6. *See, e.g*., Tehan v. United States *ex rel*. Shott, 382 U.S. 406, 415 (1966) ("The basic purpose of a trial is the determination of truth . . . .").

7. Howe, *supra* note 1, at 221 (arguing that not using certain types of gamesmanship is "disrespectful of the opponent—it implies that the other competitor is not significant enough to warrant one's full attention").

An important caveat in comparing sports to criminal litigation is the asymmetry in role and resources between the contestants. Although a general requirement of sport is that each participant faces the same restrictions, is bound by the same rules, and pursues the same goals,[8] our tradition of criminal justice assigns different objectives to prosecutors and defense lawyers. Because of these different roles, rules of gamesmanship should apply differently to the different players in the criminal justice system. Defense lawyers are bound, as a matter of ethics, to pursue the interests of their clients and to use whatever legal and ethical means are available to them to achieve their clients' goals.[9] Prosecutors, on the other hand, are required not primarily to be advocates, but to be "ministers of justice."[10] In a very real sense, then, prosecutors and defense lawyers are—or at least should be—playing different games. Some kinds of strategic behavior by defense lawyers can be acceptable and even socially productive while the same kinds of behavior by prosecutors would be inconsistent with their institutional role and therefore unacceptable.

In addition to the different roles assigned, an imbalance of resources that virtually always favors the prosecution provides another justification for limiting the use of gamesmanship by prosecutors.[11] The real problem facing our criminal courts is not one of excessive zeal and gamesmanship by defense lawyers but rather a system of mass processing that undervalues zeal, due process, and adversarial testing of evidence.[12] Aggressive application of procedural rules by defense lawyers can help to restore some of the balance to the adversarial process.

In our seemingly boundless appetite for watching sports, Americans generally accept without much debate the legitimacy—if not always the accuracy—of the process of rule enforcement in sports.[13] On the other hand, many have called into question the fairness, neutrality, and legitimacy of the American criminal justice

8. *See* PAPINEAU, *supra* note 2, at 68 ("The various understandings of fair play observed by different sports are like contracts that you enter into when you start a match.").

9. *See* CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION 4-1.1(b), (d) (AM. BAR. ASS'N, 2019) (providing that the primary duties of defense counsel is to their clients and that they should act "zealously" for their clients).

10. *See, e.g.*, Banks v. Dretke, 540 U.S. 668, 696 (2004) ("We have several times underscored the 'special role played by the American prosecutor in the search for truth in criminal trials.'" (citation omitted)); MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983) (describing the role of the prosecutor); Brady v. Maryland, 373 U.S. 83, 87 (1963) (quoting the Department of Justice's saying that "The United States wins its point whenever justice is done its citizens in the courts."). *Compare* CRIM. JUST. STANDARDS FOR THE PROSECUTION 3-1.2(c) (AM. BAR. ASS'N 2019) (describing the role of the prosecutor as "seek[ing] justice") *with* CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION 4-1.2(b) (AM. BAR. ASS'N 2019) (stating that the basic duty of defense counsel is "to serve as their clients' counselor and advocate with courage and devotion").

11. Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RSRV. L. REV. 531, 532–33 (2007).

12. *See, e.g.*, ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 110 (2018) (describing argument that blames high caseloads as "leading to an excessively administrative mindset, where norms of cooperation overpower norms of conflict, thereby eroding the adversarial roles of defense and prosecuting attorneys").

13. Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239, 240 (1998) ("Perhaps because we grew up playing and watching a game in which law matters and rules count, we have learned to accept the different views of judges and the finality of their decisions.").

system.[14] This Article compares these "legal" systems and the ways that each deals with allegations of gamesmanship, seeking to illuminate productive ways that the criminal justice system can understand and, when necessary, address such claims by altering the procedural rules by which claims are adjudicated.[15] This Article proceeds in four Parts. Part I introduces the potential for examining sport as a comparative legal system that can illuminate important aspects of American criminal justice. Part II discusses some illustrative allegations of gamesmanship in both criminal litigation and in sport. Part III analyzes the distinction between gamesmanship and cheating, and examines some regulatory responses to unwanted gamesmanship in the context of sport. Finally, Part IV proposes a framework by which the American criminal justice system can evaluate claims of gamesmanship and determine whether and when regulatory intervention would be desirable.

Recognizing that gamesmanship is not only an inevitable but also a positive and productive force in both sports and criminal litigation, reformers should take action to curb a specific practice only when it conflicts with a broad and fundamental goal of the criminal justice system. But where a practice is at odds with some important value or objective, legislatures and courts should alter procedural rules and penalties to eliminate these specific forms of gamesmanship. In this process, however, we should remain cognizant of the different roles assigned to prosecutors and defense lawyers in criminal litigation and the particularly corrosive effect that prosecutorial gamesmanship can have on the legitimacy of the criminal justice system.

I. WHY LOOK AT SPORTS RULES?

The study of sports and games can illuminate any aspect of human activity. Almost a century ago, Dutch historian Johan Huizinga convincingly demonstrated that "[t]he great archetypal activities of human society are all permeated with play from the start."[16] Those seeking to make sense of the American criminal justice system have looked to sports as an alternative legal regime at least since Jeremy

14. *See, e.g.*, Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 829 (2003) (describing the "overwhelming empirical evidence" of unjust and unequal treatment of African Americans in the criminal justice system); John Tyler Clemons, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 692 (2014) (stating that implicit racial bias is a "sinister, surreptitious force [that] taints the criminal justice decision-making of even the best intentioned"); Connie Hasset-Walker, Thomas Lateano & Michael Di Benedetto, *Do Female Sex Offenders Receive Preferential Treatment in Criminal Charging and Sentencing?*, 35 JUST. SYS. J. 62, 63 (2014) (discussing the shorter incarceration sentences and lesser offense charges that female sex offenders receive due to gaps in knowledge and biases).

15. *See* Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 1012 (1999) ("Given the importance of sport to the American people, one might consider the process through which sports contests are judged as a means of exploring the relationship of process to the legitimacy of particular outcomes.").

16. Jennifer W. Reynolds, *Games, Dystopia, and ADR*, 27 OHIO ST. J. ON DISP. RESOL. 477, 485 (2012) (alteration in original) (quoting JOHAN HUIZINGA, HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE (1938)); *see also* Barbara Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1135 n.11 (1982) (using sports as a metaphor to analyze prosecutorial behavior

Bentham did so in the nineteenth century.[17] The long history of comparing legal systems to sporting systems continues to this day, although not everyone is comfortable with the analogy. With a recognition of the vastly different objectives of law and sports in mind, however, looking to sports for a comparative legal analysis allows for a fresh perspective on difficult issues in the context of criminal litigation.

A. Comparing "Legal" Regimes

Legal scholars and philosophers study games as a lens into, and a microcosm of, larger social problems.[18] Games are an attractive object of study because "they are intellectually accessible and compact, providing quick traction for examinations into the structure, dynamics, and norms of interpersonal and organizational behaviors."[19] The frequent use of sports and games as metaphors for legal rules and culture, however, is matched by an ambivalence about whether viewing legal disputes as games is an appropriate comparison, given the lack of seriousness that defines games.[20] Comparisons to sports and games are seen as positive insofar as they demonstrate adherence to a predetermined set of specific procedures that apply

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after *Brady v. Maryland* and noting the growing body of research that concludes "that the study of games and play explains many facets of society").

17. *See* Babcock, *supra* note 16, at 1137 (citing Bentham as an "early and still celebrated" critic of the adversary system who compared the system to games).

18. The political role of sports in modern society has a long and contested history. While Theodore Roosevelt claimed that sports "encourage a true democratic spirit," Noam Chomsky argued that sports are a capitalist trick to sedate the masses, "an area which has no meaning and probably thrives because it has no meaning, as a displacement from the serious problems which one cannot influence . . . ." *Compare* President Theodore Roosevelt, Address at the Harvard Union, (Feb. 23, 1907), *reprinted in* IN THE WORDS OF THEODORE ROOSEVELT: QUOTATIONS FROM THE MAN IN THE ARENA 176 (Patricia O'Toole ed., 2012) *with* NOAM CHOMSKY, THE CHOMSKY READER 33 (Pantheon Books ed., 1987).

19. Reynolds, *supra* note 16, at 485. Reynolds states this accessibility goes beyond academics who theorize about the analogy:

> For lawyers, games and sports provide familiar shorthand for understanding and explaining how legal culture operates. Indeed, as a descriptive matter, litigation is easy to depict as a game: Players and umpires (lawyers and judges) conduct themselves according to substantive and procedural rules in pursuit of one or more well-defined goals.

Id. at 485–86.

20. *See* Reynolds, *supra* note 16, at 488 (noting such analogies are "problematic because of the playful, arbitrary attributes of games"). On the importance of sports to the formation of values and role models, however, see Hua Hsu, *Should We Keep Politics Out of Sports?*, THE NEW YORKER (Sep. 24, 2018), https://www.newyorker.com/magazine/2018/09/24/should-we-keep-politics-out-of-sports. Hsu gives an example of the effect of such a role model:

> In 2014, the *Times* political reporter Mark Leibovich was on his way to interview the Patriots' superstar quarterback, Tom Brady, when he recalled feeling something unprecedented: he was nervous. . . . His professional life requires him to be unfazed by politicians and policymakers, people with true power over our everyday realities. Yet he retained a bit of awe for Brady: "Sports pedestals are funny that way. Athletes often constitute our earliest objects of allegiance."

Id. See MARK LEIBOVICH, BIG GAME: THE NFL IN DANGEROUS TIMES (Penguin Press ed., 2018) for a fuller exploration of the broader significance of sports as a constitutive component of identity.

impartially to all players.[21] Such comparisons, however, can also be seen as a negative because games and sports often reflect a win-at-all-costs mentality without regard to broader or higher values.[22] Arthur Allen Leff referred to the "ludic metaphor" as the tendency of legal systems and players to derive legitimacy from comparison to games and the systems of rules that govern games.[23] Although Leff recognized the imperfect comparison of law to games and conceded that law is not simply a game, he argued that the law is "not not a game either."[24] Some have traced the philosophical and historical underpinnings of the adversarial system of adjudication to medieval models of trial by ordeal and by battle.[25] Whether or not a fully appropriate comparison, our system of law has much in common with sports and games and, accordingly, has much to learn from their examples.[26]

B. The Long History of Comparing Law to Sport

The comparison of law to sport has a long and conflicted history. While one recent example is Chief Justice John Roberts comparing the role of a judge to a baseball umpire—i.e., merely calling balls and strikes[27]—Roscoe Pound criticized the "sporting theory of justice" over a century earlier.[28] Pound argued that the public lost faith in the justice system when that system was seen as just another manifestation of sport: both sides engaged in mutual combat like two teams in a sporting event.[29] An even earlier critic of what came to be called the "sporting theory of justice" was Jeremy Bentham.[30] Bentham criticized the privilege against self-incrimination, arguing that it served no purpose except to make the criminal trial more "fair" in the sense of a fox hunt, in which the fox must have some chance of escape.[31] Far from being a necessary or laudable part of the criminal trial,

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21. *See* Reynolds, *supra* note 16, at 486 ("Players and umpires (lawyers and judges) conduct themselves according to substantive and procedural rules in pursuit of one or more well-defined goals.").

22. *See id*. at 488 ("Game metaphors can have multiple and sometimes conflicting uses in legal texts, standing in for both fair process (good) and nonserious, cynical tactics (bad).").

23. *See* Arthur Allen Leff, *Law and*, 87 YALE L.J. 989, 998–1003 (1978). Leff argued that games provide an appealing organizational model because of the determinacy provided by the use of a set of procedures mutually agreed upon in advance of the contest. *Id*.

24. *Id*. at 1005.

25. Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653, 667–68 (2007) (citing Marian Neef & Stuart Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective*, 20 N.Y.L.F. 123, 133–47, 153–61 (1974)).

26. More contemporary commentators have questioned the use of "masculinist" sports metaphors for legal analysis. *See* Krotoszynski, Jr., *supra* note 15, at 995 n.7 (outlining the objections); Michael J. Yelnosky, *If You Write It, (S)he Will Come: Judicial Opinions, Metaphors, Baseball, and "the Sex Stuff,"* 28 CONN. L. REV. 813, 842–43 (1996) (same).

27. *Roberts: 'My job is to call balls and strikes and not to pitch or bat*,' CNN (Sept. 12, 2005), http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/.

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

29. *Id*. at 14–16.

30. Babcock, *supra* note 16, at 1137.

31. *Id*.

Bentham argued, the privilege against self-incrimination introduced into the criminal trial the concept of

> "fairness" in the sense in which the word is used by sportsmen. The fox is to have a fair chance for his life: he must have (so close is the analogy) what is called "law"—leave to run a certain length of way for the express purpose of giving him a chance for escape. . . . In the sporting code, these laws are rational, being obviously conducive to the professed end. Amusement is that end; a certain quantity of delay is essential to it; dispatch, a degree of dispatch reducing the quantity of delay below the allowed minimum, would be fatal to it. . . . [T]o different persons, both a fox and a criminal have their use; the use of a fox is to be hunted; the use of a criminal is to be tried.[32]

Bentham's argument has modern echoes in critiques of the adversarial system as too tied to a game-like philosophy of winners and losers. Criminal law should not be like a sporting event, say these critics, because we do not want the process to be a competition between two roughly equal adversaries. Instead, we want the guilty to lose and the innocent to win.[33]

With regard to specific instances of criminal litigation, resort to sports analogy is also common. Dissenting in *Taylor v. Illinois*, in which the Supreme Court affirmed a conviction after the trial court had excluded a defense witness as a sanction for a discovery violation, Justice Brennan famously wrote that "[c]riminal discovery is not a game."[34] Justice Brennan had touched on similar themes years earlier in an article entitled *The Criminal Prosecution: Sporting Event or Quest for Truth?*[35] Such comparisons are familiar in critiques of the shortcomings of our legal system from all sides. As an example of commentators' nostalgia about how the legal profession has lost its way, U.S. District Judge Stanley Sporkin said, "[L]itigation has become an intricate game rather than a search for truth. I believe for this reason the legal profession may no longer be seen as the honorable, revered profession that so many of us found when we first entered the profession."[36] Of course, this has been a common refrain for ages and every generation of lawyers has a tendency to bemoan what the profession has become and to look back nostalgically at what may be a mythical idealized past.[37]

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32. *Id.* (quoting Jeremy Bentham, *Impropriety of the Exclusion Put Upon Self-Disserving Evidence by English Law*, *in* 7 THE WORKS OF JEREMY BENTHAM 445 (Bowring ed. 1843)).

33. *See* Rollin Morris Perkins, *The Great American Game*, HARPER'S MAG. (Nov. 1927), https://harpers.org/archive/1927/11/the-great-american-game/ ("[T]he outstanding purpose of a criminal trial [should] be recognized by all to be the undivided effort to ascertain the guilt or innocence of the person charged.").

34. Taylor v. Illinois, 484 U.S. 400, 419 (1988) (Brennan, J., dissenting).

35. *See* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 279 (1963).

36. Stanley Sporkin, *The Legal Profession Under Scrutiny*, 39 ARIZ. L. REV. 401, 401 (1997).

37. *But see infra* notes 250–256 and accompanying text (providing several examples from history including Clarence Darrow's cigar trick and Abraham Lincoln's "phantom moonlight" ploy).

More recently, Justice Brennan noted that some of the resistance to the idea of extending discovery in criminal cases "derives from a declining but still identifiable tendency to regard the criminal trial as being . . . 'in the nature of a game or sporting contest,' rather than as 'a serious inquiry aiming to distinguish between guilt and innocence.'"[38] Long before *Taylor*, the Court had described the goals of the discovery rules as making litigation "less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[39]

Justice Brennan also addressed the use of metaphor in illuminating legal practice: "Metaphor certainly has its uses in bringing us to an understanding of the various elements of the legal system. A metaphor may give more depth to an insight than any amount of dry legal discourse."[40] Brennan points out the limitations of sports as a metaphor for criminal trial, however, because of the different objectives of each: while the fundamental objective of a trial is "the determination of the truth," the fundamental objective of a sporting contest is "to ensure that the person or the team with the best skills wins."[41]

Others have emphasized the positive potential in comparing sports to law and legal procedure, using the rules of instant replay review in sports to explain and illuminate the rules and functions of courts and describing the comparison with sports as "our platform for discussing how the system of justice really works and its importance to our society, as well as the important role lawyers and judges play."[42] Looking at sports in relation to a legal system is simply a variation of any comparative legal inquiry and can allow for fresh perspectives.[43] Sports can provide an accessible entry point to discussions of law.[44]

Many scholars have examined and critiqued aspects of criminal law and procedure through the lens of sports and games.[45] As one explained, "[l]egal scholars

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38. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth—A Progress Report*, 69 Wash. U. L.Q. 1, 16 (1990) (quoting Glanville Williams, *Advance Notice of the Defense*, 1959 CRIM. L. REV. 548, 554); *see also* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 91 (1949) ("Our contentious trial method, I have said, has its roots in the origin of court trials as substitutes for private brawls.").

39. United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958).

40. Brennan, Jr., *supra* note 38, at 17.

41. *Id*. at 18.

42. Chad M. Oldfather & Matthew M. Fernholz, *Comparative Procedure on a Sunday Afternoon: Instant Replay in the NFL as a Process of Appellate Review*, 43 IND. L. REV. 45, 46–47 (2009) (quoting Joseph G. Bisceglia, *CSI, Judge Judy and Civic Education*, 95 ILL. B.J. 508, 508 (2007)).

43. *See id*. at 48.

44. *See, e.g*., Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L.J. 227, 229 (1994) ("[A]ll American lawyers are enmeshed in the normative boundaries of two incompatible legal systems: the so-called 'real' legal system, which they tediously learn through years of law school, and the legal system of baseball, which they pick up effortlessly from playgrounds, sports pages, and television.").

45. *See, e.g*., Mitchell N. Berman, *"Let 'em Play": A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325 (2011) [hereinafter Berman, *Let 'em Play*]; Mitchell N. Berman, *Replay*, 99 CALIF. L. REV. 1683 (2011) [hereinafter Berman, *Replay*]; Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44

like to connect sports rules and legal rules—legal analysis sheds light on sports rules and sports rules shed light on legal rules governing other structures and institutions."[46] In this way, procedural regimes of sports serve as a kind of comparative legal system and, as with any comparative analysis, serve to illuminate and problematize aspects of our legal system that may otherwise escape scrutiny.[47]

Professor Mitchell Berman has advocated for the development of a jurisprudence of sport, arguing that sport and law have much to learn from each other. In *"Let 'em Play": A Study in the Jurisprudence of Sport*,[48] Berman pursues two agendas. First, he tackles the relatively discrete task of determining the advisability of temporal variance in the enforcement of rules: that is, examining whether rules should be enforced differently depending on how close a potential infraction occurs to the end of a game.[49] More broadly, however, Berman sets out to examine the procedures and practices of sports as a lens into how legal systems work.[50] Berman recognizes that various legal and philosophical scholars have from time to time used sports analogies to illustrate a particular legal point,[51] but argues that the "distinct legal systems"[52] employed by sports are ripe for broader comparative analysis. Not only are sports generally governed by written codes, but they also "exhibit such essential institutional features as legislatures, adjudicators, and the union of primary and secondary rules."[53]

Like organized sports, litigation is an actively managed enterprise. As critiques surface about new developments or tactics seen as problematic, actors with power can move to alter the procedural regime to restore a balance of power or discourage certain behavior.[54] Questions of what types of behavior should be allowed, tolerated, and encouraged necessarily involve normative determinations about the

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U.C. DAVIS L. REV. 1407 (2011); Linda E. Carter, *The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's "No Harm, No Foul" Debacle in* Neder v. United States, 28 AM. J. CRIM. L. 229 (1987); Babcock, *supra* note 16; Krotoszynski, Jr., *supra* note 15; Gershman, *supra* note 11.

46. Howard M. Wasserman, *The Economics of the Infield Fly Rule*, 2013 UTAH L. REV. 479, 480 (2013).

47. *See* Berman, *Replay*, *supra* note 45, at 1683 ("Formal organized sports are, in effect, legal systems, and legal theorists might find much both to teach and to learn from by paying closer attention to competitive athletics.").

48. Berman, *Let 'em Play*, *supra* note 45, at 1331.

49. *Id*.

50. *See id*. at 1329 ("[J]urisprudential attention to sports and games is decidedly ad hoc. I am unaware of any sustained or systematic investigation into the insights that formal sports and municipal legal systems might offer up for students of the other.").

51. *See id*. at 1328–29 nn.12–14 (citing John Rawls's, H.L.A. Hart's, and Ronald Dworkin's use of baseball, cricket, and chess, respectively, to illustrate various points about rules and constructive interpretation).

52. *Id*. at 1329.

53. *Id*.; *see also id*. at 1330 (listing ways in which sports and law attempt to answer many of the same procedural questions, including whether to be guided by formal rules or informal norms; how much discretion to endow adjudicators and how to guide and limit that discretion; and whether to provide a form of appellate review and how to structure that review).

54. *See infra* Section II.B.

overall objectives of the system.[55] How do we decide what *should* be tolerated and encouraged, either in sports or in litigation? Berman answers this question in the sports context with reference to what he calls the "competitive desideratum": the main point of an athletic contest is to reward the competitor who demonstrates the highest degree of "excellence in executing the particular athletic virtues that the sport is centrally designed to showcase, develop, and reward."[56] In deciding whether and how to enforce a particular rule, Berman argues that the decision maker should consider whether the infraction in question implicates the competitive desideratum; if not, then it is not essential that the rule is always enforced.[57] This discussion illuminates an important distinction between sports and litigation, because the primary objective of litigation has nothing to do with the relative skill of the lawyers but instead with factors external to their performance, like accuracy and fairness.[58]

C. Limitations of the Analogy Between Law and Sport

The critical difference between sports and legal contests is the ultimate objective of each: while sporting contests are all about deciding which of the competitors best displayed mastery of a skill during the contest, trials are about (in addition to a normative moral determination) what happened outside of the courtroom, and should seek to minimize or eliminate the skill of the litigators as a factor in the outcome.[59] The overall objectives of the system should dictate the specific procedural rules of engagement:

> The usual justification for the adversary system is that truth will emerge from a rule-bound contest between two opponents presided over by a passive

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55. Berman argues that the practices must be based on these goals, rather than the current norms:

> Some people think that what I claim to be a puzzle of genuine legal-philosophical interest is no puzzle at all. They say that the answer is that it all depends on the "norms," "customs," or "conventions" of the sport in question. . . . But this won't do. For we are seeking not simply a report of existing practices but an account of what the practices *should be*.

Berman, *Let 'em Play*, *supra* note 45, at 1331 (emphasis added).

56. *Id.* at 1358.

57. *See id.*

58. *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035 (1975) (stating that the primary objective for a trial judge in an adversary system is to search for truth).

59. Noting that the procedures of sport and criminal law are not perfect, Babcock states:

> A good game should be won by the better team, most of the time. That is the analog to our belief that trial procedure should be designed so as to find the truth, most of the time. But sports are not a scientific procedure to investigate objectively and in the abstract the worth of the opposing contestants, or to discover and reward merit. The rules and principles that constitute fair play are not aimed solely at making certain that the best team wins, but also at assuring that the game is a satisfying contest in itself. Thus, full of hope we say "may the best team win," precisely because we know that the best team sometimes does not. That either team may win makes sport and is also central to our concept of fair play.

Babcock, *supra* note 16, at 1141.

> umpireal judge. But if the central goal is truth-seeking, why should the prosecutor, with his greater resources and access to witnesses, not have the responsibility for putting all the evidence on the table, including that which is favorable to an accused?[60]

Many scholars have discussed the difference between rules and standards in legal adjudication.[61] The same distinction applies in the regulation of sports: rules may be more appropriate where their application turns on an objective determination of the presence or absence of a condition, while standards require more of a subjective evaluation of intent and effect.[62] The lack of discretion in the enforcement of rules (as opposed to standards) can be a virtue or a vice depending on the situation and one's point of view: "[T]he choice of rule-based decision-making ordinarily entails disabling wise and sensitive decision-makers from making the best decisions in order to disable incompetent or simply wicked decision-makers from making wrong decisions."[63] The discussion of rules and standards has direct relevance to the questions of whether and how to regulate gamesmanship in both the sports and litigation contexts.

The concept of gamesmanship carries within it the implication of something unfair: certainly not cheating, but behavior that might fall short in the eyes of some competitors as "fair play." Professor Barbara Babcock has argued that

> the concepts of fair play in sports and due process in criminal trials are in fact united. We have taken the notion of fair play from its native habitat in the world of games and sports and applied it directly to our legal procedures. Perhaps the reader will come to believe with me that this metaphor aids one's understanding of the requirements of the adversary system.[64]

Because criminal trials have a communicative purpose as well as a fact-finding function, the game-like aspects of criminal litigation serve a purpose in speaking to the community.[65] The aspects of criminal procedure that seem like a game "may be the most culturally compatible means of saying what we have to say. . . . In our culture, the most concrete manifestation of the collective sense of justice is the notion of fair play."[66] Babcock examines the *Brady* rule against this backdrop and identifies a tension within *Brady* and the early cases that interpret it, in that it "violated a central tenet of agonistic play: In putting forth its best efforts, a team must be assured of helping itself more than its opponent."[67] If the criminal justice system

60. *Id*. at 1134.

61. *See, e.g*., Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 380 (1985) (noting that "disputes that pit a rule against a standard are extremely common in legal discourse").

62. *See* Berman, *Let 'em Play*, *supra* note 45, at 1361 (explaining that "rules turn upon factual predicates that are sharper edged, whereas standards require those who apply them to exercise evaluative judgment").

63. *Id*. (quoting SCHAUER, *supra* note 4, at 153).

64. Babcock, *supra* note 16, at 1135–36.

65. *See id*. at 1139–40.

66. *Id*. at 1140–41.

67. *Id*. at 1145.

is seen as tolerating behavior that is unfair, that has important implications for popular understandings and acceptance of the legitimacy of the system. And if gamesmanship falls short of cheating but is seen as somehow problematic or undesirable anyway, looking to sports for examples of how to treat it might lend insights into the question of gamesmanship in criminal litigation.

One problem with both the idea of a "sporting theory of justice" and more generally with analogizing sports to criminal litigation is the different institutional roles that are assigned to prosecutor and defense lawyer. Because they are asked to be not only advocates but also "ministers of justice," instances of prosecutors involved in gamesmanship pose a special threat to the legitimacy of the criminal justice system.[68] The practice of prosecutors making obviously pretextual arguments in order to prevent people of color from serving on criminal juries, for example, undermines confidence in the integrity of the system.[69] Gamesmanship can be corrosive to the public's trust in a system, whether a system of sports rules or criminal justice. When official actors are seen as behaving arbitrarily or unjustly, the legitimacy of the system is questioned by those who use it.[70] As that legitimacy is called into question, rates of compliance with the law fall.[71]

Rules exist in large part to reassure participants and observers that the system can be trusted, and that its outcomes are fair and worthy of respect.[72] For this reason, the rules of both criminal procedure and sport need to be adjusted from time to time in order to maintain fairness as well as the perception of fairness.[73] These minor shifts in procedural rules happen all the time, from amendments to civil pleading standards, to criminal discovery rules, to the height of the pitcher's mound, and the number of pitches that constitute a walk in baseball.[74] Ideally, they are implemented to maintain or advance the higher-level objectives of the system, whether it is fairness and accuracy in the courts or a balance of offense and defense in sports.

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68. *See* Gershman, *supra* note 11, at 532 (arguing that, because of the prosecutor's dual role as advocate but also as promoter of public justice, "[t]here is no place in [our criminal justice] regime for prosecutorial gamesmanship").

69. *See infra* Section II.B.3.

70. *See generally* TOM TYLER, WHY PEOPLE OBEY THE LAW (2006) (contending that people focus on the fairness of court procedures, rather than their results, when evaluating procedural justice) and other writings of his.

71. *See id*. at 4–5; *cf*. AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 4 (2014) (describing how arbitrary contact with the criminal justice system led to non-engagement with the political system).

72. Wasserman, *supra* note 46, at 485 ("Rules of procedure and rules of sport also share a similar purpose: to ensure outcomes are accepted as fair and legitimate, even by a losing party disappointed in the result, because of faith in the fairness and legitimacy of the framework.").

73. *Id*. at 485 (arguing that "[t]he quest for this level field means framework rules should not tip too far in one direction" and therefore "rulemakers must recalibrate rules, sometimes along arbitrary lines, when a particular situation tilts (or is perceived as tilting) too far in one direction").

74. *Id*. at 485–86.

II. CHARGES OF GAMESMANSHIP IN CRIMINAL LITIGATION AND IN SPORT

Gamesmanship can be a tricky concept to precisely define. Knowing the rules of a game well and using them to one's advantage are expected of litigators as much as they are of athletes in a sporting match. Advocating zealously and making strategic decisions is what we expect of all criminal litigators.[75] At what point, however, might strategic deployment of procedural rules cross a line of acceptability and begin to undermine core values or fundamental goals of the system, whether in sport or in criminal litigation? To examine the concept more precisely, it is necessary to look at specific examples of when charges of gamesmanship are made against competitors in both contexts. This Part looks at examples from the worlds of both sport and criminal practice.

A. Charges of Gamesmanship in Sport

Allegations of gamesmanship in sport fall into a few general categories. When a player violates a rule that is seen as central to the definition of the game itself, many feel that a line has been crossed and such conduct should be condemned. Violation of these constitutive rules can lead to charges that the offender is not even playing the game at all and so should not only be sanctioned but also disqualified. Instances in which competitors detect a broader competitive advantage to losing a particular match are not uncommon and can provoke outraged cries of poor sportsmanship and gamesmanship. Finally, the strategic and aggressive invocation of minor rules to confuse or disadvantage one's opponent divides fans and players alike regarding whether such behavior is simply part of the game to be celebrated or a distraction to be condemned. Infamous (or brilliant) examples of each of these kinds of sporting behavior can be compared to similar behavior in the litigation context.

1. Violating a Core Rule of the Game

Those who only know one rule of soccer know that the players (other than the goalkeeper) are not allowed to use their hands. In the quarterfinal game of the 2010 World Cup, Uruguay and Ghana were tied 1–1 in the final seconds of extra time when Ghanaian striker Dominic Adiyiah headed the ball past the Uruguayan keeper in what looked like a certain last-minute goal to win the game. Uruguayan striker Luis Suarez, standing on the goal line and unable to stop the ball with his head, reached up with both hands and knocked the ball away, a clear violation of soccer's central rule.[76] The referee immediately and correctly gave Suarez a red card, ejecting him from that game and the next, and awarded Ghana a penalty kick.

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75. *See, e.g.*, CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION 4-1.2(b) (AM. BAR. ASS'N 2019) (requiring defense counsel to serve as "loyal and zealous advocates for their clients").

76. *See* FIFA TV, *World Cup Moments: Luis Suarez*, YOUTUBE (May 25, 2015), https://www.youtube.com/watch?v=8CcPELUFKKU.

In an unforgettable ending, Ghanaian striker Asamoah Gyan missed the penalty kick in what was the last play of extra time, and Uruguay went on to win the penalty kick shootout, advancing to the semifinals over Ghana.[77]

After the game, Suarez was unrepentant and clear: he had intentionally stopped the ball with his hands because the alternative would have assured his opponent the victory. Rather than pretending that his use of hands was inadvertent or accidental, Suarez declared, "I made the save of the tournament!"[78] Immediately a debate began about whether the consequence to Suarez and the Uruguayan team was too light and, on a more philosophical level, whether what he did should be considered cheating.[79] The disciplinary committee of FIFA, the governing body of the World Cup, considered extending Suarez's one-game suspension but decided against it.[80] Uruguayan coach Oscar Tabarez argued strongly that, although Suarez had violated one of the rules of soccer, he did not cheat: "Saying we cheated Ghana is too harsh a word to use. . . . We also abide by what the referee did. It could have been a mistake. Yes, he stuck his hand out, but it's not cheating."[81]

Others disagreed, arguing that Suarez's action was so far beyond the acceptable limits of what is allowed that it should be considered cheating and should merit a more severe penalty.[82] The fact that it prevented Ghana from becoming the first African nation to advance to the semifinals added to the public outrage.[83] Heated discussions took place over whether Suarez had violated FIFA's code of fair play, which states, "Winning is without value if victory has been achieved unfairly or dishonestly. Cheating is easy, but brings no pleasure."[84] Suarez himself appeared to justify his actions with a cost-benefit analysis: "The way in which I was sent off today was worth it."[85] In the wake of the incident, Ghana's sports minister, Akua

77. *See* Jamie Doward, *Luis Suarez is New World Cup Villain After 'Hand of God' Claim*, GUARDIAN (July 3, 2010), https://www.theguardian.com/football/2010/jul/04/luis-suarez-world-cup-villian-hand-of-god.

78. *Id.*; *see also* Ian Chadband, *World Cup 2010: Uruguay's Luis Suarez Revels in Second Coming of Hand of God*, TELEGRAPH (July 3, 2010), https://www.telegraph.co.uk/sport/football/teams/uruguay/7870586/World-Cup-2010-Uruguays-Luis-Suarez-revels-in-second-coming-of-Hand-of-God.html (explaining how Suarez went on in exultant fashion: "There was no alternative for me. This was the end of the World Cup and when I saw Gyan miss the penalty it was a great joy. I thought 'it is a miracle.' We were still alive."); Paul Fletcher, *Luis Suarez – Hero or Villain?*, BBC NEWS (July 3, 2010), https://www.bbc.co.uk/blogs/paulfletcher/2010/07/luis_suarez_hero_or_villain.html (providing one writer's description of Suarez's demeanor in the post-game interview: "The huge grin on his face as he spoke to reporters indicated in the clearest terms possible that he had no regrets about what he had done.").

79. Chadband, *supra* note 78; Fletcher, *supra* note 78.

80. Chadband, *supra* note 78.

81. Doward, *supra* note 77.

82. *See* Ofeibea Quist-Arcton, *Ghana's Black Stars Celebrated in Defeat While Handball Debate Rages*, NAT'L PUB. RADIO (July 4, 2010), https://www.npr.org/sections/showmeyourcleats/2010/07/04/128300381/ghana-s-black-stars-tour-soweto.

83. Chadband, *supra* note 78.

84. *A Credo to Live and Play By*, FIFA (Aug. 26, 1997), https://www.fifa.com/news/credo-live-and-play-72003.

85. Chadband, *supra* note 78.

Sena Dansua, called on FIFA to change its rules regarding intentional handballs, saying that Ghana had been "robbed" of its victory.[86]

Of course, one's perspective on whether Suarez was a hero or a villain depended at least in part on one's loyalty to one team or the other. Fans and teammates of Suarez defended and celebrated his decision while supporters of Ghana expressed outrage. While Uruguayan striker Diego Forlan said that Suarez had "made a great save" and was "one of the heroes,"[87] Ghanaian defender John Pantsil was harshly critical of the move, declaring, "There is no chance that any of us Ghana[ian] players would have used our hand[s] to stop the ball—no way."[88] Beyond team loyalty, however, some proposed that views of the acceptability of Suarez's move were culturally specific and that "[w]hat might be regarded in Europe or Africa as cheating is seen as cunning or exploitation of the rules in other parts of the world."[89]

The Suarez incident recalled another well-known intentional handball from the previous year when French captain Thierry Henry admitted that he had touched the ball with his hands to set up a game-winning goal by teammate William Gallas that knocked Ireland out of World Cup contention.[90] Unlike the Suarez incident, however, the match officials did not see Henry's violation and did not call a penalty. Only after the game was over did Henry admit to the offense.[91] As with the Suarez incident, public reaction was swift and furious. Debates raged about whether Henry's action constituted cheating, and Henry claimed that he considered quitting soccer as a result of the uproar.[92] The Irish government and others called for the result to be set aside and, alternatively, for Ireland to be awarded a special extra spot in the 2010 World Cup.[93] FIFA rejected these proposals, but the incident spurred an increase in the use of technology in officiating, leading to the addition of video-assistant-referee and goal-line technology to assist officials during matches.[94] Similarly, FIFA considered and rejected rule changes after the 2010 Suarez incident.[95] One proposal would have allowed a referee to award a goal in

86. *See Ghana Calls for Fifa Rule Change After World Cup Exit*, BBC NEWS (July 7, 2010), https://www.bbc.com/news/10537133.

87. Fletcher, *supra* note 78.

88. *Id*.

89. *Id*.

90. 1095macho, *Thierry Henry Handball Controversy France. vs Ireland*, YOUTUBE (Nov. 21, 2009) https://www.youtube.com/watch?v=uCDZjtC3mug.

91. *See id*.

92. *See* Jack Bell, *GOAL; Henry Considered Quitting*, N.Y. TIMES (Nov. 24, 2009), https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9E0CE4D8103BF937A15752C1A96F9C8B63.html.

93. *See* Emmet Malone, *One Night in Paris: Henry's Stray Hand, the 33rd Team, and the Great Fifa Shakedown*, IRISH TIMES (May 23, 2020), https://www.irishtimes.com/sport/soccer/international/one-night-in-paris-henry-s-stray-hand-the-33rd-team-and-the-great-fifa-shakedown-1.4260282.

94. *See Fifa to Investigate Thierry Henry Handball*, BBCSPORT: FOOTBALL (Dec. 2, 2009), http://news.bbc.co.uk/sport2/hi/football/internationals/8391388.stm.

95. *See World Cup 2010: Blatter Rules Out 'Penalty Goals' Following Suarez Handball Anger*, SCOTSMAN (July 8, 2010), https://www.scotsman.com/sport/world-cup-2010-blatter-rules-out-penalty-goals-following-suarez-handball-anger-2481283.

cases where an intentional handball prevented what would have been an obvious goal.[96]

Unlike Luis Suarez, Thierry Henry was contrite and proposed that the game should be replayed: "Naturally I feel embarrassed at the way that we won and feel extremely sorry for the Irish who definitely deserve to be in South Africa [at the World Cup]. . . . It was an instinctive reaction to a ball that was coming extremely fast in a crowded penalty area."[97] Irish players and even the president of FIFA, Sepp Blatter, expressed sympathy for Henry.[98] FIFA's disciplinary committee opened an investigation into whether he should be suspended or otherwise penalized for the handball but ultimately found no grounds to impose discipline on Henry.[99]

2. Losing on Purpose

Tournament formats in many sports use the results of preliminary rounds to seed teams for the final knockout rounds. Occasionally, a team will qualify for the final knockout round and still have a preliminary round match to play, making the result relevant only to seeding. And on rare occasions, it will be to that team's benefit to lose the match, giving the team a better chance to win in the final knockout round of the tournament.[100] In truly remarkable cases, it will be in the interests of both teams to lose a match in the preliminary round, leading to some bizarre match behavior.[101]

This was the case in the women's doubles badminton competition at the 2012 London Olympics.[102] Sixteen teams qualified for the tournament and eight would advance to the knockout round, with the seedings determined by performance in the preliminary round. China's two teams were the favorites entering the

96. *Id*. This would be similar to the rules of rugby, which allows for a goal to be awarded by the official when a player "would probably have scored . . . but for foul play by an opponent." WORLD RUGBY, WORLD RUGBY LEISURE RUGBY LAWS: BEACH FIVES RUGBY 8 (2020), https://laws.worldrugby.org/?domain=7&modified_form=5&language=EN.

97. Laura Stevenson, *Replay the Best Solution Says Henry*, INDEPENDENT (November 20, 2009), https://www.independent.co.uk/sport/football/international/replay-the-best-solution-says-henry-1824593.html.

98. *See Blatter Breaks Silence to Reveal Henry Support*, DAWN (Nov. 29, 2009), https://www.dawn.com/news/929684; Malone, *supra* note 93.

99. *See Fifa to Investigate Thierry Henry Handball*, *supra* note 94; David Hytner, *Thierry Henry Escapes Punishment for World Cup Handball*, GUARDIAN (Jan. 18, 2010), https://www.theguardian.com/football/2010/jan/18/thierry-henry-fifa-handball-escapes-punishment.

100. *See* PAPINEAU, *supra* note 2, at 86. A similar incentive exists in leagues that give the first-round draft pick to the team that finished last in the previous year. *See infra*, note 110 and accompanying text.

101. One notorious variation of this was in the 1994 Barbados-Grenada soccer match. PAPINEAU, *supra* note 2, at 88. The Barbados team needed to beat Grenada by two goals in order to advance to the finals. Because extra-time points counted as double for goal-differential purposes, Barbados tied the game by *scoring on their own goal*, defending both goals (so that Grenada could not choose to lose by one), and then defeating Grenada by a goal in extra-time. *Id*. at 88–89.

102. *See Olympics Badminton 2012 China vs Korea*, YOUTUBE (Aug. 1, 2012) https://www.youtube.com/watch?v=H-bsqzlS-Gg (showing both teams intentionally serving faults into the net, prompting referee to tell teams to play properly or risk being thrown out of the tournament).

tournament and were hoping for gold and silver medals. But when the Danish team unexpectedly beat the favorites from China in the preliminary round, both Chinese teams appeared to be headed to the same side of the bracket, meaning that they would meet not in the finals but in the semifinals, so there would be no chance of winning both gold and silver. To avoid this result, one of the Chinese teams resolved to lose their final preliminary game against South Korea, after which they would be back on the opposite side of the bracket from the other Chinese team.[103]

Once it became clear that the Chinese were trying to lose the match, the South Korean team decided that it would be to their advantage as well to lose the game. "As the crowd groaned and booed, the Chinese and South Korean players repeatedly served the birdie into or under the net, looking less competent than a bunch of Americans playing with a plastic Target badminton set at a backyard barbecue."[104] Eventually the Chinese team managed to lose, but in a match later that day another South Korean team and a team from Indonesia came to the same mutual conclusion: their chances of winning the *tournament* would be enhanced by losing the *match*. Amid widespread public outrage, all four teams were subsequently disqualified from the Olympic competition for "conducting [themselves] in a manner that is clearly abusive or detrimental to the sport."[105]

Public opinion was split, with many agreeing that the players behaved in an unsportsmanlike manner and others arguing that they were shrewdly maximizing their chances of winning the ultimate prize: a gold medal. Many felt that the players had disrespected the game by not trying their hardest,[106] while others argued that the athletes were simply employing the rules of the tournament to their advantage. The point, after all, was to win the tournament rather than a particular match.[107] Professor David Papineau defends the athletes who purposely lost in these contexts, arguing that "the public should be grateful that the incompetence of the authorities was so clearly exposed."[108]

The idea of purposely losing a match to gain an advantage comes up with surprising frequency, especially in multi-stage tournaments where seedings for final rounds depend upon results in preliminary rounds.[109] The other notorious context in which teams have an incentive to lose on purpose is toward the end of a season

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103. *See* Justin Peters, *Shuttlecock and Bull*, SLATE (Aug. 1, 2012), https://slate.com/culture/2012/08/badminton-scandal-olympics-2012-why-were-those-olympic-badminton-players-trying-to-lose-and-why-is-the-sport-so-dirty.html.

104. *Id*.

105. *Id*.

106. *See Olympics Badminton 2012 China vs Korea*, *supra* note 102 ("They're both trying to lose . . . and that is unforgivable.").

107. *See* PAPINEAU, *supra* note 2, at 86–87 ("[I]t was outrageous that the players should have their Olympic hopes shattered, just for doing their best to win the tournament.").

108. *Id*. at 88.

109. Prominent examples include not only the Olympic badminton tournament described above but also the 1982 World Cup soccer tournament between West Germany and Austria and the 1994 Barbados-Grenada soccer game. *See id*. at 86, 88.

when future draft picks are awarded to the teams with the worst records.[110] Both of these situations are easily remedied by administrative tinkering with the specific procedures and awarding of incentives. All final-round preliminary matches in the World Cup, for example, are now played simultaneously to reduce the potential for strategic losses in the final round.[111] Other professional sports have turned to a weighted lottery system in drafting new players in order to avoid teams competing to have the worst record late in the season.[112] Losing on purpose turns out to be a form of gamesmanship easily addressed by changes to the governing rules.

3. "Over-Enforcing" an Obscure Rule Against an Opponent

It is no coincidence that legal scholars interested in procedure are drawn to baseball metaphors.[113] The rules of baseball are full of arcane and little-known minutiae,[114] waiting to be strategically deployed against an opponent. And while of course there is no dispute about the appropriateness of raising the central or

110. One particularly notorious example of this phenomenon was the 2006 "Bush Bowl," in which the Houston Texans played the San Francisco Forty-Niners. If the Texans lost the game, they would ensure the worst record in the National Football League that season and, therefore, the first draft pick of the following year, when Heisman-winning Reggie Bush of the University of Southern California would be available. *See* John Branch, *In Bush Bowl, Texans Lose, and Win*, N.Y. TIMES (Jan. 2, 2006), https://www.nytimes.com/2006/01/02/sports/football/in-bush-bowl-texans-lose-and-win.html. Notwithstanding some controversy about incentivizing losses, the NFL still assigns draft picks in order of worst performance in the previous season. *The Rules of the Draft*, NAT'L FOOTBALL LEAGUE: OPERATIONS, https://operations.nfl.com/the-players/the-nfl-draft/the-rules-of-the-draft/ (last visited Oct. 24, 2020). The National Basketball Association (NBA), by contrast, uses a weighted lottery for the worst teams, so a poorly performing team has little incentive to purposely lose games late in the season. *See NBA Draft Lottery: Schedule, Odds and How It Works*, NAT'L BASKETBALL ASS'N (Aug. 20, 2020), https://www.nba.com/nba-draft-lottery-explainer.

111. *See* Kirsten Schlewitz, *Why Are the Final Group Stage Matches at the World Cup Played Simultaneously?*, SBNATION (Jun. 26, 2014), https://www.sbnation.com/soccer/2014/6/26/5843018/group-stages-2014-world-cup (describing the 1982 West Germany v. Austria strategic plan that caused public uproar and prompted the scheduling change).

112. *See, e.g.*, Ryan Nanni, *It's a Very Bad Time to be the Worst Team in the NBA*, SBNATION (May 14, 2019), https://www.sbnation.com/2019/5/14/18615941/nba-draft-lottery-history-worst-team-odds. In 1947 and 1948, having the worst season record in the NBA unconditionally guaranteed a team the first pick in the draft. Between 1949 and 1965, draft picks were assigned in reverse order of record, but territorial picks allowed any team to forfeit its first-round pick *at any time* and instead claim any player within a 50-mile radius of the team's home arena. Then, in 1966, the NBA's lottery system was created. The system initially used a coin flip to determine whether the worst team from the East or the worst team from the West would get the first pick. The system did away with the coin flip in 1985. Instead, every team that missed the playoffs had a chance to be randomly selected to have first pick. Beginning in 1994, the NBA implemented the system that is still used today. The NBA now takes 14 ping-pong balls, assigning 25% of the possible combinations to the worst team, and draws four of them to determine which team gets first pick. *Id.*

113. *See, e.g.*, Frankel, *supra* note 58, at 1033 ("[T]he 'sporting theory' continues to infuse much of the business of our trial courts."); Finkelman, *supra* note 13, at 239 ("[Y]ear after year, . . . the rhythm of baseball and the law continue to shape our world. . . . I believe that our legal culture, perhaps the very rule of law itself in the United States, is to some extent tied to our national past time."); Yablon, *supra* note 44, at 229 (advancing the "radical" theory that "most of the advances in American legal theory have come from lawyers trying to figure out why the real legal system can't be more like baseball").

114. *See, e.g.*, Emma Baccellieri, *A Brief Guide to MLB's Bizarre Uniform Guidelines*, SPORTS ILLUSTRATED (May 16, 2018), https://www.si.com/mlb/2018/05/16/mlb-uniform-guide-willson-contreras.

constitutive rules of baseball against an opponent during a game, managers will, on occasion, invoke the lesser-known rules of baseball to seek an advantage and be subject to cries of gamesmanship for their efforts.

The Kansas City Royals were losing by a single run with two outs in the ninth inning in a July 1983 game at Yankee Stadium when George Brett, of the Kansas City Royals, came to the plate with a runner on base.[115] When Brett hit Goose Gossage's pitch out of the park into the right field seats, it looked like the Royals had taken the lead. But Billy Martin, the manager of the Yankees, came out of the dugout immediately after Brett's hit and told the umpire that, because Brett's bat had too much pine tar on its handle, the home run should be disallowed, and Brett should be called out. Then and now, Major League Baseball allows for pine tar to be used on the handle of the bat to improve the batter's grip but, in order to maintain the cleanliness of the baseballs,[116] restricts the use of pine tar to the bottom eighteen inches of the bat. The officiating crew examined the bat, measured the length of the pine tar on the handle, and concluded that it exceeded the allowable length and therefore violated the rule.[117] Because he had used an "illegal bat" according to the rules,[118] Brett was ruled out, his home run nullified, and the game declared over with the Yankees having won by a run.[119]

Outrage ensued—at least outside of New York. The Royals appealed the decision and commentators lamented the clear gamesmanship of Billy Martin and the Yankees. The Royals petitioned American League president Lee MacPhail to reverse the decision because "the intent of the rule was not about competitive advantage but about keeping balls cleaner."[120] Likely not lost on MacPhail was the strategic decision by the Yankees to wait until *after* the home run to invoke the rule, seeming to show that their concern was not the cleanliness of the baseballs but in obtaining a competitive advantage. To great public celebration, MacPhail took the extremely unusual step of overturning the umpire's decision, finding that, although the umpire had complied with the letter of the law in ruling Brett out, the decision was "not in accord with the intent or spirit of the rules."[121] MacPhail ordered that the Royals be credited with Brett's two-run home run and that the game be resumed at a future date at Yankee Stadium.[122] Columnist George Will's

115. Jared Tobin Finkelstein, In re Brett*: The Sticky Problem of Statutory Construction*, 52 FORDHAM L. REV. 430, 430 (1984). For an in-depth and entertaining analysis of the "pine tar incident," see *id*.

116. Steve Wulf, *A Win for Common Sense*, ESPN (July 24, 2013), https://www.espn.com/mlb/story/_/id/9498442/george-brett-pine-tar-game-common-sense-won-out.

117. *Id*. at 430.

118. *See id*. (stating that "the pine tar on Brett's bat extended beyond the permissible eighteen-inch limit of the Official Baseball Rules").

119. *See id*.; MLB, *George Brett and the Pine Tar Incident*, YouTube (May 9, 2013), https://www.youtube.com/watch?v=gbEHAsZxRYo.

120. Wulf, *supra* note 116.

121. Finkelstein, *supra* note 115, at 435 (quoting Press Release, American League, Decision Regarding the Protest of the Game of Sunday (July 28, 1983)).

122. Finkelstein, *supra* note 115, at 431.

relieved reaction to the decision spoke for many fans: "George Brett's pine tar almost let the plague of modern life, lawyers, into the sole redeeming facet of modern life, baseball."[123]

MacPhail's decision in the pine tar incident can be defended not only on textual grounds but also with regard to the broader purposes of the specific rule in question and, more generally, the rules of baseball.[124] But just under the surface of his analysis overturning the decision was a recognition that the Yankees had realized that Brett's bat violated the rule and then waited until a strategically opportune time to register their objection. By ruling against the Yankees even though Brett's bat did clearly and factually violate the rules, MacPhail undermined "a traditional managerial tactic—to use the rules to your best advantage."[125] Although some commentators criticized the decision because "clever ploys and gambits are a part of the essence and history of baseball,"[126] others lauded the decision on the grounds that "[g]ames are supposed to be decided by skills of players, not technicalities and loopholes."[127] Whether MacPhail's decision upheld or undermined the best values of baseball depends, of course, on what those values are, and the pine tar incident demonstrated that not everybody agrees on that central question.

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As described above, one's reaction to a particular charge of gamesmanship often depends on one's pre-existing allegiance to the team or side engaged in the behavior. For every Royals fan in Kansas City who was appalled at the poor sportsmanship of the Yankees, there was a fan in New York celebrating the shrewd tactics of Billy Martin, the Yankees' manager. But while some such behavior undermines the overall objectives of the contest, other examples can be understood to advance and refine those goals. By taking a broader perspective on the concept of gamesmanship and what different types of behavior can fall within this broad category, we can come to a clearer understanding of when it is desirable and when, on the other hand, it should be discouraged by amendment of the formal rules that allow it to exist.

B. Allegations of Gamesmanship in Criminal Litigation

Allegations of gamesmanship in criminal litigation fall into a few general categories, each broadly characterized as pursuing some objective that, while conferring an advantage on the litigant, is peripheral to what is supposed to be the central goal of the litigation. Although they have not used the term expressly in this context, several members of the Supreme Court have accused lawyers representing

123. George Will, *Such, Such Were the Joys*, NEWSWEEK, Jan. 2, 1984, at 72.

124. *See* Finkelstein, *supra* note 115, at 434, 437.

125. *Id*. at 438.

126. Ira Berkow, *The Eternal Pine Tar Case*, N.Y. TIMES (Aug. 9, 1983), https://www.nytimes.com/1983/08/09/sports/sports-of-the-times-the-eternal-pine-tar-case.html.

127. Peter Gammons, *Off-Color Questions in Pine Tar Controversy*, ST. LOUIS POST-DISPATCH, July 26, 1983, at 3C.

clients sentenced to death of a kind of gamesmanship in their litigation strategy. Most explicitly, Justice Thomas recently wrote that

> it is obvious that, for some who oppose capital punishment on policy grounds, the only acceptable end point . . . is for this Court . . . to strike down the death penalty as cruel and unusual in all circumstances. In the meantime, though, the next best option for those seeking to abolish the death penalty is to embroil the States in never-ending litigation concerning the adequacy of their execution procedures.[128]

Justices Alito and Scalia have joined in this questioning of the true motives of those advocates raising constitutional challenges to methods of execution.[129] Litigating whether a particular method of execution violates the Eighth Amendment's prohibition of cruel and unusual punishment is seen by some as a basic protection of a defendant's rights and by others as an attempt to achieve an instrumental goal through means unrelated to the central merits of the issue.[130] Some of the most frequent procedural areas of criminal litigation have to do with discovery rights, disclosure by the government of evidence favorable to the defense, and jury selection. Disputes in each of these areas lead to charges of gamesmanship.

1. Confrontation and Discovery Rights

Criminal defendants possess a variety of procedural rights that are designed to lead to accurate and reliable results at trial, as well as to ensure the dignity and

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128. Baze v. Rees, 553 U.S. 35, 104–05 (2008) (Thomas, J., concurring). *See also* Glossip v. Gross, 135 S. Ct. 2726, 2755 (2015) (Thomas, J., concurring) ("To the extent that we are ill at ease with these disparate outcomes, it seems to me that the best solution is for the Court to stop making up Eighth Amendment claims in its ceaseless quest to end the death penalty through undemocratic means."). Ty Alper has disputed this interpretation, arguing that it is in fact lawyers for the state who are playing games in an attempt to manipulate the courts into denying valid Eighth Amendment challenges to methods of execution. *See* Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11, 49–52 (2009) (arguing that state officials have "exaggerated their inability to find willing doctors" to participate in death penalty cases).

129. *See, e.g.*, *Glossip*, 135 S. Ct. at 2749 (Scalia, J., concurring) (declaring that arguments by anti-death penalty advocates about lengthy delays in carrying out executions "calls to mind the man sentenced to death for killing his parents, who pleads for mercy on the ground that he is an orphan"); *Baze*, 553 U.S. at 67 (Alito, J., concurring) ("Although there has been a proliferation of litigation challenging current lethal injection protocols, evidence regarding alleged defects in these protocols and the supposed advantages of alternatives is strikingly haphazard and unreliable.").

130. Justice Scalia brought up concerns of gamesmanship with some frequency in his opinions. *See, e.g.*, Sell v. United States, 539 U.S. 166, 193 (2003) (Scalia, J., dissenting) (arguing that gamesmanship could result from allowing a defendant to seek immediate review of a medication order when ordinarily that challenge is only available on appeal); Maryland v. Shatzer, 559 U.S. 98, 110–11 (2010) (arguing, in the context of police interrogations, that the police can re-approach a suspect fourteen days after release because any "gamesmanship" of releasing and re-arresting suspects will have been dispelled); Puckett v. United States, 556 U.S. 129, 140 (2009) (requiring an objection at the time of sentencing on the basis of a breached plea agreement because otherwise a defendant could "game the system" and wait to see if the sentence is later satisfactory); Yeager v. United States, 557 U.S. 110, 131 (2009) (Scalia, J., dissenting) (noting issue preclusion is used to prevent "gamesmanship" of subsequent prosecutions that require defendants to "run the gantlet a second time") (internal quotations omitted).

fairness of the proceeding. Invocation of these rights, however, can lead to claims of gamesmanship by prosecutors. In *Melendez-Diaz v. Massachusetts*,[131] the Supreme Court considered the impact of its newly invigorated Confrontation Clause jurisprudence[132] on the everyday prosecution of drug cases.[133] Five years earlier, the *Crawford v. Washington* Court held that the Sixth Amendment's Confrontation Clause prohibited the use of testimonial out-of-court statements against a defendant in a criminal case.[134] Charged with distribution of cocaine, Mr. Melendez-Diaz objected at trial to the introduction into evidence of a certificate of laboratory analysis defining the substance in question as cocaine.[135] The Supreme Court reversed Melendez-Diaz's conviction and agreed with him that introduction of the certificate violated his rights under the Confrontation Clause.[136]

The Court's decision in *Melendez-Diaz* changed how courts conduct trials of drug offenses in most jurisdictions. Defendants and defense lawyers now had a new tool that could be used in challenging the government's case: they could insist that the prosecution call a live witness to testify about the testing and nature of the substance in question and to undergo cross-examination on those topics. Justice Kennedy's dissent in *Melendez-Diaz* described the majority opinion as offering a "windfall to defendants," allowing factually guilty defendants to go free on technical grounds.[137] This practice, Kennedy argued, did not advance the truth-seeking function of trials.[138] If the lab analyst was unable for whatever reason to appear in person for trial, the defendant would walk free regardless of the existing quantum of evidence against him.

The majority recognized the potential for this kind of defense strategy but predicted that defendants would not use this tactical advantage too frequently because of the prospect of angering judges.[139] In response, the dissent argued that not only

131. 557 U.S. 305 (2009).

132. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 68–69 (2004) (ruling that testimonial statements fall within the Confrontation Clause); Davis v. Washington, 547 U.S. 813, 822 (2006) (refining the definition of "testimonial" within the meaning of statements made during police interrogations that therefore fall within the Confrontation Clause).

133. *Melendez-Diaz*, 557 U.S. at 305.

134. *Crawford*, 541 U.S. at 68–69.

135. *Melendez-Diaz*, 557 U.S. at 308–09.

136. *Id.* at 329.

137. *See id.* at 343 (Kennedy, J., dissenting).

138. *See id.* at 331–32 (Kennedy, J., dissenting) (arguing that the ruling is "divorced from . . . the underlying purpose of the [Confrontation] Clause" and "has vast potential to disrupt criminal procedures . . . .").

139. *See id.* at 328 (arguing that defense attorneys will be reluctant to exercise the newly-recognized right to confront because of a desire not to "antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion"). Justice Kennedy argued against the idea that courts will punish defense attorneys for taking advantage of the Court's ruling:

> [T]he Court's speculation rests on the apparent belief that our Nation's trial judges and jurors are unwilling to accept zealous advocacy and that, once "antagonize[d]" by it, will punish such advocates with adverse rulings. The Court offers no support for this stunning slur on the integrity of the Nation's courts.

Id. at 352 (Kennedy, J., dissenting) (internal citations omitted).

would defendants be tempted to regularly employ these tactics, but defense counsel would also have an obligation to object when the prosecution failed to call the technician.[140]

The consequences of *Melendez-Diaz* extend to many different kinds of cases, with prosecutors occasionally crying foul when defense lawyers raise creative objections based on the newly expanded confrontation rights. After one acquittal in a DUI case in which the trial judge excluded evidence of the breath test because the test operator did not testify, the chief prosecutor declared, "[i]t's Christmas in July for criminal lawyers who represent drunk drivers."[141] States quickly responded to the decision by passing "notice-and-demand" statutes, requiring the defendant to make any objection well in advance of trial to allow prosecutors to secure the attendance of necessary witnesses.[142]

Such claims can be based on statutory discovery rules as well as constitutional rights. In a federal criminal prosecution, a defendant is entitled to discovery through Rule 16 of the Federal Rules of Criminal Procedure.[143] Among other entitlements, Rule 16 not only allows a defendant to "inspect" material documents but also allows him to do the same to "buildings or places" that are both within the government's possession and control, and material to the preparation of the defense.[144] For example, a typical drug-related prosecution ordinarily will involve disclosure of a certificate of analysis concluding that the substance in question is indeed illegal drugs along with, perhaps, some lab notes of the analyst who performed the chemical testing.[145] Occasionally, however, defense lawyers have tested the scope of Rule 16 and asked for disclosure and inspection of documents and items not routinely disclosed.

In *United States v. Curtis*,[146] for instance, the District of Columbia Court of Appeals addressed a defense request for broad disclosure under Rule 16.[147] In *Curtis*, the defendants, who had been charged in connection with the alleged sale

140. *See id.* at 353–54 (Kennedy, J., dissenting).

141. Joseph King, Chris Leibig, & Kristen D. Clardy, Melendez-Diaz *and* Briscoe*: Return of Constitutional Guarantees Worth the Cost to the System*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 289, 290–91 (2010) (quoting Tom Jackman & Rosalind S. Helderman, *Kaine Calls Session to Amend Laws on Trial Testimony*, WASH. POST, July 23, 2009, at B1).

142. *See, e.g.*, N.C. GEN. STAT. ANN. § 90-95(g) (West 2020). The *Melendez-Diaz* Court seemed to encourage the creation of such statutes. *See Melendez-Diaz*, 557 U.S. at 326 (explaining that "notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence" unless the analyst testifies and noting that such statutes are likely constitutional).

143. FED. R. CRIM. P. 16(a) (detailing information subject to disclosure).

144. *Id.*

145. *See, e.g.*, *Melendez-Diaz*, 557 U.S. at 307–08 (describing drug testing process, including notarized "certificates of analysis").

146. 755 A.2d 1011 (D.C. 2000). Although I was not involved in the *Curtis* appeal, the defendant was represented by lawyers in my office, the Georgetown Criminal Justice Clinic.

147. Although the litigation addressed the District of Columbia's Rule 16, the Court noted that its rule is "substantially the same as its federal counterpart" and "is to be construed consistently with the federal rule." *Id.* at 1014.

of heroin, were given the discovery that was "customarily provided before trial in narcotics cases"[148]: a chain of custody report and a certificate of analysis containing the analyst's conclusion that the substance seized from the defendants was heroin. The defendants sought additional discovery not relating specifically to the analysis of the charged substances in their cases, but rather to the maintenance and repair records of the scientific instruments used in the analysis. They also requested training materials and testing protocols concerning the laboratory's methods. When the prosecution refused to comply with these requests, the defendants filed a motion to compel discovery, which the trial court granted. The prosecution then refused to comply with the court order and the trial court granted the defendants' motion to dismiss the charges as a sanction for the government's noncompliance.[149]

On appeal, the District of Columbia Court of Appeals reversed the trials court's dismissal of the cases because the trial court had made no specific findings concerning whether the evidence sought was material to the preparation of the defense. The Court remanded the case to the trial court to make these findings but also stated that, to prevail, the defendants "must make some preliminary showing of a reason to doubt the chemical analysis provided by the government."[150] Although the appellate court ultimately reversed the trial court's dismissal of the cases, in the months leading up to that reversal, the underlying litigation led to many drug cases being dismissed for violations of Rule 16 when defense lawyers began filing similar discovery requests in every drug case.[151] Among the various trial courts handling drug cases, several judges took the position that Rule 16 required such disclosure and several other judges disagreed. Whether a drug case was dismissed prior to trial, therefore, became largely a function of which judge was presiding.

With the many pre-trial dismissals came claims from prosecutors that defense lawyers were just engaged in gamesmanship: that they were not interested in actually obtaining the discovery that they requested under Rule 16, but instead were simply interested in provoking a dismissal based on the government's refusal to comply with a pre-trial order to compel discovery. Such arguments were a prelude to claims by prosecutors after *Melendez-Diaz*[152] that defense lawyers would exercise their newly recognized procedural rights in a way that had nothing to do with the search for the truth but would simply drive up the costs of prosecuting crimes and lead to dismissals based on "technical" violations of the Confrontation Clause.

Did the defendants in *Curtis* and the hundreds of other drug cases in that jurisdiction in which similar discovery requests were made seek the requested

148. *Id.* at 1012.

149. *Id.* at 1013–14.

150. *Id.* at 1015.

151. My description of this period—here and in the succeeding paragraphs in this Subsection—is based on my firsthand experience as a defense lawyer practicing in the Superior Court of the District of Columbia at this time.

152. 557 U.S. 305 (2009).

discovery solely to test the strength of the government's evidence and establish reasonable doubt as to whether the government had proven each element of its case? Or were the defense lawyers reacting to a procedural ruling that, without regard to the factual merit of the case, would lead to a dismissal of the charges? There is certainly a colorable claim to be made that the maintenance records and training protocols could "lead to other admissible evidence, assist the defendant in the preparation of witnesses or in corroborating testimony, or be useful as impeachment or rebuttal evidence."[153] But any defendant charged with such a crime—even one who may have admitted to law enforcement that the substance in question is in fact illegal drugs—is similarly entitled to request discovery in this way. And, until the appellate court in that jurisdiction restricted the trial courts' reading of Rule 16, any defense lawyer who did not make such a request would not be providing effective assistance of counsel.

2. Disclosure of Favorable Evidence

Allegations of gamesmanship in criminal litigation flow both ways, of course, and just as prosecutors sometimes complain about defendants' active exercise of their procedural rights to discovery and to confront witnesses against them, defense lawyers often complain about gamesmanship in the disclosure of *Brady*[154] material by prosecutors.[155] In *Brady v. Maryland*, the Supreme Court ruled that prosecutors have an obligation to disclose to the defense evidence that is favorable to the accused and material to the outcome of the case.[156] Subsequent cases, however, have restricted this right and created numerous doctrines that can make what seemed like a command into more of a suggestion.[157] Because of the numerous decisions cutting back on the promise of *Brady*, especially by restricting the definition of what evidence is material and therefore within the scope of the requirement, a prosecutor so inclined can withhold favorable evidence with little fear of consequence.[158]

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153. *Curtis*, 755 A.2d at 1015.

154. Brady v. Maryland, 373 U.S. 83 (1963).

155. *See* Gershman, *supra* note 11, at 533 ("[N]o rule in criminal procedure . . . has generated as much gamesmanship[] as the *Brady* rule.").

156. *See Brady*, 373 U.S. at 87.

157. *See* Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 158 (2012) (explaining how the "defendant due diligence rule" suggests that the government's *Brady* obligations are not absolute and encourages suppression of exculpatory evidence by shifting the burden of discovery onto the defendant); Gershman, *supra* note 11, at 548 (discussing suppression of evidence through misleading open-file policies); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 659 (2002) (explaining how the realities of the criminal justice system, particularly the high rates of pleas, make the *Brady* requirement "more of a post-trial due process safety check" rather than a pre-trial discovery mechanism).

158. Gershman, *supra* note 11, at 531, 549 ("[A]s interpreted by the judiciary, *Brady* actually invites prosecutors to bend, if not break, the rules, and many prosecutors have become adept at *Brady* gamesmanship to avoid compliance.").

Examples of prosecutorial gamesmanship in this context include the avoidance of overt and explicit promises of rewards to cooperating witnesses so neither the prosecutor nor the witness need disclose the existence of an agreement;[159] the purposeful decision to avoid creating any *Brady* material so there is nothing to disclose;[160] the disclosure of material at the last minute;[161] and the disclosure of a single piece of favorable evidence amid an avalanche of less consequential evidence in the hopes that the defense will fail to recognize the significance of the *Brady* material.[162] An extreme version of *Brady* gamesmanship occurs when a prosecutor enters into an agreement with an attorney for a cooperating witness but agrees that neither lawyer will reveal to the cooperating witness either the details or even the existence of the agreement.[163]

While *Brady* seemed on its face to embrace a move away from adversarialism, in practice it has accomplished very little.[164] *Brady* on its face appeared to mark "a potentially revolutionary shift from traditionally unfettered adversarial combat toward a more inquisitorial, innocence-focused system."[165] Because other aspects of the criminal adjudication system, however, remained adversarial, most observers would agree that *Brady* has had little effect on how criminal cases are tried.[166] This is an example of behavioral norms—as well as formal financial and other incentive structures—being more powerful than formal procedural rules.[167]

Courts have at times referred critically to prosecutors' gamesmanship in dealing with *Brady*.[168] With the curtailing of the doctrine in subsequent cases, however,

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159. *Id*. at 540.

160. *See id*. at 551.

161. *Id*. at 560–62.

162. *Id*. at 548. *See, e.g*., Carrie Johnson, *Federal Prosecutors Discussed "Burying" Evidence in Troubled New York Case*, NAT'L PUB. RADIO (July 6, 2020), https://www.npr.org/2020/07/06/887297768/federal-prosecutors-discussed-burying-evidence-in-troubled-new-york-case (revealing email correspondence between prosecutors in which one referred to an important piece of evidence favorable to the defense and wrote to the other, "I'm wondering if we should wait until tomorrow and bury it in some other documents."); *cf*. Babcock, *supra* note 16, at 142–45 (recounting the thought process of prosecutors when asked to open their files to the defendant); Weisburd, *supra* note 157, at 175–78 (criticizing the due diligence rule as not taking into account the differing resources between prosecutors and defense lawyers).

163. Gershman, *supra* note 11, at 538–40.

164. *See* Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 129, 129 (Carol Steiker ed., 2005).

165. *Id*.

166. *See, e.g*., Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 4, 29 (2015) ("[S]ince its inception, the [*Brady*] doctrine has attracted sharp criticism."); Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 708 (2006); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 644 (2002).

167. Bibas, *supra* note 164, at 141 ("Simple exhortations to be neutral or pursue justice cannot transform our adversarial system into an inquisitorial one. The traditions, culture, and incentives of our adversarial system are deeply rooted and hard to change.").

168. *See* Gershman, *supra* note 11, at 531 n.4 (citing United States v. Oxman, 740 F.2d 1298, 1310 (3d Cir. 1984) ("This court has been faced with annoying frequency with gamesmanship by some prosecutors with respect to the duty to disclose.") and United States v. Starusko, 729 F.2d 256, 265 (3d Cir. 1984) ("The [*Brady*] game will go on, but justice will suffer.")).

appellate courts often lack the authority to require prosecutors to meaningfully disclose evidence that would be helpful to a defendant.[169] Because the doctrine has evolved in a way to make actionable *Brady* violations rare, and because disciplinary authorities have been reluctant to take action against prosecutors who have failed to disclose favorable evidence,[170] strategic nondisclosure by prosecutors remains a frequent complaint of defense lawyers.[171]

3. Jury Selection

Any first-year law student can recite the importance and the sanctity of the jury in America's criminal justice system. The criminal jury serves as an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[172] With a pedigree tracing back to Magna Carta, criminal trial by jury was a motivating factor in the very founding of the country.[173] Of course, the importance of the criminal jury right is codified in the Sixth Amendment[174] as well as in Article III of the Constitution itself.[175] And for well over a century, the right to trial by jury has been recognized as an important protection against racial discrimination.[176]

Of course, just as any first-year law student can recite the theory behind the right to trial by jury, any first-year trial lawyer can recite the conventional wisdom and cynical truth of jury selection: trial lawyers routinely strike jurors on the basis of race.[177] Probably the most notorious embrace of race-conscious jury selection is the 1987 training video made for new Philadelphia prosecutors[178] in the wake of

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169. *See, e.g.*, United States v. Agurs, 427 U.S. 97, 114 (1976) (providing that a prosecutor's failure to provide evidence to defense counsel does not deprive a defendant of a fair trial because defense counsel did not specifically request such evidence nor did the evidence involved perjury).

170. *See* Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 521 (2011) ("[E]ven where cases go to trial and prosecutorial misconduct is established on appeal, it is rarely found to constitute harmful—and therefore reversible—error. . . . Prosecutors are almost never subjected to professional discipline-even where the misconduct constitutes harmful error.").

171. *See* Ellen Yaroshefsky, *Why Do* Brady *Violations Happen?: Cognitive Bias and Beyond*, 37 CHAMPION 12, 12–13 (2013) (discussing the "[s]cores of defense lawyer accounts of intentional *Brady* failures").

172. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

173. *See id.* at 151–52 ("[B]y the time our Constitution was written, jury trial in criminal cases had been in existence . . . for several centuries and carried impressive credentials traced by many to Magna Carta.").

174. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .").

175. U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury . . . .").

176. *See* Strauder v. West Virginia, 100 U.S. 303, 305 (1880) (answering the question of whether "every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impanelled [sic] without discrimination against his race or color" in the affirmative).

177. *See, e.g.*, Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1077 (2011) (noting that "virtually every commentator (and numerous judges) who have studied the issue have concluded that race-based juror strikes continue to plague American trials").

178. *Jury Selection with Jack McMahon All 1 Hour and 1 Minute*, YOUTUBE (Apr. 6, 2015), https://www.youtube.com/watch?v=Ag2I-L3mqsQ.

the Supreme Court's decision in *Batson v. Kentucky*.[179] In the training video, Assistant District Attorney and experienced prosecutor Jack McMahon encouraged the new prosecutors to empanel juries as "unfair" as they possibly could, specifically instructing them to strike African Americans from their juries.[180] McMahon went on to instruct the new prosecutors on how to get around the new constitutional restrictions against race-based peremptory strikes:

> When you do have a black juror, question them at length. And on this little sheet that you have, mark something down that you can articulate later if something happens . . . and question them and say, "Well the woman had a kid about the same age as the defendant and I thought she'd be sympathetic to him," or "She's unemployed and I just don't like unemployed people." . . . So, sometimes under that line you may want to ask more questions of those people so it gives you more ammunition to make an articulable reason as to why you are striking them, not for race.[181]

Although the McMahon training video may be remarkable for its candor, many think the sentiments expressed and tactics suggested by him are commonplace.[182]

Peremptory challenges allow for any party to a criminal trial to strike a certain number of potential jurors who are otherwise qualified, without stating a reason.[183] Although sometimes questioned and criticized by scholars and judges,[184] peremptory challenges are still allowed by every state[185] and the federal system.[186] The Supreme Court has approved the use of peremptory challenges and has cited their long historical pedigree and widespread use in American jurisdictions as demonstrating "the long and widely held belief that peremptory challenge is a necessary

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179. 476 U.S. 79 (1986).

180. *See* Bellin & Semitsu, *supra* note 177, at 1078–79 ("Let's face it . . . there's the blacks from the low-income areas . . . you don't want those people on your jury. . . . You know, in selecting blacks, again, you don't want the real educated ones . . . [I]n my experience, black women, young black women, are very bad.") (quoting *Jury Selection with Jack McMahon All 1 Hour and 1 Minute*, *supra* note 178, at 39:15).

181. *See Jury Selection with Jack McMahon All 1 Hour and 1 Minute, supra* note 178, at 57:50.

182. *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228, 2247 (2019) ("On average . . . the State asked 29 questions to each struck black prospective juror. The State asked an average of one question to each seated white juror.").

183. FED. R. CRIM. P. 24(b).

184. *See Batson*, 476 U.S. at 102–03 (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."); Miller-El v. Dretke, 545 U.S. 231, 272 (2005) (Breyer, J., concurring) (urging the reconsideration of *Batson* because "[i]f used to express stereotypical judgments about race, gender, religion, or national origin, peremptory challenges betray the jury's democratic origins and undermine its representative function"); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 812 (1997) ("I have come to realize that the very notion of peremptory challenges is in hopeless conflict with our ideals of what an impartial jury is and how it should be selected.").

185. *See, e.g.*, D.C. CODE ANN. § 23-105(a) (West 2020); FLA. STAT. ANN. § 913.08(1) (West 2020); MD. CODE ANN., CRIM. PROC. § 4-313(a)(1) (West 2020).

186. FED. R. CRIM. P 24(b).

part of trial by jury."[187] Although traditionally a peremptory challenge could be exercised for any reason, the Supreme Court held in *Batson v. Kentucky* that a lawyer may not exercise peremptory challenges in a manner motivated by race.[188] The potential for gamesmanship in the jury selection process, and for the use of peremptory challenges to skew the racial makeup of a jury based on pretextual reasons, was foreseen by Justice Marshall at the time of the *Batson* decision, in which he argued that peremptory strikes should no longer be allowed in criminal trials.[189]

A chronic complaint of litigants in the criminal justice system is that their opponent is using race-based strikes to exclude jurors of a particular ethnicity. Much evidence exists to show that prosecutors and defense lawyers do take race and gender into account when exercising their peremptory challenges.[190] Indeed, the *Batson* rule is seen as one of the most frequently violated rules of constitutional criminal procedure.[191] As with the *Brady* context discussed above, the Supreme Court opened the door for gamesmanship in the *Batson* context when, a decade after the initial decision, it held in *Purkett v. Elem* that a lawyer need only provide a race-neutral—not necessarily a plausible—reason for a strike to survive the initial stage of a *Batson* challenge.[192] Any lawyer can insulate a peremptory challenge from meaningful review by articulating a race-neutral reason, however absurd, or by relying on behavior by the struck juror that would not appear in the trial record.[193]

Using race as a basis for exercising peremptory strikes violates a clear rule and therefore could more properly be characterized as cheating than gamesmanship. Because the enforcement mechanism established by the Supreme Court in *Batson* and *Purkett* has made it so difficult to establish such a violation and obtain a remedy, however, such behavior continues to be a significant part of criminal litigation. Violations of the rule against using race in this way generally result only in the potential juror being seated on the jury (if before trial) or the conviction being reversed (if after trial) but not in professional discipline for the lawyer found to

187. Swain v. Alabama, 380 U.S. 202, 219 (1965).

188. *Batson*, 476 U.S. at 89. This holding was extended to cover peremptory challenges by the defendant in *Georgia v. McCollum*, 505 U.S. 42, 59 (1992), and was further extended to include gender-based peremptory challenges in *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 146 (1994).

189. *Batson*, 476 U.S. at 107 (Marshall, J., concurring) ("The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system.").

190. *See* David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 52–53, 73, n.197 (2001) (finding that prosecutors struck 51% of Black jurors in a sample and that race-based uses of prosecutorial peremptories declined by only 2% after *Batson*); *Jury Selection with Jack McMahon All 1 Hour and 1 Minute*, *supra* note 178.

191. *See* Baldus, et. al., *supra* note 190, at 73, n.197 (explaining a study that found race-based uses of prosecutorial peremptories declined by only 2% after *Batson*).

192. 514 U.S. 765, 768–69 (1995).

193. *See, e.g.*, Jonathan Abel, Batson*'s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 719–20 (2018) ("Anyone with even a modicum of savvy can choose a justification that is not observable on the record— such as the claim that the juror was not making good eye contact—thereby making it impossible for trial judges, and later appellate judges, to disprove the justification."); Bellin & Semitsu, *supra* note 177, at 1093.

have engaged in this practice.[194] Because a peremptory strike is so easily defended against a *Batson* challenge by citing some race-neutral reason, and because the system seems to largely tolerate this behavior, the practice of race-based strikes is more usefully analyzed as a form of gamesmanship than as an example of cheating.

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These are just a few of the most commonly cited examples of gamesmanship in criminal litigation. Of course, gamesmanship is in the eye of the beholder and some will see nothing remotely troubling in these examples. Other strategic litigation decisions are so commonplace that many do not view them as gamesmanship. In some criminal justice systems, for example, delay has become such a central part of strategic decision-making by defendants and prosecutors that it seems to escape notice as a litigation tactic. In her book *Misdemeanorland*, Professor Issa Kohler-Hausmann describes how prosecutors can use pretrial delay and detention to achieve goals unrelated to the merits of the criminal charges. In her description of low-level courts in New York City, conviction is not even the central goal of prosecutors as much as the marking, monitoring, and social control of those people brought into criminal court.[195] The statutory speedy trial guarantee, generally understood as a protector of defendants' rights, operates in Kohler-Hausmann's account as a tool in the hands of the prosecutors, allowing them to keep a case open long enough to coerce certain actions by the defendant regardless of the merits of the case.[196] The book is full of examples of actors on both sides using the delay that is endemic to the system to engineer outcomes unrelated to the legal or factual guilt of the defendant.[197] Such behaviors have become such constant features of the architecture of the system, however, that they can escape critical attentions as examples of strategic behavior and gamesmanship.

III. GAMESMANSHIP, CHEATING, AND HOW TO RESPOND

In criminal litigation, as in sports, gamesmanship forces to the surface those values and qualities that are considered essential to the adversarial process. Strategic

194. *See, e.g.*, Bellin & Semitsu, *supra* note 177, at 1099–1102 (describing the rarity of successful post-trial *Batson* challenges).

195. *See* KOHLER-HAUSMANN, *supra* note 12, at 5 ("[C]riminal courts are using tools for social control work. . . . [S]ocial control in misdemeanorland is primarily sought through three primary techniques that I call 'marking,' 'procedural hassle,' and 'performance.'").

196. *See id.* at 204 ("The statutory time allowed to prosecute a case is therefore not only a guarantee to the defendant of a speedy trial or resolution, it is a tool that allows the state to engage the defendant in a series of encounters with state authority.").

197. *See, e.g.*, *id.* at 201–02 (describing a scenario in which the defense attorney used delay to the benefit of their client); *see also* Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L.J. 1648, 1690 (2018) ("Prosecutors took advantage of court delays, postponements, and the requirement that defendants be physically present at every court date to pressure defendants to plead."). Natapoff provides a description of how the entire misdemeanor system (at least in New York) might be engaged in a kind of gamesmanship to encourage waivers of rights and resolution through guilty pleas. *See generally id.*

behavior in litigation necessarily brings about a discussion regarding which qualities we truly value in the criminal justice system and clarifies the boundaries within which the process plays out. To understand how discussions from sports can illuminate the criminal litigation context, it is important to clearly define gamesmanship, distinguish the concept from cheating, and examine how sports authorities have responded to allegations of gamesmanship that were seen as detrimental to the sport.

A. Gamesmanship Defined

Gamesmanship forces those who care about a system to clarify what the rules should specifically allow and forbid. By reflecting on these concepts, we refine our ideal boundaries and make plain the values of the criminal justice system. Do we want to define the role of the prosecutor, for example, as one who affirmatively seeks out particular evidence helpful to the defense, or do we prefer a prosecutorial role that simply makes available all evidence to the defense without reference to what might be particularly helpful? Or do we instead prefer a system of relatively pure adversarialism, where the prosecutor has no obligation to disclose any favorable evidence?

Those who have looked at the issue of gamesmanship from a philosophical perspective come to at least a half-hearted defense of the practice. Unlike cheating, true gamesmanship by definition exists not outside of the formal rules but within the rules themselves. True gamesmanship depends on the rules for its very existence. Our system of criminal procedure evolves and develops only by individual litigants asserting rights and pressing creative legal arguments. The system succeeds in achieving its goals (including those of accurate fact-finding and just outcomes) only by aggressive application of procedural rules by lawyers.[198] A system without aggressive policing of the rules, especially by defense lawyers, would lead increasingly to unclear procedures and inaccurate (and unfair) outcomes.[199]

Not only can the practice be justified as acceptable in the criminal litigation context, but many also defend it as socially productive within the world of sport. Defending what she terms actions of "weak" gamesmanship, such as baseball pitchers purposely throwing inside and the strategic withholding of information about player injuries and likely lineups, philosopher Leslie A. Howe argues that such tactics advance the ultimate goals of sport and should, in fact, be welcomed:

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198. *See* Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 535 (2006) (referring to "our systemic overdependence upon individual defendants and their attorneys to proctor the criminal justice system").

199. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 12 (1997) (describing how rules of criminal procedure "extensively regulate[] the conduct of various actors in the system, ranging from police officers and prosecutors to defense attorneys and court personnel" and arguing that the rules "depend for their enforcement on an adequate level of litigation by defendants, meaning in practice by defense counsel").

> Provided that a tactic is compatible with the rules of a given sport and with the aims of sport in general, there seems no prima facie reason to discourage it. If it enhances or furthers these aims, . . . that seems prima facie a good reason to encourage it.[200]

Similarly, David Papineau defends those badminton players who tried to purposely lose a match in order to improve their chances of winning the tournament, arguing that their actions only exposed an irrationality that existed in the rules of the tournament and should be fixed.[201] The clear exposure of flawed or outdated rules benefits the system by making plain that changes are needed.

The same can be said of gamesmanship in the context of criminal litigation, as long as we are careful to define the term to include those tactics that are within the rules of procedure and ethics and are consistent with the ultimate goals of the criminal justice system.[202] These goals, of course, encompass more than simply the factually accurate resolution of disputes. They also include normative expressions of community judgment, procedural safeguards for the defendant, and respect for the individual rights of those involved in the process.

B. Gamesmanship Distinguished from Cheating

To define the idea of gamesmanship in a way that is both clear and useful, we must clarify what it is not: cheating is importantly different and theoretically easier to deal with than gamesmanship. A prosecutor who knowingly presents the testimony of a lying witness or a coach who bribes an official presents an ethically uncomplicated case, and that conduct would be universally condemned as cheating. Professor Howe defines gamesmanship as

> the attempt to gain competitive advantage either by an artful manipulation of the rules that does not actually violate them or by the psychological manipulation or unsettling of the opponent (or sometimes the officials), whether this be

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200. Howe, *supra* note 1, at 221. Howe goes further:

> A case can be made that certain forms of (weak) gamesmanship are indeed *required*—it would be wrong not just athletically but also morally not to employ them, because to withhold such actions is disrespectful of the opponent—it implies that the other competitor is not significant enough to warrant one's full attention.

Id.

201. PAPINEAU, *supra* note 2, at 87 ("I thought it was outrageous that the players should have their Olympic hopes shattered, just for doing their best to win the tournament. What did the organizers expect, if they didn't have the sense to organize a competition properly? The hazards of group-knockout competitions are well known. If anybody betrayed the Olympic spirit, it was the incompetent badminton authorities, not the players.").

202. Because of the asymmetrical nature of criminal litigation, however, the sports metaphor can only go so far. Unlike sporting events, we assign different roles to the defense lawyer and the prosecutor, and we ask the prosecutor not simply to win the case but to see that justice is done. Due to this structural preference in criminal litigation, it is possible that gamesmanship on the part of the prosecutor is less defensible than a similar tactic employed by the defendant. *See supra* Section I.C (describing the limits of the analogy between law and sport, including the different institutional roles assigned to the prosecutor and defense attorney).

> by intimidation, nondisclosure of information, outright deception, or the first alternative (instrumental use of the rules).[203]

Cheating, on the other hand, is "the intentional *violation* of a public system of rules to secure the goals of that system for oneself or for those for whom one is concerned."[204] Cheating is considered wrong and unacceptable not only because it violates an implicit promise but also because the behavior, if universally adopted, would destroy the system of rules and the broader purpose that those rules serve.[205]

The distinction between gamesmanship and cheating—and the reasons one might be celebrated, or at least tolerated, while the other condemned—gets at the very idea of what sport is. Sport only exists if there is a possibility of failure, of one side winning and the other losing.[206] Without this element, there is no true sporting contest.[207] If sport is defined by the possibility of failure, the same is true of a criminal trial. Where no risk of losing exists, no jeopardy has attached and no trial has occurred in any realistic sense.[208] When forms of gamesmanship in either context simply invalidate the competition and are clearly indefensible, they are more akin to cheating. The more interesting cases are those such as the "professional foul," which Howe defines as "an action that is explicitly contrary to the rules of the competition, *but* . . . committed openly, with the player accepting . . . the legal punishment for it."[209]

Cheating occurs when a participant in a contest fails to accept the legitimacy of the rules and the restrictions placed upon the competitors by the nature of those rules. "One can have various personal ends in view when playing a particular game. But whatever these ends, one thing is clear: One's means for achieving these ends are importantly limited in ways they would not be in a more purely 'technical' exercise."[210] Failing to observe and acquiesce to these limits is called cheating, at least in a strictly formalist sense. One pure formalist view argues that someone

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203. Howe, *supra* note 1, at 213.

204. ROBERT L. SIMON, CESAR R. TORRES & PETER F. HAGER, FAIR PLAY: THE ETHICS OF SPORT 60 (4th ed. 2014) (emphasis added) (citing BERNARD GERT, MORALITY: ITS NATURE AND JUSTIFICATION 198 (1998)).

205. *See id.* ("The distinctive element in the general presumption that cheating is wrong is that the cheater behaves in a way that no one could rationally or impartially recommend that everyone in the activity emulate; that is why the public system of rules prohibits it in the first place.").

206. *See* Babcock, *supra* note 16, at 1141.

207. *Psychology of Losing*, EXACTSPORTS (Aug. 14, 2011), https://exactsports.com/blog/psychology-of-losing/2011/08/14/ (stating that "[i]n all sporting events there is a winner and a loser," and that the desire to win is the primary reason for some athletes' participation in sports).

208. *See, e.g.*, People v. Aleman, 667 N.E.2d 615, 624–25 (Ill. 1996) (providing that the Double Jeopardy Clause did not bar retrial after acquittal in a case where the defendant had bribed the judge to obtain the acquittal). Similarly, when asked about trying enemy combatants in the regular American criminal court system, Jack Goldsmith, responded, "Another reason why you might not want to use the trial system [is] [b]ecause the trial system, to be legitimate, has to be able to have the possibility of acquitting someone of the crime." *Transcript: After Guantanamo*, NOW ON PBS (Sept. 4, 2009), https://www.pbs.org/now/shows/536/transcript.html.

209. Howe, *supra* note 1, at 212.

210. Fred D'Agostino, *The Ethos of Games*, 8 J. OF THE PHIL. OF SPORT 7, 8 (1981).

who purposely violates a rule of a game is no longer playing that game. Some argue that it is impossible to cheat and to still be playing a game.[211]

But this formalist view leaves unexplained the difference between playing a game and playing a game fairly. As scholar Fred D'Agostino argues:

> [A] formalist account of games effaces the distinction in ordinary language between playing and playing fairly (i.e., according to the rules). Against formalism, we might maintain . . . that "it seems more reasonable to say that the cheater is not playing fairly than that he is not playing at all."[212]

Alternatively, a formalist might take the position that there can be no cheating at a game if a specified sanction within the game is dictated by the formal rules for a particular action. The sanction, then, could be considered a price to be paid in exchange for taking a particular action, rather than something that is against the rules.[213]

D'Agostino suggests that our ordinary intuitions tell us that neither explanation of cheating is adequate nor satisfying. What is missing from either formalist account of the idea of cheating is the explanatory power of a game's ethos and the possibility that a player might forgo a legal tactic because it seems inappropriate or contrary to the spirit of the game.[214] One of the limits of formalism in its ability to explain behavior is its failure to account for informal norms of conduct.

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211. *See* BERNARD SUITS, THE GRASSHOPPER: GAMES, LIFE, AND UTOPIA 41 (1978) ("To play a game is to attempt to achieve a specific state of affairs . . . *using only means permitted by the rules* . . . ." (emphasis added)); *id*. at 25 ("It is impossible for me to win the game and at the same time to break one of its rules.").

212. D'Agostino, *supra* note 210, at 9 (quoting Michael Quinn, *Practice-Defining Rules*, 86 ETHICS 76, 80 (1975)).

213. *See* Berman, *Let 'em Play*, *supra* note 45, at 1347 n.66. Berman also cites the philosophical literature on whether intentional fouling can be considered breaking the rules or unethical, and he suggests that fouls are not actually prohibited by the rules of basketball. Rather than banning fouls, the rules of basketball simply impose a price for their use. Berman illustrates this idea:

> If you drive southward from Marin County over the Golden Gate Bridge, you will be compelled to pay a toll on the far side. That toll is not a penalty, and your driving into San Francisco is not prohibited. The toll . . . is a price exacted for permitted conduct, not a penalty or sanction imposed for prohibited conduct.

Id.

214. Making this distinction, D'Agostino argues:

> This alternative account of penalties suggests that the only rational motive a participant in [a game] might have for refraining from [a prohibited behavior] is that engaging in such behavior is likely to be technically inefficient since it is likely to be penalized. But, surely, participants in [a game] often refrain from [prohibited behavior] not for reasons of technical efficiency, but because they believe that engaging in [that prohibited behavior] is, by and large, inappropriate in the context of [the game]. It is the inappropriateness, rather than the technical inefficiency of penalty-liable behavior which this alternative account of penalties fails to capture.

D'Agostino, *supra* note 210, at 11.

Some have attempted to resolve the conundrum of what constitutes cheating by distinguishing between the constitutive and regulative rules of a game.[215] They argue that rules that constitute what a game *is* cannot be violated without actually ceasing to play the game, while regulative rules can be violated and punishment for those violations imposed within the game.[216] According to D'Agostino, "On this account, every penalty-invoking rule of [a particular game] is regulative, but not constitutive."[217] Under this proposal, every rule of a game is either constitutive or regulative, but cannot be both. D'Agostino dismisses the explanatory power of this "dichotomization thesis" because of the arbitrariness of the division of many rules into one or the other category. He wrote, "[a] rule which is regulative from the formal point of view (a penalty-invoking rule . . .) may be constitutive from the intuitive point of view."[218]

This critique of the dichotomization thesis gets at the heart of the Luis Suarez intentional handball issue.[219] Because the rules of soccer provide for a penalty in exchange for his behavior, a formal approach would tell us that intentionally using one's hands is merely a regulative rule of soccer. But it is difficult to think intuitively of a rule that is more constitutive of the game of soccer than the prohibition against using one's hands.[220]

As a concrete example of why formalism fails to explain behavior within games, D'Agostino offers basketball. By its rules, basketball is a "non-contact" sport.[221] Any game of basketball, however, is full of both accidental and intentional contact between players, only some of which results in a penalty being called. D'Agostino asks, "Why is this so?"

> This is so because the players and game officials have, in effect, conspired to ignore certain of the rules of basketball, at least in certain situations, in order to promote certain interests, which they share, for instance, with team owners

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215. *See generally* JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995) (discussing the difference between constitutive and regulative rules).

216. *Id*. at 27–28.

217. D'Agostino, *supra* note 210, at 11. On the proposed distinction between constitutive and regulative rules, see Christopher Cherry, *Regulative and Constitutive Rules*, 23 PHIL. Q. 301, 302 (1973).

218. D'Agostino, *supra* note 210, at 12. The idea that any behavior with a specified and explicit penalty is necessarily within the rules of a game is intuitively unsatisfying and can lead to absurd results. As Kathleen Pearson argued, "penalties for breaking the law are contained within the law books, but no sensible person concludes, therefore, that all acts are within the law." Kathleen M. Pearson, *Deception, Sportsmanship, and Ethics*, *in* PHILOSOPHIC INQUIRY IN SPORT 183, 184 (William J. Morgan & Klaus V. Meier eds., 2d ed., 1995).

219. See *supra* Section II.A.1 for a discussion of the Luis Suarez handball incident.

220. Avishai Margalit discusses Thierry Henry's deliberate handball and Maradona's 1986 "Hand of God" handball by saying that they "were not fine examples of disregarding the rules. They were cases of successful cheating." Avishai Margalit, *Monday Morning Philosophers*, N.Y. REV. BOOKS (Mar. 22, 2018), https://www.nybooks.com/articles/2018/03/22/monday-morning-philosophers/. Margalit goes on to suggest that, because the prohibition against using one's hands is a constitutive rule of soccer, neither Henry nor Maradona were even playing soccer when they deliberately used their hands! *See id*.

221. *See* Kevin Bosner, *How Basketball Works*, HOWSTUFFWORKS, https://entertainment.howstuffworks.com/basketball5.htm ("Basketball, by rule, is a non-contact sport.").

> and spectators—e.g., to make the game more exciting than it would be if the rules were more strictly enforced.[222]

Although the formal rules of basketball specify a particular sanction for prohibited behavior, "an unofficial system of conventions . . . determines how the official rules of the game will be applied in various concrete circumstances."[223] No formal set of rules generally provides a guide on how rules are actually applied and enforced in a game; instead, one can only understand these conventions and the ethos of a game by studying how it is actually played. Of course, the formal rules can be modified to clearly supplant or supplement the ethos of a game if it is determined by those in authority that the manner in which the rules are being applied is not in the broader interests of the game.

All games are governed by a set of formal rules as well as an ethos, or a system of conventions that dictates how and when the formal rules of a game are applied.[224] If we seek to understand a game solely by looking at the formal rules of the game, our understanding will fall short because we are not taking into account the ethos by which the game is played. This is the shortcoming of the formalist approach to examining how games work.[225] "[T]he ethos of a game distinguishes between behavior that is permissible, behavior that is impermissible but acceptable, and behavior that is unacceptable."[226] This account leaves out, however, behavior that is permissible but unacceptable. Baseball is full of examples of such behavior, such as running up the score or bunting when one's team is winning by a number of runs.[227]

One important distinction is between morality and convention: a baseball fielder who traps the ball just after it bounces is generally expected to pretend to have caught the ball and nobody thinks it a violation of the code of fair play to try to mislead the umpires in this way. But doing the same thing in cricket would be considered unsportsmanlike, embarrassing, and even shameful. A fielder caught doing this in cricket would be seen to have been "exposed as someone lacking in moral fibre."[228] This distinction has been used as an illustration of the difference between morality and convention: "[M]orality is universal, independent of authority, and has to do with genuine welfare, while convention varies across societies, depends on decree, and governs matters of no intrinsic importance."[229] Violation of a

222. D'Agostino, *supra* note 210, at 14.

223. *Id.* (emphasis removed). For a detailed analysis of whether officials are justified in temporal variance in the calling of various kinds of fouls, see Berman, *Let 'em Play*, *supra* note 45, at 1334–46.

224. D'Agostino, *supra* note 210, at 7.

225. *See id.*

226. *Id.* at 15.

227. *See, e.g.*, Craig Bogar, *Running Up the Score: Is it Ever Acceptable?*, SPORT DIG. (Jan. 20, 2011), http://thesportdigest.com/2011/01/running-up-the-score-is-it-ever-acceptable/.

228. PAPINEAU, *supra* note 2, at 63–64.

229. *Id.* at 64 (citing a study showing that children "discriminate naturally between moral principles, which they view as unalterable, and rules instituted by parochial authorities, which they assume can be easily changed").

"convention" is ordinarily not a moral issue but sometimes such violations can rise to the level of immoral behavior.[230]

The same is true in the criminal justice context. In criminal procedure, local conventions can dictate, for example, when a plea agreement has been reached and the extent to which parties can rely on a common understanding. Some defense lawyers forgo filing motions for discovery because of a shared understanding of the conventions governing informal discovery. In that way, the observation (or violation) of a convention can become a more important matter than just convention alone. This is why a cricket player falsely claiming a catch can be said to be behaving immorally, while a baseball outfielder engaged in the exact same action would not be subject to the same moral judgment.[231] Cricket players collectively agree to self-police while baseball players collectively agree to try to fool the umpire when possible.[232] Papineau explained:

> The various understandings of fair play observed by different sports are like contracts that you enter into when you start a match. . . . The different standards upheld by different sports are at first pass just alternative contractual arrangements, different sets of expectations about what the players owe each other.[233]

Actors in the criminal justice system are frequently governed as much by informal norms and understandings as by the formal rules of evidence and criminal procedure.

Mitchell Berman makes the same point by comparing the norms of baseball and golf—in the latter, there is an expectation that players will confess an infraction even when they could get away with it. He tells the story of Bobby Jones assessing himself a one-stroke penalty for moving the ball when nobody else saw the infraction: "Applauded afterwards for his integrity, Jones would have none of it: 'You might as well praise me for not robbing banks.'"[234] By contrast, Berman describes baseball as a sport that is "widely understood, even glorified, as a game of cheating and deception—from spitballs and sign stealing to the hidden-ball trick."[235]

Of course, adherence to convention can at times amount to complicity in an immoral or unjust system. Some social conventions can serve to prop up an unjust regime or hierarchy, and sometimes adhering to convention is itself immoral. Even

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230. Papineau's example is driving on the wrong side of the road. *Id*. at 66.

231. *Id*. at 67 ("Anybody taking part in a cricket match has effectively agreed to abide by the cricketers' code of practice, and in particular not to claim catches they haven't made.").

232. *Id*. at 64. Examples of this occur throughout baseball, including the practice of catchers attempting to "frame" pitches so the umpire will call them strikes when they are really balls. *Id*. at 71–72.

233. *Id*. at 68.

234. Berman, *Let 'em Play*, *supra* note 45, at 1332 n.22 (quoting ROBERT SOMMERS & ARNOLD PALMER, GOLF ANECDOTES: FROM THE LINKS OF SCOTLAND TO TIGER WOODS 81–82 (2004)).

235. *Id*. Berman also quotes Chicago Cubs president Andy MacPhail: "There is a culture of deception in [baseball]. It's been in this game for 100 years. I do not look at this in terms of ethics. It's the culture of the game." *Id*.

if the conventions of rugby, for instance, condone or encourage eye gouging and worse, and even if the tradition of bicycle racing tolerates or even encourages doping, these practices could be considered immoral, especially if they lead to real-world harms outside of the game.[236] Rule breaking can be strategic—as in an intentional foul in basketball—or contemptible—as in eye-gouging in rugby. In the real world of criminal litigation, norms of conduct in many courthouses dictate that defense lawyers waive procedural rights of their clients at astonishingly high rates, often without any apparent benefit to the defendant.[237] Although contrary behavior would violate widely accepted local norms of behavior, it is likely the only way to defend the rights of the defendant and uphold the stated values of the system.

Certain contexts seem to encourage and even celebrate a benign disregard for formal rules. Where most participants in a system seem to agree that a degree of "rule-bending" is appropriate and even expected, analyses of cheating and fair play become more difficult. One defense of this attitude is where such behavior is not only generally condoned but also consistent with the broader goals of the game or system within which it is practiced. Baseball presents the starkest example in sports of this phenomenon and may share with the criminal justice system a celebration of some degree of rule-bending.[238]

Baseball and criminal litigation share a history of what could be called "folk heroes who are also outlaws."[239] The narrative of outlaws in baseball fits into a broader American narrative that celebrates rule-breaking and those who "skirted . . . just inside the rules."[240] As examples of plays that complied with the formal rules but seemed to be at odds with some broader principle of the game, legal (and baseball) historian Paul Finkelman has cited baseball owner Bill Veeck's sending a dwarf to bat in order to guarantee a walk.[241] He also noted Reggie Jackson's breaking up a double play by intentionally interfering with a throw, knowing that he was already out and that the only penalty for interference was that he would be called out.[242] One can imagine that both Veeck and Jackson were criticized and celebrated for their tactical moves, depending on the loyalties of the commentator.

This ambivalence toward the formal rules of a game has been compared to a broader American ambivalence toward rules and authority.[243] But to be considered

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236. *See* PAPINEAU, *supra* note 2, at 70–71.

237. *See generally* AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT (2009) (detailing the norms of conduct that make defense lawyers waive procedural rights).

238. Finkelman, *supra* note 13, at 239–40, 244 (noting that baseball and the law are similar, and both encourage learning "to manipulate the rules to our advantage").

239. *Id*. at 244.

240. *Id*. at 245.

241. *Id*.

242. *Id*.

243. David Luban & Daniel Luban, *Cheating in Baseball*, *in* THE CAMBRIDGE COMPANION TO BASEBALL 187 (Leonard Cassuto & Stephen Partridge, eds., 2011) ("At one level, Americans understand the importance of laws and extol the rule of law. At another level, we hate red tape and despise robotic rule-following. It's a cultural contradiction engraved in our national psyche.").

morally acceptable, rule-breaking must not systematically disadvantage one team or violate some fundamental principle of the game.[244] Some actions violate not only the formal rules of the game but also broader moral commands. Although the rules of baseball forbid a pitcher from intentionally hitting the batter, the practice is widely accepted from a moral perspective but only as long as the pitched ball hits the batter below his neck and head. "The game's unwritten rules have always allowed plunking the batter below the neckline . . . in fact, that's how teams enforce the code. But players and fans have always agreed that outright headhunting is beyond the pale, just as bribing umpires would be."[245]

Rogers Hornsby, one of baseball's legends, said, "I've been in pro baseball since 1914 and I've cheated, or watched someone on my team cheat, in practically every game. You've got to cheat."[246] Examining the question of cheating in baseball, authors David and Daniel Luban distinguish between two kinds of cheating, saying that the "right kind" of cheating belongs "in an unusual moral category: wrongdoing that baseball lovers would rather have in the game than not."[247] In this category, the authors include tactics like stealing signs and taking shortcuts around the basepath when the umpire is not looking.[248] Because of the widespread acceptance and even celebration of these tactics by fans, the authors question whether such actions, though contrary to the formal rules of the game, constitute cheating.[249]

Criminal lawyers delight in telling stories of courtroom stunts that seem close cousins to these examples of deception in sports. Clarence Darrow is said to have put a long wire in his cigar and smoked it during his opponent's closing argument, distracting the jury members who, instead of listening to his adversary's argument, wondered why the ash would not fall off Darrow's cigar.[250] The story is well-known of Abraham Lincoln winning a case by referring, during cross-examination

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244. *See id*. ("We tolerate rule-breaking as long as it's equal-opportunity and doesn't violate some deeper principle, and we admire the audacity of players who care more about the game than the rule book.").

245. *Id*.

246. *Id*. at 185.

247. *Id*. at 186.

248. *See id*. ("The fact is that many of the most beloved and colorful stories in the annals of baseball involve cheating."). Controversy over stealing signs broke into the public consciousness in 2020, when it as revealed that the 2017 World Series champion Houston Astros had employed a sophisticated algorithmic system called "codebreaker" to monitor and decode signals and inform batters of what pitches to expect. *See* Jared Diamond, *"Dark Arts" and "Codebreaker": The Origins of the Houston Astros' Cheating Scheme*, WALL ST. J. (Feb. 7, 2020), https://www.wsj.com/articles/houston-astros-cheating-scheme-dark-arts-codebreaker-11581112994. Major League Baseball fined the team five million dollars and suspended both the manager and the general manager for one year. *See* Katherine Acquavella & R.J. Anderson, *A.J. Hinch Suspended Then Fired; Draft Picks Lost*, CBS SPORTS (Jan. 14, 2020), https://www.cbssports.com/mlb/news/mlb-hammers-astros-in-cheating-scandal-jeff-luhnow-aj-hinch-suspended-then-fired-draft-picks-lost/.

249. *See* Luban & Luban, *supra* note 243, at 186 ("The label 'cheating' is morally loaded: by definition, cheating is wrong. By definition, wrong is what you cannot do. But far from becoming incensed by cheating in baseball, fans tolerate it and—truth be told—fans enjoy it. What's going on?").

250. *See* Tim Jones, *Renowned Attorney Trying to Bring some L.A. into Law*, CHI. TRIB. (Mar. 31, 2004), http://www.chicagotribune.com/news/ct-xpm-2004-03-31-0403310174-story.html (explaining how Clarence Darrow used a cigar to distract the jury in the Scopes Monkey Trial in 1925).

of a key prosecution witness, to a document that he said showed the night in question to be moonless, when in fact it said no such thing.[251] Others later accused Lincoln of unethical conduct as a trial lawyer for the phantom moonlight trick,[252] and indeed, such antics may violate Rules 3.5(d) and 8.4(d) of the Model Rules of Professional Conduct.[253] Scholars and experts have weighed in on whether ethics allow, for example, a lawyer to put glasses on a defendant or witness to make him look more believable,[254] and on whether, and to what extent, a criminal defendant can be dressed up to appear more innocent than normal,[255] among other tactics.[256]

C. Regulatory Responses to Gamesmanship in Sport

John Rawls once famously described a conversation he had with legal scholar Harry Kalven about baseball. Rawls cited with approval Kalven's description of baseball as the perfect game because its rules, he believed, were static and pristine from the beginning:

> [T]he rules of the game are in equilibrium: that is, from the start, the diamond was made just the right size, the pitcher's mound just the right distance from home plate, etc., and this makes possible the marvelous plays, such as the double play. The physical layout of the game is perfectly adjusted to the human skills it is meant to display and to call into graceful exercise. Whereas basketball, e.g., is constantly . . . adjusting its rules to get them in balance.[257]

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251. *See, e.g.*, JOHN EVANGELIST WALSH, MOONLIGHT: ABRAHAM LINCOLN AND THE ALMANAC TRIAL 3 (2000). There is a whole genre of "phantom document" anecdotes, in which a lawyer suggests that a document says something while knowing it is not true. In addition to Lincoln's "phantom moonlight" trick, this was a plot point in "A Few Good Men."

252. *Id.* at 89–99 (describing Lincoln as "clever but unscrupulous" and noting that there are rumors that Lincoln later edited the document for use during other trials).

253. *See* MODEL RULES OF PRO. CONDUCT r. 3.5(d) (AM. BAR ASS'N 1983) ("A lawyer shall not . . . engage in conduct intended to disrupt a tribunal."); MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR ASS'N 1983) ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.").

254. *See* Kevin Deutsch, *Defense Lawyers Swear by Gimmick of Having Defendants Wearing Glasses at Trial*, N.Y. DAILY NEWS (Feb. 13, 2011), http://www.nydailynews.com/news/crime/defense-lawyers-swear-gimmick-defendants-wearing-glasses-trial-article-1.138930 (providing explanation of the "nerd defense" by defense attorney Harvey Slovis who stated, "Glasses soften [defendants'] appearance so that they don't look capable of committing a violent crime . . . . I've tried cases where there's been a tremendous amount of evidence, but my client wore glasses, dressed well and got acquitted."). Research has shown that the "nerd defense" seems to work on jurors—a 2008 study claimed that wearing glasses led to more acquittals. *Id. See also* Janet Lee Hoffman & Andrew Weiner, *The Juror as Audience: The Impact of Non-Verbal Communication at Trial*, 32 LIT. J. 3, 5 (2013) (stating that using eyeglasses to mislead jurors might violate ethical rule prohibiting lawyers from engaging in dishonest conduct or misrepresentation).

255. *See* Hoffman & Weiner, *supra* note 253, at 4–6.

256. *See generally* JACK MARSHALL & PROETHICS, LTD., CLARENCE DARROW'S ETHICS LESSONS FOR TODAY'S MORE ETHICAL LAWYER (2018) (discussing the ethical implications of a variety of "court room stunts").

257. John Rawls, *The Best of All Games*, BOS. REV. (Mar. 1, 2008), http://bostonreview.net/rawls-the-best-of-all-games.

Of course, the truth is that baseball has changed its rules many times during its history and continues to do so.[258] These rule changes come in response to new tactics that existing rules cannot accommodate without changing the nature of the game for the worse. Administrators have also implemented rule changes in response to developments in the manner in which the game is played, as when Major League Baseball lowered the height of the pitcher's mound in 1969 in response to a "complete dominance of pitching over hitting" that year.[259]

The infield fly rule, which prohibits fielders in baseball from purposely dropping a fly ball to force a double play, has been a fruitful metaphor for legal scholars for close to a half century, since the *University of Pennsylvania Law Review* published an "Aside" entitled "The Common Law Origins of the Infield Fly Rule."[260] The publication has been called "the launching point of the Law and Baseball movement."[261] Two later authors in the movement summarized the rule as:

> At its core, the infield fly rule is a rule against a form of strategic play that results in a deviation from the normal principle that the offensive team benefits from always seeking to hit the ball in such a way as to maximize the chance of a base hit. . . .[262]

When the administrators of baseball noticed that players had discovered that the rules allowed for a strategic advantage that did not advance the broader purposes

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258. *See* Steven P. Gietschier, *The Rules of Baseball*, *in* THE CAMBRIDGE COMPANION TO BASEBALL 9–20 (Leonard Cassuto & Stephen Partridge, eds., 2011).

259. Earl Nash, *Pitching Mound History—Balance Between Pitchers and Batters*, BOSOX INJECTION, https://bosoxinjection.com/2013/12/13/pitching-mound-history/ (last visited Sept. 22, 2020). There have been multiple other rule changes. *See, e.g.*, Earl Nash, *Origins of Baseball: "In the Big Inning . . ." When Did 60'-6'' Become the Distance From Pitching Plate to Home Plate?*, BOSOX INJECTION, https://bosoxinjection.com/2013/05/02/origins-of-baseball-in-the-big-inning-when-did-60-6-become-the-distance-from-pitching-plate-to-home-plate/ (last visited Sept. 22, 2020) (stating that overhand pitching was allowed for the first time in 1888, and the resulting harder throws spurred the new rule in 1893 that increased the distance between the pitcher and batter); David Hiskey, *There Once Was a Little Person Who Played in Major League Baseball*, TODAYIFOUNDOUT (Mar. 28, 2012), https://www.todayifoundout.com/index.php/2012/03/there-once-was-a-little-person-who-played-in-major-league-baseball/ (stating that the American League once banned little people from playing after Bill Veeck signed a little person who managed an easy walk in a game). For an evolution of the rules of baseball, see Gietschier, *supra* note 258, at 9–20.

260. William S. Stevens, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975).

261. Neil B. Cohen & Spencer Weber Waller, *Taking Pop-Ups Seriously: The Jurisprudence of the Infield Fly Rule*, 82 WASH. U. L.Q. 453, 454 (2004); *see also* Yablon, *supra* note 44, at 238 (listing a series of law review articles published in response to the Stevens essay); John J. Flynn, *Further Aside - A Comment on "The Common Law Origins of the Infield Fly Rule,"* 4 J. CONTEMP. L. 241 (1978) (critiquing and expanding on Stevens's analogy); Yelnosky, *supra* note 26, at 825–26 (discussing the influence of baseball rules and baseball traditions on legal scholars); Mark W. Cochran, *The Infield Fly Rule and the Internal Revenue Code: An Even Further Aside*, 29 WM. & MARY L. REV. 567 (1988) (responding to the Stevens essay); Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*, 5 FED. SENT'G REP. 96, 97 (1992) (comparing prosecutors and baseball players and arguing for the functional equivalent of the "infield fly rule": a new evidentiary rule).

262. Cohen & Waller, *supra* note 261, at 458 (providing a concise description of the rule but also comparing the infield fly situation to intentional walks and sacrifice bunts).

of the game, they changed the rule. By doing so, they took away the incentive for that behavior and eliminated it from the sport.

Some have called for the abolition of the infield fly rule, characterizing it as "protectionist rulemaking" and calling instead for a fuller embrace of deception and trickery in baseball.[263] Whether this point of view is correct depends on one's perspective of just what the "objectives" of baseball are. The normative determination regarding whether (and to what extent) baseball should embrace deception and trickery necessarily precedes any discussion about whether particular strategic behavior should be allowed and rewarded.[264] Although the infield fly rule may have been appropriate in the gentler times in which it was adopted, goes the argument, "proper conduct in today's America is governed not by rigidity and gentility, but by autonomy, risk taking, and shamelessness."[265] If true, then perhaps the infield fly rule is indeed "a perversion of protectionism based on outdated values."[266]

When a new development or tactic in sports is deemed harmful to some broader interest of the sport, adjudicators (the sporting equivalent of legislatures) can change the rules to accommodate the game or ban the practice. Former University of North Carolina basketball coach Dean Smith developed the "four corners offense" in the 1960s to run out the clock and hold on to a lead. Four players would spread out to four distant corners of the offensive half of the court and the fifth would stay in the middle dribbling. The players would occasionally switch positions but generally the point was to slow the action down so the game clock expired. Although the strategy was useful in reducing the number of possessions in a game and retaining a lead, it led to a very boring style of play. Smith used this strategy very successfully for two decades until the NCAA finally responded to calls for reform and instituted a shot clock in 1985, which limits the amount of time one team can have the ball on a single possession.[267] Because the four corners offense was seen as detrimental to the overall appeal of college basketball and

263. Andrew J. Guilford & Joel Mallord, *Time to Drop the Infield Fly Rule and End a Common Law Anomaly*, 164 U. PA. L. REV. 281, 283 (2015). In support of their proposal, the authors argue that the purposely dropped infield pop-up is no different from the other "bag of tricks filled with deception, risk, and even purposely dropped balls" available to baseball players and list many such tactics considered perfectly appropriate in the game of baseball. *Id*. at 286–87.

264. *See id*. at 288 ("[T]he rules of sports, like a society's laws, must reflect cultural values . . . [and] are meant to ensure proper conduct, and it is society that determines what is proper.") (citing Stevens, *supra* note 260, at 1479).

265. *Id*. at 288. The authors published this essay in the relatively genteel era of 2015. It is difficult to imagine what conduct might be permissible on the baseball diamond today if we allow the evolving standards of decency in popular culture to dictate acceptable on-field behavior. *See id*.

266. *Id*. at 288; *see also* Eldon L. Ham, *Aside the Aside: The True Precedent of Baseball in Law, The Residue of Luck – Or, Who's Not on First?*, 13 MARQ. SPORTS L. REV. 213, 213 (2003) ("In baseball, as in free market economics and in law, the chip-on-the-shoulder, tobacco-spittin' object of competition is to win.").

267. *See* Gordon S. White Jr., *Boring, But It Worked*, N.Y. TIMES (Mar. 7, 1982), https://archive.nytimes.com/www.nytimes.com/packages/html/sports/year_in_sports/03.07.html (stating that the NCAA adopted the 45-second shot clock in order to thwart the stall that Dean Smith used in his "four corners" strategy).

therefore antithetical to the broader values of the game, the league took action to remove the incentives for this style of play and it largely disappeared.[268] As in the earlier cases involving teams purposely (and rationally) losing a match,[269] this tactic was seen as detrimental to the overall objectives of the game. Once this determination was made, it was a relatively simple matter to change the procedural rules to eliminate the incentive for teams to engage in this conduct. The same thing can and does happen in the world of criminal litigation.

IV. WHAT CRIMINAL PROCEDURE CAN LEARN FROM SPORTS

As with sports, the rules of criminal litigation are always subject to refinement and modification. If we decide that a particular practice has become detrimental to the overall objectives of the system, we can always clarify and refine the rules to move that practice clearly outside of the rules. As philosopher Howe stated, "It is no use saying 'that's the way it's played,' any more than 'the poor will always be with us,' or 'war is inevitable'; we can always *choose* to play differently than we do."[270] But it is those in charge of making and implementing the formal rules of play, rather than those engaged in the competition, who should bear the burden of changing the rules.

Examination of sports rules can shed light on the rules, laws, and procedures governing our lives. "When a subject has become overfamiliar," according to one scholar of law and sports, "sometimes it is best approached from the side rather than head-on."[271] A comparative analysis of the rules of various sports shows that sets of rules in particular sports, just like laws in particular societies, reflect the values and culture of those sports.[272] And public outcry over what seems like an unjust application of a rule can spark a broad outcry about the evolving values and goals of the larger system governed by those rules.[273] The process of changing sports rules to better reflect the overall values of the game can provide a guide to how rules of criminal procedure should and should not be changed to better achieve broader goals of the criminal justice system. As in the justice system, allegations

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268. *See* Krotoszynski, Jr., *supra* note 15, at 1023.

269. *See supra* Section II.A.2.

270. Howe, *supra* note 1, at 222.

271. Michael Herz, *How the Electoral College Imitates the World Series*, 23 CARDOZO L. REV. 1191, 1191 (2002).

272. *See* Ilhyung Lee, *The Danish Question, the Mailman, and Justice Scalia: Examining the Group Play Tiebreaker Rules*, 27 SO. CAL. INTERDISC. L.J. 133, 136 (2017) ("A sport's rules and regulations reflect the purpose and goals of the governing body (sometimes guided by the elusive 'best interests' of the game), just as the legislature's enacted laws reflect the public's will and desire.").

273. Lee attributes changes in the sports and law context to public reactions:

> Some rules, like some laws, receive little attention until their application in unusual circumstances results in an outcome that the fan base, the media, and perhaps some within the governing body itself, find objectionable. Such instances sometimes trigger debate, deliberations, and even amendment.

Id.

of gamesmanship in sports, or offensively using a rule to achieve a purpose other than the rule's intended purpose, allow us an opportunity to refine or amend the rules to better serve important interests of the overall system.[274]

The rules of engagement are always subject to modification in service of larger systemic objectives. The legislative responses to the *Melendez-Diaz* decision can be seen as one such example.[275] In response to the potential for a cascade of dismissals and acquittals simply because of the absence of a lab technician, state legislatures enacted notice-and-demand statutes. Contrary to some predictions,[276] the criminal justice system adapted to the newly understood confrontation rights and the system did not grind to a halt.

While the enactment of notice-and-demand statutes came in response to a constitutional decision from the Supreme Court, rules of criminal litigation have evolved to accommodate changing social norms as well. In advocating for passage of the federal rape shield law in 1978, Representative Elizabeth Holtzman described what many saw as a pressing problem of the manner in which rape trials were conducted:

> Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten rapes is ever reported.[277]

Throughout the 1970s, advocates argued for passage of "rape shield" laws to change the way that rape charges were prosecuted and defended. These laws generally prohibited inquiry into the complaining witness's prior sexual history and character for promiscuity or chastity.[278] The practice of putting the victim on trial, argued reformers, resulted in low rates of reporting and prosecution and high rates

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274. *See id*. at 138 ("Ultimately, the game's rules, like a society's laws, reflect the values and culture of the jurisdictional base that enacts them. Rules should make sense, and when they do not, action is required."). In his article comparing tiebreaker rules among various sports, Ilhyung Lee describes an unhappy application of the Big 12 tiebreaker rules, by which the University of Oklahoma's football team was named champion of the Big 12 South Division, even though the University of Texas football team had an identical record and had defeated Oklahoma during the regular season. After calls for reform, the tiebreaker rules were changed within two years. *See id*. at 148.

275. *See supra* note 142 and accompanying text.

276. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 343 (2009) (Kennedy, J., dissenting) ("The result, in many cases, will be that the prosecution cannot meet its burden of proof, and the guilty defendant goes free on a technicality that, because it results in an acquittal, cannot be reviewed on appeal.").

277. Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 764 (1986) (quoting 124 CONG. REC. 34,913 (1978) (statement of Rep. Elizabeth Holtzman)).

278. *See id*. at 764–71 (describing rape shield laws and their origins).

of acquittal.[279] More broadly, advocates for women "attacked the entire jurisprudence of rape as an embodiment of stereotypes and attitudes highly contemptuous of women."[280] Very quickly, both state and federal legislators passed rape shield laws and other legislation that eliminated the requirement that a complaining witness's testimony be corroborated to support a conviction and that a complaining witness show that she physically resisted the attack to the utmost.[281]

As courtroom tactics came to seem increasingly out-of-step with contemporary understandings of rape and inconsistent with the stated goals of the system, legislators changed both the procedural and substantive rules of engagement to modernize the system. The new rules were widely celebrated as a needed corrective to an outdated system of trial.[282] As feminists joined forces with traditional law-and-order legislators in jurisdictions across the country, "[t]he result was nothing short of a full-scale revision of existing rape law."[283] Today, almost half a century after the rapid revision of rape law, some argue that the reforms of the 1970s and early 1980s should be re-examined and amended.[284]

Just as legislatures responded to evolving public views by changing the substantive and procedural law of sexual assault in the 1970s and 1980s, some today are calling for a change in how prosecutors can use uncharged allegations of misconduct against criminal defendants. Because federal sentencing law allows for the enhancement of sentences through the use of uncharged misconduct, federal prosecutors can elect to withhold certain conduct from evaluation by the jury and then raise it during the sentencing phase, when it will be subject neither to the scrutiny of a jury nor the more stringent standard of proof beyond a reasonable doubt.[285]

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279. *Id*. at 767. Without rape shield laws:

> In effect, these common law evidentiary rules allowed defendants to turn the tables. No longer was the defendant the only one on trial. Also on trial was the complainant, to determine whether she was the type of woman who consents, the type of woman to lie about it, and hence the type of woman who should not be protected by the law, at least not at the expense of a presumptively good man.

I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 835 (2013).

280. Galvin, *supra* note 277, at 768; *see also* Capers, *supra* note 279, at 835.

281. *See* Capers, *supra* note 279, at 834, 839.

282. *See, e.g*., J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 549–50 (1980) (citing numerous law review articles that criticized the old rules and argued that it was "manifestly unfair to women and a reflection of outmoded morality" to allow the complaining witness's prior sexual history to be admitted at trial); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 12–32 (1977) (discussing the old system's focus on the victim's sexual history and the various efforts made to make trial less inimical to an accuser).

283. Capers, *supra* note 279, at 839.

284. *See, e.g*., *id*. at 842 ("Far from liberating women from our long history of measuring their worth against a chastity yardstick, rape shield rules have in fact reinstantiated chastity norms."); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 627 (2009) (discussing how realist reforms have produced only limited benefits and should be further amended).

285. U.S. SENT'G GUIDELINES MANUAL § 1B1.3(a) allows sentencing courts to consider all relevant conduct, including uncharged or acquitted conduct, that can be proven by a preponderance of the evidence when determining a sentence. *See* United States v. Watts, 519 U.S. 148, 153 (1997) (per curiam); *cf*. Witte v. United

One scholar has compared this situation to the "infield fly rule" problem in baseball and called for adoption of evidentiary rules to limit this practice in federal sentencing hearings.[286] The infield fly rule was adopted as "a legislative response to actions that were previously permissible, though contrary to the spirit of the sport."[287] In baseball prior to the enactment of the infield fly rule, the umpire had the discretion "to disallow the double play in egregious circumstances" just as a federal sentencing judge is free to disregard evidence of uncharged misconduct.[288] But a clear rule prohibiting the use of uncharged misconduct in sentencing would enhance certainty and reduce gamesmanship in charging and prosecution, just as the infield fly rule has done.[289]

Others have argued that the federal law of interlocutory appeals would be improved by following the lead of sports leagues and instituting a form of limited "instant replay."[290] Professor Kenneth Kilbert would allow each side in a civil case one "challenge appeal" that could be used at any time during the pendency of a case, without asking permission of any judge.[291] Kilbert describes how the National Football League experimented with and refined the rules for using instant replay to respond to criticisms of how it was being implemented.[292] Over a relatively short period of time, the procedural system evolved from being entirely referee-initiated and unlimited in the number of permissible instant replays to one in which coaches could initiate challenges but were limited in the number of challenges.[293] These refinements were made in response to critiques that the earlier system was too cumbersome and inefficient.[294] The standard of review has always retained a degree of deference to the on-field call, with a reversal warranted only in the face of "indisputable visual evidence" or "clear and obvious visual evidence" that the initial call was incorrect.[295] Major League Baseball, the last major sports league to utilize instant replay, also evolved from a system in which only umpires

States, 515 U.S. 389, 405–06 (1995) (holding that considering relevant conduct at sentencing does not constitute "punishment" and therefore is not subject to the Double Jeopardy Clause).

286. *See* Berger, *supra* note 261, at 97.

287. Stevens, *supra* note 260, at 1477.

288. Berger, *supra* note 261, at 97.

289. *See id*.

290. Kenneth Kilbert, *Instant Replay and Interlocutory Appeals*, 69 BAYLOR L. REV. 267, 281 (2017) (arguing this could be accomplished because "[s]ports and civil litigation share many common attributes, including the existence of winners and losers, reliance on rules, an adversary system, and neutral decision-makers").

291. *Id*. at 299.

292. *Id*. at 285–87.

293. *Id*. at 287. Kilbert argues that the parties themselves are best positioned to decide which pre-trial issues should be appealed and any efficiency concerns are addressed by limiting the number of "challenge appeals" in federal civil litigation to one per side.

294. *See id*. at 295, 299 ("One obvious parallel between interlocutory appeals in federal civil cases and instant replay review in professional sports is that, despite inefficiency concerns, both have evolved toward more error correction over the years.").

295. *Id*. at 288.

could initiate review to a system in which each team's manager can initiate a challenge.[296]

Just as baseball instituted the infield fly rule to stop strategic behavior on the part of infielders that took away from the overall enjoyment of the game, and as football developed procedural limitations on the use of instant replay for the same reason, the criminal justice system has evolved to address behavior or tactics that were seen as counter-productive to the broad mission of the system. Legislatures enacted notice-and-demand statutes to check the prospect of criminal cases being dismissed when chemists and forensic witnesses were not called to testify in every case involving drugs or scientific evidence.[297] Courts and legislatures changed the way in which sexual assault cases were litigated in response to evolving social views of appropriateness.[298] Courts and legislatures should continue this response to litigation behavior that does not advance the broad objectives of the criminal justice system. And as the system appropriately assigns very different roles to prosecutors and defense lawyers, it is entirely appropriate for different rules to apply to these actors in this context.[299] Having a lower level of tolerance for gamesmanship by prosecutors is consistent with the core values of the system.

Legislators could and should respond to the practice of prosecutors failing to disclose favorable evidence by passing laws requiring broader disclosure than currently required under federal constitutional law. Courts and state bar associations could achieve the same result by court rule or by interpretations of existing ethical rules. And of course, elected prosecutors could do the same by changing office policy and practice. Many would agree that prosecutorial gamesmanship in this area subverts fundamental objectives of the criminal justice system, but reform efforts have not solved the problem.

Similarly, the use of racially-motivated peremptory strikes in jury selection undermines core values of the system and current doctrine has failed to effectively discourage the practice. Because of their dual role as advocate and as minister of justice,[300] prosecutors' use of race in selecting juries is especially troubling and should be viewed in a different light than similar practices by defense lawyers.[301] This is a form of gamesmanship in criminal litigation that could easily be curtailed

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296. *Id.* at 289–90, 292. Similarly, Judith Maute has argued that amendments to rules governing civil litigation are analogous to changes in rules governing sports, to adjust to developments in tactics or new normative desires about what behavior and outcomes we want to encourage. *See* Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 9 (1987).

297. *See supra* note 142 (discussing notice-and-demand statutes).

298. *See supra* notes 278–81 and accompanying text (discussing changes in "rape shield" laws).

299. *See supra* notes 8–9 and accompanying text (discussing differences between prosecutors and defense attorneys).

300. *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

301. *See* Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 GEO. J.L. ETHICS 1163, 1164–65 (2014).

by legislators or courts, either by eliminating the practice altogether, limiting the exercise of peremptory strikes to defendants, or changing the doctrinal framework to require a rational or plausible reason for exercising a peremptory strike. Indeed, the Washington Supreme Court recently expanded the *Batson* prohibition to include not only intentional discrimination but also situations in which "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge."[302] Seeing a practice that threatened the legitimacy of the system, the court broadened the rule to more effectively curtail the use of race-based strikes.

In the absence of an infield fly rule, nobody would criticize a second baseman for purposely dropping an infield fly to get a double play. If the second baseman did not purposely drop the ball, he would be rightly criticized for not doing his best to win the game. Not trying to exploit every opportunity within the rules can be a form of bad sportsmanship, violating shared norms of fair play.[303] Luis Suarez, the women's badminton teams, and the New York Yankees were each operating *within* the rules of their respective games. In response to each incident, the relevant governing bodies of those sports considered rule changes and actually changed the rules in some cases. Similarly, advocates in criminal courts should be expected to know the procedural rules of engagement and deploy them to their clients' advantage. Strategic behavior within the ethical and legal rules is generally a productive and valuable aspect of the criminal justice system. Only where it threatens core values and objectives of the system should lawmakers step in to discourage such practices.

CONCLUSION

A December 2014 National Football League playoff game between the Baltimore Ravens and New England Patriots ended in a close victory for the Patriots, who would go on to win the Super Bowl. Bill Belichick, the coach of the Patriots, employed various strange offensive formations and plays that resulted in confusion among the Ravens defense.[304] By knowing the arcana of the NFL rule book, Belichick was able to twice use a player assumed by the defense to be

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302. WASH. GEN. R. 37(e); *see also* Debra Cassens Weiss, *Any Prior Police Contact? New State Rule Deems that a Presumptively Invalid Reason for a Juror Strike*, ABA JOURNAL (Apr. 25, 2018, 8:00 AM), https://www.abajournal.com/news/article/Any_prior_police_contact_new_state_rule_deems_that_a_presumptively_invalid ("General Rule 37 says judges shall deny a peremptory challenge if an 'objective observer' would view race or ethnicity as a factor in the use of a peremptory strike to eliminate a potential juror.").

303. Papineau argues that the main goal of sport is to win, and gamesmanship serves that purpose:

> [G]amesmanship, in all its forms, is an integral part of competitive sport. All serious athletes are constantly striving to avoid defeat and ensure victory. If they can find some new angle to help them, they would be perverse not to go for it. An athlete who ignores an open avenue to victory is an athlete who is not competing seriously.

PAPINEAU, *supra* note 2, at 89.

304. LIEBOVICH, *supra* note 20, at 134.

ineligible to receive a pass.[305] Believing him to be ineligible, the Ravens defense did not cover him, and he easily caught a touchdown pass to put the Patriots in the lead. All of the Patriots' plays were legal but "Ravens coach John Harbaugh was furious after the game, accusing the Pats of 'deception' and calling the formation 'an illegal type of a thing.' This led [Patriots quarterback Tom] Brady to counter smugly that 'maybe those guys gotta [sic] study the rulebook' . . . ."[306] An account of the game in the New York Times was headlined "Patriots' Real Trick: Knowing the Rules."[307]

In any adversarial contest governed by rules, it is inevitable that the competitors will look for strategic advantage in the creative and aggressive use of those rules. Gamesmanship is both an inevitable and productive aspect of sports and litigation. When extreme forms of gamesmanship threaten to undermine core objectives of the system, those in charge of administering the system should respond by altering the rules to eliminate the rewards for this strategic play. Baseball effectively eliminated the strategic practice of purposely dropping infield fly balls to get a double play and many sports have changed their tournament rules to take away the incentive for purposely losing preliminary-round matches. Legislators and courts have responded similarly to strategic litigation tactics, changing trial procedures in sexual assault cases and in response to expanded defense rights under the Confrontation Clause. Aggressive use of existing procedural rules should be welcomed rather than condemned, as the practice sheds light on rules that may not advance the objectives of the system and forces an open conversation about what those objectives are.

Learning from these examples of gamesmanship in sports, legislatures and courts should not hesitate to change the procedural rules and disincentive structures when necessary to eliminate forms of gamesmanship that are detrimental to the overall objectives of the criminal justice system. Examples include requiring broader disclosure of favorable evidence by the prosecutor and more effectively barring the use of race in peremptory strikes by adopting an "objective observer" test in evaluating whether a party has engaged in race-based strikes. This refinement of the procedural rules is an inevitable and desirable part of any adversarial system, whether in sports or litigation. In this process, however, legal reformers should be careful to limit their efforts only to those forms of gamesmanship that threaten a broad and fundamental objective of the criminal justice system. At the same time, any reforms should recognize the asymmetrical nature of the criminal litigation system and the distinct roles assigned to prosecutors and defense lawyers, affording less indulgence to gamesmanship by prosecutors than by defense lawyers.

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305. Chase Stuart, *Patriots' Real Trick: Knowing the Rules*, N.Y. TIMES (Jan. 27, 2015), https://www.nytimes.com/2015/01/28/sports/football/a-peek-inside-the-patriots-trick-playbook.html.

306. LEIBOVICH, *supra* note 20, at 134.

307. Stuart, *supra* note 305.