

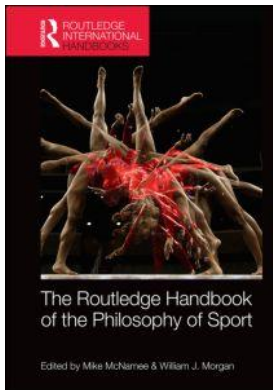
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SPORT AS A LEGAL SYSTEM

John S. Russell

Sport incorporates the elements of a legal system. It is a rule-governed institution for regulating the conduct of human communities (the communities of individuals who participate in sports). It has legislators or legislative bodies (rules committees or gamewrights) that enact legislation (the rules of a sport). It has judicial officers whose role is to ensure that conduct is regulated according to those rules (referees, umpires and other officials charged with ensuring that the sports are played properly according to the rules). Such parallels suggest that our understanding of sport can be deepened by regarding it as a type of legal system. It seems worthwhile, then, to consider whether philosophical treatments of sport can be illuminated by drawing on legal theory and our experience of the operation of law in human societies. It has been just over 15 years now that a literature has emerged in sport philosophy that has examined these connections and begun to develop what might be called “a jurisprudence of sport” or, in effect, an account of sport as a legal system. Despite its recent appearance, this body of work has had a profound impact on sport philosophy and has important normative implications for the conduct of sport generally. This chapter critically surveys that literature and discusses its implications.

The attempt to understand sport as a type of legal system begins with two papers on adjudication in sport by Russell (1997, 1999). Russell noted that the distinction in law between judging “matters of fact” and “matters of law” has a parallel with umpires’ and referees’ decisions making calls and interpreting and applying rules. Judicial officials in both contexts, in sport and in law, are called upon to examine evidence to identify important facts and to make decisions about what the laws or rules are or mean and how they are to be applied. Russell used resources from law and philosophy of law in an attempt to clarify umpires’ and referees’ roles in these respects and, in particular, the nature of discretion they have with respect to making calls and application of rules. Russell regarded these two papers as presenting an outline of a theory of adjudication in sport (1999: 46n1).

It will be useful to organize the current essay into parts that consider judicial roles in sport with respect to matters of fact (or calls) and matters of law (understanding and applying the rules). Philosophical consideration of legal issues in sport extends beyond these two areas, but consideration of them leads to these other topics. It is also important to bear in mind important differences between the nature of law and adjudication in human societies and in sport. In particular, the progress that has been made in understanding the apparent nature of sport as a legal system allows us to sharpen the comparisons that legal theorists have often drawn from

sport to illuminate the law of human societies. This is an interesting topic in its own right but it deserves separate treatment and will not be a focus of this chapter, although many of the issues that deserve discussion will be evident from ground covered here.¹ A complete account that describes sport as, or at least compares it to, a legal system should also say something about the nature of rules in sport and may also need to consider the relevance of the work of legal theorists in explaining the nature of rules. However, the nature and status of rules is a foundational issue in sport philosophy that extends beyond the current discussion, which will focus mainly on what appear to be legal institutions and practices in sport. While consideration of the normative content of sport, including rules, figure prominently, this discussion leaves aside consideration of basic questions about the specific nature and variety of rules in sport, despite their undoubted relevance to any jurisprudence of sport.²

Making the calls

Any systematic discussion of calls in sport should begin with a small philosophical puzzle (Russell 1997; see also Mumford 2006). By their pronouncements on events that occur during play, umpires in an important sense determine what the events are. That is to say, umpires' calls make facts. When the umpire calls a "strike" or an "out", this creates the fact that a "strike" is added to the count or the number of "outs" remaining in a game has been reduced. This is reflected in the famous saying attributed to baseball hall of fame umpire, Bill Klem "it ain't anything til I call it" (quoted in Russell, 1997: 21). The same idea is suggested in another Hall of Fame umpire Bill McGowan's reported statement to a batter who had protested a call: "If you don't believe you're out, read the morning newspaper!" (quoted in Russell 1997: 22). A puzzle arises because facts are neither true nor false. They simply are. (Propositions are true or false, not facts.) But clearly we do not want to say that we cannot challenge the truth or falsity of a call because it is a fact made by an umpire's pronouncement. That would let Klem and McGowan off the hook too easily. It would render meaningless the idea of "getting the call right" and trying to settle athletic contests as judged assessments of athletic skill. The solution to this puzzle is recognized by the philosopher of language J. L. Austin (1962). Austin noted that performative elements of language (those elements that use language to create social facts like "promises" or "outs" and "strikes") can be readily combined with declarative or descriptive statements which will be true or false. Austin noted that these are commonly combined in judicial-like pronouncements that he called "verdictives". Thus, a judge's finding of fact that an accused is guilty of murder creates the legal fact that the accused is guilty of the crime of murder, but the finding is also a declarative statement of fact and so can be true or false. This analysis applies straightforwardly to umpires and referees, as Austin himself recognized (1962: 152). Their calls, or findings of fact, create a sort of legal fact (a "strike" or an "out" is entered in the scorebook, or a goal is added to one team's score, etc.), but the umpire's finding may be true or false. He or she may have "missed the call" (that is, got it wrong).³

Using baseball umpires as an example, Russell describes the above puzzle and its solution to help to clarify the role and function of umpires and referees (these terms will be used interchangeably) in sport. Russell notes, however, that what is distinctive about umpires in sport as compared with judges in courts of law and many other contexts is that they are also *witnesses* to the events that they adjudicate (1997: 23–4). This has important implications for understanding the status of certain calls. In particular, it turns out that some classes of bad calls are not calls in any genuine sense and so should be open to review and change.

In particular, where an umpire either is not, or is prevented from, functioning as a judge or a witness, his or her calls cannot be regarded as genuine calls, even though they may have been

made and are, so to speak, “on the books”. Thus, an umpire who is prevented from making a call by a player’s intentional deception, or a corrupt umpire’s intentionally incorrect calls, or an umpire who in the heat of the moment makes a call on an event he or she did not witness but supposes has happened, is failing to meet some of the requirements of fulfilling the role of an umpire. Such calls should be regarded as having no genuine status as calls, much in the same way that we say that a paid-for mail-order Ph.D. is not a real Ph.D. or a flat soufflé is not a real soufflé (because they lack the functional elements of genuine Ph.D.s and soufflés). We might call these sorts of familiar judgments “dismissive judgments” (Kretzmann 1988), since they identify a purported instance of a particular kind (say, a mail-order Ph.D.) but dismiss it as not a genuine instance despite some appearances to the contrary. Thus, when a player deceives an umpire into making a bad call, for example, by “selling” a “phantom tag” or pretending to catch a trapped fly ball (that is, one that has hit the ground fractionally before being caught by the fielder), there is an attempt to prevent him or her from properly performing the function of an umpire by intentionally misleading or confusing him or her through deception as to what the evidence properly is. An umpire in this situation is prevented from performing his or her role by the player’s deception. If he or she has a reasonable suspicion about this (perhaps because of the opposition’s complaints and the circumstances), this is grounds for asking for help to review the call. Similarly, umpires who in the heat of the moment simply guess at calls or who think that they have made incompetent calls have good reason to believe that they have not functioned reliably as witnesses to an event. If so, they cannot regard their calls as having fulfilled a necessary element of their role as an umpire and should be prepared to seek help. Finally, corrupt umpires who fail to act impartially are not functioning as judges and their calls cannot be regarded as genuine judicial calls and should be set aside. In all these cases, we might apply something like the dismissive judgment “that is no call!” This has the air of paradox about it, because, of course, a call has been uttered and so appears to have been made. But since one of the necessary elements of being an umpire and making calls is missing (functioning as a reliable witness or as an impartial judge), the call’s status as a genuine instance of its kind (like the flat soufflé or mail-order Ph.D.) is only apparent.

Russell’s analysis (1997) opened discussion of when umpires should regard their calls as open to review and revision. His prescriptions seem modest in light of the reliance on various forms of replay and other electronic aids to umpiring that have become widely entrenched since this paper was published. Russell had little to say about technological aids to umpiring beyond acknowledging the issue and suggesting that replay for key plays was justified and that efficient conduct of games was a consideration in assessing how much further technological aids to officiating should be used (1997: 36–7n20). Nevertheless, Russell’s proposals remain relevant. Nicholas Dixon (2003: 104–6) used the analysis to explain and justify the decision in the 2002 Winter Olympics to set aside the scores of a corrupt French figure skating judge and to award Canadian Figure skaters Salé and Pelletier gold medals (they had initially been awarded silver medals), and his argument applies generally to corrupt judging and refereeing scandals, which regrettably are far from unheard of in competitive sport (with refereeing in Olympic boxing taking centre stage recently [Sanneh 2012]). Russell’s analysis can also arguably be extended to include instances where the behaviour of fans undermines impartiality; for example, when fan outbursts encourage “homer” calls. Where practicable, such calls should be reviewed on this analysis. Moreover, most of sport is played without benefit of replay and other electronic umpiring aids and will apparently continue to do so. Hence, the arguments that umpires should be prepared to review calls where they believe they have been deceived by participants into making bad calls or where they have reason to believe that their witness’s reports are unreliable remain relevant. In either case, the rough test would be whether the umpire would be confident

enough to offer his or her own observation of an event as evidence of what actually happened. If the answer is “no,” help should be sought where this is practicable.

A rich literature has since emerged on the use of replay and other electronic aids to officiating. The leading contributions in this area are now Harry Collins’ “The Philosophy of Umpiring and the Introduction of Decision-Aid Technology” (2010), Mitchell N. Berman’s “Replay” (2011c, 2012), Tamba Nlandu’s “The Fallacies of the Assumptions behind the Arguments for Goal-line Technology in Soccer” (2012) and Seth Bordner’s “Call ‘Em as They Are: What Is Wrong with Blown Calls and What To Do About Them” (2014). Collins (2010: 144n3) elaborates the same Austin–Russell framework for conceptualizing what umpires and referees do. He characterizes the performative aspect of the umpire’s role as the umpire’s “ontological authority” and the role of umpires as special witnesses as their “epistemological privilege. The ontological authority is grounded in their role as judges to make calls and their epistemological privilege is based in the belief that they will be trained, impartial witnesses who will ordinarily be in a better position than competitors to make calls. What has happened in recent years is that the epistemological privilege of umpires has been challenged in various ways by technology. Thus, television and event spectators, and even participants who have access to video review, are frequently in better positions to make calls than umpires are. This in turn has raised doubts about the extent to which their ontological authority should be preserved “leading to loss of credibility of the match official and the sport” (Collins 2010: 136). Collins distinguishes between two different types of technological decision aids, replays and “reconstructed track devices” (RTDs). The latter use television cameras to filter pixels in each frame to construct a path for a moving object to determine its location in space, say, as either inside or outside the service box in tennis. Information about the speed and composition of an object can also be calculated to determine the “footprint” it makes on contact with the ground, thereby to determine more precisely whether a ball is “in” or “out”. Collins rightly points out that viewers often assume that RTDs are perfectly accurate, but as with all scientific measuring devices, there is a degree of (often disputed) uncertainty about this. Sports deal with this uncertainty differently. In cricket, Hawk–Eye technology⁴ is sometimes used to assist an umpire’s call on a “leg before wicket” infraction by calculating whether the thrown ball would have hit the wicket if it had not made contact with the batter’s leg first. If the calculated trajectory falls within the machine’s margin of error, the decision-making (ontological) authority remains with the umpire. In tennis, where Hawk–Eye technology is also used, no uncertainty is acknowledged, and the decision-making authority is removed from the umpires and the authority to make the call resides with the technology in the zone of uncertainty. Collins plausibly argues that use of technology in this latter way is unjust, since it encourages people to believe that justice is being done, when in fact this is not fully evident. The lack of acknowledgement of the limitations of Hawk–Eye technology delivers a sort of “false transparency”. Rather, in some situations, we should acknowledge that even with the machine’s assistance we simply do not know what is “in” or “out” when a call falls within a zone of uncertainty. Acknowledging this and retaining umpires’ decision-making authority within such zones “would make it clear when and where nothing could *be sure to do* better than the human umpire” (Collins 2010: 142, original emphasis).⁵

Collins’ discussion reflects a widely held view about the use of technological aids to umpiring, namely, that the on-field umpire’s call should stand unless there is incontrovertible evidence that it is erroneous. Thus, the general conclusion to be drawn from his view is that where no call can be made that “is obvious to all” (Collins 2010: 143) as the correct one based on use of RTDs or other technological aids (such as instant replays), the decision should remain with the umpire. Versions of this approach are currently reflected in use of replays in many

major sports, including professional (American) football, hockey, and baseball. Collins thinks that such an approach is mandated by considerations of justice. But all these claims can be challenged. First, it is not clear why the decision-making authority should be given to the umpires who made the initial call where the review does not provide fully definitive evidence to overturn a call. The problem is that all decision-making devices, including human umpires and RTDs and instant replay review, will have statistical “zones of uncertainty”. It is entirely possible, and indeed likely, that on-field umpires’ zones of uncertainty are larger than those of RTDs (or instant replay that is based on views of a dozen or more cameras that can manipulate speeds and other aspects of the images). Collins appears to acknowledge this (2010: 141). If umpires have, on average, greater zones of uncertainty, then other things being equal deferring to the best judgment of technologically aided calls with smaller uncertainty associated with them is simply deferring to the better measuring device (although neither is in a position to claim absolute authoritative superiority). If this choice is acknowledged and disclosed to participants and fans, there is no false transparency. Arguably, it is superior on grounds of justice as well, since it demonstrates that the most reliable efforts are used to recognize athletic successes. A qualification needs to be acknowledged, however. Since “zones of uncertainty” are statistical averages quantified over many different circumstances each of which has its own zone of uncertainty, in some circumstances on-field umpires may be more reliable (that is, have smaller areas of uncertainty). Such qualifications should be noted and incorporated where it is practicable. But this does not detract from the main point. There is good reason to defer to what we believe is, overall, the most reliable measuring device in the circumstances.

But Collins thinks that deference should be given to on-field umpires’ decisions where there is uncertainty about what the correct decision should have been. His most striking claim is that “match officiating is not about accuracy it is about justice” (2010: 142). His comments in defence of this claim are brief but worth careful consideration:

Accuracy and justice are not necessarily the same. For example, where an optimally skilled and perceptive umpire would consistently call the ball one way and an optimally accurate machine based on impact footprint would call it another, it is not at all clear that machine provides the appropriate call. Coherence with tradition and the way the non-technically assisted game is played may be more important so long as there is equity for all players.

(Collins 2010: 142)

Collins may be correct that accurate umpiring decisions and justice are not necessarily the same thing in sport, but quite a bit of clarification and defence is needed for this claim. Match officiating does indeed seem to be about accuracy since, as we have seen, officials’ calls are also witnesses’ reports about what happened. Moreover, since competitive sport requires the measurement of relative competitive outcome, justice in competitive sport is directly tied to identifying competitive successes accurately. This explains why it is so important for umpires to get the calls right and to strive to learn to be reliable detectors of the on-field facts. It also explains why modern technologies have been adopted to assist adjudication in competitive sport: they can enhance accurate decision making and reinforce the appearance of impartiality in doing so. Thus, if optimally skilled umpires and optimally accurate machines disagree systematically on certain assessments of the facts, the best and fairest way of resolving the disagreement would appear to be to defer to the measuring device with the statistically greater reliability. Sometimes this may favour on-field umpires, although in increasingly many circumstances it will favour decisions supported by technological devices aids like Hawk-Eye and

instant replays. This is a result that arguably all participants should find acceptable from the perspective of competition and justice. Justice would have the best chance of being done, and being seen to be done, in such circumstances. “Tradition” may play a role here, but at times it can be in conflict with justice.

Collins has an important, if partial, response available, however. He can point to the traditional role that human referees often play in managing games; for example, when they ignore calls to preserve the flow of a game or to avoid imposing an unjust penalty in certain circumstances (even sometimes for calls that are “obvious to all”), or when they make a call on uncertain evidence as a deterrent when the good conduct of a game needs to be preserved. Indiscriminate use of technological aids could thus end up changing the nature of many sports, not necessarily for the better and not necessarily in ways that would always preserve justice.⁶ This is arguably a deeper concern than simply stating that “coherence with tradition” should be preserved. As we shall see, this point complements discussions below, including about the use of umpire discretion with respect to applying and interpreting rules. It does not, however, establish a complete defence of Collins’ claim that deference should always be given to on-field umpires in the absence of evidence that should be “obvious to all” that a call needs to be overturned.⁷

An article that stakes out a position opposed to any use of in-game technological aids to umpiring is Tamba Nlandu’s “The Fallacies of the Assumptions behind the Arguments for Goal-line Technology in Soccer” (Nlandu 2012). Nlandu’s arguments address the use of goal-line technology in soccer, but they can be applied generally to the use of technological aids to on-field officiating in all sports. He offers three arguments for opposing technological aids. First, he argues their use is driven mainly by “win at all costs” approaches to competition that are found in elite amateur and professional sport and that are inconsistent with a “play spirit ethic” that is the proper ideal toward which sport should strive. Second, he claims that it is a fallacy to assume that technological aids can be shown to affect game outcomes more than any other events that occur in a game. His view is that we have no reason to believe that umpires’ decisions have a greater impact on the game than the players’ and coaches’ actions and decisions, and so use of technology is driven in part by a “scapegoating” of referees. Third, there is a mistaken belief that technology can eliminate most errors and ensure fairness of game outcomes. Nlandu’s positive proposal is to educate athletes to take greater responsibility for assisting umpires make the correct calls (for example, reporting that a goal had been scored when the referee had failed to see it) and to take more responsibility to regulate the game themselves, as this would promote the appropriate play spirit and ethics education in sport while also de-emphasizing the role of referees and the potential for scapegoating them (p. 462–3).

Nlandu’s argument for having participants share the responsibility of officiating is worth taking seriously (see Russell [2013], who comes to a similar conclusion via a different argument) But there is no reason to think this is inconsistent with some use of technological aids in some circumstances, for even people of good will may reasonably disagree or not be in a position to make accurate calls. Indeed, a judicious use of technological aids can arguably sometimes contribute to a play spirit and discourage scapegoating of referees when an important refereeing mistake may have been made but no one on the field can agree about this.

Nlandu’s other arguments are challengeable as well. To begin with, it is not at all clear that technological aids must promote or encourage a corrupt win at all costs approach to sport. Indeed, it is reasonable to believe that a win at all costs approach will exploit umpires’ limited ability to monitor all aspects of a game and thus they will fail to recognize or be taken in by various acts of deception and cheating. Technological aids can help prevent more of these activities from undermining fair competitive outcomes and may deter some of them. It is doubtful,

for example, that certain types of cheating like baseball's "double squeeze cut play" would be attempted in any game that had video review.⁸

Nlandu's second argument is a counterfactual one. Thus, he says that a game of soccer "involves thousands of decisions made by players, coaches, managers, referees and even sometimes spectators" (2012: 458). As a result, there is no way of knowing whether "referee mistakes play a much more significant role in determining outcomes ... than mistakes made, for instance, by players, coaches, and managers" (2012: 461). The inference to be drawn is that we cannot therefore say that the umpire's mistaken decision was more consequential to the outcome than any other error made by a participant, for if (counterfactually) a player or coach had made any number of different strategic decisions at other points in the game, the outcome could equally have been affected. If I am right that Nlandu has this sort of argument in mind, I doubt that it counts against assisting or changing umpires' calls through use of technological aids. The players and coaches are responsible for the choices and actions they take, including any strategic or other errors they make, so they should accept as fair the outcomes based on them. However, players and coaches can reasonably claim that an outcome may have been unfair if it was influenced by an erroneous call, since this means that the contest and its outcome are not the product of choices, actions, and omissions they are responsible for. The game is thus flawed to the extent that calls have been missed or mistaken. Their claims are stronger to the extent that the erroneous call occurs at a crucial point in a game and has a clear game-changing result, say, a winning goal scored by an undetected hand-ball in the last few seconds of a match.⁹ It is certainly true that, had players made certain different choices, a different outcome would have resulted. But this is irrelevant. It overlooks the question as to whether the outcome that occurred was actually a reflection of the legal choices and actions or omissions of the participants – or whether a failure of officiating interfered with or "wrecked" the game in these respects. Another point is that umpires' erroneous calls can not only affect the fairness of outcomes, they can deny participants fair access to other scarce competitive goods (Russell 2013). Thus, an umpire who makes a bad call at first on the 27th out after a pitcher has retired 26 consecutive batters has denied the pitcher (and his teammates) a perfect game. Like competitive wins, personal achievements are also scarce competitive goods that should be fairly awarded. An example occurred in Major League baseball in June 2010, when umpire Jim Joyce wrecked Detroit Tiger Armand Galarraga's perfect game on a clearly erroneous call on the 27th out. Perfect games are extremely rare achievements in baseball. At that time, only 18 had been recorded since the modern Major League era began in 1900.¹⁰ In this instance, there was no other outcome besides changing the call that would have produced a just outcome for the pitcher and his teammates. Nlandu is right that umpires are often wrongly "scapegoated" for what should more honestly be accepted as failures of athletes and coaches. But more argument is needed to show that umpires' failures should never be acknowledged and addressed on the field of play in soccer or other sports.

The most careful and thorough discussion of use of technological aids currently in the literature is undoubtedly Mitchell N. Berman's lengthy law review essay "Replay" (2011c). I cannot do full justice to Berman's rich and nuanced discussion. However, the essay should be the starting point now for discussions of use of technological aids to officiating, in part because it is mainly a ground-clearing exercise that is intended to set the terms for further discussion.

Berman helpfully sets out three separate questions that should be addressed: "(1) What calls should be reviewable?; (2) What should be the procedures for implementing review?; and (3) what should be the standard of review?" (2011c: 1687–8). Berman suggests that the answers to the first two questions are likely to be sport-specific because the practical costs associated with review are likely to be different for different sports (for example, time required for review, the

effect the review has on continuity of play). The main part of his discussion addresses “the conventional view” that reversal of on-field decisions by umpires should occur only if there is “indisputable visual evidence” (or “IVE”) to support this. Berman’s discussion can be regarded, then, as a challenge to views like Collins’ which give priority to on-field officials’ decisions where there is any uncertainty about whether a call should be overturned. Following mainly the history and arguments for replay within the National Football League, Berman convincingly shows that arguments for the deferential IVE standard are substantially flawed and that the less demanding standard of “*de novo* review” would better serve the goal of error correction while not being unduly costly in loss of efficiency or respect for officials. (*De novo* review is when an appeal body, say, a higher court, makes a new decision as if no prior decision or trial had taken place. In the sport case, it would look at the available evidence, including the eye witness evidence of officials on the field, and make the decision that seemed most likely to be correct.)

Berman falls short, however, of endorsing *de novo* review, noting that it needs to respond to certain further objections that have either not yet been recognized or fully discussed. In particular, he thinks it is necessary to address the concern that all reversals may make sport less entertaining or satisfying because (1) overturning an umpire’s decision may reduce the utility of those who lose out on changed calls (perhaps especially if the call is erroneously changed) more than it increases the utility of those who benefit from the corrected call; and (2) there may be a distinction between desert and entitlement that supports the idea that only blunders and not mere mistakes should be corrected. The former are manifestly mistaken calls that a competitor is entitled to have overturned, whereas the latter represent instances where a competitor deserves a different call but is not entitled to it. Thus, a pitcher might deserve a called strike on a pitch that was called a “ball” but may not be entitled to it. If so, only blunders reflect loss of entitlements and so should be corrected, but not mere mistakes. Berman does not appear to be sympathetic to either of these arguments, though he does not respond to them. Arguably, he overlooks the strength of his own arguments against IVE. There is scant evidence for (1). If *de novo* review reduces the number of overall errors without incurring other unacceptable costs (including the ones suggested by Collins), it is not unreasonable to think people will recognize that the best, impartial efforts have been made to get the calls right and live with the consequences without too much unhappiness. In some, probably very rare circumstances, a call may be overturned erroneously. Nevertheless, it is difficult to see why this should be sufficient to reject the case against IVE, and probably the only way to answer this question is to test by *de novo* review. Berman offers no clear grounds for distinguishing between desert and entitlement that seems to help here beyond suggesting it may be a character flaw to expect perfect justice and that just deserts should always be recognized.

If it is correct that Berman’s arguments for reform are stronger than he acknowledges, the question then pressed is how far technological aids should be incorporated into competitive sport. A considerably more ambitious stand is taken by Seth Bordner (2014). Bordner argues that wherever it is technically practicable, we should make unrestricted use of technological aids. The goal of officiating should be “to get all of the calls right all of the time”. If Berman’s own misgivings about the strength of his position are put aside, it seems that we may be driven to a position like Bordner’s. However, it is not clear that Bordner addresses objections suggested by Collins. I anticipate further productive discussion between all the points of view discussed so far. I have one related consideration to raise about this that that has not yet been directly discussed in relation to the use of technological aids, although it is suggested in Collins’ work.

There may be instances where umpires’ “errors” should be tolerated on athletic grounds. This is not because such errors can be competitive obstacles to be overcome as is sometimes

argued, but because failures to enforce certain rules can actually add to and improve the nature of the athletic challenges a game presents. Bordner thinks that if machines can do a better job making calls, then they should be permitted to do it. Much of his discussion supports the use of electronic aids to call “balls” and “strikes” in baseball. However, in baseball the strike zone is rarely called as described in the rules. Indeed, it enlarges and contracts and changes shape depending on the level of skill of pitchers and hitters in a particular league, and there is also plenty of evidence that it changes depending on the count (Walsh 2007, 2010). As well, each umpire calls the zone differently, and so one of the interesting athletic challenges for pitchers and hitters is to adjust to an umpire’s strike zone. The zone can also change during the game, for example, to improve its conduct (say, enlarging the strike zone to speed it up). Finally, it sometimes appears that umpires give any benefit of doubt on called strikes to the losing teams’ batters in the final inning. This adds certain elements of athletic challenge and drama. I suspect, therefore, that there are some types of officiating “errors” that, if applied in an even-handed manner, can actually enhance the quality of the competition and the athletic challenges it presents. Similar points may be true about umpires’ decisions not to call certain penalties late in games (discussed below). This is arguably not merely a matter of respecting tradition but of respecting the principles that underlie a competition, and it may mean that some calls should be respected even if technological review reveals an error is “obvious to all”. Although further discussion is undoubtedly required, there are some good competitive and athletic reasons to think it would be a mistake to eliminate such elements from games through indiscriminate use of technological aids.

Two other notable papers about calls are Mark Hamilton’s (2011) “The Moral Ambiguity of the Make-up Call” and Berman’s (2011a) “Let ’Em Play: A Study in the Jurisprudence of Sport”. Hamilton’s paper discusses the apparent phenomenon in some sports of umpires’ trying to correct mistaken calls by making proportionately compensating mistaken calls against the team that benefited from the initial error. Hamilton defines make-up calls as “the act of compensation for a questionable or bad officiating call by making a proportionately even call against the team that was aided by the first call” (Hamilton 2011: 212, 216–17). Hamilton argues that the best case for make-up calls treats them as a species of corrective justice, or roughly, the idea that people have obligations to repair harms they have caused (2011: 224). Make-up calls are thus instances of attempts to correct wrongful gains. In the case of competitive sport, the make-up call attempts “to keep the game in harmony” by restoring to a team or player what has been mistakenly taken away from them. However, Hamilton notes that there are powerful arguments against make-up calls. Trading injustices seems morally questionable (it is controversial that two wrongs can make a right); make-up calls also appear to use players or teams as mere means; the practice is beset with uncertainty regarding what proper compensation amounts to, since the compensating call may provide either insufficient or excess benefit given its timing in a contest; and makeups create questions about the honesty and impartiality of umpires (2011: 216–17). We might add to this list that the practice it encourages of “working the umpires” (acknowledged by Hamilton) cannot be limited to laying the ground for make-up calls only. Hamilton concludes that make-up calls are “morally offensive ... [and] are self-evidently immoral and compromise the integrity and impartiality of officials” (2011: 225).

The latter remark may be too strongly stated in light of the apparently conflicting moral considerations. But Hamilton’s strong moral reservations seem well-founded on balance, as is his conclusion that the ethos of make-up calls in certain sports like baseball and basketball (and I would add hockey) is properly regarded as immoral. He proposes responding to this by becoming more accepting of the need to accept reversals of erroneous calls and by better

training of umpires and more extensive use of technological aids (2011: 227). All this is consistent with much of what has already been covered here. Arguably, if Hamilton is correct that an ethos of make-up calls is immoral, it would also be appropriate to consider the proposals by Nlandu and Russell to call on participants, at least sometimes, to assist with making calls. The ethos of leaving these matters entirely to officials may be another tradition that deserves to be overturned on moral grounds and would further reduce the motive for make-up calls. Although having participants sometimes assist umpires may seem overly ambitious or unrealistic, it is worth recognizing that many sports have effective practices of having participants make calls (such as golf, ultimate, curling), and it used to be a more common practice in other sports (for example, tennis, including professional tennis).¹¹ The argument can be given straightforwardly on grounds of distributive and restorative justice: since athletic successes are scarce goods (for example, wins, strikeouts, hits, perfect games, championships), the team that benefits from an erroneous call is obtaining an undeserved scarce good. If the distributive justice argument is relevant, being the recipient of an umpiring error may be like finding a banking error in your favour (the apparent good fortune of a lucky windfall of a scarce good!) and having an obligation to disclose that error (Russell 2013).

Another important discussion of umpire discretion about calls is Berman's "Let 'Em Play: A Study in the Jurisprudence of Sport" (2011a). Berman attempts to justify the apparent practice of "temporal variance," or enforcing certain fouls (and sometimes other rules) less strictly toward the end of contests. Called fouls negatively affect opportunities and, according to Berman, can have more consequential effects later in a game as opposed to earlier in games because opportunities are running out. As a result, sometimes fouls called later in a game can result effectively in "over-compensation" for a rule violation. Berman has an extended defence of this view that includes careful discussions of probability and a complex conceptual apparatus, but the idea can be illustrated simply with an example. Awarding two free throws in the last second of a tied basketball game can amount to over-compensation, in particular, if the foul is given for an infraction that is tangential to determining the outcome of a contest (say, some minor body contact in basketball in the last seconds of a tied game).

The persuasiveness of Berman's position relies crucially (as he recognizes) on recognizing a role for principles in interpreting the rules in sport, in this case that athletic outcomes should be measured by relative display of the athletic skills a sport is designed to test (2011a: 1349). The role of principles in sport and in adjudication is an issue that will be taken up in the next section. I have two further observations to offer here.

Berman's arguments for temporal variance might be extended to justify other changes to umpiring practices, including proposals that may be in tension with his defence of temporal variance. Berman's focus is on fouls late in games that cause no or very little harm to an opponent's chances for competitive success. One might think penalizing such fouls is always over-compensatory and ask why they should be called at all. The idea that such penalties deter more serious fouling seems open to question, since the line could in theory be drawn consistently at another place where the penalties are appropriate. Berman says stricter enforcement early in games can be "easily defended" for its deterrent value (2011a: 1341). Maybe this is true, but the evidence deserves to be carefully examined (and it may be different for different sports). Moreover, a great deal of harmless fouling seems ignored generally in certain sports, including the sports Berman discusses. A more revisionist approach may be supported by standard legal practices of having the punishment fit the importance of the wrong or the harm caused, attempts to avoid falling afoul of the *de minimis non curat lex* doctrine in law (roughly, the law does not deal with trifles), and a simple commitment to the consistent application of the law.

Perhaps an even more pressing related question is whether Berman's reasoning supports enforcing certain rule violations *more strictly* late in games. For example, maybe referees in hockey or basketball, for example, should call certain obstruction-like fouls more closely later in games *to ensure* that sport-specific skills determine the outcome of games as time is running out. Purely inconsequential violations need not be called perhaps, but clear rule violations that are at all borderline as to whether they may influence outcomes should be assiduously called to encourage players to conduct themselves in ways that will do most to ensure that games are determined by superior game-specific athletic skills, particularly as opportunities to exercise those skills are running out at the end of a game.

The evidence that Berman collects for temporal variance could also be interpreted as being inconsistent with ensuring that games are determined by sport-specific skills (2011a: 1334–54). An explanation for temporal variance is that umpires prefer taking a more lenient approach to enforcement at the close of a game because they do not want to be seen to have too great an influence on the outcome of a game. Perhaps participants (and fans) also prefer that umpires adopt this practice because they would prefer to have available at the end of games an “anything goes” option for trying to win in order to preserve the drama of the contest. If such preferences are what is supporting temporal variance to any significant degree, we should be sceptical that umpires' willingness to “let 'em play” late in athletic contests means they are more likely to be determined by sport-specific skills. In fact, the contrary may be true, and if we want outcomes to reflect accurately players' relative display of skills, umpires should apply many rules more stringently than they currently do late in games. Or perhaps they should apply some rules more stringently and others more leniently at the end of games or perhaps throughout them. This is not a rejection of Berman's approach (it is arguably an extension of it), and I do not mean to defend the forgoing arguments. It suggests, however, that the possible implications of Berman's views merit further discussion. Arguably, temporal variance may sometimes reflect a conflict of values between sport as display and measurement of athletic skill and sport as dramatic contest. A consideration of this conflict may encourage more critical stances toward certain umpiring conventions. I suspect that further discussion would help to illuminate a theory of adjudication in sport and also deepen our understanding of specific sports and sport generally.

The discussion so far has overlooked the role of judging in aesthetic sports. Graham McFee initially discussed this topic in *Sport, Rules and Values* (2004: ch. 5) and has recently updated his position (McFee 2013). He has clarified the role of judging in aesthetic sports in part by contrasting it with what umpires do in refereed or umpired contests. He uses David Best's distinction between “aesthetic and purposive sports” (Best 1978) to mark the difference, respectively, between sports that are judged and sports that are umpired or refereed (for example, diving and figure skating are judged sports, whereas soccer and baseball are umpired or refereed sports). McFee notes that judged sports raise different questions about fairness of officiating, particularly since judging is driven by aesthetic value and may appear more subjective and less factual (a position that he challenges). He also notes that judging in aesthetic sports resembles refereeing more than may appear at first glance. These contributions represent foundational additions to the literature and introduce another area of scholarship in adjudication in sport.

Applying the rules

In his 1999 paper, “Are Rules All an Umpire Has To Work With?”, Russell challenges the conventional view that umpires' sole source for making decisions are the rules of a game. He argues that this “ideology of games” reflects the vices of “legal formalism” that were noted by

philosopher of law H. L. A. Hart (1961), in particular by overlooking the ineluctable indeterminacy of rules and the practical and moral necessity for the use of judicial discretion where rules fail to provide sufficient guidance by themselves or pose serious problems of injustice. Following Ronald Dworkin's (1978, 1986) theory of law and adjudication, Russell argues that certain principles are embedded in legal systems, including in sport. These principles are as much parts of the law as the rules, and so what is the law of a sport is a reflection of both principles and rules. Principles, in particular, can direct umpire decision making when the rules are significantly indeterminate or when their force indicates that the rules require amendment in some way. Thus, once we recognize the role and force of principles in legal systems, we must recognize that judicial officials have obligations to use those principles and that those principles can direct judicial discretion in determining what the law is. This will not lead to arbitrary decisions, since integrity is the supreme virtue of law and this requires that the law be interpreted in a principled and coherent way, looking at past practice and attempting to show it in its best light. Russell applies this idea to sport, using baseball umpires as an example: "We might try to understand and interpret the rules of a game, say, baseball, to generate a coherent and principled account of the point and purposes that underlie the game, attempting to show the game in its best light" (Russell 1999: 35).

This is quite abstract, of course. What might these principles be? Russell suggests the following key principle, which he describes as "the first principle of games adjudication": "Rules should be interpreted in such a manner that the excellences embodied in achieving the lusory goal of the game are not undermined but are maintained and fostered" (1999: 35).

Russell draws three other principles of adjudication from this principle (principles of competitive balance, fair play and sportsmanship, and good conduct of games). This is not intended to be an exhaustive list of principles of adjudication, and in fact Russell proposes some other principles as well.¹² He then shows how these principles are reflected in various disputed decisions by umpires and other rules officials from the history of baseball.

This analysis has had significant influence on sport philosophy generally. Robert Simon (2000) coined the term "broad internalism" to describe an account of sport that recognizes that normative principles are part of sport in addition to the rules, using this Dworkinian interpretivist analysis and the principles of adjudication as a principal support for this position. The position was offered as a competitor to formalist and conventionalist theories of sport and is now probably the leading account of sport in the literature. This discussion is not reviewed in this chapter, except to note that a Dworkinian approach to law in sport arguably must be informed by a general theory of sport, just as a theory of law must be informed by a theory of political morality (Russell 1999, 2011; see also McFee 2004: 110–11). Simon's article, in effect, takes up this suggestion. The discussion has since advanced further by noting the role of various moral principles that are internal to sport, all of which will of course be relevant to exercise of judicial authority and discretion in sport (Simon 2002; Russell 2004, 2007, 2011; Torres 2012).

Since a Dworkinian analysis of adjudication and law was developed in response to a legal positivist theory of law, it was to be expected that sport philosophers would present a legal positivist response to an interpretivist account of law and adjudication in sport. Although legal positivism is a theory of law and not a theory of adjudication *per se* (legal positivism regards law as constituted by certain social facts that do not include moral values as a necessary element), Patrick Lenta and Simon Beck (2006) later argued that virtues of efficiency, predictability, and respect for separation of powers are features of legal positivist approaches to law that can inform judicial practice. They argue this is preferable to a Dworkinian approach to adjudication in sport, which is too activist because it gives umpires and referees too much authority to meddle

with the rules of games. They say Dworkinian referees threaten the advantages of predictability and efficiency involved in black letter (that is, literal and rigid) rule-following and represent a threat to the separation of powers between legislators and judges (or gamewrights and umpires).

Lenta and Beck's concerns about umpires' exercising too much discretion are understandable, but the importance of respecting predictability and efficiency were outlined in Russell's paper (Russell 1999: 34, 36, 40). Moreover, since Lenta and Beck agree that these virtues are not always overriding, it is not clear what the disagreement amounts to, particularly since they also recognize that positivists and Dworkinians can agree on how to deal with a well-known paradox in applying the rules of cricket that provides the case study that animates their discussion. Throughout his writings, Dworkin (1978: 37; 1986, 401) has recognized that respect for separation of powers is a principle that constrains adjudication. Russell's remarks reflected this as well (Russell 1999: 44), although he has acknowledged that they deserved to be developed more carefully (2011, 266). Respect for a doctrine of precedent also plays a similar constraining role in Dworkinian adjudication and can be exported to sport by recognizing precedents set by rulings of interpretation of rules by higher level officials and governing bodies. Even more importantly, however, Lenta and Beck's discussion overlooks the evidence for the normative principled foundations of sport and how they undermine the application of a positivist theory of law to sport and sport adjudication, since positivists reject the idea that legal systems have any inherent specific normative content. As Russell notes, sport, perhaps unlike municipal legal systems, appears to have an internally "fixed", principled constitution that includes various moral and other normative elements (Russell 1999: 39). Prospects for a legal positivist-inspired approach to law and adjudication in sport thus appear quite uncertain.

A similar but more sympathetic criticism of Russell's theory of adjudication in sport is presented by Berman in "On Interpretivism and Formalism in Sports Officiating: From General to Particular Jurisprudence" (2011b). Berman's qualified defence of formalism represents the most carefully argued response to Russell's Dworkinian interpretivist approach to umpiring adjudication. Berman's position is distinct from Beck and Lenta's in that he acknowledges a role for principles as internal to sport. He rightly observes, however, that while the law in sport includes principles, what the law is one thing and how far it should be enforced by judges is another. Thus, he suggests that a "formalist" theory of adjudication is reconcilable with interpretivism, in part because of the role certain principles internal to particular sports may play. For example, he suggests that some "honour sports" like golf may value rigid, black letter rule following as a sort of test of "self-abnegation" whereas other sports may value a "rules-lawyering" type of gamesmanship as an internal sport-related excellence (Berman 2011b: 187–9). (Rules lawyers "interpret rules in an overly literal sense or in such a way as to significantly reduce the thematic or logical aspects of a game").¹³ A more pragmatic reason for defending formalism in sport is that umpires may do a better job of enforcement of rules if they take a formalist approach (2011b: 191). Given that what the law is in sport is a function of both rules and principles, formalism is thus, strictly speaking, a "second best strategy for epistemically limited officiators", although it is the best practically available strategy. It is not clear how far Berman means to defend such formalism. He says that "some degree of formalism in sports officiating may often be supported" (2011b: 178) but also that "formalism as a theory of adjudication is reconcilable with interpretivism as a theory of legal content" (2011b: 192). The first claim is a modest one that interpretivists should accept: sometimes black letter rule following is appropriate for all sorts of reasons. This discussion therefore focuses on the idea that formalism may be practically reconcilable with interpretivism as a matter of general practice.

Berman's arguments in defence of formalism are open to challenge on a number of fronts. About rules lawyering, it is difficult to think of an actual instance where it can plausibly be argued that this is a part of "the law or normative content of a sport" (2011b: 192). Berman thinks baseball represents an example, but the evidence supports the contrary. If rules lawyering were an internal part of baseball that justified a formalist approach to adjudication (because baseball recognizes "wily self-assertion" through exploitation of rules as a legitimate type of sporting excellence [Berman 2011b: 192]), then we should be surprised that decisions were overturned like the one in the famous "pine tar incident" (Russell 1999: 30–1) where umpires disallowed a potentially game-winning home run because some pine tar was covering the hitter's bat in a prohibited but non-consequential way, even though the rules could be stitched together and read this way. Moreover, this is consistently what happens when players attempt to exploit loopholes and other features of rules to their advantage, as Russell's baseball examples all show. The protests were all either addressed on the field or are overturned later in ways that follow from the principles of adjudication and Berman's similar "athletic principle" (Berman 2011b: 177). This distinguishes baseball from the examples that Berman gives of non-sporting games that explicitly permit rules lawyering. This strongly suggests that rules lawyering is not reflected in the internal principles or norms of baseball and that it should be treated with the utmost suspicion by adjudicators. Rather, the evidence supports the view that rules lawyering is a shrewd and sometimes desperate strategy to deny or nullify other players' deserved athletic successes by exploiting baseball's extensive and complex rules. It should thus be aligned with a morally-flawed "win at any cost" approach to competition (Russell 2013, 2014).

Berman's own example of umpire Dick Nallin's decision in 1932 to allow Yankee Tony Lazzeri to bat out of turn, which was overturned after the game was protested, is arguably not a matter of rules lawyering, since there was nothing merely formal or black letter about requiring this rule to be observed and overturning the umpire's decision. Tigers' manager Bucky Harris allowed the Yankees to make this mistake and then pointed it out to the umpire. This sort of "gamesmanship" (if it is that) is not obviously rules lawyering but merely an insistence that an opponent observe the rules in a way that is consistent with the principles of the game. Umpire Nallin should have known better. Knowing the batting order in advance is a key to defensive strategy in baseball (for example, often determining how the previous batter will be pitched to). Setting a precedent to the contrary would undermine this and raise questions about the need for a batting order. So upholding the rule had its basis in respect for something like the first principle of adjudication or what Berman calls "the athletic principle".

Berman is, however, correct that rules lawyering might be parts of some games. But there is another more general objection that any such introduction would face in sport. It is that the precedents it would set would often tend either immediately or over time to undermine, or render unrecognizable, a sport as a test of the athletic excellences it was designed to measure. As Russell (1999: 37) suggests, it is best regarded as a sort of "anti-game" strategy. Nevertheless, Berman (2011b: 187) is correct that some non-sporting games incorporate it and perhaps some sports could though this remains to be seen.

Berman's golf example is similarly open to question. One response is that formalism and a formalist approach to officiating actually interferes with the game of golf. There *should be* more exercise of discretion by officials in some situations and there should be a robust debate about certain rules in golf. Even with changes to rules to ensure that the game is properly a test of athletic excellence, there will still be plenty of room for golf to remain a test of honour and self-abnegation for the simple reason that the rules are complex, the game is expected to be self-officiated, and frequently only the players are in a position to know if a rule has been

violated. Another response is that despite the apparently counterintuitive implications of some of the rules of golf in some circumstances, they nevertheless have a basis in ensuring that the game is really a challenge of the athletic skills that the game sets out to test. In a way, the expectations of officiating in golf are a challenge to the “let ’em play” approach that Berman defends elsewhere (2011a), but are grounded in the same principle that outcomes of games should be determined by who better displays the skills they were designed to test. Golf strives to do its utmost to ensure that outcomes in competition really are the product of the exercise of sport-related excellences by interpreting and applying the rules very strictly. It does not matter that a penalty late in a competition is more consequential to a player’s prospect for success. Nor does it matter that certain penalties are for events that have the appearance of being inconsequential. What matters is that the entire competition should be judged consistently within the rules throughout and that everything be done so that we can be as confident as we can be that the winner really deserves the victory based on the athletic skill he or she displays *and* that the relative differences in skill between competitors is accurately measured. Perhaps golf should relax some of its rules and adjudicators should play a role in this, but this is consistent with recognizing that the consistent and meticulous application of rules in golf is appropriate and a model that perhaps should be taken more seriously elsewhere. Moreover, since golf is self-officiated, allowing golfers to exercise discretion about when rule violations are consequential and when they are not would present too great a conflict of interest for the competitors, and so the solution is to demand strict enforcement of the rules. All this is consistent with and supported by an interpretivist approach to adjudication that is focused on fostering a context where the excellences related to the game are maintained and fostered, or as Berman (2011b: 177) puts it “the outcome reflects the competitors’ relative excellence”.

Finally, it is not clear that formalism is the best practically available approach to adjudication generally. For example, if formalism should be taken as the proper approach to umpiring, then it would appear that Berman’s (2011a) proposals in “Let ’Em Play” should be regarded with more scepticism than he acknowledges. Rather, it makes sense to acknowledge and discuss the principled basis for umpires to use discretion in applying rules, because they exercise that discretion *so very often* even where the rules are clear, as Berman shows in “Let ’Em Play,” and as Russell suggests in his examples,¹⁴ and as is evident in other umpired sports. Extensions of that discretion to resolve some further cases may make sense, and indeed are probably often occurring without comment. There are many good reasons for judicial restraint, but there will arise practical and moral necessities to exercise a limited (or a Dworkinian “weak”) discretion. Where the boundaries are between judicial discretion and judicial restraint should be a lively topic of discussion in sport as it is in other contexts.

In “Fairness, Epistemology, and Rules: A Prolegomenon to a Philosophy of Officiating” (McFee 2011; see also McFee 2004: ch.6), Graham McFee advances a somewhat different Dworkinian framework for adjudication than the one defended by Russell. McFee is sceptical that it is possible to identify any “exceptionless” principles of adjudication that apply across sports. His view is “contextualist” in the sense that the principles in sport cannot be separated from the rules of a particular sport, which is to say that each sport will have something like its own principles that provide normative guidance along with its rules (McFee 2011: 234–5, 2004, 115–16). In defending this contextualist approach, McFee does not claim that the problem is with the abstractness of the principles of adjudication, “but rather that they are abstracted from actual decisions; and thus do not in themselves facilitate our coming to officiating decisions” (2011: 238). His idea is that the principles of adjudication are really just “derived after the fact ... where, having *made* the decision the umpires use these terms to explain or justify it” (2011: 239, original emphasis).

This is an interesting objection. McFee does not mean to press without qualification a common contextualist criticism that general principles are too abstract to be normatively useful (but see McFee 2004: 141–3). Also, I am sure that he is correct that umpires and participants can often look at a case and decide what is to be done without thinking carefully about what the principles might be that justify a decision. They may then look at what they have decided and explain their decision using principles like the first principle of game adjudication. But none of this shows that the role of these principles is limited to a sort of mere ex post facto rationalization of a decision. Umpires, and judges generally, want to know what led them to a conclusion. The principles that they identify are used to explain the normative basis for their reasoning, and thus support a role for the principles as internal to that reasoning, not abstracted from it. Dworkin's theory of law sought to explain this apparently key aspect of judicial reasoning, and to the extent that McFee rejects this position, it is unclear that he is really defending a Dworkinian account of judicial decision making in sport. In addition, the fact that umpires may not have explicitly recognized the role of such principles while they were deliberating (perhaps they talked about the importance of preserving the "spirit" or the "integrity" of the game, and so on, or perhaps they just *knew* what was the right thing to do) does not demonstrate that these principles were not at work. Moreover, once those principles are articulated, they may be used as guides in other relevantly similar contexts, although they may sometimes only amount to rough guides and new circumstances may shed further light on their meaning. The principles can also clarify the meaning and uses of frustratingly abstract terms like the "spirit of the rules" or "integrity of the game" that are often used to justify the exercise of discretion with respect to rules. In this way, what is going on reflects a clarification and deeper understanding of sport and specific sports and of judicial reasoning in sport. It is worth noting that, until very recently, there had been no serious discussions about umpires' exercise of discretion in sport, and there had been general scepticism that they have any such authority. Thus, we should see the principles of games adjudication as first attempts at contributing to a jurisprudence of officiating and look forward to further articulation of these and other principles.

A corollary to this is that McFee's account of umpires' decision making about rules seems obscure about how principles actually figure officials' reasoning. Again, the Dworkinian influence seems uncertain. Since rules and principles cannot be separated (cf. Dworkin 1978: 26) and umpires are to think contextually, the entire process seems intuitionist at its core. A problem with this approach is that it is unclear how disagreements about what should be done could be resolved without articulating what the deeper principles are that inform aspects of the disputants' reasoning and then examining the evidence to determine what weight, if any, should be assigned those principles in a particular context. This is, of course, a familiar problem with contextualist reasoning: its methodology may be too uncritical in its respect for authority or tradition. However, these are just problems, not refutations. The contextual nature of judgments involving principles deserves to be carefully considered, and the differences between the accounts described here "may be only one of nuance," as McFee (2011: 239) acknowledges. Nevertheless, we have not seen any compelling argument for rejecting a more traditional account of judicial reasoning.

Conclusion

Inquiry into the relationship between sport, law, and legal theory has emerged in recent years as a flourishing new area within sport philosophy. It has contributed importantly to the understanding not only of adjudication in sport but to the understanding of sport in general. Moreover, none of this work is of merely academic interest. The review presented here clarifies

the grounds for the exercise of discretion by umpires and referees with respect to making calls and interpreting rules. These arguments support recent trends in officiating while also presenting noteworthy caveats to those trends and challenges to more traditional practices and conceptions of umpiring. The nature of judging in aesthetic sports has also been examined and clarified (a topic that tends to be further removed from the public spotlight and deserves careful consideration). Such contributions should be considered and taken into account by practicing umpires, referees, performance sport judges, and sport officials generally. Despite some cautions and disagreements, arguments considered here for review of judgment calls and use of technological aids have been illuminating and appear compelling and consistent with the best worked out conceptions of sport and of particular sports. As well, it is clear that umpires must acknowledge that the normative content of sport and what they do sometimes in upholding “the spirit” of athletic contests is informed by more than just the rules. Sport philosophers have developed specific, carefully supported proposals for what that extra-rule normative content might be. All this fits with and helps to inform trends in sport that have seen the role of umpiring change substantially in recent years. More change is likely on the way but will need to be informed by carefully considered evidence and reasoning. Officiating in sport is complex and fascinating, much more so than is commonly thought. A remarkable amount of progress has been achieved in making sense of this within a period of not much more than 15 years. It will be interesting to see what the next 15 years brings.

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Notes

- 1 See Russell (2011) for an attempt to explain some of the limitations of the sport–law comparison.
- 2 See Carlsen and Gleaves (2011) for a critical review of the literature on rules in sport philosophy. Sport philosophers’ extensive work on the nature of rules in sport draws mainly on philosophy of language and has not yet been influenced by legal theory *per se*. See also McFee (2004).
- 3 Umpires’ calls also have what Austin calls “exercitive force”, which reflects the exercise of powers in light of the position an official holds (for example, the power to make a person out and thus to send someone off the field who has made an out). Austin (1962: 153) also recognizes that these performative elements can be bundled with descriptive statements. See Russell (1997: 23) for discussion.
- 4 Hawk-Eye cricket officiating system, Hawk-Eye Innovations Ltd. See the company website at www.hawkeyeinnovations.co.uk/page/sports-officiating/cricket (accessed October 14, 2014).
- 5 Collins’ position is not meant to take a position on the use of video review in aesthetic judging; for example, in diving or gymnastics. The general issue of aesthetic judging in sport is addressed later in this chapter.
- 6 I am indebted to Harry Collins for clarifying that he meant “coherence with tradition” to include preserving the nature of the game and that use technological aids may unintentionally undermine this (personal communication, May 25, 2013). Technology may also undermine participant safety; for example, when umpires allow defensive players in baseball to miss bases on clear force outs to avoid injury (that is, so-called “vicinity plays”).
- 7 See Royce (2012) for a more complete discussion of some of the elements of Collins’ paper that appear in need of clarification. See also McFee (2004: 101–2) for other pertinent remarks about relying on technological devices.
- 8 In this case, under a two-umpire system with runners at second and third with less than two out, the batter lays a bunt down the first base line, the runner at third scores while the runner at second cuts across the infield in front of third base behind the field umpire, who will be watching the play to first and while the plate umpire is watching to see that the bunt remains fair. Two runs score on the

sacrifice because neither umpire can detect that third base was missed. Personal note: one of my philosophy of law students won a California state championship on this play. He reported that it was a controversial result – a near riot ensued.

- 9 See Berman's "Let 'Em Play" (2011a) for further development of this point (and discussed later in this chapter).
- 10 See Wikipedia "Perfect Game" and "Armando Galarraga".
- 11 Mike McNamee has reminded me that in the earlier times of "the gentleman athlete", matches were self-officiated by the captains of opposing teams. All these sorts of precedents suggest that we should be open to experimentation about sharing the burdens of officiating.
- 12 Later, Russell refers to the first principle of adjudication as "the internal principle" and contrasts it with another principle "the external principle" which recognizes the voluntary aspect of playing games. For Russell, these are the two most general principles that are internal to sport. See Hardman (2009) and Weimar (2012) for thoughtful discussions that express plausible objections to Russell's formulation of the external principle.
- 13 Definition from the website "Board Game Geek," quoted in Berman (2011b: 187).
- 14 The strike zone in baseball is probably his best example, but he could have mentioned "cheating" on balks and "vicinity plays" as others.

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