Article

Legal Formalism, Institutional Norms, and the Morality of Basketball

Jonathan Yovel*

This article is dedicated to my father, Yirmiyahu Yovel, my first coach and the toughest and kindest basketball player I have ever played with.

* Professor of law, University of Haifa School of Law. Discussions with many friends and colleagues over legal formalism, norms, and the relations between law and sports have informed this work. I would like to particularly acknowledge comments by Aharon Barak, Neil Cohen, Edward Geffner, Manny Mautner, Joseph Raz, Amnon Reichman, Tony Sebok, Ido Shacham, Dan Simon, Larry Solan, and Steve Winter, as well as the late Dick Speidel, a dear friend and my "mentor of common sense." I gratefully acknowledge Columbia Law School, where this article was researched and written, for making me a member of its intellectual community during 2007.

INTRODUCTION

In May 2007, following an altercation during a playoff game between the Phoenix Suns and the San Antonio Spurs of the National Basketball Association, the NBA suspended two key Phoenix starters, Amare Stoudemire and Boris Diaw,[1] for having left "the immediate vicinity of their bench."[2] Phoenix ended up losing the series, and San Antonio rode the victory on to win the championship that year. The suspensions ("the Suns decision") were widely discussed—and mostly lamented—by various sports media, mainly because Stoudemire and Diaw's actions did not involve any actual belligerence, and were seen as momentary transgressions following a calculated provocation by a veteran Spurs player, Robert Horry.[3] Yet even when deplored on grounds of fairness, the decision was generally accepted as unavoidable and thus "correct."[4] There were exceptions—one commentator described the suspensions as an "utterly, profoundly, alarmingly, unreasonably ridiculous"[5]—but most

[1] The game was game 4 of the Western Conference's semifinals, best-of-seven series; consequently Stoudemire and Diaw served the suspensions during game 5, which the Suns lost. See Marc Stein, NBA suspends Stoudemire, Diaw for Leaving Bench (2007), available online at http://sports/espn.go.com/nba/playoffs2007/news/story?id=2871615 (last visited Nov. 25, 2008).

[2] Rule 12A Section VII(c) of the NBA Rules ("Rule 12A") states, "During an altercation, all players not participating in the game must remain in the immediate vicinity of their bench. Violators will be suspended, without pay, for a minimum of one game and fined up to $50,000. The suspensions will commence prior to the start of their next game." Official Rules of the National Basketball Association, 2007-2008, 43 (NBA Operations Department, 2007).

[3] With the Suns leading 100-97 and in possession with 18.2 seconds left and having practically secured the win, Spurs forward Robert Horry body-checked the Suns' MVP point guard Steve Nash out of bounds (in lay talk this means he shoved him hard enough to send Nash flying and crashing into the scorers' table), which incited Stoudemire and Diaw to get up and move toward the court, although they did not actually intervene in the ensuing melee. A video of the incident is available online at http://www.youtube.com/watch?v=-0qe7PGCQvI. For why Horry's foul was deemed a provocation designed to effect the *next* game rather than merely a competitive move in Game 4, see infra note 56. A fuller description of the event appears in several media, for example, Liz Robins, Nash Shows Some Fire, and Suns Show Some Life, New York Times, May 15, 2007; Stein, supra note 1.

[4] A sample of reactions by sports commentators yields the following: "They had to do it. The rule is clear-cut" (Jon Barry, ESPN); "It's miserable, and entirely against what's best for basketball fans. But it's perfectly in keeping with how that rule has always been interpreted in the past" (Henry Abbott, TrueHoop.com); "[T]he league office had no choice but to suspend Diaw and Stoudemire. However, it may be the most unbalanced ruling in history . . . the Spurs lose their eighth man while the Suns lose a first-team All-NBA player and another starter" (Tim Legler, ESPN). See Experts: Suspensions justified? Change the rule? Who wins series now? (2007), http://sports.espn.go.com/nba/playoffs2007/news/story?id-2872149 [hereinafter Suspensions justified?] (last visited Nov. 25, 2008).

[5] Chris Sheridan's blog, Ruling Is Ridiculous (2007), available online at http://insider.espn.go.com/espn/blog/index?entryID=2871726&name=sheridan_chris&action=login&appRedirect=http%3a%2f%2finsider.espn.go.com%2fespn%2fblog%2findex%3fentryID%3d2871726%26name%3dsheridan_chris (last visited Nov. 25, 2008). Other comments described the suspension decision as "[h]eavy-handed and wrong-headed" (Ric Bucher, ESPN Magazine) or simply "[a] mess. They interpreted it in such a way to cause maximum damage to the Suns, even though the Spurs

commentators agreed, however reluctantly, that once an applicable disciplinary rule could be invoked, the outcome was inevitable.[6] It was a matter, the consensus ran, of a "blanket rule."[7] In the words of Stu Jackson, NBA vice president overseeing disciplinary affairs, "The rule is the rule." Its application was, he reportedly said, "not a matter of fairness but of correctness."[8]

This article critiques the notion that the suspension decision—or any legal or quasi-legal decision, for that matter—is ever unavoidable in the "correctness" sense invoked by the Suns decision. It analyzes previous cases (Knicks 1997, Kings-Lakers 2003) and shows that the NBA itself has deviated from the "correctness" strategy, rendering formalist application a matter of a judgment call rather than normative imposition. The article critiques the Suns decision and others similar to it as failing jurisprudentially, to acknowledge the institutional norms and morality inherent in all forms of coordinated competition, such as basketball.

On the theoretical level, the article traces the formalistic presuppositions of the "unavoidability thesis" and contrasts it with other jurisprudential approaches that take seriously the notions of context and institutional norms: Dworkin's "law as integrity" and the constructive model of purposive interpretation. Under both models, it is argued, correct application should have taken into account broader principles governing the morality of sports competition, even as expressed in the NBA disciplinary rules themselves. Institutional norms, that govern practices such as sports enterprises, create a normative context that is always germane to rule application. This Article will identify such institutional norms, focusing on sportsmanship, and examine how they become operative in specific instances of application. Readers who feel comfortable with the jurisprudential background and are more interested in the direct argument itself will find it in sections IV-X, below.

The notion of institutional norms and the role of institutional context in normative application are especially germane in sports. By itself, the language of rules typically does not communicate enough information for its own application. Texts, such as rules (and most legal language is written, as are rules of institutionalized sports), isolate a chunk of action from the rest of social reality (a.k.a. "decontextualization"). Some of the reasons for the rule get entrenched in

started it" (John Hollinger, ESPN.com). See Suspensions justified? (2007), supra note 4.

[6] None more so, perhaps, than Bill Simmons, a.k.a "The Sports Guy," who wrote,

> Here's the problem with that stupid, idiotic, foolish, moronic, brainless, unintelligent, foolhardy, imprudent, thoughtless, obtuse and thickheaded rule: It's currently designed as a black-or-white law that leaves no room for interpretation. . . . Don't blame the NBA higher-ups for the way they interpreted that . . . rule. Blame them for having the rule itself.

Bill Simmons, Common Sense vs. the NBA Rulebook (2007), available at http://sports.espn.go.com/espn/page2/story?page=simmons/070516&sportC (last visited Nov. 25, 2008).

[7] A notable exception was columnist Eric Neel, according to whom the Suns decision was a "hyper-constructionist interpretation of the rule." See Eric Neel, Hey Shaq, listen up, would you please? (2008), http://sports.espn.go.com/espn/page2/story?page=neel/080208 (last visited Nov. 25, 2008).

[8] As reported by Stein, supra note 1.

it, and the rule then becomes, to an extent, an independent entity in relation to those reasons.[9] The general reiterability of texts—the ability to read and cast them in new contexts—allows rules to govern new instances that the rule itself is expected to identify. Rules then get recontextualized when called upon to govern specific cases that are removed from the immediate context of their inception.[10] Yet rules do not exist in a normative vacuum, and to the new, factual contexts they carry the normative context in which they function. In the case of rules that operate within (or in constitution of) institutions, that normative context is best understood in terms of institutional norms.

The flaw in the NBA's formalistic approach, which recognizes none of this, is owed to the mistaken view according to which rule application can be automatic and wholly acontextual. The contrary argument of this study is that rules—due to their belonging to systems, as well as their dependence on the language that articulates them—always require and invoke contextual construction of their operative terms (e.g., in the context of the NBA's Rule 12A that governed the Suns decision, the term "during an altercation" must communicate a causal relation between the altercation and the player's subsequent actions, rather than merely a temporal correlation; but this is a contextual requirement that does not emerge from the language of the rule itself. This point is further elaborated in section VI below).

This theoretical critique does not necessarily mean that the Suns decision was wrong on the merit, yet it does mean that the decision-making process in such and similar cases, as far as it was described by the NBA itself, is flawed. Examining other instances from the NBA's past show that the very same rule was not always interpreted formalistically, making the formalist approach a matter of policy choice rather than a matter of inevitable "correctness." This is a work in critical rationalization: it offers an interpretation of the rule and the process of rule application that rationalizes it, in view of alternative strategies of construction and application, mainly formalism. It challenges the apparently prevailing formalistic view and claim that it is almost never the case that a specific decision must follow automatically from an application of a rule to a fact pattern. Indeed, even mundane applications of the rule—not just in "highly unusual circumstances," as the NBA characterized a scuffle during a 2002 Lakers-Kings game that did not result in suspensions[11]—are contextual, although

[9] Following Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (Clarendon Press 1991).

[10] Elizabeth Mertz, The Language of Law School: Learning to "Think like a Lawyer" (Oxford University Press 2007); Elizabeth Mertz, Recontextualization as Socialization: Text and Pragmatics in the Law School Classroom, in Natural Histories of Discourse 229, 230-31 (M. Silverstein and G. Urban eds., 1996).

[11] See Marc Stein, Christie Suspended Two Games for Fight (2002), http://espn.go.com/nba/news/2002/1028/1452258.html (last visited Nov. 25, 2008). See also infra text accompanying note 52 for discussion.

the contextual considerations may remain hidden and underarticulated; it would then be up to commentary to draw them out. "Blanket rules" simply do not operate as such, because the language of rules typically does not and indeed cannot convey enough information for automatic, acontextual application.

The next two sections present a theoretical basis for this argument. This Article then moves to the specific context of spectator sports, as a prime case of institutional normativity.[12]

I. FORMALISM OLD AND NEW

Curiously, two very different jurisprudential schools claim that legal questions must be allowed only one possible correct answer; moreover, both see this as a major criterion for law's legitimacy. One is legal formalism, according to which legal application is mainly a matter of logical inference and entailment. Under formalism, unless discretion or other "freedom levels" of decision making are stipulated in the rule, legal deductions are, ideally, as unique and sustainable as the logical structures that underlie legal doctrine.[13] At the basis of formalism stands what can be termed the "formalist fiction": that the process that produced the legal norms has exhausted normative and policy considerations, and thus law can be seen as a more or less "closed" normative system, and norms—typically, rules—are applicable to concrete cases without further recourse to external normative deliberation (such as principle, policy, and ethics).[14] For example, in

[12] One topic that I find immaterial for this analysis is the tricky definition of institutions—such as professional sports or games in general—as "systems of constitutive rules," famously put forward by the philosopher John Searle, Speech Acts 51 (1969). If this were the case, there could be little talk of institutional norms beyond those rules. However, even prior to pointing to sociological and political critiques of this definition, analytical critiques of the constitutive-regulative distinction itself (in this and other contexts) have severely discounted it. See Joseph Raz, Practical Reason and Norms 108-113 (1975); see also Schauer, supra note 9.

[13] This article is certainly not the place for a comprehensive account of legal formalism beyond the most relevant points. Works that have informed the present study include Morton Horowitz, The Transformations of American Law: The Crisis of Legal Orthodoxy, 1850-1960 (Oxford University Press 1992); Schauer, supra note 9; Hanoch Dagan, The Realist Conception of Law, 57 U.T.L.J. 607 (2007) (which, inter alia, offers a critique of the collapse of some legal realist insights into new dogmatic formalism in the law and economics school); Anthony T. Kronman, Jurisprudential Responses to Legal Realism, 73 Cornell L. Rev. 335 (1988); Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The Numerous Clausus Principle, 110 Yale L.J. 1 (2000); Richard H. Pildes, Forms of Formalism, 66 Chi. L. Rev. 607 (1999); Alan Schwartz & Robert E. Scott, Contract Theory and the Limits of Contract Law, 113 Yale L.J. 541 (2003); Anthony J. Sebok, Legal Positivism in American Jurisprudence (1998) (especially pp. 83-104); and Henry E. Smith, The Language of Property: Form, Context, and Audience, 55 Stan. L. Rev. 1105, 1151-53 (2003) (offering a spectrum of formalism in interpretation and in communication in general). A useful general work offering a functionalist approach to formalism in terms of relative independence from context is Francis Heylighen, Advantages and Limitations of Formal Expression, 4 Foundations of Science 25 (1999), although, like much of traditional philosophy, this work's main concern is epistemological rather than performative—i.e., it deals with formalism as an architecture for crystallizing and expressing truth rather than for exploring conditions for valid application. For further sources see infra notes 14-18.

[14] A "classical" formulation frequently referred to as a model of formalist construction is Christopher

private law, such tight systems as the law of negotiable instruments (governed in the United States by the Uniform Commercial Code Article 3 and a set of federal statutes and regulations) is frequently described as "formalistic" because decisions rest on a relatively closed set of logically-organized rules,[15] while contract law tends to be more "relational" than formalistic as it deals with much wider sets of relations and cases.[16]

As a legal approach, classical formalism was largely discredited, in twentieth century American jurisprudence, by legal realist critiques and insights.[17] In the

Columbus Langdell, A Summary of the Law of Contracts (1880). See Thomas Grey, Langdell's Orthodoxy, 45 U. Pitt. L. Rev. 1, 2 (1983). My suspicion, that American pragmatism could not have wholly yielded to Langdelian formalism even during that era, is to an extent vindicated by Daniel R. Ernst, The Critical Tradition in the Writings of American Legal History, 102 Yale L. J. 1019, 1037-44 (1998). Following Grey, Pildes identifies three modes of American legal formalism that to significant degrees do not overlap: formalism as aconsequential morality in law, as apurposive rule-following, and as an efficiency-enhancing regulatory architecture. (Another typical characteristic of formalism is comprehensiveness.) In this work I show how, in different instances and to various degrees, all three modes are expressed in the NBA's disciplinary rulings. "The rule is the rule" conforms mainly to the second, but also hints that standards of behavior are entrenched in rules, to use Fredric Schauer's terminology; in other instances, the rationale was that formalism is the best (in the sense of most efficient) strategy to regulate behavior in real-time occurrences. Schauer make the point that rules, which gradually entrench their reasons and purposes in language, always have presumptive power, to be potentially overridden in specific cases.

[15] This is of course a general typification lacking in nuance. For critical takes on the formalist structure of Article 3, see Jonathan Yovel, Quasi-Checks: An Apology for a Mutation of Negotiable Instruments, DePaul Journal of Business and Commercial Law 579 (2007); Kurt Eggert, Held Up in Due Course: Codification and the Victory of Form over Intent in Negotiable Instruments Law, 35 Creighton L. Rev. 363 (2002); Grant Gilmore, Formalism and the Law of Negotiable Instruments, 13 Creighton L. Rev. 441 (1979).

[16] I owe this insight, like many others—including the intimate relation between law and sports—to Neil Cohen. Under the relational approach, contracts are not distinct legal instruments that exist independently of relations between the parties, but the aggregate of these relations, only some of which are articulated. While relational contract theorists supplied insights into understanding long-term and complex contractual relations, they also drew away from the view of contract as such being merely a mechanism for the rational allocation of risks. Reliance and future relations are important parameters of relational contracts. See Ian Macneil, The New Social Contract: An Inquiry into Modern Contractual Relations (Yale University Press 1980); Stewart Macaulay, Elegant Models, Empirical Pictures, and the Complexities of Contract, 11 Law & Society Rev. 507-28 (1977); Stewart Macaulay, Contracts, New Legal Realism, and Improving the Navigation of The Yellow Submarine, 80 Tul. L. Rev. 1161 (2006); Ian Macneil, Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich" Classificatory Apparatus 75 Nw. L. Rev. 1018 (1981).

[17] See Duncan Kennedy, Legal Formalism *in* International Encyclopedia of the Social and Behavioral Sciences, vol. 13, 8634 (Amsterdam: Elsvier, 2001). American jurisprudence has been almost obsessed with the question of formalism, especially in view of legal realist critiques. In its most offensive—for realists—manifestation, formalistic jurisprudence is a "science for the sake of science" absorbed exclusively with "the niceties of [law's] internal structure and the beauty of its logical processes," Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605, 605 (1908). But that kind of "old formalism" seems to have all but disappeared, as ("new") formalism today bases its legitimacy on functional grounds, mainly those of economic efficiency. A more lingering critique is that of Felix

last couple of decades, however, the label "new formalism" has emerged to denote a dominant and growing school of thought associated with the economic approach to law.[18] New formalism shares some traits with plain old formalism—mainly, a preference for autonomous modes of construction and relatively strict application of rules and restrictions. Yet the new differs from the old on some important levels, predominantly on the matter of justification. While old formalism regarded itself as a correct, even scientifically correct, descriptive theory of law, and jurisprudence as a "science for the sake of science" (as opposed to a substantive discourse involving various and competing normative types and concerns), new formalism justifies its approach on functionalist grounds. For instance, a formalist approach to the construction of contracts may justify a narrow, acontextual parol evidence rule as tending to create ex-ante incentives for efficient negotiating processes, in terms of utility and costs.[19] The process of shaping the rule exhausts the normative concerns (these will no longer direct the application directly, only through the interests entrenched in the rules; otherwise this would simply be a functionalist approach biased towards economic efficiency). New formalism resembles the older brand in another, ironic way: on the one hand, it is as committed—perhaps more than its predecessor—to a specific metaphysics and ideology of individualism. On the other hand, it attempts to shy away as much as possible from engaging in substantive ethical discourse, suspecting all ethical talk of relativism or at least lacking scientific rigor. The fact, that a preference for economic efficiency is itself based on a substantive moral theory—utilitarianism—is acknowledged, of course, but mostly in the background of discourse where it is taken as a universal dogma.

While the NBA itself has presented it in light of old formalism, some of its apologists—including virtually all of those interviewed for this Article—have instinctively shifted to new formalism arguments. In other words, while the initial justification was, ostensibly, unavoidable "correctness," later justifications argued that narrow, acontextual application of rule 12A is a *preferable* strategy—not anymore a matter of correctness, but of a better course of action. We return to this argument below.

II. INTEGRITY AND INSTITUTIONAL NORMS

Another "one right answer" school is as far from formalism as could be:

Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935), according to which formalism (or "conceptualism") supplies the philosophical basis for "objectifying" legal concepts or assuming that they stand for objects in the real world, namely normative entities, rather than artifacts or constructions, or ways of talk. For a rich reference, see Dagan, supra note 13. See also Morton White, Social Thought in America: The Revolt Against Formalism (1957).

[18] See Dagan, supra note 13; Thomas C. Grey, The New Formalism, Stanford Law School Public Law and Legal Theory Working Paper, No. 4, 1999 (SSRN 200732).

[19] However, such works as Schwartz & Scott, supra note 13, advocate strict rules of construction in contract interpretation on functional grounds.

Dworkin's model of "law as integrity,[20] and the earlier strands of nonpositivism that led to it in the mid-1980s.[21] Under this theory, law consists not merely of the rules and other norms identified by any conceivable Hartian "rule of recognition" but also by the tenets of the political morality of the given community or relevant reference group. Dworkin set to refute the claim that some legal questions (otherwise known as "hard cases") may allow for several, equally legally correct solutions, as Hart and later Barak claimed.[22] Under a "rule of recognition" positivistic model,[23] such instances call for the application of a "strong" form of legal discretion that is, essentially, a creative act of inventing a new solution where the rules of prevailing law have not yet reached, so to speak. But such cases, Dworkin claims, do not and cannot exist at all, because there are no corners of law where its normative "integrity" does not apply and thus entails a single correct course of action. Law consists of more than the restricted set of social facts identified by positivism—such as statutes and precedents—and its integrity, according to Dworkin, is powerful enough to prescribe a correct legal answer to every question not simply as an empirical matter (relative to any given legal system) but as a matter of the concept of law. Although Dworkin's work is frequently identified with the "interpretative turn" in jurisprudence, interpretation, according to Dworkin, actually allows little leeway. Interpretation is normative: its function is to put the interpreted object "in the best possible light." Reasonable persons may argue what "best" means, but Dworkin implies that sophisticated political communities have mostly resolved such questions—in a sense these solutions define the community—that, as far as integrity is concerned, they have gotten their act together. Moreover, while there can be arguments about the "best," Dworkin is no moral relativist. For him, the "best" light is simply the best, and if people disagree about what the best is, then some of them must be mistaken.

A famous case that can serve as a parable for the Suns decision is *Riggs v.*

[20] Ronald Dworkin, Law's Empire (1986). Dworkin's theory of institutional norms occupies a larger role in Taking Rights Seriously (1977) and A Matter of Principle (1985).

[21] Dworkin's reaction to an earlier formalistic application of Rule 12A—the Knicks decision of 1997—reportedly was, "This was a miscarriage of justice. . . . We don't do that in the courts; why should we do it in basketball?" James Traub, Talk of the Town, New Yorker, June 2, 1997 at 35 (for the 1997 suspension of the four Knicks players see *Ewing v. Stern*, infra note 43).

[22] See Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14 (1967). For Barak's earlier position, clearly influenced by Hart, see Aharon Barak, Judicial Discretion (Yadin Kaufmann trans., Yale University Press, 1989).

[23] H.L.A. Hart, The Concept of Law (Clarendon Press, 1961). Hart sees law as a "union of primary and secondary rules," whose unifying agent is the "rule of recognition" that identifies the norms belonging to a given system. Unlike neo-Kantian frameworks such as Kelsen's, where the "basic norm" of a legal system is a "fiction" or "hypothesis" indispensable for conceptualizing law, Hart's notion of the rule of recognition is empirical. One suggestion is to see it as the "custom of the courts" of a given system. For discussion and critique, see Joseph Raz, The Concept of Legal System (2nd ed. 1980); Ronald Dworkin, The Model of Rules, supra note 23.

Palmer,[24] cited by Dworkin early on in *Law's Empire*. *Riggs*' facts could not have been more suitable for this discussion had they been invented by a law professor. The case concerned an inheritor's right to inherit from his grandfather, whom he has murdered in order to come into the inheritance. The case features a majority and a minority opinion. The minority made a strong a case for legal formalism, almost anticipating Lhumann's approach to systems theory:[25] There are systems of punishing the malfeasant, it says, but the law of wills and estates is not one of them; under the applicable legal rules, the inheritor's claim to the inheritance is indisputable. No additional norms may affect the case except those that were codified in the applicable rules. In contrast, the majority claimed that in addition to such rules, law consists also of "unwritten" principles that apply as much as the codified rules and in certain cases may outweigh them. Because these principles do not apply like rules do—they are not mandatory or binary—but are ever present, and apply through relative weight—automatic application in law is, by and large, impossible. Substantive adjudication must take place, irreducible to mechanical rules of application.

For the purposes of this article, what's important about *Riggs* is not that, if true, then the positivistic approach according to which law consists exclusively of a well-differentiated set of rules is significantly weakened, even if both rules and principles are social facts rather than normative or interpretative constructions. For Dworkin, *Riggs* showed that normative systems are complex in the sense that they consists of different types of norms, some of which operate quite differently than rules, and those cannot be recognized by any unifying notion of a master rule of recognition.[26] These "principles" supply decision-making systems with flexibility and creativity where rules ostensibly supply them with stability and predictability. But whether such principles can, in fact, be identified by interpretative conventions (or even by a rule of recognition), or not, is beyond the point here: under the formalistic interpretation of disciplinary adjudication, no such principles play any role at all. (Positivists do not dispute the use of a principle in *Riggs*; they just wonder why Dworkin insists that it is unrecognizable by a rule of recognition.)[27] Positivism, after all, consists of a much broader spectrum of theoretical positions than formalism, and the two debates—about the role of principles in law and about their systematic recognizability by a master rule—should not be confused.[28]

[24] 115 NY 506 (Ct. App. N.Y. 1889).

[25] Niklas Luhmann, Law as a Social System (trans. Klaus A. Ziegert, Oxford University Press, 2008).

[26] See A.W.B. Simpson, The Common Law and Legal Theory, *in* Oxford Essays in Jurisprudence, 2nd series 77, 82–88 (A.W.B. Simpson ed., 1973). For a critique of this view, see Joseph Raz, Legal Principles and the Limits of Law, in Ronald Dworkin and Contemporary Jurisprudence 73 (Marshall Cohen ed., 1984).

[27] See Kenneth Einar Himma, Waluchow's Defense of Inclusive Positivism, 5 Legal Theory 101, 113–15 (1999); Fredrick Schauer, The Limited Domain of the Law, 90 Va. L. Rev. 1909, 1914–18, 1933–42 (2004).

[28] Robert A. Hillman makes similar and other helpful points regarding formalism and the use of principles in interpretation in What the Knicks Debacle of '97 Can Teach Students About the Nature of

The principle invoked by *Riggs* according to which "no man should profit by his own wrong" (we shall presently look back at Horry's flagrant foul in the Suns-Spurs incident) operates in such a manner, that an otherwise correct rule-based legal decision is defeated by an opposing legal principle. An otherwise legal decision becomes *illegal* for failing to account for an applicable principle. Such principles exist, for instance, in some areas of private law, whereby parties are enjoined from what would otherwise be behavior "within their rights" by a general obligation to act in good faith or by principles of estoppel. Good faith obligations look more like a principle than a rule: they apply constantly within a given legal relation or interaction (not just in particular fact patterns), they are quite general, they operate through relative weight rather than on a binary basis, and their main operation is to restrict otherwise permissible action. The principle identified and applied in *Riggs* is even more general: it is not allowing a person to benefit from his or her own malfeasance, even if by default—by applying the relevant legal rules formally—he or she were entitled to.[29]

Recognizing this as a general principle of jurisprudence applicable to normative systems in general, including sports, is one of the two arguments against the "correct" [and indifferent to fairness] justification for the Suns decision. Below, it is concretized in terms of the relevant institutional norms, namely sportsmanship.

The notion of institutional norm, while certainly not identical to that of normative purpose, is a close cousin. The following section explores the fruitfulness of this link.

III. PURPOSIVE INTERPRETATION

Purposive interpretation shies from such absolute terms as Dworkin's "integrity" or "the best light" yet shares with it its evaluative, constructive nature. It builds on one simple insight: legal interactions, particularly the creation of normative entities (e.g., statutes, contracts, wills, disciplinary rules) are always set up in the service of a purpose or purposes.[30] Moreover, while the bon ton in academia in the last couple of decades has been to compare law to literature, art, film, sport, and whatnot, a constitutive aspect of legal artifacts is that, unlike the creative spontaneity of other genres, they are deliberately created for specific reasons and rationales. Yet not to confuse purpose with intent, purposive

Rules, 47 J. Legal Educ. 393 (1997).

[29] Generally speaking, this account also sits well with Fredrick Schauer's model of "presumptive positivism," according to which rules are best conceived as presumptions for action (rather than as exclusionary reasons, on Raz's classical account)—even though Schauer is suspicious of Dworkin's "principles-talk" and considers such cases as *Riggs* to be entirely accountable in rules-talk. See Schauer, supra note 9. For a critique of Dworkin's account of *Riggs* see Frederick Schauer, (Re)Taking Hart, 119 Har. L. Rev. 851 (2006).

[30] See Lon L. Fuller, Positivism and Fidelity to Law: A Reply to Professor Hart, 71 Har. L. Rev. 630 (1958).

interpretation is certainly not a kind of intentionalism. Between the duality of intention and text that frames so much of the discourse around interpretation, purposive interpretation offers a third category, consisting of both subjective and objective elements, whose relative weight is not predetermined but contextually determined.

Given this basic insight about norms as teleological constructions, it seems senseless to interpret legal artifacts while denying their teleological, or "purposive," nature. Applying a norm becomes an instance of promoting its purpose (which then becomes the "best" light in Dworkin's terms, except that the "best" is constructed in relation and commitment to a set of purported purposes). The most comprehensive exposition of purposive interpretation is offered by Barak.[31] Initially influenced by Hart, Barak later came closer to Dworkin's approach regarding the close knit between strictly "legal" norms and political morality. However, an essential component of his approach is its eclecticism, which allows him to reconceptualize and give a new explanation and justification—within the system of purposive interpretation—to the freedom levels formerly dealt with in terms of judicial discretion. Unlike the formalist model of the Suns decision, "correctness" thus becomes a constraint from the legitimacy of a legal decision rather than a criterion that divorces interpretation and application from morality.[32]

How would purposive interpretation approach the Suns decision? Barak's model, in essence, contains two levels of construction: 1) objective—analyzing the purpose of the legal instrument in ways similar to those used by system analysts by asking, "What does this thing (contract, will, statute, etc.) do?" and 2) subjective—looking into such matters as author's or party's or legislative intent. The more intimate the interaction, according to Barak, the weightier the subjective dimension becomes, and vice versa: we allocate it a relatively high weight in wills, less so but still germane in contracts, still less in statutory

[31] Aharon Barak, Purposive Interpretation in Law (Sari Bashi trans., Princeton University Press 2005).

[32] Michael Dorf sees the Suns decision as "echoing Hart on the separation of law and morals," Legal Theory Blog, http://michaeldorf.org/2007/05/basketball-formalism-prevails.html (May 16, 2007) (last visited Nov. 25, 2008) and thus goes back to one of the most famous debates in modern jurisprudence, the so-called "Hart-Fuller Debate." Following Wittgenstein, H.L.A. Hart introduced the term "open texture" of concept-words to legal interpretation in his famous parable of the sign that reads, "No vehicles allowed in the park" (H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Har. L. Rev. 593 (1958)). Hart's point was that whether this would include, for example, a bicycle, is not anything that the language of the rule itself can account for or constrain, and because law is a separate social institution from morality, no appeal to morality is either compelling or useful in such cases. Conversely, Lon Fuller argued that this parable didn't entail "strong" interpretative discretion (by judges and other decision-makers) but instead hangs on "fidelity" to law's purposes (Lon L. Fuller, Positivism and Fidelity to Law: A Reply to Professor Hart, 71 Har. L. Rev. 630 (1958)). On this approach, "[l]aw is shaped by purpose and human agency" (Frederick Schauer, (Re)Taking Hart, 119 Har. L. Rev. 852, 866 (2006). Schauer adds that Fuller "was on target in suggesting that purpose rather than language, or language subject to a purpose constraint, is a far more accurate explanation of how modern common law interpretation, for better or worse, actually operates." Id. at 866-67.) For Fuller, this means that the rule remains "loyal" to the telos of its inception.

interpretation, and least of all in constitutional interpretation, which deals with the most general tenets of social and political organization and where we care least of all for the autonomy of the norm-determining agent.[33] We must now look to the purpose of Rule 12A—only to find out that this would be impossible without reconstructing the general institutional norms that form the rule's "normative environment."

IV. FROM JURISPRUDENCE TO BASKETBALL: SPORTSMANSHIP AS AN INSTITUTIONAL NORM

At the outset, constructing the purpose of Rule 12A poses relatively few interpretative problems. For one, the legislative and adjudicative bodies are pretty much the same—the NBA's disciplinary body is practically part and parcel of the rule-generating body. Nor has there been much contention in the matter of legislative purpose. The rule, to recall, forbids players who are not part of the five on-court players from leaving the bench during an altercation. According to Stu Jackson, "The purpose of the rule is to prevent the escalation of these types of incidents and in turn protect the health and safety of our players and diminish the chance of serious injury [for] our players."[34] The rule's purpose is thus to prevent on-court altercations from escalating into brawls, and to allow the referees and other game officials to concentrate on containing on-court events.

There is, however, a further level of analysis that, while less obvious, is not less significant in constructing the purposes of Rule 12A. Why is it so important to avoid altercations? At first, the question may sound silly. Yet because answers come from very different spheres of interests, examining them minutely will prove profitable in understanding the rule's purposes. Examining Rule 12A in its historical and institutional contexts since its introduction in 1994 suggest at least four different purposes, some of which are more specific to it and some, like in *Riggs*, of a more general, yet not less imperative, nature: 1) Avoiding the effects of dangerous violence among players; 2) Avoiding any possibility of altercations spilling over to involve the spectators (which would create a legal hazard for the NBA, teams, and arena owners, as well as present a public relations nightmare);[35] 3) Promoting sportsmanship in disallowing violence and excessive

[33] One way of looking at this matrix is as expressing a continuum of *rationalization* and *will*. In the most intimate interactions, will would tend to act relatively free of the constraints of rationalization, although even then it would not be allowed total freedom from it (e.g., the law of wills). The domain of contract still respects will but requires a higher measure of rational justification for determinations and choices, which are then reflected in interpretation. That measure increases the more the field becomes "public," culminating in constitutional law.

[34] Stein, supra note 1.

[35] For discussions of relevant liabilities see Walter T. Champion, Jr., At the "Ol' Ball Game" and Beyond: Spectators and the Potential for Liability, 14 Am. J. Trial Advoc. 495 (1991); George D. Turner, Allocating the Risk Of Spectator Injuries Between Basketball Fans and Facility Owners, 6 Va. Sports & Ent. L.J. 156 (2006) (applicable to accidents in the normal course of spectator sports events

aggression to influence or alter the course of competition; and 4) Maintaining the symbolic character of violence and aggression that is constitutive of spectator sports. Purposes (3) and (4) are more general, yet not at all abstract: sportsmanship is a constitutive norm of any sports practice,[36] and so are the ritualized forms of competition that define sport as a balance between permissible and unacceptable uses of physical (and at times, verbal) contact and abuse.[37]

rather than to altercations involving fans or other bystanders).

[36] Sportsmanship has suffered from over-didactic talk of "character building" and a "formative framework for cultivating citizenship" in general. See, e.g., Gábor Papp & Gyöngyvér Prisztóka, Sportsmanship as an Ethical Value, 30 Int'l Rev. Soc. of Sport 375 (1995). This kind of talk has justly earned a good amount of abuse from various critical angles (including gender studies, see, e.g., Susan J. Birrell, Discourses on the Gender/Sport Relationship: From Women in Sport to Gender Relations, 16 Exercise and Sports Sci. Rev. 459 (1988); Susan J. Birrell & C. L. Cole, Women, Sport, and Culture (1994)). Additionally, the concept itself is too readily reducible to sets of traditional moral categories. It is significant to recognize sportsmanship as both broader and more specific than the moral qualities or social virtues which it is supposed to express. According to James W. Keating, "Sportsmanship is not merely an aggregate of moral qualities comprising a code of specialized behavior; it is also an attitude . . . *a manner of interpreting* what would otherwise be only a legal code." Sportsmanship as a Moral Category, 75 Ethics 25, 29 (1964) (italics added).

Keating's main argument is that sports and athletics are not the same; that sports is a much richer social practice, and that this entails a different attitude toward rules and norms than the more legalistic discourse of athletics. In sports, "the well-known phrase 'sense of fair play' suggests much more than an adherence to the letter of the law. It implies that the spirit must be observed;" by contrast, the athlete's "sole objective" is to demonstrate superiority, and her approach to rules is subordinate to this interest (under Keating's topology, professional sports and all other contests are "athletics," while "sport" is recreational in nature). Id. at 34. While I think that this demarcation is overly sharp, it certainly captures the on-court, real-time approach to rules in recreational versus competitive (or more precisely, institutional) activities, where the first is characterized by leniency and generosity and the second by competitiveness and dominance. Few practices and enterprises, however, obey only one overarching governing norm, and while competitive sports ("athletics") still retain a sense of *play*, recreational sports can be fiercely competitive.

[37] The canonical works of mainstream sociology making this claim and tracing the transformation of modern sports violence to its historical groundings in European society during the seventeenth and eighteenth centuries are by the German sociologist Norbert Elias. See Elias, The Civilizing Process: the History of Manners and State-Formation and Civilization (Edmond Jephcott trans., Blackwell ed., 1994); Norbert Elias & Eric Dunning, Quest for Excitement: Sport and Leisure in the Civilizing Process (Basil Blackwell 1986); Norbert Elias, Genesis of Sport as a Sociological Problem, in The Sociology of Sport: A Selection of Readings (E. Dunning ed., Cass, 1971); Elias, Sport et Violence, 6 Actes de la Recherche en Sciences Sociales 2 (1976). J.Y. Lassalle, La Violence dans le Sport (PUF 1997) deals with sports violence in the more informed terms of post-colonialist sociology. The point about modern sports violence is not that sports serve as a release mechanism for otherwise-generated social violence, but that sports generate their own brand of violence. (The most obvious example perhaps is the "controlled rage" that professional football players are expected to generate in preparation for games.) Violence, then, is not a peripheral phenomenon in relation to sport but inherent to it. See Eric Dunning & Joseph Maguire, Process-Sociological Notes on Sport, Gender Relations and Violence Control, 31 Int'l Rev. Soc. Sport 295 (1996). Disciplinary codes can thus be seen not as sets of norms that curb violence, but as rules *allowing and organizing violence*. For the claim that violence is seen as inherent to sports by professional athletes themselves see Sébastien Guilbert, Sport and violence: A Typological Analysis, 39 Int'l Rev. Soc. Sport 45 (2004). Guibert's findings are limited in

Sportsmanship has suffered from over-didactic talk of "character building" and a "formative framework for cultivating citizenship" in general.[38] This kind of talk has justly earned a good amount of abuse from various critical angles (in particular, gender studies).[39] Additionally, the concept itself is too readily reducible to sets of traditional moral categories. It is significant to recognize sportsmanship as both broader and more specific than the moral qualities or social virtues it is supposed to express. According to Keating, "Sportsmanship is not merely an aggregate of moral qualities comprising a code of specialized behavior; it is also an attitude . . . *a manner of interpreting* what would otherwise be only a legal code."[40] Keating's main argument is that sports and athletics are not the same; that sports is a much richer social practice, and that this entails a different attitude toward rules and norms than the more legalistic discourse of athletics. In sports, "the well-known phrase 'sense of fair play' suggests much more than an adherence to the letter of the law. It implies that the spirit must be observed"; by contrast, the athlete's "sole objective" is to demonstrate superiority, and her approach to rules is subordinate to this interest (under Keating's topology, professional sports and all other contests are "athletics," while "sport" is recreational in nature).[41] While I think that this demarcation is overly sharp, it certainly captures some of the on-court, real-time approach to rules in recreational versus competitive activities (or more precisely, institutional and professional, which are not the same), where the first is characterized by leniency and generosity and the second by competitiveness and dominance. Few practices and enterprises, however, obey only one overarching governing norm, and while competitive sports ("athletics") still retain a sense of *play*, recreational sports can be fiercely competitive.

Now to apply this to our analysis: while purposes (1) and (2) are the directly applicable considerations relevant to Rule 12A, (3) and (4) are its normative environment, the governing institutional norms. To use *Riggs* as a parable, purposes (1) and (2) correlate to the applicable rules of inheritance that governed

some respects (geographical region, gender, and interpretative approach), yet they are valuable in pointing out that this "internal" position is typical of team sports such as basketball and soccer almost as much as it characterizes obviously ritualized forms of violence such as Karate. His findings also show an inverse correlation between the internally-perceived level of violence and the level of cheating; in other words, the more a sport is considered violent, the less it involves cheating. (The most distinct finding concerns swimming, Table 1, id. at 48.) Where the internal position perhaps fails is in acknowledging the role of violence in non-contact sports such as tennis or volleyball (the latter abounds with "trash talk," which Guibert treats as "verbal violence," id.).

[38] See, e.g., Gábor Papp & Gyöngyvér Prisztóka, Sportsmanship as an Ethical Value, 30 Int'l Rev. Soc. of Sport 375 (1995).

[39] See Susan J. Birrell, Discourses on the Gender/Sport Relationship: From Women in Sport to Gender Relations, 16 Exercise and Sports Sci. Rev. 459 (1988); Susan J. Birrell & C. L. Cole, Women, Sport, and Culture (1994)).

[40] James W. Keating, Sportsmanship as a Moral Category, 75 Ethics 25, 29 (1964) (italics added).

[41] Id. at 34.

that case, while (3) and (4) are the general principles that correlate to those that lead to the majority's decision, notwithstanding those rules.[42]

Institutional rules (such as NBA disciplinary rules) do not exist in a normative vacuum. Irrespective of their specific purpose, each instance of their application imports the normative commitments expressed either by the nature of the institution or by practice. Indeed, this seems to be acknowledged by the NBA, at least in court. In 1997, four New York Knicks players were suspended on grounds of Rule 12A during a playoff series against the Miami Heat. During a hearing in federal court of a petition for a TRO against the suspensions, counsel for the NBA explained the significance of Rule 12A,

> It is the swift discipline, the swift punishment that is absolutely essential not only to prevent players tomorrow night from engaging in the same kind of conduct, but to *preserve really the essence and integrity of the game*, to assure the fans that *this game is going to be played according to a set of rules*.[43] (Italics added.)

As a form of entertainment, spectator sports constantly balance, so to speak, perceived characteristics of the civilized and the savage.[44] They orchestrate risks by using rules to generate excitement without deteriorating into the kind of "state of nature" that some sports fans are perhaps more apt to identify with the 1975 movie *Rollerball* than with Thomas Hobbes' *Leviathan*.[45] Players bumping each

[42] According to Schauer, rules are mediators between justifications and action; justifications become "entrenched" in rules during their practical and institutional histories. This is a critique of intentionalism, because the process of entrenchment cannot be entirely accounted for nor reduced to intentionalist "founding" processes. Supra note 9.

[43] Ewing v. Stern, No. 97 Civ. 3578 (JSR), 1997 U.S. Dist. LEXIS 24206 (S.D.N.Y. May 16, 1997) at 35-36 (*Ewing v. Stern*). William N. Eskridge Jr. begins his wonderful critique of textualism with a purposive analysis of the application of Rule 12A in that case, Textualism, the Unknown Ideal? 96 Mich. L. Rev. 1509, 1509 (1998) (a review of A Matter of Interpretation: Federal Courts and the Law by Antonin Scalia). Here is Eskridge's description of the incident:

> In May 1997, the New York Knickerbockers basketball team was poised to reach the finals of its division. . . . The Knicks led the rival Miami Heat by three games to two and needed one more victory to win the best-of-seven semifinal playoff series. Game six would be in New York; with their star center, Patrick Ewing, playing well, victory seemed assured for the Knicks. A fracas during game five changed the odds. During a fight under the basket between Knicks and Heat players, Ewing left the bench and paced in the middle of the court, away from the fight. . . . [The] NBA . . . suspended Ewing and another player for game six in New York, which the Knicks lost. . . . Having lost the series, four games to three, the Knicks cried foul: the rule should not have been applied to Ewing because he did not leave the bench to join the altercation. The rule was not intended to apply to Ewing; it was not fair to apply the rule to someone who was not contributing to the fight; "we wuz robbed." Id. at 1509-10.

[44] See Elias, The Civilizing Process; Elias and Dunning, Quest for Excitement: Sport and Leisure in the Civilizing Process, supra note 37.

[45] In *Rollerball* (United Artists, 1975), an imaginary, futuristic, violent sport to begin with is gradually stripped of all its rules: in the last match played, there are no penalties and no time limits, as players are crippled and killed in swift order. The protagonist, Jonathan E., a champion player portrayed by James Caan, overcomes the brutality of the cynical organizers by keeping to the rules of the game up to the very last moment, in which he is literally the last man standing (or skating), going on to complete and score on the final play. (Reportedly, *Rollerball*'s author, William Harrison—who initially wrote it as a short story titled Roller Ball Murder, Esquire, Sept. 1973—was inspired to write

other (and sometimes into each other), the logic goes, is, to an extent, part of the game; but the instance that violence takes on extra-sportive forms (e.g., shoves and punches), sport loses its symbolic character and effectively evaporates as a separate form of social practice.

V. DISCIPLINARY RULES AND INSTITUTIONAL TRAUMA

Interests (1) and (2), then, are more specific to the firewall of security that spectator sports must offer, even as courts in various jurisdictions have long recognized that some measure of assuming risk is inherent to attending sports events.[46] They protect two major assets of sports organizations—players and fans.[47] Both concerns may be traced quite directly to notorious and traumatic events in the NBA's history, one dating to 1977 (a.k.a. "the punch") and the other to 2004 (a.k.a. "the brawl"). In the former, Kermit Washington, a forward playing for the Los Angeles Lakers, while involved in an on-court fracas, turned and threw a formidable punch at a would-be peacemaker, Rudi Tomjanovich of the Houston Rockets who was rushing toward him. The blow was so hard that it literally cracked Tomjanovich's skull and caused spinal fluid from the brain area

it after witnessing an on-court fight break out during a college basketball game. See J.P. Trostle, The Rules of the Game: The Evolution of Rollerball, available at http://home.nc.rr.com/jape77/evolution_of_rollerball.html (last visited Nov. 25, 2008).)

Sometimes the equilibrium between rules and competition is, arguably, tilted too much the other way (a.k.a over-enforcement). Regarding NBA basketball, Bill Simmons complains as much, supra, note 6:

> Ever since the Bad Boys Pistons and Riley's Knicks tried to turn the NBA into the WWF in the late '80s and early '90s, nearly every rule change was created to prevent ugly incidents, even if some of those rule changes compromised the competitiveness of the league in the process. . . . [D]uring the golden era of the NBA (1984-1993), three of the most inspired/famous/memorable moments, in retrospect, were McHale's clothesline of Rambis in the '84 Finals, MJ standing over Ewing after a hard foul and swearing at him in the '92 playoffs, and Parish getting fed up with Bill Laimbeer's crap, taking justice into his own hands and clocking him in Game 5 of the '87 playoffs. Why do those moments still resonate? Because there was a level of competitiveness back then that doesn't exist anymore—it's been beaten out of these guys.

[46] In Bereswill v. NBA, Inc., 719 N.Y.S.2d 231, 232 (App. Div. 2001), a courtside photographer injured by a Knicks player diving out of bounds after a loose ball was denied recovery on the basis of assumption of "risks . . . inherent to the sport of professional basketball." In Benejam v. Detroit Tigers, Inc., 635 N.W.2d 219, 223 (Mich. Ct. App. 2001), the court barred recovery on grounds of assumption of risk by a spectator struck by a foul ball as "it seems axiomatic that baseball fans attend games knowing that . . . objects may leave the field with the potential of causing injury in the stands." A similar argument was accepted in Pakett v. Phillies, L.P., 871 A.2d 304, 308 (Pa. Commw. Ct. 2005) ("One who attends a baseball game as a spectator can properly be charged with anticipating as inherent to baseball the risk of being struck by a foul ball while sitting in the stands during the course of a game."). See also Bellezzo v. State, 851 P.2d 847, 852 (Ariz. Ct. App. 1992). For legal analysis of torts and liability in such matters see Champion, supra note 35; Turner, supra note 35.

[47] Counsel for the NBA in *Ewing v. Stern*, supra note 43 at 32, expresses two purposes of Rule 12A:

> This is a pro-player rule. This is not an anti-player rule. This is for the players, for very large, strong, powerful men who can do significant injury to one another, this is to prevent them from doing that and certainly to prevent their altercations from spilling out in the crowd.

to leak into skull cavities.[48] During the 1997 Knicks hearing, this incident was cited by the NBA as "one [video] clip that stands out" and a case from which "the NBA has learned by experience."[49] Relating the story in court, counsel for the NBA added: "[T]hat is why there is this rule [12A]."[50]

In "the brawl," a cup of beer thrown by a Detroit Pistons fan on Indiana Pacers player Ron Artest caused a complete meltdown, with nine players involved in the ensuing melee, including some who fought fans.[51] Four Pacers players were suspended by the NBA for lengthy periods, effectively ruining the Pacers' promising year; consequent trades later broke up that team, which has yet to regain prominence.

Trauma may affect organizations in ways that are not dissimilar to those in which it affects persons, and, listening to the media and NBA officials, it could appear that Rule 12A, in the wake of "the punch" and later "the brawl," responds exclusively to concerns (1) and (2). That would be the direct conclusion of applying the common law's "mischief rule" of interpretation, whereby a rule is understood on the basis of the "mischief" that it seeks to rectify. Yet both purposive interpretation and law as integrity direct us to seek comprehension not just in the immediate context of the rule's formation, but in its institutional and normative environment. Because rules are always cast within normative systems—indeed, Raz shows that the concept of law itself presupposes its own systematicity[52]—they cannot help but taking on normative meanings and implications from those contexts. Because they are thrust from their very inception into a normatively saturated medium, they take on functions generated by that medium.[53]

In the context of this Article, that normative environment has to do with

[48] See John Feinstein, The Punch: One Night, Two Lives, and the Fight That Changed Basketball Forever (Little, Brown and Company 2002). Tomjanovich recovered and eventually became a successful NBA head coach. Washington played a few more seasons before retiring and becoming a tireless philanthropist, devoting his efforts to humanitarian work in Africa. See Laura Kurz, "Where Are They Now?"—Kermit Washington (2006), http://www.nbrpa.com/news/wherenow/Kermit_washington.aspx (last visited Nov. 27, 2008).

[49] *Ewing v. Stern* supra note 43 at 43.

[50] Id. Here is Bill Simmons' contrary take on the traumatic nature of "the punch":

> Personally, I don't believe Kermit's punch could happen again—it was the perfect storm of an NBA brawl, a powerful 6-foot-9 guy whirling around during a fight, then delivering a perfect straight right . . . to the face of a peacemaker (Rudy Tomjanovich) who was running toward him at full speed and forgot to protect himself. Kermit's punch was a complete fluke. . . . And yet, every decision made in the past 30 years keeps coming back to that one punch.

[51] Artest, Jackson Charge Palace Stands (2004), http://sports.espn.go.com/nba/news/story?id=1927380 (last visited Dec. 27, 2008).

[52] Joseph Raz, supra note 24.

[53] According to this insight the social sphere is normatively saturated, and thus all performative acts and all new norms are affected by the encounter with a non-neutral medium. According to the philosopher John Searle, normative saturation (he uses other terms) is a particular character of institutions; elsewhere I claim that it is a basic structure of the social sphere generally. See Jonathan Yovel, What is Contract Law "About"? Speech Act Theory and a Critique of "Skeletal Promises," 94 Northwestern University Law Review 937 (2000); idem, The Language Beyond Law: Linguistic Performativity in Legal Context, SJD Dissertation, Northwestern 1997.

sportsmanship and competition. Ostensibly, Rule 12A is a rule that regulates on-court violence and the potential for its escalation. Such rules obviously take on an emphasized significance in the context of the symbolic representation and manipulation of violence. The regulation of on-court violence has a direct connection to sportsmanship as well, because it affects what counts as legitimate means of competition. Clearly then, interests (3) and (4) are entrenched in Rule 12A not less than (1) and (2). And because every application of a rule is also an instance of interpreting it,[54] taking into consideration these functions is part and parcel of the decision-making process itself. In other words: when constructing and applying Rule 12A in specific instances such as the Suns decision, the question of sportsmanship and the regulation of sportsmanship cannot be avoided. Not allowing a malfeasant to benefit from her own wrong—recall *Riggs*—is a tenet of regulated competition as much as it is of law. In the Suns' case, the "malfeasants" are Horry, the Spurs player whose flagrant foul was the provocation that started the incident, and, by proxy, the Spurs team that rode it to victory.

Thus far, we identify two compelling norms that would work against the Suns decision and that seemingly were not weighed as part of the decision-making process. One is the general principle just noted. The second norm is inherent to Rule 12A and also pertains to sportsmanship. Sportsmanship is not merely a concretization of the general principle cited above. It is in some senses more restricted, in others richer. In fact, strict definitions of sportsmanship are both tricky to devise and possibly detrimental.[55] Sports are traditional activities, and part of what the respective traditions are precisely about is a constant development of the notion of sportsmanship. It involves a shared community sense of fairness in competition. Fairness does not mean an embargo on craftiness and a manipulation of rules, nor, of course, setting traps for opponents. (This logic would disallow pump fakes and defensive traps.)

Tempting an opponent to detrimental, forbidden action cannot itself be considered unsportsmanlike. On the contrary, it is engrained in the mental aspects of competition. Players who cause opponents to lose concentration or commit unnecessary fouls are praised for it, and rightly so: it is part of their competitive arsenal, their expertise. The boundaries of legitimacy for such actions are not crystal clear. In the Suns-Spurs incident Horry, the instigator, was suspended two games for unsportsmanlike behavior (a.k.a. a "flagrant foul").[56]

[54] We must answer the general question, "What generally falls within the sphere of application if this rule?" when we ask the specific question, "Does action X fall within the sphere of application of this rule?"

[55] For normative characterizations of sportsmanship see supra note 36, infra notes 57, 73, 90.

[56] "Instigated" was the term used by commentator Dan Patrick during an interview with Commissioner Stern. See Stern defends Stoudemire, Diaw ruling, blames Suns (May 17, 2007), http://sports.espn.go.com/nba/news/story?id=2872926 [hereinafter Stern defends ruling] (last visited Nov. 25, 2008). It may be noted that the notion that Horry's flagrant foul on Nash was intentional,

Yet the matter of calculated provocation by Horry was not even a consideration in the NBA's decision to suspend Diaw and Stoudemire. According to NBA Commissioner David Stern, Horry didn't "cause" their behavior: he supplied a stimulus, but it was their responsibility to hold back. They "took themselves out of the game."[57] The point is not, however, whether Stoudemire and Diaw deserved the suspensions or not; the question is, were they assigned suspensions on a causal link that began illegitimately, and what effect, if any, should this have had on the suspensions? The formalist strategy would be to overlook these contextual aspects. But nonformalist approaches, especially those concerned with institutional norms, would at least suggest that a formalist approach here is self-defeating, because while it promotes certain purposes of Rule 12A—namely, the immediate need to curb violence—it frustrates others, notably sportsmanship. This does not add up to a clear-cut or "no brainer" decision (as Stu Jackson

even tactical in the sense that its purpose was to achieve an advantage in the next game, is based on two points, one circumstantial and the other personal. The first was the stage of the game: at 18.2 seconds to go with the Spurs trailing 100-97 and the Suns in possession, it would have made little sense for Horry to carry out a flagrant foul and risk certain suspension for himself, when a simple foul on Nash would have achieved the same effect in *that* game, unless the point was to carry the incident over to the next game. This may seem too calculated, too rationalistic or "Chicago schoolish" for on-court tactics, better explained by tensions running high among fierce competitors. However, here the personal consideration comes in, further suggesting a calculated provocation: to fans of NBA basketball, Robert Horry is one of the smartest, coolest, and winningest players of his era. Nicknamed "Big Shot Rob" for his knack for clutch jumpers in decisive games (and declared "best role player ever" by Marc Stein, Best Ever?
Horry fits role perfectly (June 21, 2005),
http://sports.espn.go.com/nba/playoffs2005/columns/story?id=2090270 (last visited Nov. 25, 2008)), Horry had an NBA career like no other. He played pivotal roles on seven championship teams, winning with three different clubs—the Houston Rockets in the 1994 and 1995; the Los Angeles Lakers in 2000, 2001, and 2002; and the San Antonio Spurs in 2005 and 2007. Other than members of the Boston Celtics dynasty of the 1960s, Horry is the only player in NBA history to have won seven championships (one more than Michael Jordan). With two exceptions only, between 1996 and 2007—a span of twelve championships—only teams featuring either Horry or Steve Kerr, another swingman, won an NBA championship (oddly enough, Kerr was the general manager for the Phoenix Suns at the time of the 2007 incident.) Given the available information about Horry's calculated prowess, the notion of exploiting the Suns' young and relatively inexperienced players' impulse to rush to Nash's defense does not ring implausible.

[57] According to Stern,

> [T]hese players took themselves out of the game. . . . To listen to the palaver that Robert Horry changed the series is just silly. What changed the series is Amare and Boris ran out onto the court and they either forgot about it or they couldn't control themselves. I don't know which one. And there wasn't an assistant coach there, one of six, to restrain them.

Stern defends ruling, supra note 56. Stern's last point responds to another line of analysis, which sees the team as a culprit in this issue, deserving of liability and sanction. However, in an insightful piece, Robert L. Bard and Lewis Kurlantzick make the claim that high stakes game such as playoff games are not appropriate instances for suspensions at all, for concerns relating to groups other than the players, such as irredeemable team aspirations and even more so fans' aspirations. Robert L. Bard and Lewis Kurlantzick, Knicks-Heat and the Appropriateness of Sanctions in Sport, 20 Cardozo Arts & Ent. L.J. 507 (2002).

described the Suns case),[58] and it puts on the table a valid argument that seems to have been, in this and other cases, overlooked.

To recall, the NBA characterized the Suns decision as "correct." Once the rule was "on the books," its application was automatic and the final outcome a matter of entailment—a necessary, logical conclusion of the meeting of rule and "fact pattern." This leaves almost no room for the faculty of adjudication: the relation rule-breach-outcome was mechanical. Jackson adds, "The rule with respect to leaving the bench area during an altercation is very clear. Historically, if you break it, you will get suspended, regardless of what the circumstances are."[59]

Both statements, however, are inaccurate. As claimed above, the rule is *not* very clear; and historically, circumstances *have* counted in its application. Possibly the most outstanding instance occurred during a 2002 game between the Los Angeles Lakers and the Sacramento Kings, at the time when both were perennial contenders and frequent opponents. In that case, Rick Fox of the Lakers and Doug Christie of the Kings, not contented to confine an altercation to the court, continued the scuffle in the tunnel leading to the locker rooms after having been ejected from the game for fighting. Next, "[s]everal Sacramento players left the bench area and raced down. . . . Lakers center Shaquille O'Neal was also at the heart of the second scuffle in the tunnel."[60]

No suspensions were meted to any player for breaching Rule 12A in this incident. Stu Jackson was in charge of NBA discipline then as he was in 2007, and according to him,

> Our rule regarding an automatic suspension for players leaving the bench *was not intended to apply in a highly unusual situation* like this one, where an altercation occurs in an access tunnel or hallway . . . . In this circumstance, our judgment was *that the players who left the bench were attempting to break up the fight and did not escalate the altercation*.[61] (Italics added).

This short paragraph holds a wealth of interpretative material, all contrasting the "rule is a rule" dictum given in the Suns decision. According to it, Rule 12A should be applied contextually and according to its intended purpose; circumstances and context count; application of the rule is a matter of judgment, as opposed to an automatic "blanket" approach; and the purpose and meaning of the player's action in leaving the bench during an altercation is relevant, inasmuch as it separates peaceful from belligerent purposes (this, to recall, was Ewing's claim in 1997).[62] In the 2007 Suns case, none of these considerations

[58] According to Stu Jackson, see Stern defends ruling, supra note 54.
[59] Stein, supra note 1.
[60] Stein, supra note 11.
[61] Id.
[62] According to Jeffrey L. Kessler, counsel for the suspended players in the Knicks' case,
Up until this incident last night, we never realized that in the application of this so-called "rule". .

seemed to have been weighed, nor in the 1997 Knicks case, when a blanket interpretation of the rule was applied, possibly for the first time. Thus, it seems that invoking a formalistic approach to applying Rule 12A is itself a jurisprudential—and contextual—*decision*, rather than an inevitable constraint.

VI. ANTICONSEQUENTIALISM AND HAPPENSTANCE

Another characteristic of "old" formalism—i.e., the kind invoked by the NBA in the Suns decision—is its anticonsequentist nature, which makes it impervious to considering questions of luck (or "happenstance"). Should the league have considered the fact that both the Knicks in 1997 and Suns in 2007 were engaged in crucial playoff series, that the suspensions effectively decided the outcome of the season for the teams involved, and that they possibly ruined those players' best opportunity to ever elevate their game to contending caliber (as did, in fact, happen)?[63] In petitioning for a TRO against the 1997 Knicks suspension, counsel for the suspended players emphasized the matter of timing and luck, and a strong sense of agent-regret permeates the affidavits submitted by the suspended players, based on the immediate effects of the suspensions *at that time*.[64] Possibly, the suspended Knicks players would not have even

.their position is, literally, as we found out for the first time, that if you walk three feet away from the bench, you engage in no hostile conduct, you do not go near anyone, you do not push anyone, you do not look angrily at anyone, if you come from here to here, as Patrick Ewing did, you are suspended. . . . [W]e have no problem in case-by-case determinations by the Commissioner.

In oral arguments, *Ewing v. Stern* at 9-10.

[63] The 2006-07 Suns team was not dubbed a "team of destiny" as was the 1992-93 Suns team that, led by Charles Barkley, gave valiant battle to Michael Jordan's Chicago Bulls in the 1993 finals. And yet, the sense of an unusual team reaching surprising success through unusual measures and in face of unfortunate adversity hovered throughout the 2006-07 season. Led by two-time MVP point guard Steve Nash and a young athletic center rehabilitating from two microfracture surgeries (Amare Stoudemire), a thin team sporting a 7-8 player rotation using coach Mike D'Antoni's uptempo, offense-oriented style ripped through opposing defenses to unprecedented success. (D'Antoni's system—dubbed SSOL or "seven seconds or less" to get a shot—allowed the team to reach a convincing sixty-one wins out of eighty-two games and tied 2-2 with the Spurs in the conference's semifinals.) Re the Knicks' case, Eskridge goes out on a limb:

> In May 1997, the New York Knickerbockers basketball team was poised to reach the finals of its division in the National Basketball Association (NBA). The Knicks led the rival Miami Heat by three games to two and needed one more victory to win the best of seven semifinal playoff series. Game six would be in New York; with their star center, Patrick Ewing, playing well, victory seemed assured for the Knicks.

Supra note 44 at 1509.

[64] Kessler emphasized this point in oral arguments:

> I was on the phone last night with these players, and the pain in their voice for what this means to their team and how far they have come, there is no way to make them whole. . . . There is no way to make the fans whole. There is no way to make the team organization whole if the players are right. . . . [I]t was pure happenstance that this turned out to be the sixth game and the seventh game of this play-off series. The rule doesn't provide for that. . . . [I]f this had been the championship game, the last game, then their punishment would have been to miss the first regular season game of the next season.
>
> *Ewing v. Stern* supra note 43 at 6-8.

This tenor resonates also from the affidavits of the plaintiffs. The following excerpt is from Patrick Ewing's:

bothered to approach a federal court had the suspensions taken place during the regular season.

Actually, there are good reasons to accept the NBA's refusal to weigh in the question of happenstance at the application level, although it may be claimed that it should have taken the high stakes of playoff games into consideration *at the rule formation level* by implementing different rules for playoff games, such as allowing suspensions to start during the next regular season. This is one parameter where legal doctrine is different than disciplinary guidelines. In court, happenstance matters, because some of the conditions for issuing a TRO or other forms of injunctions have to do with probable effects: the balance of hardships is an estimate of relative consequences, a pragmatic consequential approach as much detached from questions of merit as possible.[65] In disciplinary rulings, however, the stakes are clearer, *ex-ante*, to all parties involved. Although the stakes in playoff competition are higher than during the regular season, the players are aware of them; the high stakes are not arbitrary, not a matter of happenstance at all. Of course, suspensions may be overpreventive just as they may be underpreventive. This consideration, however, should generally be exhausted at the rule-generating level. Attempting to weigh, in each and every case, the relative impacts of suspensions would wreck havoc with any attempt at serious ex ante regulation. Weighing consequential contingencies in each case would probably mean that the rule does not exist at all, and that the disciplinary body simply has a general mandate to discipline aggressive behavior or other transgressions. Robert L. Bard and Lewis Kurlantzick insightfully suggest avoiding this problem on the rule level by creating a separate, non suspension-based rule for the playoffs.[66] I return to this point at the conclusion.

VII. DOES CONTEXT EVER MATTER?

Incorporating context into legal or quasi-legal decisions is perhaps the most salient aspect of the jurisprudential withdrawal from formalism. According to one insightful author, "In many areas of law, the notion of context is more important than ever."[67] The NBA's Stu Jackson seems to reject this notion, stating that "We have a set of rules and those rules apply to every player that plays in our game and they're subject to abiding by the rules. When they cross

> If I am suspended from participation in tonight's game, my team's chances for victory in tonight's game and in the series are seriously hurt. This would be terrible blow to my career, since I believe we have an excellent chance to win the NBA Championship this year. The one professional accomplishment that I most want to achieve is winning the NBA Championship.

Affidavit of Patrick Ewing, paragraph 8, on file with author.

[65] Id. at 40. (The court refused to hear arguments from the Miami Heat, who stood to benefit from the suspensions. That, too, was a matter of happenstance, ancillary to the dispute between the NBA and the suspended players.)

[66] Supra note 57. Additionally, that would be the most fan-friendly rule.

[67] Henry E. Smith, The Language of Property: Form, Context, and Audience, 55 Stan. L. Rev. 1105, 1105 (2003).

the line they're going to pay a penalty."[68] Jackson seems to imply that adjudication itself is redundant: once the fact pattern is established, the disciplinary outcome is unavoidable, automatic. The former is a sufficient condition for the latter, and there is no real sense of a *decision* taking place. In law, more often than not such decision making processes are subject to epistemological concerns, both law- and fact-based: we must establish that certain acts took place, and even then we are left with the question of application. Jackson's approach seems to entail that in such contexts as NBA disciplinary action, even if these stages in some sense exist, they are unproblematically passed over in silence because of the relative simplicity of fact patterns and lack of evidentiary problems. However, all the operative terms of Rule 12A—"altercation," "immediate vicinity," and "during"—actually require much more interpretative work than initially seems. It could be reasonably argued that Horry's foul on Nash in the Spurs-Suns incident did not amount to an "altercation" when Stoudemire and Diaw got up; and at least one federal court considered the term "immediate vicinity" in the context of Rule 12A as requiring further interpretation.[69] More to the point, "during" cannot simply mean "at the same point in time" in the context of Rule 12A: the term must entail a causal dimension, namely, leaving the bench must be *caused* by the altercation, or at least by awareness of it, and by an intention to take part in it. A player who did not see the altercation and was not aware of it, and nonetheless stepped away from the bench at the time it took place—say, to go to the locker room—or a player rushing oncourt to administer first aid—would clearly not be in breach of the rule, although his act occurred "during" the altercation.[70] However, as Eskridge plainly shows, the language of the rule alone does not convey such constraints.[71] Such a scenario "strikes me as no less a violation of the letter of the rule but lies completely outside its spirit: the bathroom scenario is far from the

[68] Stu Jackson Q&A (2006), http://www.nba.com/features/stu_jackson_rules_20061107.html (last visited Nov. 25, 2008).

[69] In *Ewing v. Stern*, Judge Rakoff considered the term "immediate [vicinity]" as requiring construction, although the rest of Rule 12A was for him "a flat, unequivocal statement." See *Ewing v. Stern* at 11.

[70] "An act must be designed to deliberately interfere with the purpose of the activity in order for that act to be labeled unethical. Since the criterion of intentionality is missing from the accidental foul, that act has no ethical significance." Kathleen M. Pearson, Sportsmanship as a Moral Category 71 (E.W. Gerber and W.J. Morgan eds., 1979). Eskridge points out that even a textualist such as Scalia applies the traditional "golden rule" of common law statutory interpretation, which rejects "plain meaning" construction when this results in a patent absurdity. See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-30 (1989) (Scalia, J., asserting that judges must rewrite statutory texts where the plain meaning applied to the facts is absurd); K Mart Corp. v. Cartier Inc., 486 U.S. 281, 324 n.2 (1988) (Scalia, J., asserting that it is absurd to apply a statute requiring inspection of ovens for flames when the oven is electric).

[71] Supra note 43, at 1553. Eskridge conjures various such situations: the player leaves the bench but moves away from the altercation, leaves the court altogether, or moves on court only to save the life of a player who is gravely assaulted and not official can perform that function. The last situation is perhaps better dealt with in terms of defense.

core activity the rule was designed to regulate."[72] Dworkin's take on the Knicks' case makes a similar point:

> Suppose Ewing saw somebody pulling a knife in the middle of a fray and he leapt off the bench and jumped on this person to try to prevent harm? It would be inconceivable in a case like that that you would interpret the law literally.[73]

This is not a flaw in Rule 12A: it expresses the general insight that the language of rules is simply not enough to determine whether all actions that ostensibly fall under the fact pattern constitute breaching of the rule or not. Interpretation here must go to purpose, framed by institutional norms, to understand what "during" means. No literal construction could do this work. As Steve Winter shows, when rules are linguistic entities, understanding how they operate requires taking into consideration all the constitutive aspects of a linguistic interaction and its typical reliance on context to generate meaning.[74]

There is something deceptive about the language of rules. The rule seems to consist of a descriptive portion and a normative one, or a fact pattern and an ensuing normative operation (i.e., a sanction, remedy, etc.). Following a suggestion by H.L.A. Hart, the philosopher of language J.L. Austin initially termed these the "constative" (or "descriptive") and the "performative" portions of rules (or contracts, wills, etc.).[75] As Austin partially acknowledged, however, the distinction does not work well, because the descriptive portion of the rule is already normatively based, or normatively "saturated." The descriptive portion of the rule is sensitive to the rule's purpose, function, and contexts of inception and application. That is why a player who has left for the locker room "during" an altercation without awareness of it did not "leave" in the normative sense entailed by rule 12A, although she certainly did so in a descriptive sense.[76]

Commissioner Stern, according to news reports, announced that "the NBA

[72] Id.

[73] Traub, supra note 20.

[74] Steve Winter, A Clearing in the Forest: Law, Life, and Mind (University of Chicago Press 2002).

[75] J.L. Austin, How to do Things with Words (J.O. Urmson ed., Clarendon Press 1962). Hart, in turn, was initially greatly influenced by Austin's "ordinary language philosophy," although he became more reserved in relation to the inherent performativity of legal language later on in his career. See Timothy A.O. Endicott, Law and Language, *in* the Oxford Handbook of Jurisprudence and Philosophy of Law 935, 960–66 (Jules Coleman & Scott Shapiro eds., Oxford University Press 2002).

[76] Consider another fundamental legal concept, that of relevance. Lawyers discuss relevance in two distinct senses: causal and normative. Causal relevance means that a certain piece of information has a tendency to affect the probability of a proposition of consequence to the action (Fed. R. Evid. 401); normative relevance deals with the question of whether it *should* be allowed to affect it and casts it in terms of admissibility (It is precisely because a given piece of information is relevant in the causal sense that it may merit a normative exclusion); see Jonathan Yovel, Two Conceptions of Relevance, 34 Cybernetics and Systems: Formal Approaches to Legal Evidence 283 (2003). Institutional norms and the normative context of evidence law (some of which have nothing to do with epistemological or probative concerns) form what is eventually treated as "relevant." See David Crump, On the Uses of Irrelevant Evidence, 34 Hous. L. Rev. 1 (1997).

conducted one of its most thorough investigations into the matter, repeatedly reviewing the tape of the incident in question." He said, "'You look at all the angles. You decide what to do with respect to Robert Horry. So you talk to people, see what happened. You try to do it in some full way.'"[77] If this indeed took place, then it seems that it may not have been the clear, flat out "the rule is the rule," "no brainer" decision, as it was characterized by NBA officials. Except that both can occur; this does not mean that interpretation was not involved: sometimes, interpretation is "swallowed up" by the process of application. For example, the NBA may have exhausted its efforts at a comprehensive examination of videotapes (the "facts" of the case), devoting less concern to interpretative matters concerning the rule. Thus, it would be possible to claim that this was a both a complicated and a clear-cut case, the former on the question of facts, the latter on rule application; yet the determination of whether the requirements of "immediate vicinity," "altercation," and "during" were satisfied in this case, ostensibly a factual matter, requires substantive construction of the rule. Life simply does not divide itself neatly into instances of rule interpretation on the one hand and fact determination on the other.

VIII. ECONOMIC ANALYSIS AND A "NEW FORMALIST" CRITIQUE OF INSTITUTIONAL NORMS

A significant objection to this analysis of institutional norms and their role in construction and application emerges from influential literature in the law and economics tradition and especially the so-called Chicago School. The analytic approach of this school would be to treat purposes (1) to (4) of the rule as proxies, or mediating notions that hide the true economic purpose of the rule, better articulated in the business terms of marketing, reputation, and revenues. Thus, Peter Gerhart discusses the "Chicago approach" to suspensions (or in his terms, and more generally, "exclusions") as a means for the marketer (in this case, the NBA) to create negative incentives for reputation-decreasing actions by players, such as repulsive violence, perceived antisocial behavior, or overt ethnic or "objectionable" cultural expressions, such as identifying with gangs or even hip hop culture.[78] The player's reputation-decreasing actions (in terms of the team's reputation) represent an externality whose cost can be internalized to the player by the disciplinary action, and that is the true purpose of such disciplinary rules as Rule 12A. In terms of revenues, disciplinary action would then tend to appease not necessarily the majority of fans, but those most likely to spend top dollars on the league's products—which would explain the NBA's anti-ethnic policies (e.g., the players' dress code, implemented in the 2005-06 season), given the perception that most of the league's revenues are generated by middle-class, white Americans. The problem, of course, is that suspensions create new externalities, because they shift costs away from transgressing players to the

[77] See Stern defends ruling, supra note 55.

[78] Peter M. Gerhart, The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School, 1982 Sup. Ct. Rev. 319.

team, its fans, and other stakeholders. Conceivably, both the Knicks decision of 1997 and the Suns decision of 2007 resulted in fewer playoff games played in New York and Phoenix, respectively, which externalized the reputation costs to any number of peripheral stakeholders and created further incalculable reputation risks through the communicative networks in which these stakeholders engage (e.g., blaming the league for unjust suspensions, rendering its product less marketable to some consumers). Still, the rule indubitably does create negative incentives for players, as well. Gerhart's point isn't that regimes of "exclusions" are necessarily efficient in internalizing reputation costs to players, but they cut through language of culture and norms to the "true" economic rationale of any given rule.

In a critique of this approach, Robert Heidt argues that the social place of sports in American culture precludes treating sport associations merely as efficiency-committed businesses whose practical logic is reducible to bottom-line profit. A sports organization such as the NBA, he claims,

> In light of its substantial power to affect the lives of players, and in light of its highly visible and representative role in American culture . . . may not concern itself only with profit maximization, but . . . also needs to concern itself with maintaining its legitimacy. As part of maintaining its legitimacy, it needs at least to appear to treat players fairly.[79]

While Heidt's objection is well taken, it can also be absorbed into Gerhart's economic approach. Unlike talk of institutional norms that are not reducible to economic terms (although they certainly must prove themselves in the general economic competition for entertainment and sports "products"), Gerhart may actually agree that the semblance of fairness is reputation-enhancing for the NBA and thus becomes one more factor to be considered under the efficiency analysis of disciplinary action or other forms of exclusions from participation.

A different critique of Heidt's Chicago School position reinforces talk of the role of institutional norms in sports. For it is not only cultural entities—such as sports organizations—that are not well captured by economic reductionism; this approach gradually seems less fitting for some bona fide business organizations, too. Thus the sociologist Ronen Shamir theorizes what he terms the "responsibilization" process of some economic entities.[80] This means that, especially in the last decade or so, more and more business enterprises—manufacturers, high-tech companies, even retailers (although certainly not enough financial institutions, as the 2008 collapse of the financial bubble showed)—are gradually adopting and developing a language of civic responsibility that cracks open capitalism's traditionally iron-clad division

[79] "Don't Talk of Fairness": The Chicago School's Approach Toward Disciplining Professional Athletes, 61 Ind. L.J. 53, 60 (1985).

[80] Ronen Shamir, The Age of Responsibilization: On Market-Embedded Morality, 37 Economy & Society 1 (2008).

between the economic and the social realms. According to Shamir, "[C]ommercial enterprises increasingly perform tasks that were once considered to reside within the civic domain of moral entrepreneurship and the political domain of the caring welfare state, dispensing social goods other than profits to constituencies other than their shareholders."[81] Shamir's point is that this process of "responsibilization" is not simply another marketing strategy of business entities catering to the ethical sensitivities of the Western consumer, but a way for capitalism to reinvent itself by appropriating a domain of responsibility and authority. Given present global conditions, capitalism extends itself into these spheres, bringing about a new notion of corporate citizenship. Such are

> [T]endencies of corporations to assume socio-moral duties that were heretofore assigned to civil society organizations, governmental entities and state agencies . . . the moralization of markets has become an important part of the neo-liberal global social order, one which does not only neatly fit the principle of self-regulation but, moreover, one which essentially grounds the very notion of moral duty within the rationality of the market.[82]

Note that self-regulating bodies, such as sports leagues, are even more susceptible to "moralization" than purer business entities. According to David Vogel, even some paradigmatic market actors (such as Google, Nike, and Wal-Mart) become more and more engaged in dealing with externalities, sometimes going beyond legal requirements, for example, by setting community programs, dealing with human rights issues, or installing internal compliance systems that approach concerns of various stakeholder groups.[83] While this is may or may not become a prevailing paradigm, expanding corporate power is no longer satisfied with acting in the realm of monetary profit alone, gaining influence in civic and social contexts, culture, and politics.

Vogel and Shamir's arguments are not identical. Vogel is interested in the shifting level, or intensity, of corporate commitment to self-interest, which has been recognized as the primary driving force of economic behavior since Adam Smith. Shamir doesn't think that corporations are necessarily less motivated by self interest, but that what self interest entails, and the modes by which it is

[81] Id. at 2.

[82] Id. at 4. In what can be read as an updated Habermasian critique, Shamir adds,

> Yet at another level, the moralization of markets also entails the economization of morality; a process which is compatible with the general neo-liberal drive to ground social relations in the economic rationality of markets. In this respect, the moralization process [of corporate action] . . . entails a set of practices that contribute to a constantly evolving and adapting neo-liberal imagination, in fact practices that amount to an epistemological breakthrough in that they ground and reframe socio-moral concerns from *within* the instrumental rationality of capitalist markets.

Id. at 3.

[83] David Vogel, The Market for Virtue: The Potential and Limits of Corporate Social Responsibility (2005). See also Bruce Hall and Thomas J. Biersteker, The Emergence of Private Authority in Global Governance (2002); Linda Markowitz, Structural Innovators and Core Framing Tasks: How Socially-Responsible Mutual Fund Companies Sustain Resonant Frames, 50 Sociological Perspectives 131 (2007).

imagined and conceived, are changing.

Of course, the Chicago School may still insist that this as-yet eclectic trend—backed more by elite business schools' developing curricula in "ethics" than most prevailing business practices—simply expresses the preferences which the relevant actors would like to see promoted in the most efficient ways. This is not an anti-market critique but an informed, more nuanced analysis of how market players operate. It is relevant to the discussion of institutional norms—of sports associations and otherwise—because it emphasizes the symbolic and communicative nature of normative commitments expressed through corporate and other forms of practice. In other words: while the Chicago School claims to cut through language (e.g., talk of "sportsmanship" and "symbolic violence") directly to economic functions, the sociological approach suggests that, in understanding social practices and institutions, we should take seriously precisely those notions and purposes that the Chicago School sees as redundant mediators between culture and profit. If teams, fans, players, and a host of other actors take the notion of sportsmanship seriously—not solely as a means for enhancing marketability but as an expression of ethics within the institutional context of sports—that is a good reason to consider sportsmanship as one of the *meanings* of sports, even of commercial sports.

This, I hasten to say, does not amount to "essentializing" sport. Sport is an idea and a tradition, but even as such it is not larger and not more real than the actual practices that make it up. If sportsmanship matters to sport, it is because it is part of the practice of sport—more precisely, of the intersubjective set of signifiers through which persons who are engaged in sports (in any capacity) understand this engagement. It matters to understanding the practice because it counts as such for the actors who care for and engage in it.[84]

Thus, the purposes discussed above—rather than being at best proxies and at worst masks for pure economic interests—are genuine in social and cultural

[84] This sociological approach differs from the notion that the values of a given practice—or its institutional norms—are deduced from some ideal definition of it. The former approach is an interpretation of practice; the latter—a conceptual deduction. An example of the latter appears in Keating: "On what grounds is such a conclusion [the centrality of sportsmanship to sports] reached? Through the employment of the principle that the nature of the activity determines the conduct and attitudes proper to it." Supra note 5 at 29.

The position invoked in the present study is, in fact, the opposite. The "nature of the activity" is an interpretative construction based on an examination of any given practice according to certain methodologies. As Hans-Georg Gadamer, in Truth and Method (1975) argues, any such approach must content itself with the limitations of the presuppositions of the method it applies, an insight that, to my mind, calls for methodological eclectism rather than fundamentalism (Gadamer's metaphor was of "asking" the text, or any other object of interpretation, thus engaging in dialogue that creates an interpretative instance, and a history and tradition of such; of course, the questions frame the terms of the exchange and what counts as legitimate "answers," according to conventions of discourse which later traditions attempted to define in terms of universal rules of linguistic exchange, for example, Grice's "supermaxims of conversation." H. P Grice, Logic and Conversation in 3 Syntax and Semantics 41 (P. Cole and J. Morgan eds., 1975)).

terms, even if they also have a significant economic factor.

IX TRANSGRESSION AND DEFENSE

Until this point in the argument, institutional norms and purposive interpretation of Rule 12A were brought in at the level of transgression, i.e., as considerations whether a transgression has taken place. A different approach may sit better with the NBA's "old" formalism. That would be to concede the validity of formalism on the level of determining transgression, yet allow for the introduction of applicable defenses.

Under defense, the transgression is not nullified by context (e.g., by the lack of awareness of the altercation or by a clearly benevolent purpose for leaving the bench, which was Ewing's main claim in 1997); but the sanction (or remedy) is not applied due to an additional, applicable mitigating factor. Under this model, the defense operates at a different level, not that of the determination of transgression, but at the adjudicative level: what to do about it. For instance, a contract that was breached is not less breached for the existence of some defense against enforcement, such as impracticability. The breach is excused rather than deemed nonexistent. The defense model would first allow the transgression to be determined literally, and then it would explore the applicability of a contextual defense. Thus, Eskridge claims that a player who steps on court during an altercation only in order to save another from harm, while prima facie having transgressed the rule, would benefit from an applicable defense.[85] Ostensibly, we may apply formalist construction initially, while hoping to avoid over-enforcement *ex post facto* by allowing defenses. This is one of those structural niceties of law, inventing one mechanism to compensate for the flaws in another.

As neat as this structure sounds, it can't work. There is no way around the fact that operative terms of Rule 12A such as "during" or "immediate vicinity" are saturated with contextual normative context, and there is no way to tell the story without a contextual interpretation of the rule. There is no purely semantic way to approach rules, and the moment we apply pragmatic heuristics—i.e., bring in context—we are engaged in substantive, nonformalist construction. Every time we apply Rule 12A and others like it the defense will sneak into the structure of transgression.

The NBA may not wish to adjudicate substantively (there can be no blame where there is no discretion!), instead regarding adjudication as restricted to *identifying* the applicable rule and declaring the outcome in technical terms; yet this convenient possibility is not really available. Every act of following the rule expresses both a jurisprudential approach and an exercise in judgment. Thus every adjudicative act, be it the most narrow and technical, is also a jurisprudential and interpretative one. These may be "swallowed up" by deceptively simple procedures, and yet the examples discussed above plainly show how they can become salient to the decision-making process and come to the fore of discussion.

[85] Eskridge, supra note 43, at 1553-54.

X. FORMALISM AS PRAGMATISM?

The attractiveness of theory depends, among other things, on the stage of action and analysis. A "new formalist" approach may simply be that the salient question is not unearthing some hidden norms of the practice and institution of sports and casting those in terms of interpretative purposes, but pragmatically asking the best way to approach disciplinary rules. Influential scholarship claims that in some decision-making contexts, in law and otherwise, relatively strict adherence to some categories of rules is advisable.[86] Since we need them to be effective in the quick-paced, real-time realities of sport competitions, using narrow, clear-cut rules is simply the best strategy, even at some risk of overenforcement.

Overenforcement means that under regulation, the regulated agent would abstain from some actions that should have been permissible or even salutary. The justification for overenforcement is usually that when more precise regulation is impossible or impractical, overenforcement is better than underenforcement. In matters of curbing violence, overenforcement is frequently the preferable strategy.[87]

However, this is not a classical problem of over-enforcement, and to an extent, this argument is not to the point. The reason is that we require a contextual, purposive interpretation approach from the *adjudicative body*, not the regulated agent (i.e., the player). In other words, we distinguish between rule following at the ex-ante and the ex-post stages. This article pertains entirely to the latter. A fairer approach by the NBA to applying Rule 12A, one that takes into consideration context and institutional norms, will not reduce ex-ante compliance by players.

There is an obvious objection to this distinction. Legal realism of the behavioral, Holmsian brand has taught us that law is best perceived as predictions regarding the actions of courts and other officials and institutions (the "bad man" model). The ex-ante and ex-post then merge. The ex-ante is nothing than a simulation of the ex-post.[88]

However, this standard objection seems weak in this case. The reason is that for the regulated agents—the players—treating the rule *as if* it were applied formalistically would still be the preferable strategy, even if that were not the case. The reason is that prediction and simulation of complex adjudication, under

[86] See, e.g., Lisa Bernstein, Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions, 99 Mich. L. Rev. 1724, 1735-44 (2001); Merrill and Smith, supra note 13; Scott & Swartz, supra note 13. See also Mark L. Movsesian, Formalism in American Contract Law: Classical and Contemporary, Hofstra Legal Studies Research Paper Series, No. 06-8 at 5 (n.d.), available at http://ssrn.com/abstract=894281 (last visited Nov 26, 2088).

[87] See Eskridge, supra note 43 at 1555.

[88] A similar critique, in terms of economic analysis, is made by Richard Craswell, Two Economic Theories of Enforcing Promises, *in* Readings in the Theory of Contract Law, 19-44 (P. Benson ed., Cambridge University Press 2001).

real time conditions, is not just impractical but almost impossible. Automobile drivers instinctively slow down in sight of a police patrol, even before checking their own speed. Given the proportionality of action and sanction, most players would tend to follow a maximum strategy.[89] There is simply not enough time, under real time conditions, for any other strategy; too many parameters and considerations require processing.[90] Time, after all, cannot be simulated: the adjudicative body has it, the player doesn't. This can yield a surprising effect: compliance, and possibly some over-enforcement in real time (i.e., during games) but no overenforcement at the ex-post, adjudication level. If we take advantage of the time differentials of the two systems we lose nothing, or close to nothing, at the level of regulated behavior, while playing it fair at the institutional level.

In many areas of life and law we expect institutions and persons to act differently. There is no contradiction in requiring an institution or adjudicative body to apply a nonformalist approach to application and construction while still acknowledging that a formalist approach may be the preferable strategy for the agent who is subject to the norm. The reason that agents may not adopt an ex-ante approach that attempts to approximate ex-post decisions is itself contextual: in this case, the quick, real-time tempo of sports encourages formalism as a heuristic approach as far as players are concerned. It is more practical and risk-effective, even if it sometimes fails to predict ex-post decisions.

CONCLUSION

Basketball, like every form of competition within culture, is also a structure of morality. In contrast to formalist claims, no system of morality can be captured, or reduced to, a strict set of automatic rules. Floating the institutional norms that underlie any given practice is one methodology of refuting formalism claim *qua* theoretical claim, although it still leaves room for instrumental approaches to formalism. This means that for some agents, and in some contexts, applying an ex-ante formalist approach to decision making is the best strategy for approximating non-formalist institutional norms. Above, I have shown that such shortcuts could apply to players' real-time decisions, but never to those of an adjudicative body.

Every scholarly treatment of sports hides, I suspect, the author's passion for the subject matter. I confess to having approached this Article, to an extent, as a fan—not of the Phoenix Suns in particular, nor even necessarily of the NBA, but of basketball. The cases examined here—the Knicks case of 1997, the Suns case of 2007, as well as the NBA's deviation from its own policy in the Kings-Lakers debacle in 2002—suggest two things to people whose passions involve both

[89] They would look to minimize exposure to risk in a given interaction rather than maximize exposure to gains. See John Von Neumann and O. Morgenstern, Theory of Games and Economic Behavior, (Princeton University Press 1944).

[90] In Razian terms, this entails an "exclusionary reason" because no matter how compelling first-order reasons may be, under such conditions, it is more rational not to engage in a substantive decision-making on the merit. See Joseph Raz, Reasons for Action, Decisions and Norms, 84 Mind 481 (1975).

sports and justice. One is to allow context and institutional norms to play their proper function in adjudication. The second is more specific, and regards luck or "happenstance": given the nature of playoff games and their significance not just for players and teams but for fans and a host of stakeholders who bear the burden of the externalities of players' suspensions, leagues should consider, as a rule, either postponing playoff suspensions until the following regular season or relinquishing playoff suspensions altogether for risk-enhancing cases (such as those that fall under Rule 12A), reserving them for actual violence and overt belligerency. In exchange, the monetary fines for creating hazards can be much higher, possibly calculated as a percentage of the player's yearly salary so as to keep the proportional character of suspensions (Rule 12A's fixed fine of $50,000 sounds substantial, but conceivably affects a player earning many millions of dollars per annum less than a teammate making the minimum pay under the CBA). The advantage of fines is that they do not externalize the costs of policing to fans. Nothing upsets a genuine sports fan more than "bumps" such as injuries, officiating mistakes or suspensions that prevent true competition.

A casual survey of sports media suggests that the NBA's decision to suspend the Suns' players "automatically" was the most oft-discussed and controversial issue arising from the 2007 NBA playoffs—more so than anything that took place on the hardwood floor itself. In a playoffs that saw such events as the dramatic collapse of the heavily-favored Dallas Mavericks team (led by MVP Dirk Nowitzki) against an eighth-seeded Golden State Warriors team that barely made it into the playoffs, the miserable show put on by the incumbent champions, the Miami Heat, and indeed the forgettable finals series itself, in which the Spurs predictably swept the Cleveland Cavaliers—it was a quasi-legal decision that made the most lingering headlines. One of the reasons, I think, was "discursive frustration"—the lack of a more exact analytic framework to examine what, precisely, was flawed in the Suns decision, and how such decisions can be made better in the future. Lots of people hated the Suns 2007 and Knicks 2003 decisions, but no clear explanation of what was wrong with them was offered. This article attempts to address that lack.

When the Knicks fans protested "we wuz robbed" in 1997, they did not mean that their team was robbed of victories, but of the legitimate conditions to compete. The lingering sense was that it was really basketball—or more precisely, the sense of genuine competition embedded in the practice—that was thwarted by not letting those teams who made it to the playoffs play it out without exclusionary intervention. The question, of course, is not whether the Knicks would have advanced to the finals in 1997 (for that they had to pass through Chicago and beat Michael Jordan's Bulls, which they never have been able to do in the playoffs), or how the Suns would have fared in 2007;[91] such

[91] The 2006-07 Suns team was not dubbed a "team of destiny" as was the 1992-93 Suns team that, led by Charles Barkley, gave valiant battle to Michael Jordan's Chicago Bulls in the 1993 finals. And yet,

counterfactual speculation is tempting but silly. The harm that was done was not, primarily, consequential, but intrinsic. It harmed genuine basketball competition. This is not, by any long shot, on the list of the worst grievances in the world. And yet it matters to whom it matters, not simply as an indulgence but as imparting both a sense of integrity and the need for an articulating language to express it.

the sense of an unusual team reaching surprising success through unusual measures and in face of unfortunate adversity hovered throughout the 2006-07 season. Out of a preseason ESPN's panel of experts, none had chosen the Suns to win it all that year. Led by two-time MVP point guard Steve Nash and a young athletic center rehabilitating from two microfracture surgeries (Amare Stoudemire), a thin team sporting a 7-8 player rotation played coach Mike D'Antoni's uptempo, offense-oriented style to unprecedented success (a convincing sixty-one wins and tied in the conference's semifinals, up until Game 5 from which Stoudemire and Diaw were suspended).