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What Appeals in Sports Teach Us About Appeals in Courts

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Abstract

Baseball, football, and civil procedure all entail the use of appellate procedures to review initial decisions. The study of appeals in sports can illuminate principles applicable to appeals in courts. This Essay considers baseball's Pine Tar Incident, which involved perhaps the most famous appeal in sports history, and football's Instant Replay rule. This Essay shows that these sports appeals provide insight into important aspects of appeals in civil litigation, particularly into the key concept of the standard of review on appeal.

I. Prologue

Sunday, July 24, 1983. Ronald Reagan was President.[1] Sally Ride had just become the first American woman in space.[2] Billboard's Number One song was "Every Breath You Take" by The Police.[3] Most people who are now

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[1] *See* National Atomic Veterans Day, 48 Fed. Reg. 32747 (July 19, 1983) (proclamation by President Reagan).

[2] John Noble Wilford, *First U.S. Woman in Space Called "Equal" to Men*, N.Y. Times (July 2, 1983), https://www.nytimes.com/1983/07/02/us/first-us-woman-in-space-called-equal-to-men.html [https://perma.cc/U9KQ-UE2A].

[3] *See Billboard Hot 100*, Billboard, https://www.billboard.com/charts/hot-100/1983-07-23/ [https://perma.cc/MG4M-WPN6].

law students weren't born yet. I was at home, watching a baseball game on television.

The game had reached an exciting moment, but it was just the ordinary excitement over who would win. I didn't know—no one yet knew—that the game would become one of the most famous baseball games of all time, and not because of a dramatic hit or pitch or play, but because of a controversy over the rules of baseball. I was about to witness the Pine Tar Incident.

The New York Yankees were at home, hosting the Kansas City Royals.[4] It was the top of the ninth inning, and the Yankees were ahead 4–3.[5] The Royals' U.L. Washington was on first base, but the team had two outs.[6] If the Yankees could retire just one more batter, they would win the game.

The Yankees brought out their great relief pitcher, Rich ("Goose") Gossage.[7] At the plate stood the Royals' most powerful hitter, George Brett.[8] The star pitcher faced the star batter in a tense moment. The Yankees could win the game by getting Brett out, but Brett could tie up the game with a long hit or even put Kansas City ahead with a home run.

Sure enough, after hitting a foul ball off the first pitch, Brett slammed Gossage's second pitch for not only a long hit, but a home run over the right-field fence.[9] With a runner already on base, the Royals scored two runs. Now the Royals were ahead 5–4. Suddenly, things looked grim for the Yankees. In a moment, they had gone from likely winners to likely losers of the game.

But then something unexpected happened. Billy Martin, the Yankees' colorful manager,[10] came bouncing out of the Yankee dugout and picked up Brett's bat. He gave the bat to the umpires. Why would he do that?

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[4] For background on the Yankees, the Royals, and their rivalry in the years leading up to the Pine Tar Game, *see* Filip Bondy, The Pine Tar Game: The Kansas City Royals, The New York Yankees, and Baseball's Most Absurd and Entertaining Controversy 9–125 (2015).

[5] *Id.* at 138.

[6] *Id.* at 139.

[7] *Id.* at 138–39 (describing Gossage as "at the time arguably the best reliever in the game").

[8] *Id.* at 115–36 (describing Brett), 139.

[9] *Id.* at 143. For video of the incident, which confirms the details stated in the ensuing five paragraphs, *see 7/24/83: The Pine Tar Incident*, Major League Baseball (July 24, 1983) https://www.mlb.com/video/7-24-83-the-pine-tar-incident-c3180386 [https://perma.cc/H8FA-V8CK].

[10] Martin was a "baseball genius," but he "mix[ed] alcohol with a fabled temper," was seen by some as "an oft-drunken clown," and got up to "shenanigans" that even some of his own players regarded as "outrageous." Bondy, *supra* note 4, at 100–01.

A long period of confusion followed. The TV announcers speculated that Martin must be claiming that Brett had too much pine tar on his bat. Pine tar, they noted, wasn't allowed on the bat above the trademark, and Brett's bat had a lot of pine tar on it. But it wasn't clear what might follow from that.

The umpires listened to Martin and then went into a huddle. While Brett accepted congratulatory slaps from his teammates and Martin paced around anxiously, the umpires kept turning, rubbing, and peering at the bat. "First time in a long, long time I've seen the umpires huddle this long," one of the announcers said.

The umpires compounded everyone's confusion by laying the bat across home plate. "I've never seen this," both announcers agreed. One added, "I don't know what they're measuring."

Then the plate umpire, Tim McClelland, picked the bat up and started toward the Royals' dugout. After a last word over his shoulder with the other umpires, he pointed at the dugout with the bat, which he was holding in his left hand, and then he held his right hand in the air in a fist. He was calling Brett out! The Yankees had won the game!

Pandemonium. Brett came charging out of the dugout, heading straight for McClelland, his arms flailing wildly. His teammates and other umpires had to restrain Brett from taking a swing at McClelland. Gaylord Perry, a Royals pitcher, grabbed the bat away from McClelland, apparently to prevent the bat from going to the American League office.[11] "I've never seen this in my life," said one of the announcers.

"*Brett Homer Nullified, So Yankees Win*," read the headline in the next day's *New York Times*—the first of three times that the Pine Tar Game made front-page news in that journal.[12] As the *Times* article pointed out, baseball games often end with a home run, but usually the team that hits the game-ending homer *wins* the game.[13] The Pine Tar Game presented a unique example in which the team that hit the game-ending homer *lost*.[14]

Except that they didn't. The Royals had apparently lost the game, but afterwards, they invoked a procedure common in litigation, but less frequently encountered in baseball: they appealed. Actually, in the language

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[11] Bondy, *supra note* 4, at 151.

[12] Murray Chass, *Brett Homer Nullified, So Yankees Win*, N.Y. Times (July 25, 1983), at A1, https://www.nytimes.com/1983/07/25/sports/brett-homer-nullified-so-yankees-win.html [https://perma.cc/MZL3-EGJ7].

[13] *Id.*

[14] *Id.*

of baseball, they protested.[15] In any event, they sought review of the field umpires' initial decision that Brett was out. Under baseball's rules, the review would be conducted by the President of the American League, Lee MacPhail. After considering the matter for three days, MacPhail issued his decision on July 28.

"*Kansas City Wins Protest on Canceled Homer*," the Times reported, as the game made the front page for the second time.[16] President MacPhail overturned the decision of the field umpires. MacPhail acknowledged that Brett's bat had violated the rule regarding pine tar, and he said that the field umpires' ruling that Brett was out was "technically defensible."[17] However, MacPhail said, the ruling was "not in accord with the intent or spirit of the rules."[18] He upheld the protest and ruled that Brett's home run would stand. The game, he decided, was now a Suspended Game, with the score 5–4 in Kansas City's favor and two out in the top of the ninth inning. The game would have to be completed before the close of the season "if practicable," and at the close of the season if it might determine who won either division.[19]

I was awestruck. Although only a college student at the time, I already had a fascination with rules issues that foreshadowed my career as a legal academic. Even as a child, I found the rules of Monopoly more interesting than Monopoly itself, and when watching sports, I liked nothing better than a rules controversy. For lovers of rules issues, the Pine Tar game was the ultimate dream. Not only did the entire game turn on a rules decision in the most dramatic possible way, but the rules decision itself had embedded in it vital issues that transcended its particular context.

In particular, the Pine Tar game offers a valuable lesson about *appeal*. Baseball and civil procedure both involve systems whereby an appellate authority may review decisions by an initial decisionmaker. The way in which

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[15] Murray Chass, *Kansas City Wins Protest on Canceled Homer*, N.Y. Times (July 29, 1983), at A1, https://www.nytimes.com/1983/07/29/sports/kansas-city-wins-protest-on-canceled-homer.html [https://perma.cc/G88W-EVL3].

[16] *Id.* For the third time, the game was on the front page, *see infra* Section IV.

[17] *Text of League President's Ruling in Brett Bat Case*, N.Y. Times (July 29, 1983), at A16, https://www.nytimes.com/1983/07/29/sports/text-of-league-president-s-ruling-in-brett-bat-case.html [https://perma.cc/ZJ99-25P5] [hereinafter "MacPhail Decision"].

[18] *Id.*

[19] *Id.*

President MacPhail explained his decision to overturn the initial call by the field umpires in the Pine Tar game illuminates the concept of the *standard of review* in connection with appeals. Indeed, the Pine Tar game, combined with an analysis of Instant Replay appeals in football, illuminates the concept of standards of review so well it can be of considerable value in Civil Procedure pedagogy. Although the standard of review is perhaps the most important concept in appeal,[20] the topic is curiously neglected in most Civil Procedure casebooks.[21] Most casebooks provide extensive detail on *appealability*, that is, the question of *when* an appeal of a district court's decision can be taken in civil litigation, but surprisingly little on the question of the standard by which a district court's decision is reviewed once it is properly appealed.[22] The Pine Tar case, this Essay shows, can help to fill this strange gap in the Civil Procedure canon.

This Essay joins much prior legal analysis of sports issues, particularly baseball issues. Baseball and its rules have always held a special place in the hearts of legal academics.[23] Volumes have been written on baseball's infield fly rule alone.[24] Scholars have endlessly analyzed Chief Justice John Roberts' assertion in his confirmation hearings that his job as a Justice would be to

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[20] *See infra* note 35 and accompanying text.

[21] *See infra* Part III.B.

[22] *Id.*

[23] *See, e.g.*, Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 Yale L.J. 227 (1994); Amy Beckham Osborne, *Baseball and the Law: A Selected Annotated Bibliography, 1990-2004*, 97 Law Libr. J. 335 (2005).

[24] A student note on the rule, Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. Pa. L. Rev. 1474 (1975), was described by the *New York Times* as "one of the most celebrated and imitated analyses in American legal history." William Grimes, *William S. Stevens, 60, Dies; Wrote Infield Fly Note*, N.Y. Times (Dec. 11, 2008), https://www.nytimes.com/2008/12/12/us/12stevens.html [https://perma.cc/4MCB-E3DJ]. It inspired Flynn, *Further Aside: A Comment on "The Common Law Origins of The Infield Fly Rule*," 4 J. of Contemp. L. 241 (1978); Mark W. Cochran, *The Infield Fly Rule and the Internal Revenue Code: An Even Further Aside*, 29 Wm. & Mary L. Rev. 567 (1988); and Andrew J. Guilford & Joel Mallord, *Time to Drop the Infield Fly Rule and End a Common Law Anomaly*, 164 U. Pa. L. Rev. 281 (2015). Other discussions of the rule include Anthony D'Amato, *The Contribution of the Infield Fly Rule to Western Civilization (and Vice Versa)*, 100 Nw. U. L. Rev. 189 (2006); Howard M. Wasserman, *The Economics of the Infield Fly Rule*, 2013 Utah L. Rev. 479; and Neil B. Cohen & Spencer Weber Waller, *Taking Pop-Ups Seriously: The Jurisprudence of the Infield Fly Rule*, 82 Wash. U. L.Q. 453 (2004).

"call balls and strikes."[25] The Pine Tar game itself has been scrutinized,[26] as has Instant Replay.[27] But as far as I am aware, the implication of the Pine Tar game for standards of review, and its pedagogical virtues with regard to that point, have not previously been discussed.[28]

Part II of this Essay analyzes President MacPhail's Pine Tar decision. Part III then discusses how this decision, combined with Instant Replay in football, can illuminate fundamental concepts relating to appeal in civil litigation.

II. The Pine Tar Case, Analyzed

To understand why the Pine Tar case sheds so much light on standards of review, it is necessary first to analyze it. Why did the field umpires call Brett out? Why did President MacPhail overrule them?

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[25] *E.g.*, Charles Fried, *Balls and Strikes*, 61 Emory L.J. 641 (2012); Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 Cath. U. L. Rev. 683 (2016); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 Const. Comment. 701 (2007); Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 Yale L.J. Online 113, 116 (2010); Mark L. Pelesh, *"Just" Calling Balls and Strikes: Umpires and Judges*, 32.2 NINE: J. of Baseball Hist. & Culture 97 (2024).

[26] *E.g.*, Joseph Lukinsky, *Law in Education: A Reminiscence with Some Footnotes to Robert Cover's Nomos and Narrative*, 96 Yale L.J. 1836, 1855–57 (1987); Mitchell N. Berman, *Our Principled Constitution*, 166 U. Pa. L. Rev. 1325, 1370–76 (2018); Raymond Belliotti, *Billy Martin and Jurisprudence: Revisiting the Pine Tar Case*, 5 Alb. Gov't L. Rev. 210 (2012); Jared Tobin Finkelstein, *In Re Brett: The Sticky Problems of Statutory Construction*, 52 Fordham L. Rev. 430 (1983); Howard Wasserman, *Pine Tar: Of Baseball and Law*, PrawfsBlawg (July 24, 2011, 10:31 AM) https://prawfsblawg.blogs.com/prawfsblawg/2011/07/pine-tar-an-older-of-baseball-and-law.html [https://perma.cc/J3TG-SC29].

[27] *E.g.*, Mitchell N. Berman, *Replay*, 99 Calif. L. Rev. 1683 (2011); Chad M. Oldfather & Matthew M. Fernholz, *Comparative Procedure on a Sunday Afternoon: Instant Replay in the NFL as a Process of Appellate Review*, 43 Ind. L. Rev. 45 (2009); Jack Achiezer Guggenheim, *Blowing the Whistle on the NFL's New Instant Replay Rule: Indisputable Visual Evidence and a Recommended "Appellate" Model*, 24 Vt. L. Rev. 567 (2000); Kenneth K. Kilbert, *Instant Replay and Interlocutory Appeals*, 69 Baylor L. Rev. 267, 284 (2017).

[28] Most discussions of the Pine Tar game focus on its implications for issues relating to statutory interpretation. *See infra* Part III.D. Discussions of Instant Replay have addressed the standard of review, but they have not focused on how Instant Replay appeals, combined with the very different Pine Tar appeal, can be used pedagogically to illuminate issues relating to appeal in civil litigation. *See infra* Part III.C.1.

A. The Field Umpires' Call

The umpires, of course, did not provide a written opinion of the reasoning behind their initial ruling that Brett was out. Umpires don't issue written rulings in the middle of a baseball game. However, Nick Bremigan, a member of the umpiring crew, subsequently published an explanation[29] that showed that the ruling was based on a simple, straightforward application of three of the then-applicable rules of baseball. As of 1983, those rules read as follows:

> Rule 6.06(a): "[A] batter is out for illegal action when . . . he hits an illegally batted ball."[30]
>
> Rule 2.00: "[A]n illegally batted ball is [among other things] . . . one hit with a bat which does not conform to rule 1.10."[31]
>
> Rule 1.10: "The bat handle, for not more than 18 inches from the end, may be covered or treated with any material, including pine tar, to improve the grip. . . ."[32]

Given these rules, it seems obvious why the umpires called Brett out. First, the umpires determined that Brett's bat had pine tar more than eighteen inches from the end of the handle. That explains the mystery of why they laid Brett's bat across home plate—they needed to measure the pine tar. They didn't have a ruler or measuring tape handy,[33] but home plate, as every umpire knows, is seventeen inches wide,[34] so they used it as a measuring device.[35] They found that the bat had "heavy" pine tar nineteen or twenty inches from the handle and "lighter" pine tar for a further three or four inches.[36]

This finding meant that Brett's bat did not conform to Rule 1.10. Under rule 2.00, a batter who hits a ball with a bat that does not conform to

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[29] Nick Bremigan, *Views of Sport; How Baseball Became Unstuck by a Rules Dispute*, N.Y. Times (Aug. 7, 1983), https://www.nytimes.com/1983/08/07/sports/views-of-sport-how-baseball-became-unstuck-by-a-rules-dispute.html [https://perma.cc/3G4R-4TEJ].

[30] Official Baseball Rules (1983 ed.) [hereinafter 1983 MLB Rules], Rule 6.06.

[31] *Id.* Rule 2.00.

[32] *Id.* Rule 1.10.

[33] Bondy, *supra* note 4, at 145.

[34] Official Baseball Rules 3, Rule 2.02 (2022 ed.); 1983 MLB Rules, *supra* note 30, Rule 1.05.

[35] Chass, *supra* note 12.

[36] *Id.*

Rule 1.1.0 has hit "an illegally batted ball." Under Rule 6.06(a), a batter who has hit an illegally batted ball is "out for illegal action." Therefore, Brett was out for illegal action. Q.E.D. As Bremigan put it, "[p]utting these three rules together, one can readily see that the letter of the law clearly indicates that there was no choice but to call Brett out and nullify his home run."[37]

B. President MacPhail's Decision

Nonetheless, President MacPhail saw things differently. He began his opinion by acknowledging that the umpires' initial call was "technically defensible."[38] But, he said, the ruling was "not in accord with the intent or spirit of the rules."[39] President MacPhail explained several reasons why he was reversing the ruling.

First, MacPhail provided *textualist* reasoning. Despite the apparent simplicity of the umpires' initial ruling, MacPhail pointed out that even if one considered only the text of the relevant rules, the matter was more complicated. Rule 1.10, MacPhail noted, did not merely state that the bat handle may be treated with material for not more than eighteen inches. More fully, the rule stated:

> The bat handle, for not more than 18 inches from the end, may be covered or treated with any material (including pine tar) to improve the grip . . . . [The material must not improve the reaction or distance factor of the bat. A ball hit with a bat treated with] any such material, including pine tar, which extends past the 18 inch limitation . . . shall cause the bat to be removed from the game.[40]

Thus, the rule did not merely state a restriction on putting substances on bats to improve the grip. It also specified a penalty for violating that restriction. MacPhail reasoned that "[i]f it was intended that this infraction should fall under the penalty of the batter's being declared out, it does not seem logical that the rule should specifically specify that the bat should be removed from the game."[41]

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[37] Bremigan, *supra* note 29.
[38] MacPhail Decision, *supra* note 17.
[39] *Id.*
[40] 1983 MLB Rules, *supra* note 30, Rule 1.10(b).
[41] MacPhail Decision, *supra* note 17.

Moreover, MacPhail called attention to Rule 6.06(d), which provided:

> [A player using a bat that] has been . . . tampered with in such a way to improve the distance factor or cause an unusual reaction on the baseball . . . . [is not only to be] called out, [but also to] be ejected from the game and may be subject to additional penalties . . . .[42]

MacPhail decided that it was:

> more logical to infer that the second part of the definition of an illegal batted ball, that pertaining to a bat which does not conform to Rule 1.10, is meant to refer to bats covered under Rule 6.06(d), which have been altered or tampered with in such a way to improve the distance factor or cause an unusual reaction on the baseball.[43]

Thus, MacPhail argued, the full text of all the rules involved suggested that Brett should not have been called out.

MacPhail further relied on *intentionalist* and *purposivist* arguments. He explained that the intent of the cited rules—which, he said, he had confirmed with members of baseball's Rules Committee—was to declare a batter out (and have him ejected) for using a bat that had been altered or tampered with so as to hit the ball farther.[44] But pine tar, MacPhail noted, does not cause a bat to hit a ball farther. The pine tar restriction, MacPhail observed, served a quite different purpose, namely, preventing balls from spoiling too quickly and thus requiring new balls be brought into the game too frequently.[45] Accordingly, it would not fulfill the intent or purpose of the rules to declare a batter out for using a bat with excessive pine tar.

MacPhail also relied on *precedent*. He observed that on previous occasions on which batters had been found to have too much pine tar on their bats, the batters had not been called out.[46]

Finally, MacPhail cited the *overall spirit* of the rules. That spirit, he said, was "that games should be won and lost on the playing field—not though

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[42] 1983 MLB Rules, *supra* note 30, Rule 6.06(d).

[43] MacPhail Decision, *supra* note 17.

[44] *Id.*

[45] *Id.*; *see also* Bondy, *supra* note 4, at 3–4 (noting that Calvin Griffith, owner of the Washington Senators (later the Minnesota Twins) and a "famous miser," pushed the pine tar rule through the rules committee in 1976 because he was "thoroughly annoyed at the costs of running a franchise," and one of his "pet peeves was that the Twins were exhausting more than their designated allotment of baseballs in games, replacing dirty ones with fresh ones too often").

[46] MacPhail Decision, *supra* note 17.

technicalities of the rules—and that every reasonable effort consistent with the spirit of the rules should be made to so provide."[47]

Thus, while the umpires' initial call was supported by what seemed to be the clear text of the rules, President MacPhail determined that the text was not as clear as one might have thought at first glance. At least some of the text supported a different interpretation. In resolving the textual ambiguity, MacPhail considered the intent and purpose of the rule, precedent, and the overall "spirit" of the rules.

III. The Pine Tar Case, Instant Replay, and Appeals

Fast forward. After the Pine Tar game, I graduated from college, spent two years at a small but surprisingly successful software start-up company,[48] went to law school, moved to Washington, D.C. for what I thought would be one year for a clerkship (I'm still here more than thirty years later), practiced for a few years at the Department of Justice, and finally arrived at the job that had always called to me, that of law professor.

A. Wanted: An Introductory Case on Appeal

Like most new law faculty, I was asked to teach a first year course. I chose Civil Procedure, which I taught out of the casebook now known as Friedenthal, Miller, Sexton, Hershkoff, Steinman, and McKenzie ("Friedenthal").[49] One of my favorite features of the casebook was its introductory section of "illustrative cases."[50] This section contains twelve cases that take the students through a civil action from beginning to end—from jurisdictional issues relating to

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[47] *Id.*

[48] The company, Decision Resources Inc., developed a business graphics product called *CHART-MASTER*, which in its heyday was the leading business graphics product for the IBM PC. The company started up in such ancient times that the product was originally written for the Apple II+, as the IBM PC didn't exist yet. We ported it over to the PC once it was developed. We worried about issues such as whether it was reasonable to expect users to have 64 *kilo*bytes of RAM. Today, of course, even a moderately priced laptop computer is likely to have *giga*bytes of RAM. Each gigabyte is one million kilobytes.

[49] Jack H. Friedenthal, Arthur R. Miller, John E. Sexton, Helen Hershkoff & Adam N. Steinman et al., Civil Procedure: Cases and Materials (13th ed. 2022) (hereinafter Friedenthal). When I started, the book was written by Cound, Friedenthal, Miller & Sexton.

[50] *Id.* at 28–77.

the plaintiff's initial choice of forum[51] to the preclusive effect of the final judgment.[52] The students learn a little bit about each issue—not enough for them to be experts on any individual topic, but enough that they can understand something about the general nature of a civil action and how the various topics studied in connection with it are related. After the initial set of cases, the book returns to each topic in detail, and knowing a little about the whole of civil procedure helps the students learn the individual topics.

Unfortunately, not every case in the introductory set is equally suitable for giving the students an initial understanding of its topic. I was particularly frustrated with the introductory case on appeal, *Hicks v. United States*.[53] The case was supposed to introduce the issue of standard of review, but it was too advanced. It concerned an appeal following a bench trial of a claim of medical malpractice. The plaintiff's decedent died after a doctor incorrectly diagnosed her condition and failed to give her necessary treatment.[54] The district court determined that the evidence did not establish negligence (i.e., it did not establish that the defendant had failed to exhibit the "degree of skill and diligence" of a "practitioner in his field and community, or in similar communities, at the time"),[55] but the court of appeals reversed.[56]

The crucial issue was the way in which the initial decision regarding negligence was to be reviewed: deferentially or de novo? The court of appeals observed that while fact findings were entitled to deferential review, the finding as to negligence was "not one of fact in the usual sense, but rather whether the undisputed facts manifest negligence."[57] Moreover, the court said that while "the absence of a factual dispute does not *always* mean that the conclusion is a question of law, it becomes so *here* because the ultimate conclusion to be drawn from the basic facts, i.e., the existence or absence of negligence, is actually a question of law."[58] Thus, the students were expected to learn the different standards of review applicable to questions of fact and law in connection with an issue that was not easy to characterize as either. And as if that weren't difficult enough, the notes following the case remarked that in a case tried by jury, the question of whether conduct is negligent is usually left to the jury,[59] which further clouded the message of the case.

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[51] *Id.* at 29.
[52] *Id.* at 72.
[53] 368 F.2d 626 (4th Cir. 1966); *see* Friedenthal, *supra* note 49, at 68.
[54] *Hicks,* 368 F.2d at 628–29.
[55] *Id.* at 629.
[56] *Id.* at 628, 633.
[57] *Id.* at 631.
[58] *Id.*
[59] Friedenthal, *supra* note 49, at 70.

I wanted to supplement *Hicks* with a different case that would more suitably introduce the topic of appeal, and particularly the issue of standard of review, to the students. But finding such a case proved more challenging than I expected. Looking for such a case, I discovered that this vital issue gets surprisingly little treatment in most Civil Procedure casebooks.[60]

B. The Curious Neglect of Standards of Review

Law students' introduction to the topic of appeal should, I believe, introduce them to three concepts: appealability, reviewability, and, most importantly, the standard of review. The concept of "appealability" controls *when* a party may appeal. A trial court's order is "appealable" if a party may appeal as soon as the trial court enters the order.[61] The distinct concept of "reviewability" controls whether a party may *ever* get appellate review of a purported error by the trial court. If a party may ever obtain appellate review of a trial court's order, the order is reviewable, even if the party cannot obtain that review immediately upon entry of the order—that is, even if the order is not appealable.[62] Finally, the "standard of review" determines whether the appellate court will show deference to the trial court's initial decision of an issue or simply do whatever it (the appellate court) believes to be right.[63]

As every appellate lawyer knows, the standard of review is the most important issue in many appeals; certainly, it is one of the most important considerations in appellate litigation generally.[64] Indeed, it is so important

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[60] *See infra* Part III B.

[61] Joan Steinman, *The Puzzling Appeal of Summary Judgment Denials: When Are Such Denials Reviewable?* 2014 Mich. St. L. Rev. 895, 901–02 (2015).

[62] *Id*. Many trial court orders are reviewable but not appealable. A party may obtain appellate review of such orders, but, typically, must wait until the end of the trial court proceedings to do so. For example, a federal district court's order denying a defendant's motion to dismiss a case for lack of subject matter jurisdiction, lack of personal jurisdiction, or improper venue, *see* Fed. R. Civ. P. 12(b)(1), (2), (3), would not be appealable, but the defendant could obtain appellate review of the order when appealing from the final judgment entered at the conclusion of the district court's proceedings. Richard D. Freer, Aspen Student Treatise for Civil Procedure 900–01 (4th ed. 2017).

[63] Freer, *supra* note 62, at 922.

[64] *See*, *e.g.*, James F. Bogan III, *Best Practices in Appellate Litigation*, 2013 WL 574532, *3 (2013) ("One of the most important considerations (and perhaps the most important) is the standard of review."); Noella Sudbury, *What Every Lawyer Should Know About Appeals*, Utah Bar. J., Nov./Dec. 2012, at 60, 60 ("Probably the most important lesson I learned as an appellate clerk is that the standard of review

that the Federal Rules of Appellate procedure require a party's brief to contain "for each issue, a concise statement of the applicable standard of review."[65]

Yet despite its critical importance, the topic of standard of review is curiously neglected in Civil Procedure casebooks. Since I didn't like the case on standard of review in the Friedenthal casebook's initial section of "illustrative cases," I thought at first that I would simply replace it with a case drawn from the full chapter on appeal in the same casebook. It turned out, however, that the full chapter on appeal in the Friedenthal book doesn't contain a suitable introductory case on standard of review either.[66]

In fact, the treatment of standard of review in the full chapter on appeal is surprisingly brief. The chapter is heavily weighted toward the topic of appealability. That is, it focuses mainly on the question of *when* a party dissatisfied with a district court's ruling can take an appeal. The chapter contains nearly twenty-eight pages that explore the basic federal rule of appealability—the "final judgment rule," which typically allows appeal only at the end of the entire case[67]—and the exceptions to that rule.[68] The chapter covers the numerous ways appeals or other forms of review can sometimes be had of orders other than the final judgment: Rule 54(b) certification,[69] collateral order appeals,[70] discretionary appeals under 28 U.S.C. § 1292(b),[71] appeals

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matters and must often be litigated as fiercely as the substantive issues in the case."); Daniel Real, *Appellate Practice in Nebraska: A Thorough, though not Exhaustive, Primer in How to Do It and How to Be More Effective*, 39 Creighton L. Rev. 29, 85 (2005) ("Beginning with a clear understanding of the appropriate standard of review governing each issue presented on appeal is one of the most important keys to more effective appellate advocacy.").

[65] Fed. R. App. P. 28(a)(7)(B) (requiring such a statement in the appellant's brief); *see also id.* 28(b)(4) (requiring such a statement in the appellee's brief if the appellee is dissatisfied with the appellant's statement).

[66] Friedenthal, *supra* note 49, at 1213–57.

[67] *See* 28 U.S.C. 1291; *e.g.*, Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1976).

[68] Friedenthal, *supra* note 49, at 1213–40.

[69] This rule allows appeal of the resolution of a claim within a multi-claim or multi-party case, if the district court certifies that such appeal is appropriate. Fed. R. Civ. P. 54(b); *see* Friedenthal, *supra* note 49, at 1219.

[70] The Supreme Court has interpreted 28 U.S.C. § 1291 to allow appeal of certain interlocutory orders that are "collateral" to the merits of a case and that cannot be effectively appealed at the end of the case. *E.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); *see* Friedenthal, *supra* note 49, at 1223.

[71] This statute allows immediate appeal of almost any order, provided the district court certifies the order for appeal and the court of appeals exercises discretion to take the appeal. 28 U.S.C. § 1292(b); *see* Friedenthal, *supra* note 49, at 1237.

of injunctive orders under § 1292(a),[72] and writs of mandamus.[73] It even includes a short case excerpt on the obscure concept of appealability based on "pragmatic finality."[74] Yet it has only about 10 pages on standard of review.[75]

And yet, short as it is, the Friedenthal book's section on standard of review is actually one of the more detailed treatments available. Many other Civil Procedure casebooks have even less coverage of this vital topic, though, like Friedenthal, they contain much detail on other matters. The Field, Kaplan, and Clermont casebook, for example, devotes 41 pages to appealability.[76] It also finds room for 15 pages on the degree to which an appellant may assert a new theory on appeal.[77] Yet, it has only a little more than *one page* on standard of review.[78] Freer and Perdue's chapter on appellate review has about five pages on standards of review, with no principal case presented.[79] And the Hazard, Fletcher, Bundy, and Bradt chapter on appellate review has *no* section devoted to the standard of review.[80]

It is not clear why so many casebooks devote so little space to this vital topic. Perhaps casebook authors think that the matter is not that important. Or perhaps they think that, although important, the issue is so simple that the book need only state the basic rule that issues of law are reviewed de novo

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[72] This statute allows for immediate appeal of orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a); *see* Friedenthal, *supra* note 49 at 1239.

[73] This writ allows a court of appeals to compel a district court to take specified action, and while it is to be used only in "extreme cases," La Buy v. Howes Leather Co., 352 U.S. 249 (1957), yet there is no precise test for when it may be awarded; *see* Friedenthal, *supra* note 49, at 1230.

[74] Friedenthal, *supra* note 49, at 1228 (considering Brown Shoe Co. v. United States, 370 U.S. 294 (1962)). This topic is so obscure that I had never heard of it before teaching, even though I had spent more than four years at an exclusively appellate practice, and I have never encountered it in a real case since I started teaching either.

[75] Friedenthal, *supra* note 49, at 1248–58.

[76] Richard H. Field, Benjamin Kaplan & Kevin M. Clermont, Civil Procedure: Materials for a Basic Course 1707–47 (14th ed. 2020).

[77] *Id.* at 1749–63.

[78] *Id.* at 1698–1700.

[79] Richard D. Freer & Wendy Collins Perdue, Civil Procedure: Cases, Materials, and Questions 823–28 (7th ed. 2016).

[80] Geoffrey C. Hazard, Jr., William A. Fletcher, Stephen McG. Bundy & Andrew D. Bradt, Pleading and Procedure: State and Federal Case and Materials 1139–73 (11th ed. 2015). According to the index, there is a section on the "scope of review," but that section is really devoted to reviewability, not standard of review. *Id.* at 1143.

while factual determinations receive deferential review and are reversed only if clearly erroneous[81] and that no case is needed to illustrate the application of the rule. In any event, many casebooks have compressed their section on standards of review to little or nothing, even though they have extensive sections on fine points of appealability, not to mention other, obscure topics that also get much more space.[82]

This slapdash approach to such a critically important topic left me puzzled. In my first semester of teaching, I searched through numerous cases, determined to find a suitable introductory case to include in the "illustrative cases" section to teach the students about standards of review.

Suddenly, however, I had a different vision. At the time I was searching for a suitable case, a controversy was simmering within the sport of football over the use of Instant Replay. This procedure, introduced in 1986, had been discontinued in 1991.[83] Some commentators were complaining that without it, field officials were making important errors that were not being corrected.[84]

Instant Replay, I realized, is an appellate procedure within the game of football.[85] The Pine Tar decision is an appeal within baseball. Put together, they form an excellent illustration of the importance of standards of review. Indeed, they illustrate all three key aspects of appeal: appealability, reviewability, and standard of review.

C. Baseball, Football and Standards of Review

I assembled a supplementary reading assignment consisting of edited versions of President MacPhail's Pine Tar decision, football's replay rule, and some additional notes and questions.[86] I have used this assignment ever since. Indeed, while I initially used these materials to supplement the *Hicks* case,

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[81] *E.g.*, Freer & Perdue, *supra* note 79, at 823.

[82] For example, the Friedenthal casebook finds room for an entire chapter on the early development of pleading, including over forty pages on common law pleading. Friedenthal, *supra* note 49, at 547–601.

[83] Dave Anderson, *Sports of The Times; Super Bowl's Instant Risk: No Replays*, N.Y. Times (Jan. 16, 1996), at B11.

[84] *E.g.*, *id.*

[85] The use of Instant Replay has expanded to other sports. *See*, *e.g.*, Berman, *supra* note 27, at 1689; Kilbert, *supra* note 27, at 284. However, its key attribute in football, namely, its deferential standard of review, is "widely embraced" across other sports, *see* Berman, *supra* note 27, at 1689, so for purposes of this Essay it suffices to consider Instant Replay in football alone.

[86] This assignment is reproduced in the Appendix: The Pine Tar Assignment.

I subsequently dropped *Hicks* altogether and now use these materials alone. They illuminate, in a more familiar context than civil litigation, the three key questions to focus on in any appeal: What is appealable? What is reviewable? What is the standard of review? The world of sports presents these issues, particularly standard of review, in a context that is easily grasped.

1. Appellate Review in Football

The Official Rules of the National Football League contain an appellate procedure within football officially known as "Instant Replay"[87] and often referred to simply as "replay."[88] Currently, the Instant Replay rule provides for the NFL's Senior Vice President of Officiating (or that official's designee) to conduct all replay reviews.[89] Thus, replay is always conducted by the NFL's central officiating office in New York, regardless of where a game is being played.[90] When replay occurs, the Senior Vice President consults with the Replay Official, who is also at the national office, and the Referee, who is one of the field officials at the game being played.[91]

Under the rule, the Senior Vice President of Officiating, after reviewing the videotape of a play, may reverse a call made by a field official. The rule provides:

> "An on-field ruling will be changed only when the Senior Vice President of Officiating or his or her designee determines that clear and obvious visual evidence warrants a change."[92]

The replay rule also provides a detailed and complex statement of what plays are reviewable.[93] Not every call made by a field official is subject to Instant Replay. Most matters are (e.g., whether a player was out of bounds,

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[87] Roger Goodell, 2023 Official Playing Rules of the National Football League 59–63 (2023), [hereinafter 2023 NFL Rules], Rule 15.

[88] *E.g.*, Ken Belson, *N.F.L. Will Experiment With Replay Reviews of Pass Interference*, N.Y. Times (Mar. 26, 2019), https://www.nytimes.com/2019/03/26/sports/nfl-pass-interference-replay.html [https://perma.cc/RM2H-CPQ3].

[89] *Id.* at 59, Rule 15 § 1, art. 2.

[90] *See id.* Previously, the rule called for replay to be conducted by the Referee, who was one of the officials on the field. Roger Goodell, 2013 Official Playing Rules of the National Football League 91 (2013), Rule 15 § 9, art. 3.

[91] 2023 NFL Rules, *supra* note 87, at 59, Rule 15 § 1, art. 2.

[92] *Id.* at 59, Rule 15 § 2, art. 1.

[93] *Id.* at 59–62, Rule 15 §§ 3–4.

whether a team had the correct number of players on the field), but some are not (e.g., whether a passer intentionally grounded a pass).[94]

The Instant Replay rule sheds light on appellate procedures.[95] Consider the football analogues of the three questions listed above as the keys to any appeal:

What is appealable?: The word "appealable" is a term of art. It means something quite different from what most students probably think it means when they first hear it. As noted earlier, it does not refer to whether a given decision by a field official can ever be reviewed.[96] It is about the *timing* of such review. Appealability addresses the question of *when* an appeal can be taken, not the question of *what* decisions can be appealed.

In football, the key point of appealability—which may seem almost too obvious to mention, but which is important all the same—is that Instant Replay can occur only at the end of a play. A team cannot necessarily seek Instant Replay at the very moment that a field official makes what might be a mistake that the team desires to challenge. If a field official throws a penalty flag (in a situation where the official does not simultaneously whistle play to a stop), or if a field official *fails* to stop play even though, for example, a player with the ball may have stepped out of bounds, neither team may stop play in order to seek Instant Replay. The challenging team must wait until the end of a play. The throwing of a penalty flag, or the failure to throw one, is not itself appealable. The appealable ruling is the ruling at the end of a play.

What is Reviewable?: As noted above, not every ruling by a field official is subject to review by Instant Replay. As the NFL has modified the replay rule over the years, the set of reviewable rulings has gradually expanded[97] and now includes most rulings, but not all. For example, there is no review of whether a pass was intentionally grounded, whether a receiver was illegally contacted, or the spot where a loose ball crossed the sideline.[98] Thus, some matters are entrusted to the unreviewable judgment of the field officials.

What is the Standard of Review?: Most important, the Instant Replay rule empowers the reviewing official to change the call made by the field officials only upon determining "that *clear and obvious* visual evidence warrants a change."[99] It is vital to appreciate the import of this standard.

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[94] *Id.* at 59–62, Rule 15 § 3, arts. 5, 8, § 4.

[95] *See* Oldfather & Fernholz, *supra* note 27, at 54–69 ("assessing the analogy" between replay appeals and appeals in civil litigation).

[96] *See supra* note 61 and accompanying text.

[97] Berman, *supra* note 27, at 1693.

[98] 2023 NFL Rules, *supra* note 87, at Rule 15 § 4.

[99] *Id.* at Rule 15 § 2, art. 1 (emphasis added).

Consider this hypothetical: A team challenges a play and raises the question of whether a player with the ball stayed in bounds. That player, let us imagine, dodged around a defender and then ran another twenty yards before being tackled. The defending team claims that the player stepped out of bounds when dodging around the defender, but the field officials rule that the player stayed in bounds the whole time. With twenty yards of gain at stake, the defending team challenges the field official's call.

Now imagine that the reviewing official, after looking at video of the play, thinks, "I believe that the player stepped out of bounds. It's a close call. I can see how someone might think the player stayed in bounds. The tapes don't clearly show what happened. But based on the tapes my best judgment is that the player went out of bounds and that the call by the field officials was wrong." What is the reviewing official supposed to do?

The answer is that the reviewing official is supposed to *uphold* the initial call made by the field officials in such a case, even though the reviewing official believes that call to be wrong. The rule allows reversal of the initial call only where the tapes provide "clear and obvious" evidence that the initial call was wrong.

But why? What policy could underlie this rule? If the call is a close one, why shouldn't the reviewing official's best judgment as to what happened be dispositive?

When asked this question, students usually give a variety of answers. Some suggest that the league's central officials desire to show respect for the field officials and to avoid the implicit insult that would be entailed by overruling the field officials in a close case.[100] Some say that the "clear and obvious" standard discourages marginal challenges, which is good because challenges slow the game.[101]

Eventually, someone suggests that the rules impose a clear error standard of review because the field official is usually in the *best position* to make the right call.[102] The field officials are on the field and see the plays with their own eyes, unmediated by technology. The reviewing officials, by contrast,

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[100] *See* Berman, *supra* note 27, at 1714.

[101] *See id.* at 1703; *see also id.* at 1714-24 (considering, though ultimately rejecting, other arguments that reversals cause harm even when they are correct, such as that reversals interfere with "the integrity of the game" or the game's entertainment value); Oldfather & Fernholz, *supra* note 27, at 62 (suggesting that the purpose of the deferential standard in instant replay review "is to prevent instant replay reversals from becoming more controversial than the original call").

[102] *See* Berman, *supra* note 27, at 1700. Berman ultimately disagrees with this position, *see id.* at 1701, but he articulates it for purposes of analysis.

aren't even in the stadium where the game is being played (they're usually not even in the same city), and they see the play only on tape, via television. That doesn't mean that the field official's ruling should always be sustained. Sometimes, the tape shows that the field officials clearly erred. In the case of a clear error, the reviewing officials will overturn the initial call. But where the case is close, and the tape does not offer a clearly superior view of the play than that of the field official who made the initial call, it is best to sustain the initial call even if it seems to be wrong, because as between the field official and the reviewing official, the field official is more likely to have it right.

One might question whether the field officials are really in the best position to make the right call. A field official sees the play only from one angle, whereas the reviewing official typically has access to video showing the play from multiple angles.[103] The reviewing official can watch the play in slow motion, whereas a field official sees it only at full speed.[104] The reviewing official also has more time to reach a correct judgment. A field official must form a nearly instantaneous judgment about what happened, whereas the reviewing official can review the play more deliberately.[105]

These details suggest that perhaps the NFL is wrong to employ deferential review.[106] Perhaps the rule was written by lawyers who uncritically imported the concept of "clearly erroneous" review from litigation to football without sufficiently considering the differences between the two situations. Or perhaps the other reasons for deferential review (e.g., the desire to show respect for the field officials) played a bigger role in shaping the rule.[107]

Still, it seems likely that whether it is correct or not, the belief that the field official is in the best position to make the right call played some role in choosing the standard of review of Instant Replay. The Instant Replay rule appears to be based at least in part on the view that if the reviewing official, even with the aid of multiple angles, slow motion, and more time to consider, finds that the matter is not clear-cut, the field official's initial call is most likely to be the correct one and should stand, even if the reviewing official's

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[103] *Id.*; Oldfather & Fernholz, *supra* note 27, at 63.

[104] Berman, *supra* note 27, at 1701; Oldfather & Fernholz, *supra* note 27, at 63.

[105] To keep the game moving along, the rules limit review to 60 seconds from the time video is shared with the Referee, 2023 NFL Rules, *supra* note 87, at 59, Rule 15, § 2, art. 2, but that's still considerably more time than the field official has to make the initial call.

[106] *See* Guggenheim, *supra* note 27, at 578 (suggesting that Instant Replay should use a "manifest weight of the evidence" standard).

[107] The NFL has never officially stated the reasons why it adopted its deferential standard of review. Berman, *supra* note 27, at 1697.

best judgment cuts the other way. One might describe the matter as one of "comparative expertise." The rulemakers apparently believe that as between the field official and the reviewing official, the field official is more adept at making the right call on a particular play.

2. Appellate Review in the Pine Tar Case

Now consider the Pine Tar case. The critical question is this: did President MacPhail determine that the field umpires made a "clear and obvious" error in their initial ruling in the case?

The answer is an emphatic *no*. In his decision, President MacPhail went out of his way to explain that the rules were *un*clear.[108] He specifically acknowledged that the field umpires' initial ruling was "technically defensible."[109] He suggested that its error could be understood only by relying on the "intent or spirit" of the rules.[110] He relied on intentionalist reasoning in determining that under baseball's rules: not every batter who uses an illegal bat should be called out, but only those whose bats "improve the distance factor or cause an unusual reaction on the baseball."[111]

To be sure, MacPhail also indicated that the same result would follow from the text of the rules.[112] Nonetheless, his leading paragraph prominently relied on the "spirit of the rules" argument, and his final paragraph expressly stated that in some areas the Official Playing Rules were "unclear and unprecise."[113] He took responsibility for the "lack of clear, uniform instruction to the umpires on the interpretation of the rules."[114]

In other words, MacPhail certainly did *not* determine that the field umpires' decision in the Pine Tar Game involved clear error. And yet, he overturned it.[115] Why? As discussed above, when a field official's call is challenged under football's replay rule, if the replay official believes that the call is wrong, but not *clearly* wrong, the replay official is supposed to uphold the call. Why didn't President MacPhail apply this principle? Is it because baseball is different from football?

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[108] *See* MacPhail Decision, *supra* note 17, at A16.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *See id.*
[113] *Id.*
[114] *Id.*
[115] *See id.*

After some discussion, the class determines that the distinction is not between baseball and football, but between the *nature* of the challenge involved in the Pine Tar case and that involved in challenges under football's replay rule. Challenges under the replay rule are challenges regarding *facts*. What happened? Did a player step out of bounds? Did the ball cross the goal line? The challenge in the Pine Tar Game, by contrast, was a challenge regarding the *rules of baseball*. Everyone agreed as to what happened. The question was whether on the agreed facts, the rules demanded that the batter be called out.

That distinction makes all the difference. First, it reverses the "comparative expertise" factor discussed above in connection with the football replay rule. As noted above, the replay rule is apparently based on the assumption that the field official is in the best position to know what happened. But who is the best position to know the true meaning of the rules of baseball: a field umpire who has to make a swift decision, or the President of the league,[116] who, before answering, can think about a rules question in depth, consider prior cases under the rule, and consult members of the rules committee? On a rules question, the league's central administrators should be better positioned to reach the correct answer than a single umpire or umpiring crew who happen to face the question in a given game. Accordingly, the "comparative expertise" argument, which on a question of fact tilts toward upholding the initial call in a close case, tilts toward going with the best judgment of the reviewing official on a question of the rules.

Moreover, there is another vital consideration that also suggests that on a rules question, the reviewing officials should go with their best judgment, regardless of the initial ruling and regardless of how close the question is: the desire for *uniformity* on rules questions. If, on a rules question, the reviewing official applied the replay rule's "clear error" principle—that is, if the reviewing official upheld a call implementing a particular interpretation of the rules, even though the reviewing official believed the call to be wrong, provided it was not *clearly* wrong—then the reviewing official would have to uphold conflicting interpretations of the rules. The rules actually governing a given game would depend on who was umpiring that game and what that umpire thought the rules meant.

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[116] Or, today, the Commissioner of Baseball. The League President positions were abolished in 1999 and their functions consolidated in the Commissioner's office. Murray Chass, *BASEBALL; League Presidents Out as Baseball Centralizes*, N.Y. Times (Sept. 16, 1999) https://www.nytimes.com/1999/09/16/sports/baseball-league-presidents-out-as-baseball-centralizes.html#:~:text=From%20Morgan%20Bulkeley%20in%201876,No%20longer [https://perma.cc/L5ML-YWZQ].

Suppose, for example, that two baseball games occur in which a batter hits a ball with a bat that has too much pine tar on it. In one game, the umpire calls the batter out. In the other, the umpire orders that the bat be removed from the game but allows the play in which the bat was used to stand. If these calls were protested to the league under a hypothetical regime in which the league applied the "clear error" principle to rules questions, then the league would have to uphold *both* calls. As President MacPhail's decision shows, neither call involves a clear error. Both involve reasonable, "technically defensible" interpretations of the rules.

Therefore, if only a *clearly* incorrect call could be overturned, even on a rules question, both calls would have to be upheld, with the result that the umpire could choose whether or not a batter who hit a ball with a bat covered with an illegal amount of pine tar was out. The rules would vary from game to game depending on the umpire's interpretation of them. Such a regime, however, would be undesirable. We want the rules to be uniform across games.[117] We don't want the *facts* to be uniform across games (what would that even mean?), but we do want the rules to be uniform. Uniform application of the rules can be achieved only if, when there is a protest on a rules question, the reviewing officials enforce their best understanding of the rule, regardless of how clear or unclear the rule's meaning is.

Thus, two considerations support MacPhail's decision to overturn the field umpires' call in the Pine Tar Game even though that call did not involve a clear error. MacPhail was in a better position to know the meaning of the rules, and applying his own understanding of the rule would promote uniform application of the rule across games.

D. Application to Civil Procedure

What does all this have to do with civil procedure? Everything. Baseball, football, and civil procedure are all systems in which reviewing officials sometimes reverse an initial decision. In civil procedure, as in sports, it is important to consider what rulings are appealable, what issues are reviewable, and, most of all, what standard of review applies on an appeal.

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[117] *See, e.g.*, Michael Steele, *O'Bannon v. NCAA: The Beginning of the End of the Amateurism Justification for the NCAA in Antitrust Litigation*, 99 Marq. L. Rev. 511, 513 (2015) (noting that the original purpose of the NCAA was to set uniform rules for college football games).

1. Appealability

Civil litigation, at least in federal courts, has a much stricter rule of appealability than football. The basic rule in federal civil litigation is that only the final judgment of a district court is appealable.[118] Appeal may not be taken from most interlocutory orders (i.e., from any order other than the final judgment).[119] Accordingly, a party dissatisfied with an interlocutory order must typically wait until the conclusion of the district court's proceedings to appeal.[120] In football terms, it is as though a team that wanted to challenge a field official's ruling had to wait not only until the end of the play, but until the end the whole *game*.

There are exceptions to the final judgment rule, to be sure. But the key point is for the students to understand that there is a distinction between reviewability and appealability. Even though most interlocutory orders of district courts can eventually be subjected to appellate review,[121] that review is available only upon entry of the final judgment.[122]

2. Reviewability

As noted above, the NFL does not permit challenges to every ruling that a field official might make. Some rulings are unreviewable. In civil litigation, most orders that a district court makes in the course of a case are reviewable, once the district court issues a final ruling that is appealable.[123] If, for example, a district court denies a motion to dismiss for lack of subject matter jurisdiction or personal jurisdiction, or for improper venue or insufficient service of process; if the district court refuses to compel production on important discovery requests; if the district court makes erroneous evidentiary rulings

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[118] 28 U.S.C. § 1291. Some state systems, most notably New York's, permit review of interlocutory orders much more freely than the federal system. *See* N.Y. C.P.L.R § 5701(a) (Consol. 1999).

[119] Kilbert, *supra* note 27, at 269. An "interlocutory" order is an order "not constituting a final resolution of the whole controversy." *Interlocutory*, Black's Law Dictionary (11th ed. 2019).

[120] Kilbert, *supra* note 27, at 269.

[121] *See infra* Part III.B.

[122] Kilbert, *supra* note 27, at 269.

[123] Charles Alan Wright & Arthur R. Miller, 15A Fed. Prac & Proc. Juris. § 3905.1 (3d. ed. 2023) ("[O]nce appeal is taken from a truly final judgment that ends the litigation, earlier rulings generally can be reviewed.") (footnotes omitted).

during a trial; or if the district court commits other errors, all of these matters can usually be reviewed at the end of the case.[124]

Again, there are exceptions and nuances not captured by this basic statement. For example, review cannot be had of errors that are harmless[125] or that are not properly preserved for review,[126] and some interlocutory orders are not reviewable because they are overtaken by subsequent trial events.[127] But in general, most district court orders are reviewable. The key is for the students to understand this basic concept of reviewability and how it differs from appealability.

3. Standard of Review

The most valuable benefit of considering appeals in baseball and football is how it illuminates the concept of the standard of review on appeal. As discussed above, the Pine Tar case and the NFL replay rule suggest that questions of fact should be review deferentially, but questions of law should be reviewed de novo. Those are, indeed, the most fundamental principles of standards of review in civil litigation. On an appeal from a trial court judgment, a court of appeals will show deference to the trial court's (or jury's) findings of fact, overturning them only if they are not only wrong, but clearly wrong, whereas on a question of law the court of appeals rules in accordance with its own best judgment, regardless of how close the question is or which side the trial court took.

Moreover, the reasons why appellate courts use these standards of review mirror the reasons for their use in football and baseball. In litigation, as in sports, we generally believe that the initial decision maker (whether that be a judge or a jury) is in the best position to find the facts of a case. In some cases this is because of the initial decision maker's superior access to the evidence.

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[124] *See id.*

[125] Fed. R. Civ. P. 61.

[126] *E.g.*, Fed. R. Civ. P. 51(d).

[127] For example, a district court's *grant* of summary judgment to a party is reviewable, but if a district court *denies* summary judgment in a case and the case is tried, a court of appeals will not subsequently review the denial of summary judgment. The losing party at trial may move for judgment as a matter of law and appeal if that motion is denied, but if the trial record contains sufficient evidence to support the judgment, a court of appeals will not review whether the summary judgment record was sufficient to allow the case to advance to trial. *E.g.*, Wright & Miller, Federal Practice and Procedure, § 3905.1, *supra* note 123; Eaddy v. Yancey, 317 F.3d 914, 916 (8th Cir. 2003).

In particular, the initial decision maker has superior access to testimonial evidence because the initial decision maker sees witnesses testify live, whereas the appellate judges see only the "cold" transcript of witness testimony. But even where all the evidence in a case is documentary, so that appellate judges can access it as well as the initial decision maker, appellate review of factual determinations is still deferential.[128] The initial decision maker's comparative expertise with regard to finding facts means that the factual findings made at trial should not be overturned unless they are clearly erroneous.

The initial decision maker does not, however, have comparative expertise in knowing the law. Appellate judges know the law at least as well as trial judges. Moreover, there are always at least three of them,[129] which reduces the probability that they will reach an erroneous legal conclusion because one of them has an eccentric view with regard to whatever legal question is raised in a given case.[130]

In civil litigation, as in sports, we want the law to be uniform from case to case. If appellate courts reviewed rulings on questions of law deferentially, then whenever a question of law was close and opposing understandings of the law could both be reasonable, appellate courts would have to uphold conflicting legal rulings. The law would then vary from case to case depending on the views of the initial decision maker, which would be undesirable. We don't want the *facts* to be uniform from case to case (again, what would that even mean?), but we want the *law* to be uniform, so that the law applied to a case does not depend on whom the parties happen to draw as their trial judge.

In short, the principles relating to standard of review that can be discerned from the Pine Tar case and the NFL replay rule apply equally well in civil litigation. By illustrating how these principles apply in the familiar context of sports, the Pine Tar case sheds light on their operation in courts.

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[128] *See*, *e.g.*, Fed. R. Civ. P. 52(a)(6) (providing for deferential review of findings of fact "whether based on oral or other evidence").

[129] *See* 28 U.S.C. § 46 (providing for courts of appeals to sit in panels).

[130] More formally, the Condorcet Jury Theorem establishes that as long as any one decisionmaker is more likely than not to make the correct decision on a given question, then a panel of three decisionmakers acting by majority vote is more likely than a single decisionmaker to answer the question correctly, and indeed the probability of a correct answer from a panel of decisionmakers increases with the size of the panel. *See* Berman, *supra* note 27, at 1726. *See also* Oldfather & Fernholz, *supra* note 27, at 62 (noting that appellate courts are more able to answer questions of law because they are larger).

E. Other Beauties of the Pine Tar Case

As shown above, the Pine Tar case illuminates the vital concept of standard of review on appeal. For those who care to explore it further, the case also provides an excellent introduction to some other highly useful concepts. In particular, President MacPhail's decision can provide the basis for a discussion of competing theories of statutory interpretation. Indeed, at the time the decision was issued, it led to "a tremendous popular debate about the spirit and letter of the law . . . [that] constituted perhaps the most widespread popular legal debate in American history."[131]

The Pine Tar case posed the fundamental question that has driven debate over competing theories of statutory interpretation for decades: if the text of a statute leads to a result that seems contrary to the likely intent or purpose of the statute, what should a court applying the statute do? Textualists believe that the role of a court in applying a statute is to read the statute's text and do what it says—even if what it says is stupid, or even if what it says is not what anyone intended.[132] Intentionalists and purposivists allow judicial discretion to depart from a literal reading of a statute when a court believes that such a reading "will produce a result demonstrably at odds with the intentions of [the statute's] drafters."[133]

The Pine Tar case presents a potential example of this conflict. The text of the relevant baseball rules suggested that Brett was out. Brett hit a ball with a bat that did not conform to Rule 1.10. Therefore he hit an "illegally batted ball," and a batter who hits an illegally batted ball is out.

To be sure, President MacPhail determined that the text of the rules could be understood differently. But his reading of the text was inferential. It is true that the rules provided that a bat with excess pine tar must be removed from the game. From this provision, MacPhail inferred that no other penalty (including calling the batter out) applies in such a case. But the text of the rule does not thus limit the penalty. Indeed, even MacPhail, in drawing the

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[131] Lukinsky, *supra* note 26, at 1855; *see also* George Vescey, *Sports of the Times: A Judge Ends the Agony*, N.Y. Times (Aug. 19, 1983), https://www.nytimes.com/1983/08/19/sports/sports-of-the-times-a-judge-ends-the-agony.html [https://perma.cc/7NEM-CXUL] ("[T]he decision became a litmus test of character and philosophy of the American people, dividing baseball fans and other maniacs into liberals and conservatives, humanists and legalists.").

[132] *E.g.*, Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. Pa. L. Rev. 117, 118 (2009).

[133] Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982); *see also* Siegel, *supra* note 132, at 118–19.

inference that the batter in such a case is not out, said that "[i]f it was *intended* that this infraction should fall under the penalty of the batter's being declared out, it does not seem logical that the rule should specifically specify that the bat should be removed from the game."[134] Thus, his decision relied on the likely intent behind the rule, not merely its text.[135]

While there is room for debate over the correct textualist reading of the 1983 baseball rules relevant to the Pine Tar case,[136] MacPhail's decision certainly relied on intentionalism and purposivism in reaching its result.[137] The decision therefore presents an opportunity to introduce students to the important debate over methods of statutory interpretation.

Thus, the Pine Tar case is doubly valuable. Not only does it provide an excellent introduction to important concepts relating to appeals, but it also highlights the vital debate over methods of statutory interpretation.

IV. Epilogue

President McPhail's ruling didn't end the Pine Tar game, nor the drama associated with it. McPhail ordered that the game be completed on August 18,

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[134] MacPhail Decision, *supra* note 17.

[135] There were other considerations regarding the correct interpretation of the 1983 rules that one would likely wish to mention if using the decision to stimulate a discussion of interpretive methods. President MacPhail's decision also cited American League Regulation 4.23, which provided that "the use of pine tar in itself shall not be considered doctoring the bat. The 18 inch rule will not be cause for ejection or suspension." This regulation might have been cited as further support for his ruling that excessive pine tar on a bat should cause the bat to be removed from the game but should not be the occasion for any other penalty. On the other hand, while the regulation specifically excluded the penalties of ejection and suspension, it said nothing about the penalty of being called out, so one might have argued that this regulation inferentially supported the umpires' ruling that that penalty was still applicable. *See* Belliotti, *supra* note 26, at 229–30.

[136] Professor Belliotti maintains that "the Pine Tar Case is not a genuine conflict between the letter of the law and spirit of the law." Belliotti, *supra* note 26, at 231. In his view, the umpires wrongly "ignored part of the relevant material that should guide the decision." *Id.* at 230. However, he relies on some interpretive principles, such as the rule of lenity, which are not clearly applicable (that rule applies in criminal cases), and he also relies on a "supplemental directive" issued by the American League in 1975 stating that in the case of a bat with too much pine tar, "the intended penalty was only that the bat be removed from the game." *Id.* at 231. A textualist might maintain, however, that the *intended* penalty is irrelevant.

[137] Wasserman, *supra* note 26 ("McPhail made an intentionalist 'spirit v. letter of the rule' decision.").

1983, when both teams were supposed to have a day off.[138] The Yankees, who were in a considerable sulk about losing the appeal, thought about taking their day off anyway and forfeiting the game.[139] Dave Winfield, the team's union representative, complained that if the game's final inning were played on August 18, the Yankees would have thirty-one game days in a row, which would violate a provision in the players' collective bargaining agreement that limited play to twenty consecutive days.[140] "We're not pack mules," he said.[141] But even Don Fehr, the chief counsel to the players' union, said that the League was within its rights to order the game played on August 18 if no other date was available.[142]

Still, a controversy arose about admission to the resumed game. The Yankees announced an admissions charge of $2.50 for those who did not have season tickets.[143] Fans who had tickets to the original game brought suit on the claim that they were entitled to see the rest of the game for free.[144] The Bronx Supreme Court issued a preliminary injunction, not resisted by the Yankees, that the game not be resumed while the litigation was pending.[145] The American League appealed, but the appeal was still pending at the time the Royals had to set off for New York, so the Royals boarded their plane not knowing whether the game would really resume.[146]

At the appellate hearing, the Yankees (represented by none other than Roy Cohn, who showed up to the hearing half an hour late),[147] argued that

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[138] *"Pine-Tar" Game to End on Aug. 18*, N.Y. Times (Aug. 10, 1983), https://www.nytimes.com/1983/08/10/sports/pine-tar-game-to-end-on-aug-18.html [https://perma.cc/6NUD-892J].

[139] Vescey, *supra* note 131; *see also* Steve Wulf, *Pine-Tarred and Feathered*, Sports Illustrated (Aug. 29, 1983), https://vault.si.com/vault/1983/08/29/pine-tarred-and-feathered [https://perma.cc/4XRF-PCMW].

[140] *"Pine-Tar" Game*, *supra* note 138; Bondy, *supra* note 4, at 173, 178.

[141] *"Pine-Tar" Game*, *supra* note 138; Bondy, *supra* note 4, at 178.

[142] *"Pine-Tar" Game*, *supra* note 138; Bondy, *supra* note 4, at 178.

[143] *"Pine-Tar" Game*, *supra* note 138.

[144] Bondy, *supra* note 4, at 179.

[145] Murray Chass, *Finale of Game in Doubt*, N.Y. Times (Aug. 18, 1983), https://www.nytimes.com/1983/08/18/sports/finale-of-game-in-doubt.html [https://perma.cc/D5Q2-J4J5].

[146] Bondy, *supra* note 4, at 186.

[147] Vescey, *supra* note 131. Cohn was most famous for his role as Chief Counsel to Senator Joseph McCarthy during McCarthy's investigation of suspected Communists. He also prosecuted Julius and Ethel Rosenberg as spies and represented future President Donald Trump. *See* Albin Krebs, *Roy Cohn, Aide to McCarthy and Fiery Lawyer, Dies at 59*, N.Y. Times (Aug. 3, 1986), https://www.nytimes.com/1986/08/03/obituaries/roy-cohn-aide-to-mccarthy-and-fiery-lawyer-dies-at-59.html [https://perma.cc/DZ4A-XYRQ].

the game was "not routine" and that they were concerned that they might not be able to ensure adequate security. Justice Joseph Sullivan of the New York Supreme Court's Appellate Division vacated the injunction on the ground that the plaintiffs had failed to show that paying the $2.50 would constitute an irreparable injury justifying injunctive relief. If the charge was wrongful, he said, the plaintiffs could get their money back later. He therefore ruled, "Play ball."[148] In the end, the Yankees honored rainchecks from the previous part of the game.[149]

The drama was, however, still not over yet. With about 1,200 fans in attendance, the Pine Tar game resumed from the moment after Brett's home run.[150] The Royals, now ahead 5–4, were still at bat, with two out, in the top of the ninth inning.[151] Brett, Perry, and two other Royals (the manager and a coach) had been ejected for their conduct during the original incident.[152]

Before pitching to the next Royals batter, Yankee pitcher George Frazier threw to first base, thus setting up a challenge to Brett's home run on the ground that Brett hadn't touched first base on his way around the bases.[153] However, Tim Welke, the first base umpire, signaled "safe."[154] Frazier also threw to second, to set up a claim that neither Brett nor Washington had touched that base, but Dave Phillips, the second base umpire, signaled "safe" as well.[155]

Billy Martin came out of the dugout for yet another challenge.[156] He pointed out that Welke, the first base umpire, hadn't even *been* at the original Pine Tar game, so how could he know whether Brett had touched first on the original day? But the umps were ready. Phillips, at second base, pulled from his pocket an affidavit, signed by all four umpires present at the July 24 portion of the game, stating that both runners had touched all the bases.[157] The League had anticipated that Martin might bring this challenge and had

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[148] Jane Gross, *Appellate Justice Orders "Play Ball,"* N.Y. Times (Aug. 19, 1983), https://www.nytimes.com/1983/08/19/sports/appellate-justice-orders-play-ball.html [https://perma.cc/FQT3-99S7].

[149] Vescey, *supra* note 131; Bondy, *supra* note 4, at 190.

[150] Murray Chass, *Resumed Game Ends in 5-4 Yankees Loss to Royals*, N.Y. Times (Aug. 19, 1983) https://www.nytimes.com/1983/08/19/sports/resumed-game-ends-in-5-4-yankee-loss-to-royals.html [https://perma.cc/8GJ4-4GG3].

[151] *Id.*; Bondy, *supra* note 4, at 188.

[152] Bondy, *supra* note 4, at 186.

[153] Bondy, *supra* note 4, at 189; Chass, *supra* note 145.

[154] Bondy, *supra* note 4, at 189; Chass, *supra* note 145.

[155] Bondy, *supra* note 4, at 189; Chass, *supra* note 145.

[156] Chass, *supra* note 145.

[157] Bondy, *supra* note 4, at 189; Chass, *supra* note 145.

prepared the affidavit ahead of time.[158] Martin told the umpires that the Yankees would continue the game, but under protest.[159]

Martin wasn't quite out of theatrics. He put Don Mattingly at second base, even though Mattingly, a first baseman, was left-handed.[160] A left-handed second baseman is rarer than a triple play—Mattingly's brief stint at second during the resumed Pine Tar game was the only recorded appearance by a left-hander at second base between 1970 and 2016.[161] Martin also put Ron Guidry, a pitcher, in to play center field, as Jerry Mumphrey, the center fielder from the July 24 portion of the game, had been traded.

But there was nothing more Martin could do to prevent the game from resuming, and the end was finally near. Hal McRae, the Royal who followed Brett in the batting order, struck out to end the top of the ninth inning—25 days after that inning began.[162] Royals relief pitcher Dan Quisenberry then retired the Yankees in order to close out the ninth.[163] The Royals therefore won the Pine Tar game, 5–4.[164]

The Yankees, who had won the American League East in 1976, 1977, 1978, 1980, and 1981 and who were just two games out of first place the day before the Pine Tar game in 1983,[165] went on to finish third in the division.[166] They didn't win the division again for thirteen years.[167] Was it the Pine Tar game jinxing them for that long? No one can say.[168]

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[158] Bondy, *supra* note 4, at 189; Chass, *supra* note 145.

[159] Bondy, *supra* note 4, at 189; Chass, *supra* note 145.

[160] Bondy, *supra* note 4, at 188.

[161] *See Left-Handers Who Played 2B, Post-1920*, Quirky Rsch., https://www.quirkyresearch.com/baseball-lists/left-handers-who-played-2b-post-1920/ [https://perma.cc/E5S5-A2FE].

[162] Bondy, *supra* note 4, at 188, 190.

[163] *Id.*

[164] Murray Chass, *Resumed Game Ends in 5-4 Yankee Loss to Royals*, N.Y. Times (Aug. 19, 1983), https://www.nytimes.com/1983/08/19/sports/resumed-game-ends-in-5-4-yankee-loss-to-royals.html [https://perma.cc/W9EX-XB3N] ("YANKEES LOSE SUSPENDED GAME" was the doleful caption of a photo of Billy Martin and some of the game's umpires on the front page of the next day's New York Times).

[165] *See MLB Scores and Standings Saturday, July 23, 1983*, MLB Reference, https://www.baseball-reference.com/boxes/?date=1983-07-23 [https://perma.cc/KD6G-C742].

[166] *See MLB Scores and Standings Monday, October 3, 1983*, MLB Reference, https://www.baseball-reference.com/boxes/?year=1983&month=10&day=3 [https://perma.cc/4Q6W-WC4Y].

[167] Bondy, *supra* note 4, at 192, 196.

[168] *See id.* at 191–99 (describing the Yankees "Post-Pine-Tar Depression" and suggesting that the Pine Tar Game "was a critical turning point in Yankees history").

What is clear, however, is that the Pine Tar game not only provided one of great moments in baseball history, but also involved important legal concepts. The game can be a useful pedagogical tool. By presenting appeal in a sports context, the game illuminates the vital concept of standards of review.

Appendix: The Pine Tar Assignment

The Pine Tar Case
Kansas City Royals v. New York Yankees

Decision of Lee MacPhail, President, American League
July 28, 1983

[An edited version of President MacPhail's decision, which appears in the assignment, is omitted here. A link to the full text of the decision appears in a footnote to this Appendix.][1]

Notes and Questions

1. The Official Rules of the National Football League provide for an appellate procedure within the game of football, known as "Instant Replay." Under the rules, Instant Replay is conducted by the NFL's Senior Vice President of Officiating ("SVPO"), an official at NFL's office in New York. The SVPO is in contact with all games electronically, regardless of where each game is played. If a team's Head Coach challenges a call made on the field by the field officials, the SVPO reviews available tapes of the play and may change the call. However, the rules provide:

> An on-field ruling will be changed only when the Senior Vice President of Officiating or his or her designee determines that clear and obvious visual evidence warrants a change.

2019 Official Playing Rules of the National Football League, Rule 15, § 2, art. 1. Under this rule, if the SVPO believes that the initial call on the field was wrong, but that it was a close call and not clear-cut, what is the SVPO supposed to do?

Why should this be the rule? In the case of a close call, why shouldn't the SVPO's best judgment prevail?

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[1] The text of the decision was reprinted in the *New York Times* shortly after its announcement. *See Text of League President's Ruling in Brett Bat Case*, N.Y. Times (July 29, 1983), at A16, https://www.nytimes.com/1983/07/29/sports/text-of-league-president-s-ruling-in-brett-bat-case.html [https://perma.cc/ZJ99-25P5].

2. Did President MacPhail determine that there was a "clear and obvious" error in the ruling of the field umpires in the Pine Tar Case? If not, what explains the difference between the football replay rule, in which reversal of the field official's call is possible only in cases of "clear and obvious" error, and this decision in a baseball appeal?

3. The football replay rule also provides:

> The Replay System will cover the following play situations:
> (a) Plays involving possession . . .
> (b) Plays involving touching of either the ball or the ground . . .
> (c) Plays governed by the goal line . . .
> (d) Plays governed by the boundary lines . . .
> [and several other, specified situations].
>
> The following aspects of plays are not reviewable:
> (a) Whether an erroneous whistle sounded;
> (b) Whether a ball was illegally batted or kicked;
> (c) Whether a passer intentionally grounded a pass; . . .
> [and several other, specified situations].

2019 Official Playing Rules of the National Football League, Rule 15, §§ 3, 4. Why is the replay rule limited to certain kinds of calls, leaving some calls not reviewable? Assuming the replay rule is a good idea, why shouldn't it apply to all situations?

4. President MacPhail ordered that the Pine Tar game be concluded on August 18, 1983. The continuation of the game was almost scuttled by a lawsuit brought by ticket holders who had attended the first part of the game on July 24 and who alleged they had a right to see the conclusion of the game without paying the $2.50 admission charge announced by the Yankees. A New York State trial court enjoined the game from proceeding, but an appellate judge vacated the injunction and ruled, "play ball." In the end, the Yankees allowed prior ticket holders in for free. The continuation of the game lasted just 9 minutes, 41 seconds, since all four remaining batters (one from Kansas City and three from New York) made immediate outs. The Yankees therefore lost, 5–4.