Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

Volume 17, Issue 1
Winter 2026

Contents

ARTICLES

Harvard Journal of Sports & Entertainment Law
Student Journals Office, Harvard Law School
1541 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-3146
jsel@law.harvard.edu
https://journals.law.harvard.edu/jsel/
U.S. ISSN 2153-1323

Submissions: The *Harvard Journal of Sports and Entertainment Law* ("JSEL") welcomes submissions of original scholarly manuscripts from professors, practitioners, and students of sports and entertainment law, as well as other related disciplines.

Submissions should not exceed 25,000 words, inclusive of footnotes. All manuscripts must be submitted in English, with both text and footnotes typed and single-spaced. Footnotes must conform to *The Bluebook: A Uniform System of Citation* (22nd ed.), and authors should be prepared to provide copies of any cited sources upon request. All manuscripts submitted to JSEL become the property of the Journal and will not be returned.

JSEL strongly prefers electronic submissions of manuscripts in PDF format via Scholastica at https://scholasticahq.com. Submissions may also be sent by email to jselsubmissions@gmail.com.

Each submission must include: (1) an abstract of no more than 250 words; (2) a cover letter; (3) a résumé or curriculum vitae; and (4) a current email address and telephone number at which the author can be reached throughout the review period.

Publication by the Journal shall not be construed as an endorsement of the author or of any views expressed in the published work.

The ***Harvard Journal of Sports and Entertainment Law*** is generously sponsored by:

Premium Partners

DLA PIPER

Arnold&Porter

SIDLEY

WILSON SONSINI

General Partners

SULLIVAN & CROMWELL LLP

Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

Volume 17, Issue 1
Winter 2026

Preface

Dear Readers,

I am Professor Peter Carfagna '79, the Harvard Law School Faculty Advisor to the *Harvard Journal of Sports and Entertainment Law* (JSEL). It has been a distinct pleasure to work with JSEL's Executive Board this year, and I am delighted to introduce Volume 17, Issue 1, which features four excellent articles by five distinguished authors.

The issue opens with *Calling Balls and Strikes* by our own Professor Roberto Tallarita. In this article, Professor Tallarita offers a novel perspective on Chief Justice John Roberts's frequently cited—and frequently criticized—assertion that a judge's role is to simply "call balls and strikes," a metaphor often used to portray judges as impartial arbiters of objective legal truths. While critics typically fault the metaphor for understating the indeterminacy inherent in legal adjudication, Professor Tallarita argues that the deeper misunderstanding lies in the conception of the umpire's role itself. By reframing baseball officiating as an interpretive practice, he contends that if the judge's role is indeed analogous to calling "balls and strikes," then it must be understood as an interpretive endeavor shaped by a range of considerations both internal and external to the "game" of legal adjudication.

Next, Judge Jennifer M. Kinsley contributes *The Myth Revisited: Obscenity Law Since 2015*, a continuation of her earlier work examining the supposed obsolescence of obscenity doctrine. Judge Kinsley identifies what she characterizes as a significant transformation in obscenity law. Whereas obscenity prosecutions once functioned primarily to enforce communal moral standards for adult entertainment, they are now increasingly deployed in tandem with other criminal charges to protect individual victims from concrete harms. In tracing this doctrinal evolution, Judge Kinsley also forecasts a potential resurgence of obscenity law in contemporary political and legal discourse.

In *Preserving a Tradition or Creating a New One? A New Model for College Sports Offers Potential Legal Benefits*, Professors Feldman and Blevins address the seismic shift in intercollegiate athletics following the advent of name, image, and likeness compensation for college athletes. They argue that the erosion of amateurism has been accompanied by a corresponding erosion of judicial deference to the NCAA, exposing collegiate athletics to significant antitrust and labor-law risks. To mitigate these challenges, Professors Feldman

and Blevins propose an "Enhanced Educational Model" that integrates athletic participation into a credit-bearing academic curriculum, thereby reestablishing a meaningful distinction between amateur and professional sports. Their strategic framework offers a thoughtful legal pathway for balancing institutions' core educational missions with mounting commercial pressures in college athletics.

The issue concludes with *Swimming's Flip Turn: New Technology Regulation In Sports* by recent Harvard Law School alum and Weiler Prize winner Sam Spurrell. In this article, Spurrell examines the role of technology in athletic competition and cautions that unprincipled regulatory approaches by sports governing bodies ("SGBs") can have unintended and destabilizing consequences. Using the rise and eventual ban of full-body technical suits in competitive swimming as a case study, Spurrell demonstrates how overly advantageous technologies can undermine tradition in sport and threaten the perceived legitimacy of athletic achievement. He ultimately advocates for technology-regulation strategies that are harmonized with SGBs' long-term vision for their sports.

As always, I am deeply grateful to JSEL's Executive Board for their dedication. I specifically want to thank the current Co-Editors-In-Chief, Natalia Brown and Esdras Camacho, for their leadership and diligent work. We sincerely hope you enjoy reading this Winter issue of Volume 17.

—Peter A. Carfagna

Editor's Note

We are proud to present Volume 17, Issue 1.

This Winter issue caps off a wonderful Fall semester marked by meaningful progress in furthering JSEL's mission: publishing rigorous, timely scholarship at the intersection of law, sports, and entertainment. During the semester, our Online publication featured a number of articles from our student authors examining legal questions surrounding family social media content creation, antitrust issues in the sale of the WNBA's Connecticut Sun, and copyright protection in the age of artificial intelligence. Our JSEL Online team was also thrilled to interview JSEL founder Ashwin Krishnan '10, without whom this publication would not be possible.

On the Print side, the articles in this Winter issue reflect both continuity and change in sports and entertainment law. The contributions range from reconceptualizing judicial interpretation through the metaphor of "calling balls and strikes," to tracing the modern evolution of obscenity doctrine, to proposing new structural models for intercollegiate athletics and evaluating the regulation of performance-enhancing technology. Collectively, the authors examine how the law responds to shifting social, technological, and institutional realities. These pieces exemplify JSEL's commitment to scholarship that is analytically sophisticated, practically grounded, and attentive to the broader implications of legal change. We extend our sincere appreciation to the five outstanding authors of these pieces for sharing their thoughtful and impactful work with JSEL.

This issue would not have been possible without the extraordinary dedication of the Journal's editorial team. We are deeply grateful to everyone who contributed their time, care, and intellectual rigor throughout the publication process. We also thank our Faculty Advisor, Professor Peter A. Carfagna '79, for his continued guidance and support, and the previous Editors-in-Chief, Maya Sharp '25, Trina Sultan '25, and Alec Winshel '25, for their significant time devoted to showing us the ropes. We hope readers find this issue both engaging and illuminating.

Sincerely,
Natalia Brown '26 & Esdras Camacho '26
Co-Editors-in-Chief
Harvard Journal of Sports and Entertainment Law

Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

Calling Balls and Strikes

Roberto Tallarita*

Abstract

Chief Justice Roberts's metaphor of judges as umpires has been often criticized for being a bad theory of legal adjudication. Critics of Roberts's metaphor argue that judges are not mechanical reporters of clear-cut normative truths, but little attention has been paid to the question whether calling balls and strikes is indeed mechanical. The traditional theory, shared by both Roberts and his critics, is that "truth in baseball is clear-cut." In this Article, I argue that this theory of baseball is mistaken. Calling balls and strikes, despite its apparent simplicity, is an inherently interpretive practice. It is shaped not only by clear-cut rules, but also by shared practices and unwritten principles on how the game ought to be played.

---

* Assistant Professor of Law, Harvard Law School. I thank Mitch Berman, Michael Hasday, Scott Hirst, Richard Neumann, William Popkin, Richard Re, Charles Yablon, Ahmed Taha, and Aaron Zelinsky for helpful comments, and Tommaso Tallarita for many instructive baseball games. I am grateful to the editors of the Harvard Journal of Sports and Entertainment Law for their valuable comments and suggestions.

I am an outsider of baseball. Growing up in Europe, where baseball is largely an exotic curiosity, my fascination with this game was initially shaped by literature and cinema. Robert De Niro's speech in *The Untouchables*; Malamud's *The Natural*; and above all the sappy and mysterious *Field of Dreams* and the epic first chapter of DeLillo's *Underworld*. To my teenage self, baseball seemed to be the interpretive key to the American mind; but this being the pre-internet era, there was no way for me to crack that code—no books on the rules and practice of baseball and no acquaintance who had the basic knowledge to explain them to me. Although my current knowledge of baseball is quite decent, I still am, and consider myself, an outsider. After all, I have never played the game, and I learn new things every week. It is in this dual spirit of outsider *and* fan that I approach the topic of this Essay. Which is dedicated to the memory of my father, who, unlike his older son, was a true sports fan but did not have the opportunity to contemplate the beauty of baseball.

Introduction

Perhaps the most successful metaphor in modern legal discourse is Chief Justice Roberts's quip that judges should be like baseball umpires. The judge's job, Roberts famously said, is to merely "call balls and strikes,"[1] that is, to be a neutral and somewhat mechanical reporter of pre-determined legal truths, rather than a lawmaker.[2] By creating this image, Roberts joined an august group of legal thinkers who had portrayed judges as men[3] who merely say out loud what the pre-existing truths of the law are.[4] Indeed, this "vocal" conception of adjudication is much older than baseball and the United States. Montesquieu, with a metaphor that worked quite well for two centuries before Chief Justice Roberts's appointment to the U.S. Supreme Court, called judges *la bouche de la loi*—"no more than the mouth that pronounces

---

[1] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J., D.C. Circuit).

[2] Some perceptive readers of Roberts's statement have argued that Roberts did not necessarily mean to advance a mechanical theory of adjudication, but merely a theory of judges as neutral actors, independent from the parties. *See* Charles Fried, *Balls and Strikes*, 61 Emory L.J. 641, 644 (2012). I think, however, that Roberts's statement contains enough references to the figure of the judge as "rule-applier" rather than "rule-maker" to justify the way in which his metaphor has been generally received by scholars, practitioners, and the general public. *See, e.g.*, Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 Const. Comment. 701, 702 (2007) ("[Chief Justice Roberts's] umpire analogy would have judges 'just' decide constitutional cases according to 'the rules.'").

[3] Roberts's precursors could not have conceived of women as judges, although progress had disrupted this assumption by the time Chief Justice Roberts made his famous statement. This has not been the case, however, in Major League Baseball, where the first woman ever to umpire an MLB game, Jen Pawol, made her debut only in the second half of the 2025 season. *See* Elizabeth Muratore, *Pawol Makes History as 1st Woman to Umpire Regular-Season MLB Game*, MLB.com (Aug. 9, 2025), https://www.mlb.com/news/jen-pawol-on-her-journey-to-becoming-1st-woman-to-umpire-mlb-game [https://perma.cc/8DYH-J9K4].

[4] John Roberts was not the first to propose the judge-umpire analogy. However, previous versions of the analogy did not seem to suggest a formalistic, rule-based conception of either judging or umpiring. *See* John Q. Barrett, *Justice Jackson on Umpires and Judges*, Prawfsblawg (Mar. 21, 2009), https://prawfsblawg.com/2009_03_this-post-was-written-by-john-q-barrett-of-st-johns-and-the-robert-h-jackson-center-it-was-sent-to-the-jackson-list-and/ [https://perma.cc/24LS-37JE]; Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 Yale L.J. Online 113 (2010), https://yalelawjournal.org/essay/the-justice-as-commissioner-benching-the-judge-umpire-analogy [https://perma.cc/9YFE-BVD5].

the words of the law, mere passive beings."[5] Montesquieu probably took this image from English legal writers of the seventeenth century[6]—notably, Sir Edward Coke wrote that "*judex est lex loquens*" (the judge is the law speaking),[7] by which he probably meant that the judge is the mouthpiece, not the source, of the law. And English jurists very likely took it from Cicero, who wrote that "a magistrate is a speaking law, and law a silent magistrate."[8]

By incorporating baseball in this tradition of vocal metaphors, however, Roberts added a layer of complexity. He proposed not only a theory of adjudication, but also a theory of baseball. Many scholars have rejected the former without questioning the latter. Indeed, the typical objection to Roberts's metaphor is that judges—and especially Supreme Court Justices—are not at all like umpires. "Truth in baseball is clear-cut," one exemplary critique goes, "a ball is fair or foul, the runner is safe or out, the pitch is a ball or a strike."[9]

---

[5] Charles de Secondat, Baron de Montesquieu, The Spirit of the Laws 180 (Thomas Nugent trans., 1773).

[6] *See generally* K.M. Schönfeld, *Rex, Lex et Judex: Montesquieu and* La Bouche de La Loi *Revisited*, 4 Eur. Const. L. Rev. 274 (2008).

[7] Calvin's Case (1608) 77 Eng. Rep. 377, 381 (K.B.).

[8] Marcus Tullius Cicero, *The Laws, in* The Republic and the Laws 150 (Niall Rudd trans., 1998). We should be very cautious about making connections between Cicero's and Montesquieu's statements, and even between Montesquieu's and Roberts's. The original historical contexts were so different that any parallelism will inevitably be seriously flawed. I will just note that, regardless of their historical and philosophical differences, all these metaphors represent the role of judges (and in Cicero, more broadly, the role of government officials) as a "vocal" one.

[9] Eric Smith, *Some Thoughts on Engaged Judging*, 55 Ct. Rev. 154, 156 (2019). For other examples of traditional responses to Roberts, see Vaughn R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. Ill. L. Rev. 1207 (2012); Fried, *supra* note 2 (generally accepting the notion that umpiring is much more mechanical than judging); Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 Ariz. St. L.J. 1, 8–9 (2006) (arguing that while Roberts's analogy is "sound in the sense that the judges for the most part really are neutral between litigants in the same way that a good umpire is neutral between the teams," it is "preposterous" in the sense that, unlike umpires, Supreme Court Justices and appellate judges make political decisions that "are not dictated by the unambiguous language of authoritative documents"); Ronald Dworkin, *Judge Roberts on Trial*, N.Y. Rev. of Books (Oct. 20, 2005), https://www.nybooks.com/articles/2005/10/20/judge-roberts-on-trial/ [https://perma.cc/6XRC-58P8] ("As Senator Joseph Biden reminded Roberts, an umpire cannot set the strike zone: that is determined by the explicit rules of baseball. But a Supreme Court justice faces no such constraint."); Siegel, *supra* note 2, at 706 ("If Supreme Court Justices are mere umpires . . . then surely the nominee could have told us, say, whether the regulations of abortion at issue in *Casey* were a ball or a strike, foul or fair").

To be sure, a few commentators have noted that baseball umpires do much more than just calling balls and strikes, and that some calls in baseball are less mechanical than calling balls and strikes.[10] Yet theorists of legal adjudication have ignored the most glaring flaw in the metaphor. Even calling balls and strikes is a much more complicated affair than Roberts suggested. Despite its apparent bright-line simplicity, calling balls and strikes is an interpretive practice, like baseball in general. Whatever the merits of Roberts's theory of adjudication, his theory of baseball is wrong.[11]

In the "law and baseball" tradition,[12] there is a well-known story about the philosophy of umpiring. Three umpires discuss how they make calls. The first says: "I call them as I see them." The second says: "I call them as they are." And the third says: "They ain't nothing till I call them."[13] These three umpires—which I will treat as paradigmatical and will refer to as the First Umpire, the Second Umpire, and the Third Umpire, respectively—embody three common theories of umpiring.

Roberts's theory resembles very closely that of the Second Umpire. Balls and strikes are out there in the objective world, the theory goes, and the umpire can only take notice of them, just like Montesquieu's "passive being."

The most radical opponents of Roberts's theory side with the Third Umpire. They argue that balls and strikes exist only when the umpire makes them so. Stanley Fish—who defended the thesis that interpreters do not decode texts but make them[14]—liked to quote a real-world exemplar of the

---

[10] *See* Howard Wasserman, *Pine Tar: Of Baseball and Law*, Prawfsblawg (July 24, 2011), https://prawfsblawg.com/2011_07_pine-tar-an-older-of-baseball-and-law/ [https://perma.cc/8AEN-VT2T] ("Umpiring—it's a lot more than calling balls and strikes.").

[11] For a sustained defense of the view that the calling of balls and strikes is and should be strictly rule-based, see Ahmed E. Taha, *The Jurisprudence of Baseball: Rules versus Standards*, 59 Gonz. L. Rev. 257, 276–85 (2023/2024). In what follows, I will try to show that this traditional view should be reconsidered.

[12] I refer to the copious body of legal scholarship engaging with baseball by using the semi-serious label introduced by Charles Yablon. *See* Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 Yale L. J. 227, 233 (1994). Since Yablon's essay, legal theorists have made significant progress in studying sports and games as normative systems worthy of rigorous analysis. For a seminal text in this field (commonly called "jurisprudence of sport") and a comprehensive overview of the main issues, see Mitchell N. Berman & Richard D. Friedman, The Jurisprudence of Sport: Sports and Games as Legal Systems (2021).

[13] *See, e.g.*, Robert L. Birmingham, *Teaching Contracts: Coming Home to Roost*, 69 B.U. L. Rev. 435, 455 (1989) (referring to this story as a "trope").

[14] *See* Stanley Fish, Is There a Text in This Class? 327 (1980).

story's Third Umpire to illustrate his own theory of interpretation.[15] According to baseball lore, Bill Klem—a legendary figure who umpired eighteen World Series and is commonly credited for introducing arm signals for umpires[16]—was behind the plate when a pitch came through and the batter did not swing. Because Klem was hesitating to make a call, the impatient batter turned to him and asked: "So what was it, a ball or a strike?" And Klem replied: "Sonny, it ain't nothing 'til I call it." For Fish, this means that umpiring (just like adjudication or literary interpretation) is a matter of power. Those who hold official power determine what counts as normative truth.[17]

Finally, the First Umpire, who "calls them as [they] see them," treats calling balls and strikes as an epistemological rather than a metaphysical problem. There is an objective truth of the game out there, but it's sometimes hard to access. Umpires strive to make accurate calls, but their judgments are inherently constrained by the limits of human perception.

This Article argues that each of the three umpires from the old story fail, in some way, to capture the reality of calling balls and strikes. Contrary to the First and Second Umpires' (and Chief Roberts's) theories, strikes and balls

---

[15] *See* Nick Paumgarten, *No Flag on the Play*, New Yorker, Jan. 2003, at 32 (reporting Fish's retelling of the story).

[16] David W. Anderson, *Bill Klem*, *in* The SABR Book of Umpires and Umpiring 47 (Larry R. Gerlach & Bill Nowlin eds., 2017).

[17] *See* Frances Ferguson, *On Getting Past* Yes *to Number One*, 30 Critical Inquiry 369, 372 (2004) ("Fish . . . treats the performative [that is, the speech act that alters the normative world, such as calling balls and strikes] as if it were largely an exercise in establishing hierarchy within groups. [His reading] makes the performative revolve around identifying who is boss."). I should note that Fish explicitly rejected the labels of relativist or nihilist. In particular, he argued that the interpreter is not "free to confer on an utterance any meaning he likes," and that "while relativism is a position one can entertain, it is not a position one can occupy." Fish, *supra* note 14, at 310, 319. Nonetheless, he kept defending the view that rules do not constrain the interpretive process. *See generally* Stanley Fish, *Fish v. Fiss*, 36 Stan. L. Rev. 1325 (1984). Similar (and perhaps more radical) views of interpretive freedom have been a major philosophical influence on various versions of critical legal theories since the 1980s. *See* Richard Rorty, *Nineteenth-Century Idealism and Twentieth-Century Textualism*, 64 The Monist 155 (1981); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1 (1984); Sanford Levinson, *Law as Literature*, *in* Interpreting Law and Literature: A Hermeneutic Reader 155, 159–162 (1988). A more modest characterization of the Third Umpire's view is proposed in J.S. Russell, *The Concept of a Call in Baseball*, 24 J. Phil. Sport 21 (1997). Russell takes Bill Klem's quip as an illustration of a theory of calls as performative utterances, in the sense introduced by John Austin, but not necessarily unmoored from rules or principles. I will use the Fish-Rorty version of the Third Umpire as it is a purer and crispier version of this theory of umpiring.

do not always exist independently of an interpretive judgment. Still, they are not an arbitrary creation of the umpire as the Third Umpire would suggest.

There are right calls and bad calls in baseball. When umpires make a call, they compare an event to its ideal version. They do not merely believe that a pitch was a strike; they claim that we and others *ought to* believe that it was a strike when trying to make sense of what happened. In other words, the umpire's calls are normative propositions, and their normativity is not based on authoritative and arbitrary commands but on rules, shared practices, and unwritten principles on how the game should be played. Indeed, what makes a call good or bad is a principled conversation—among umpires, players, fans, managers, and all other members of the baseball community—that tries to make common sense of what happened in the game.

Baseball principles, however, are neither eternal nor immutable. They are immanent in the game and therefore subject to change and decay. For decades, a subtle transformation in the collective understanding of baseball has been underway. The theory of baseball proposed here—though still consistent with the game as it is actually played—is slowly being eroded by a mechanistic view fostered by the pervasive use of technology. Chief Justice Roberts's theory could eventually become an accurate theory of baseball, but only because baseball itself would have become a different game.

The rest of the Article is organized as follows. Part I tries to present Roberts's (and the Second Umpire's) theory of balls and strikes in its best light, by examining the detailed, and apparently clear-cut, official rules of baseball. Part II examines the textual ambiguities and inconsistencies within these rules and shows that the actual practice of calling balls and strikes does not align with the official written rules. Part III builds on this analysis to argue that the misalignment between written rules and actual practices is neither accidental nor the product of epistemic failure (as the First Umpire might suggest) but rather reflects a shared understanding of the game and the central role that human judgment plays in it. A corollary of this point is that technology in baseball improves the game when it enhances the role of human judgment, not when it replaces it. Part IV argues that, contrary to the Third Umpire's theory, calling balls and strikes is not an act of power or mere discretion, but an interpretive practice based not only on clear-cut rules but also on principles. Part V discusses the differences between this theory of baseball and Ronald Dworkin's interpretivism and suggests that the Aristotelian concept of practical wisdom may help explain these differences. The last Part recapitulates and concludes.

I. Rules and Diagrams

A. The Central Question

Let's start from the beginning. The action in baseball begins when the umpire calls "Play!"[18] After that moment, "[t]he pitcher shall deliver the pitch to the batter who may elect to strike the ball, or who may not offer at it, as he chooses."[19] What happens after the pitch depends on several details. The most common consequences of a pitch, however, are balls and strikes.

Whether a pitch is a ball or a strike is a question of the utmost importance in baseball. Even casual observers know the familiar maxim: three strikes and you're out. Under the official rules, "[a] batter is out when . . . [a] third strike is legally caught by the catcher,"[20] whereas a batter "is entitled to first base without liability to be put out . . . when . . . four 'balls' have been called by the umpire."[21] The difference between balls and strikes is therefore crucial, because in baseball "[t]he offensive team's objective is to have its batter become a runner, and its runners advance,"[22] while "[t]he defensive team's objective is to prevent offensive players from becoming runners, and to prevent their advance around the bases."[23] Simply put, whether a pitch is called a ball or a strike determines whether each team advances toward its core objective.

The question at the center of this Article is how the umpire is to decide whether a pitch is a ball or a strike, and how that determination relates to the normative reality of balls and strikes. Chief Justice Roberts's implicit theory of umpiring conceives of the decision as a mechanical one: the umpire need only observe whether the facts fit the official definition of a "strike" or a "ball," and say it out loud.

In Roberts's statement, such a theory of baseball remains mostly implicit. He presents umpiring as an ideal benchmark against which legal adjudication can be measured, but he only hints at how he thinks about umpiring.

---

[18] Rule 5.01(b), Official Baseball Rules (Vanish Grover & Raquel Wagner eds., 2025). Hereinafter, any references to a "Rule," "Definition," or "Appendix," unless otherwise specified, is made to Rules, Definitions, and Appendices published in the above edition of the Official Baseball Rules.

[19] Rule 5.01(c). If you are struck by the elegance of this Rule, you are not alone. *See* Richard K. Neumann, *Elegance in the French Civil Code and in the Rules of Baseball*, 28 Green Bag 2d 199, 203 (2025).

[20] Rule 5.09(a)(2).

[21] Rule 5.05(b).

[22] Rule 1.02.

[23] Rule 1.03.

It is quite clear, however—or at least it has been so received by scores of commentators—that Roberts's view of umpiring is strictly formalistic.[24]

Yet, as it happens whenever we use one thing (umpiring, in this case) to assess another (legal adjudication), we may incur two very different problems. The most obvious is that the act of measurement may be flawed—in our case, adjudication may not be like umpiring. This has been the traditional response to Roberts's metaphor among his critics. The less obvious, but equally important, is that the measurement tool itself may be flawed.[25] In our case, calling balls and strikes may not be a strictly formalistic and mechanical task. This is the thesis defended in this Article.

Roberts's decision not to elaborate on his theory of baseball likely reflects its intuitive appeal. To understand the theory's shortcomings, let us first consider the reasons for its prima facie plausibility.

B. The Case for the Clear-Cut Truth of Balls and Strikes

The Rules of Baseball provide explicit definitions of balls and strikes. A ball "is a pitch which does not enter the strike zone in flight and is not struck at by the batter."[26] A strike, in contrast, is "a legal pitch when so called by the umpire"[27] in any of seven different circumstances, the most common of which are commonly termed the "called strike" (when the pitch "[i]s not struck at, if any part of the ball passes through any part of the strike zone"[28] and the "swinging strike" (when the pitch "[i]s struck at by the batter and is missed").[29]

The Rules also define the "strike zone" as follows:

> The STRIKE ZONE is that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and

---

[24] For the widespread reception of Roberts's metaphor as a formalist theory of adjudication, see Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. Rev. 1049, 1051 (2006).

[25] Nassim Taleb called a variant of this mechanism the Wittgenstein's Ruler. *See* Nassim Nicholas Taleb, Fooled by Randomness 224 (2d ed. 2005) ("Unless you have confidence in the ruler's reliability, if you use a ruler to measure a table you may also be using the table to measure the ruler."). For a similar observation, *See* Berman & Friedman, *supra* note 12, at 361.

[26] Definition of "Ball."

[27] Definition of "Strike."

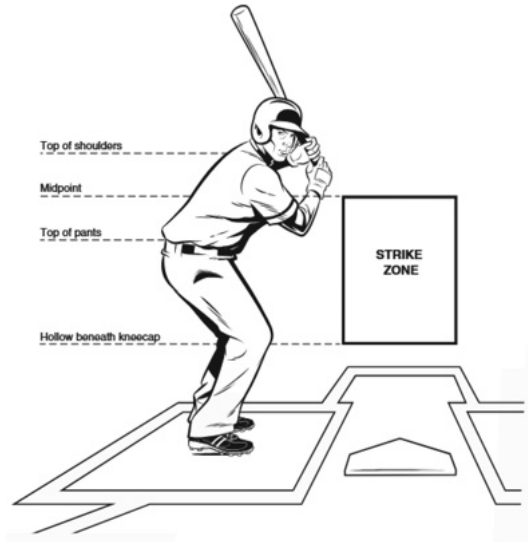
[28] *Id*. at (b).

[29] *Id*. at (a). Interestingly, in the early history of baseball, only swinging strikes were strikes. *See* John Thorn, Baseball in the Garden of Eden 75 (2011) ("Called strikes did not enter the game until 1858 and called balls were an innovation of 1863.").

> the top of the uniform pants, and the lower level is a line at the hollow beneath the kneecap.[30]

A preliminary observation should be that the "top of the shoulders," the "top of the uniform pants," and the "hollow beneath the kneecap" are somewhat open-textured concepts.[31] However, the Rules include a visual representation of the strike zone in an Appendix.[32] The figure in question, reproduced below as Figure 1, shows a rectangle: its base is of the same size of the wider edge of the home plate, and its height goes from just below the kneecaps to the armpit of the batter. Anyone who has watched a baseball game on television in the last twenty years or so has almost certainly seen an electronic version of this rectangle on the screen.[33]

Figure 1. The Strike Zone in the Appendix to the Official Rules



[30] Definition of "Strike Zone."

[31] I refer, of course, to the concept discussed in H.L.A. Hart, The Concept of Law 127-128 (2d ed. 1994) ("Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.")

[32] *See* Appendix 5.

[33] The superimposed electronic representation of the strike zone debuted on ESPN in 2001, to be used only in replays. *See* André Guéziec, *Tracking Pitches for Broadcast Television*, 35 Comput. 38, 38–43 (2002). At the time of this writing (Fall 2025), the electronic strike zone is a fixed feature of any shot of a pitch seen from behind the pitcher.

On its face, then, the question of whether the pitch is a ball or a strike seems to be a mere question of geometry. This is the theory that the Rules and the diagram included in the Appendix seem to suggest, and one seemingly reinforced by the electronic strike-zone graphics displayed on television broadcasts. According to this view, an imaginary rectangle—its dimensions and position precisely delineated in the Rules—intersects with a physical sphere observable in the real world. For a called strike, the question to answer is whether the sphere has touched the rectangle. And for a swinging strike, the question to answer is if the batter has swung at the ball and missed it. In both instances, the answers are to be found in empirical observations of physical events. These may be difficult empirical observations, to be sure, but they are empirical nonetheless.

What, one might ask, could be more mechanical than this? Roberts, it would seem, must be right. There are, however, several complications with this theory. Some of them have to do with the text of the rules themselves, others with the practice and principles of baseball. I examine them in turn in the remainder of the Article.

II. Balls and Strikes in Books and in Action

A. Contradiction and Vagueness

One textual complication for Roberts's theory of baseball is that the rules governing balls and strikes are somewhat internally inconsistent.[34] The diagram of the strike zone that we find in the Appendix does not accurately represent the description that we find in the Definitions. The Rules define the strike zone as the "area over home plate," but home plate is a trapezoid, which makes the "area over home plate" a tridimensional trapezoidal prism, not the bidimensional rectangle depicted in the Appendix. Only one face of this prism—the one facing the pitcher—corresponds to the rectangle in the diagram. A pitch, however, may enter the strike zone through other faces of the prism, a possibility that the diagram does not capture.

This may seem a pedantic observation of little consequence, but it is not. In the real world, many pitches do indeed touch the tridimensional

[34] I use "rules" here as synonymous of written rules or communicative content of written rules. For a distinction between this and other meanings of "rule," as applied to the jurisprudence of sport, see Mitchell N. Berman, *The Concept of a Rule in Baseball: An Essay in Honor of J.S. Russell, Jurisprudent of Sport*, 52 J. Phil. Sport 189 (2025).

strike zone without touching the pitcher-facing rectangle.[35] For example, the ball may take a curved trajectory, miss the frontal face of the strike zone by an inch, and catch the back corner of the plate. These are strikes according to the Definitions but not according to the Appendix. For many years, this contradiction was made more vivid and troubling by the electronic strike zone regularly shown on television, which used to be even less faithful to the text of the Definitions. The televised strike zone is often not only a rectangle but a fixed rectangle—its size and position are the same for all batters.[36] In contrast, according to the Rules "[t]he Strike Zone shall be determined from the batter's stance as the batter is prepared to swing at a pitched ball."[37] Because the strike zone is defined from the batter's stance at the moment he is prepared to swing, it can vary not only from one batter to another (because of body size) but for the same batter across pitches: for example, if he adopts a deeper crouch, widens his knees, or stands more upright. The televised strike-zone graphic has misled viewers into thinking that the geometry of the strike zone is far more simplistic than the rulebook specifies. Only more recently, thanks to the advances of ball-tracking technology, television networks began using tridimensional strike zones and strike zones that adjust to the height of the hitter.[38]

Another textual complication is that the Rules do not explain what it means to "strike at" a pitch in the case of a swinging strike. A swinging strike

---

[35] For persuasive empirical evidence, see Eric Lang, *Analyzing the Strike Zone as a Three-Dimensional Volume*, Hardball Times (Sept. 15, 2015), https://tht.fangraphs.com/analyzing-the-strike-zone-as-a-three-dimensional-volume/ [https://perma.cc/G494-2FDT].

[36] *See, e.g.*, Bor-Yao Tseng et al., *Pitching-Motion: Pose-Based Pitch Trajectory Overlay System*, 26th Int'l Conf. on Advanced Commc'ns Tech. (2024).

[37] Definition of "Strike Zone."

[38] ESPN unveiled what they actually called "K-Zone 3D" during the 2017 American League Wild Card Game. That's the first time they showed the pitch flying through a 3-dimensional strike zone that the spectator could view from different angles. In 2018, they began to use this tool more frequently, including in regular season's games. *See* Ken Fang, *ESPN Will Use More of K-Zone 3-D and Provide Even More Graphics on Sunday Night Baseball*, Awful Announcing (Mar. 19, 2018), https://awfulannouncing.com/espn/espn-will-use-more-k-zone-3d-provide-even-more-graphic-sunday-night-baseball.html [https://perma.cc/K6P5-HWC7]. Fox Sports claims that the height of the strike zone in its FoxTrax system varies from hitter to hitter. *See* Jeffrey Flanagan, *How Accurate is Foxtrax? Within One-Third of a Baseball*, Fox Sports (June 18, 2013, 10:49 ET), https://www.foxsports.com/stories/other/how-accurate-is-foxtrax-within-one-third-of-a-baseball [https://perma.cc/M95R-N9V4]. However, these systems typically do not take into account the specific posture of the hitter.

occurs only if the batter strikes at the pitch (and misses it).[39] In other Rules—and in common baseball parlance—this movement is called a "swing." However, there is no official definition for it. When the batter starts swinging and then stops—typically, because they realize that the pitch is outside the strike zone—the umpire will have to decide whether what just happened was an attempt to strike at the pitch or not. In practice, umpires use different heuristics to make this decision—for example, whether the barrel of the bat passed over the plate or whether the batter's wrists broke—but these are necessarily imperfect proxies for the application of a highly vague standard.

This predicament mirrors a familiar problem in criminal law. In most jurisdictions, the law punishes not only completed crimes but also attempts to commit crimes. However, identifying an attempt is not always easy. An assassin who pulls the trigger but misses the victim is very likely guilty of attempted murder, because they did everything in their control to bring about the prohibited result. But what about someone who spills gasoline in the basement of their enemy's home but is then interrupted before igniting it? Is this a criminal attempt? The law recognizes a *locus poenitentiae*—a space to repent—but how broad this *locus* should be is a contentious question.[40]

The swinging-strike rule in baseball presents an analogous challenge: the umpire must make a judgment call about whether an incomplete action counts as an attempt under the rules. In both contexts, applying a formal standard requires interpretation and judgment, not mere mechanical observation.

B. Interpreting The Zone

The problems with the application of Roberts's theory to the strike zone are not only textual problems. There is also copious evidence that the practice of baseball does not perfectly align with the written rules.[41]

---

[39] I will assume that the concept of "missing the ball" does not raise interpretive questions.

[40] *See, e.g.*, Andrew Ashworth & Lucia Zedner, *Prevention and Criminalization: Justifications and Limits*, 15 New Crim. L. Rev. 542 (2012).

[41] *See, e.g.*, Aaron S.J. Zelinsky, *The Supreme Court (of Baseball)*, 121 Yale L.J. Online 126, 155 (2011), http://yalelawjournal.org/forum/the-supreme-court-of-baseball [https://perma.cc/D5C3-55PV] ("[E]nforcement of the strike zone has been a controversial issue: umpires have often declined to follow the official rules."). Lax enforcement or discretionary applications of rules are not infrequent in sports. *See, e.g.*, William D. Popkin, Judgment: What Law Judges Can Learn From Sports Officiating and Art Criticism 15–18 (2017).

One example is well known to baseball fans, especially those who followed the game several decades ago: the phenomenon of the shrinking strike zone. The 1960s were an era of pitching dominance. In Major League Baseball ("MLB"), the average of earned runs averages, a measure intended to capture how many runs a pitcher gave up, fell from 3.98 in the period between 1947 and 1962 to 2.98 in 1968.[42] In response to this phenomenon, which made baseball games less engaging,[43] the Rules were changed to rebalance the relative strength of defense and offense. The upper limit of the strike zone was lowered from the batter's shoulders to his armpits, and the pitcher's mound was lowered from fifteen to ten inches.[44]

However, players and spectators noticed that "sometime in the 1970s … the upper limit of the strike zone mysteriously shrank [even more] from the armpits to somewhere between the armpits and the waist."[45] This shift was not the result of another official amendment to the rules but a change in how umpires called balls and strikes in practice. Call it the strike zone in action, as opposed to the strike zone in the books.[46]

A similar phenomenon may be happening in the current season (2025). Players have observed that "[e]verybody's zone has shrunk."[47] According to some commentators, the origin of the new shrinking strike zone is due to the recent labor agreement between MLB and the Major League Umpires Association.[48] This agreement, like the previous one, includes a system for grading umpires' calls with automated ball-tracking systems. Called strikes that fall outside what the computer thinks is the official strike zone, as well as called balls that fall within it, are graded "incorrect." However, there is a buffer for minor mistakes. Under the previous agreement, umpires had a two-inch

---

[42] *See* Douglas J. Jordan, *Eras of ERA*, Sport J., https://thesportjournal.org/article/eras-of-era/ [https://perma.cc/QK7F-ZXY5].

[43] Most of my European friends (and many of my American friends) would object that baseball is intrinsically boring, regardless of the size of the strike zone. Of course, baseball *is* boring, according to a certain conception of boredom. But that is a feature, not a bug, of the game. *See* Alva Noë, Infinite Baseball 36–38 (2019).

[44] *See* William F. McNeil, The Evolution of Pitching in Major League Baseball 96 (2006).

[45] *Id.*

[46] The reference is, of course, to Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910).

[47] Jayson Stark, Ken Rosenthal & Eno Sarris, *MLB made a change that players say shrank the strike zone — and caught them by surprise,* Athletic (May 2, 2025), https://www.nytimes.com/athletic/6328105/2025/05/01/mlb-umpire-strike-zone-buffer-zone-change/ [https://perma.cc/WYT5-P8SN].

[48] *See id.*

buffer, while in the new agreement the buffer has shrunk to three-fourths of an inch. This likely explains why the strike zone in action has shrunk.

These episodes are two very visible examples of how umpires shape the strike zone. But there are many others. Umpires approach their task of calling balls and strikes as a very active, interpretive job. For example, they engage in "pitch management," by enlarging the strike zone to speed up an unreasonably slow game. They randomize consecutive close calls to be fair to both teams. They tweak their approach in response to a manager's vigorous protests. Nobody acquainted with the reality of umpiring would believe that calling balls and strikes is a purely mechanical task.[49]

Perhaps no group understands the active role of umpires in interpreting the strike zone better than baseball parents. As the children grow, so grows their ability to play the game (on average). Umpires know that, of course, and their strike zone adjusts to these different levels of abilities, regardless of what the written rules say. A popular website for umpires, for example, suggests that the strike zone's upper limit should be just above the waistline for players aged fifteen and older, but much higher for twelve-year-olds.[50] The website underscores that these are simple rules of thumb, and the relevant ages of the players are just an approximation. "You must adapt to the skill level," the guide recommends, "which *tends* to correlate with age, but doesn't always."[51] Another guide for umpires notes that "[d]ifferent levels and leagues expect a different definition of high [pitch]. For 13 and under, the shoulders are probably a good definition or you will be there all day."[52] These tweaks and adjustments are generally accepted, but they do not align with the official rules. Indeed, the official definitions of the strike zone in the MLB Rulebook and in the Little League Rulebook are almost identical.[53]

---

[49] All these examples, and some others, can be found in Zack Helfand, *Kill the Umpire*, New Yorker, Aug. 30, 2021, at 25. For additional examples of real-world umpiring, see Bruce Weber, As They See 'Em: A Fan's Travels in the Land of Umpires (2009).

[50] *See Calling Balls & Strikes*, UmpireBible.com, https://www.umpirebible.com/index.php/rules-pitching/calling-balls-strikes [https://perma.cc/ZT56-L8U7] (last visited Dec. 20, 2025).

[51] *Id.*

[52] Peter Osborne, *Working the Plate, Part 2: Advanced Ball & Strike Calling*, UmpireBible.com, https://www.umpirebible.com/files/Osborne02.pdf [https://perma.cc/MZ5Y-GYPY] (last visited Dec. 20, 2025).

[53] *See Definition of the Little League Strike Zone*, Little League Univ., https://www.littleleague.org/university/articles/definition-little-league-strike-zone/ [https://perma.cc/DT5Q-NKFE] (last visited Dec. 20, 2025) (defining the strike zone as "that space over home plate which is between the batter's armpits and the top of the

C. The Interpretive Negotiation

By now, it should be quite clear that umpires do not practice Roberts's mechanical conception of baseball. They shrink and enlarge the strike zone for many different reasons, including within the same game. But what of the pitcher, catcher, and batter? How do these players think about and respond to the strike zone? Consider some of the additional skills and practices that their roles demand.

First, pitchers expect umpires to bring their own interpretation of the strike zone and adjust their pitches accordingly. A pitching guide written by a veteran MLB pitcher warns readers that although they naturally "ha[ve] an idea as to which pitches are strikes and which ones will be called balls," it is not at all uncommon that they encounter an "umpire [who] doesn't call [their] bread and butter pitch a strike."[54] In these cases, pitchers must adjust their strategy. For example, the guide advises the pitcher to "pitch ahead in the count,"[55] or "rely more on changes of speed." Moreover, pitchers "must stay consistent," because "[u]mpires like to see… [that] a pitcher knows where he is throwing the ball."[56] If pitchers do this, the guide explains, umpires might change their approach and start calling a consistent pitch a strike.[57] In other words, pitchers do expect umpires to interpret the strike zone, and they enter a sort of conversation with the umpire to try to influence their interpretation.

Second, batters obviously respond to the pitcher's adjustment to the umpire's interpretation of the strike zone. A pitch is, first and foremost, a subtle conversation between pitcher and batter, in which the pitcher tries to create a misleading expectation about the upcoming pitch, and the batter tries not to be misled. As Robert Francis wrote in a poem, referring to the differences between pitchers and fielders, "The others throw to be comprehended.

---

knees when the batter assumes a natural stance"). This definition is very close to the MLB Definition. *See supra* note 30 and accompanying text.

[54] Geoff Zahn, *Uncooperative Umpires*, Master Pitching Inst. (Oct. 15, 2014), https://masterpitching.com/uncooperative-umpires/ [https://perma.cc/8GCW-E2XX].

[55] The "count" is how many strikes and balls have been pitched at a given moment against a batter. Being ahead in the count means having pitched more strikes than balls. While "pitching ahead in the count" is obviously good in any situation, it becomes mandatory when the umpire has a quirky strike zone, because it builds leverage against the batter earlier and therefore mitigates the risk of unexpected calls. It also avoids the temptation to try counterproductive strategies (such as pitching in the middle of the zone to avoid balls, which makes hits much more likely).

[56] Zahn, *supra* note 54.

[57] *See id.*

He / Throws to be a moment misunderstood."[58] This conversation happens in the shadow of the umpire's determination—which pitch should be called a strike and which one a ball—a meta-expectation, as it were. Changing this meta-expectation naturally changes the boundaries of the conversation.

Third, batters and catchers often speak directly with the umpire. "Would that have been a strike?", a batter may ask after he swung and missed a pitch. Or "is that the bottom of the zone?" when looking at a strike called at the edge of the zone.[59] Catchers speak to umpires to comment on pitches. In fact, as the aforementioned pitching guide suggests, it is important that "a pitcher has a catcher that is continually talking to an umpire on his behalf"[60]—a form of advocacy.[61]

Fourth, catchers engage in a well-known practice called "framing": attempting to catch a close pitch in a way that is more likely to be called a strike than a ball. This may sound like cheating—and is sometimes perceived as such—but it is officially recognized as part of the game. The MLB Glossary defines framing as "the art of a catcher receiving a pitch in a way that makes it more likely for an umpire to call it a strike."[62] As for every important skill in baseball, framing has its own statistic and ranking. In the current season (2025), at the time of this writing, Patrick Bailey of the San Francisco Giants and Alejandro Kirk of the Toronto Blue Jays lead the MLB in the art of framing.

Fifth, managers complain about calls that they consider wrong. Sometimes these episodes turn into vigorous protests and may even result in the ejection of the manager from the game.[63] One might wonder why a highly

---

[58] Robert Francis, *Pitcher*, *in* The Orb Weaver 8, 8 (1960).

[59] Matt Antonelli, a former professional baseball player who played in MLB for the San Diego Padres, discusses some of these conversations in a video on his YouTube channel. *See* Antonelli Baseball, *Do Hitters and Umpires Talk To Each Other in MLB*?, YouTube (Feb. 7, 2024), https://www.youtube.com/watch?v=g-w0JcSFvfQ [https://perma.cc/7Y7P-4T92].

[60] Zahn, *supra* note 54.

[61] *Id; see also* Paul Finkelman, *Baseball and the Rule of Law Revisited*, 25 Thomas Jefferson L. Rev. 17, 19 (2002) ("Why does the batter argue at all? Because he is trying to limit the damage of the 'precedent' of this call.").

[62] *Catcher Framing*, MLB.com, https://www.mlb.com/glossary/statcast/catcher-framing [https://perma.cc/T9VX-KX9M] (last visited Dec. 20, 2025).

[63] Under Rule 8.02(a), managers are prohibited from arguing judgment calls such as balls and strikes. Despite this, historical data indicates that arguing these calls is the leading cause of manager ejections. *See* Alex B. Rivard, *Yer out of here*, Medium (Dec. 6, 2021), https://alexbrivard.medium.com/yer-out-of-here-3507149750fb [https://perma.cc/N6F2-4SJU].

paid and experienced professional would publicly lose their temper in such a dramatic way. One reason could be that in sports, emotions run particularly high and can serve a beneficial purpose, such as contributing to an athlete's motivation. This is probably true.[64] However, another reason is that managers want to be part of the conversation about the interpretation of the strike zone, and their way of participating is to express their objections with different degrees of emotional investment. Although an umpire will not overturn a call based on the vigor of a manager's complaint, they may take the objection into account for subsequent calls.

These skills and practices suggest that pitcher, batter, and catcher, as well as managers, do not behave as though balls and strikes are clear-cut facts. They behave more like lawyers before a court. They engage in acts of interpretation and persuasion in efforts to shape the outcome of an umpire's determinations. They treat baseball as an interpretive practice.

III. Technology and Judgment

A. The Epistemological Theory of the Strike Zone in Action

Thus far, I have shown that balls and strikes are not only products of written rules but also of practice, as shaped by umpires, owners, players, and managers. Still, this state of affairs may very well be a contingent and imperfect version of the game. Perhaps the calling of balls and strikes, as well as calling foul and fair balls, outs, and safes, *aspires to be mechanical*, and the members of the baseball community *ought to defer* to a technological device that corrects the flaws and limits of human perception and cognition.

On this account, the fact that baseball right now is not mechanical is an unfortunate product of accident and human imperfection. Determining what has happened on the field is difficult—that is why umpires call strikes that were not strikes and players engage in various tricks and tactics of persuasion to influence those calls. In other words, the indeterminacy of the strike zone would be understood as a bug, not a feature, of baseball.

This is the theory of baseball embraced by some of the critics of Chief Justice Roberts's metaphor. For example, Timothy Terrell has argued that uncertainty in law arises from "its constituent materials," whereas uncertainty in

[64] *See* Eric D. Magrum & Bryan A. McCullick, *The Role of Emotion in Sport Coaching: A Review of the Literature*, Sport J. (May 23, 2019), https://thesportjournal.org/article/the-role-of-emotion-in-sport-coaching-a-review-of-the-literature/ [https://perma.cc/5EDB-BRTL].

umpiring arises from the limits of the umpire's senses.[65] In other words, legal truths are metaphysically indeterminate, whereas baseball truths are not—our difficulty lies only in perceiving them accurately.

This philosophy of umpiring is the one offered by the First Umpire, the one who says, "I call them as I see them." The First Umpire acknowledges the inevitable subjectivity of their job but treats it as an epistemic limitation, not a metaphysical one.[66] If we embrace this theory of baseball, we should probably welcome electronic ball-tracking systems and similar high-tech devices as desirable innovations, as they reduce the physical and cognitive flaws of umpiring and bring the game closer to perfection.

It is very likely that Chief Justice Roberts himself would subscribe to some version of this theory. Indeed, the philosophies of baseball advanced by the First Umpire (the epistemological theory) and the Second Umpire (Roberts's theory of clear-cut rules) are closely aligned. The First Umpire, like the Second (and Chief Justice Roberts), accepts an external, objective reality of balls and strikes—but qualifies this view with a strong disclaimer of epistemic humility.[67] To examine this theory, we must consider whether the misalignment between rules and practice identified in Part II can be adequately explained by this epistemological addendum.

B. Rules, Practice, and Principles

To see why this epistemological theory is mistaken, let us revisit the previous examples of the strike zone in action. While on the surface they appear to be mere instances of misalignment between rules and practice, a closer look reveals an underlying *ratio* (a reasoned justification) for why such misalignment persists.

The shrinking of the strike zone in the 1960s, for example, was a deliberate response to the excessive dominance of pitchers. The tweaking and adjustments of the zone in youth leagues aim to make the game playable for less skillful batters. Pitch management and other modification strategies aim to correct an abnormal flow of the game. The alleged shrinking of the zone

---

[65] *See* Timothy P. Terrell, *The Art of Legal Reasoning and the Angst of Judging: Of Balls, Strikes, and Moments of Truth*, 8 Nw. J.L. & Soc. Pol'y 35, 38 n.7 (2012).

[66] On this view, calling balls and strikes is mainly a question of accuracy. *See* Michael J. Hasday, *Accuracy and the Robot Judge,* 25 J. App. Prac. & Process 1 (2025).

[67] On the concept of epistemic or intellectual humility, see Dennis Whitcomb et al., *Intellectual Humility: Owning our Limitations*, 94 Phil. & Phenomenological Res. 509 (2015).

in 2025, which seems to be driven by a change in how umpires are rated—reflects a trend toward a more uniform and mechanical conception of the strike zone.

These are not accidental practices, transient fashions, or products of epistemic failure. On the contrary, they represent rational patterns that arise from an underlying understanding of how the game *ought to be played*. They reveal, for example, the principle that there ought to be a certain balance between offense and defense, and, when the imbalance is too much, the strike zone should be reshaped to restore the balance.

This and other implicit yet inferable rationales behind the calling of balls and strikes are, quite obviously, normative propositions. They posit that baseball *ought to be* in a certain way. Important consequences follow. For one, they suggest that rules should be amended when they conflict with these propositions. More remarkably, however, it follows that some rules should be interpreted and even tweaked or overridden in light of these propositions. I will return to this point in Part IV.

C. Good and Bad Technology in Baseball

At this point, a supporter of the First Umpire's theory could raise a natural objection: if the misalignment between rules and practice is not an epistemic problem, what explains the spread of high-tech in baseball? For many years, the MLB, television networks, and fans have supported technological innovations such as instant replay, the electronic strike zone, various ball-tracking devices measuring speed, angle, and other features of a play.[68] Indeed, "robo-umpires" for calling balls and strikes will debut in MLB in the 2026 season, although in a limited role.[69] It seems, then, that the members of

[68] In 2012, an informal poll by Fangraphs, a popular website for baseball fans, found that a very large percentage of respondents supported extensive use of instant replay review. *See* Wendy Thrum, *Fans Want More Instant Replay But Does MLB Care?*, Fangraphs (July 24, 2012), https://blogs.fangraphs.com/fans-want-more-instant-replay-but-does-mlb-care/ [https://perma.cc/K6DN-MC7U].

[69] *See* Anthony Castrovince, *ABS Challenge System coming to MLB full time in '26*, MLB.com (Sep. 23, 2025), https://www.mlb.com/news/abs-challenge-system-mlb-2026 [https://perma.cc/X4BZ-ZV8H]. According to this news article, each team will be given two challenges per game (with additional challenges allowed in case of extra innings). Only the batter, the pitcher, and the catcher can challenge the umpire's call, and they must do so immediately after the call and without assistance from other players or the dugout.

the baseball community desire a more mechanical form of umpiring. Is this not a clear vindication of the First Umpire's theory?

The objection is not without merit. However, its grain of truth is better understood within the more capacious theory of baseball developed thus far in this Article.

Let us consider a successful example of technological innovations in modern baseball: the instant replay review. Instant replay review allows managers to challenge certain calls, which are then reviewed from different camera angles at the Replay Command Center in New York.[70]

For many fans, the function of instant replays is to make the game fairer, which is to say, to make umpires' calls more faithful to the independent reality of the play. This is, undoubtedly, a mechanical view of the game. In practice, however, instant replay extends rather than replaces human judgment in baseball. When thousands of spectators turn toward the jumbotron to scrutinize slow-motion footage, revising or confirming their impressions of what just occurred—often in spirited debate with friends and rivals—the interpretive activity at the heart of baseball is enhanced, not diminished.

As Alva Noë observed, instant replay allows fans to reach a decision about what happened and to reconsider the play and the roles of various players in it.[71] It is not the replacement of human judgment with machine judgment; on the contrary, it is an expansion of the opportunities that fans have, at the ballpark or at home, to make their own judgment about the play. In other words, the success of instant replays reveals what we are really doing when we "do baseball"—whether as players, umpires, spectators, or in other roles. We are collectively interpreting the game.[72]

---

[70] *See Replay Review*, MLB.com, https://www.mlb.com/glossary/rules/replay-review [https://perma.cc/TG2D-DP2U] (last visited Dec. 20, 2025). For a jurisprudential discussion of replay review in sports, see Mitchell N. Berman, *Replay*, 99 Calif. L. Rev. 1683 (2011).

[71] *See* Noë, *supra* note 43, at 40.

[72] Mitch Berman observed, in private correspondence, that replays in baseball are probably more conclusive that in other sports, such as (American) football. Email from Mitchell Berman, Professor of L. and Professor of Phil., Penn Carey L., to Roberto Tallarita, Assistant Professor of L., Harv. L. Sch. (Dec. 3, 2025) (on file with author). This is probably true on average. The concept of a foul in soccer—to mention a sport I am more familiar with—is much more open-textured than a fair/foul ball or a safe/out in baseball, and therefore replays of foul plays in soccer are more frequently open to interpretation. It is, however, a spectrum, not a binary distinction. As Noë explains, and as many fans know, replays of close calls in baseball trigger intense interpretive moments. *See* Noë, *supra* note 43, at 40.

This is the opposite of technology as a judgment-reducing tool. Indeed, it shows that the centrality, fallibility, and contingency of human judgment in baseball are not imperfections of the game but essential features of its character. Everyone, except those misled by the superficial function of technology, expects the game to be played this way. Baseball, as a social practice, depends on a web of complex and fallible judgments, made by a large number of people in different roles. It is, at its core, a sustained conversation centered on how to interpret what happened. Were technology to become so accurate and precise as to replace human judgment and render that conversation unnecessary, baseball would not become fairer—it would become something else entirely.

The distinction between judgment-reducing and judgment-enhancing technology is very subtle. Unlike the instant replay review, an automated ball-strike system ("ABS")—like the one that has been tried in the minor leagues and will be introduced in MLB games in the 2026 season,[73] would transform the practice of calling balls and strikes into a truly mechanical exercise.[74] The strike zone, unlike the field of play captured in replay, is particularly vulnerable to mechanization. Unlike television shots in a replay, an electronic prism (or worse, a flat digital rectangle) would leave no open texture for the exercise of human judgment. This technology would have a disruptive effect on how baseball is understood and practiced.

To be sure, the very fact that calling balls and strikes has thus far remained exempt from instant replay review, and the introduction of ABS continues to face resistance from players and fans alike, suggests something important: For most of baseball's history, and even today, calling balls and strikes has not been understood as a mechanical task. It has been understood, rather, as an interpretive practice in which human imperfection is not an error to be eliminated, but a defining feature of the game.

In a recent poll of professional baseball players, almost two-thirds of the respondents said they were against robo-umpires.[75] Current and former

---

[73] *See supra*, note 69.

[74] Amusingly, some baseball professionals believe that MLB Commissioner Rob Manfred supports the introduction of ABS because he is a lawyer and ABS is a legalistic approach to baseball. *See* Helfand, *supra* note 49, at 25 ("Frank Viola, the pitching coach of the High Point Rockers . . . said that ABS worked as designed, but that it was also unforgiving and pedantic, almost legalistic. 'Manfred is a lawyer,' Viola noted.") On this account, law is a much more mechanical practice than baseball.

[75] *See* Chad Jennings, *Robo-umps Might be Coming to MLB. Are Players for or Against Them?*, Athletic (June 11, 2025), https://www.nytimes.com/athletic/6406613/2025/06/11/robo-umpires-mlb-2025-player-poll/ [https://perma.cc/3Q4U-A4G9].

catchers, for example, lament that the introduction of ABS will mean the loss of the art of framing.[76] Some prefer a human umpire because they think that, by contrast, ABS is not able to take into account the peculiarities of the ballpark and other details.[77] Others fear that what the computer will consider a strike, although perhaps accurate from a rule-based, mechanical perspective, will not fit what baseball players consider a strike in terms of shared practice.[78] More fundamentally, many think that baseball needs the "human element"[79] and the robo-umpire would "make baseball feel sterile."[80]

These widespread intuitions and reactions are not consistent with the view that the umpire's deviations from the official rules are epistemic errors. If this were the case, ABS would be an unqualified improvement, so long as it is more accurate than human umpires. Rather, the insistence on the human element and the sterility of computerized calls reflects the shared understanding of the game as an interpretive practice.

To be sure, many fans disagree with the thesis defended here and think about the calling of balls and strikes as a mechanical activity.[81] It is plausible that more fans today hold this view than they did a few decades ago. As I will discuss in Part V, baseball principles are immanent in the game and are therefore subject to change and decay. A slow evolution (or involution) towards a mechanization of the game is undeniable and could eventually result in a radical transformation of the principles I identify in this Article.

---

[76] *See, e.g.*, Hannah Keyser, *What do Robo-Umps, Challenge System Mean for Catchers? Some Coaches are Concerned*, Yahoo! Sports (Jan. 4, 2023), https://sports.yahoo.com/what-do-robo-umps-challenge-system-mean-for-catchers-some-coaches-are-concerned-005531648.html [https://perma.cc/GU8Z-GEJR].

[77] *See* Matt Kawahara, *How Houston Astros View Baseball's Latest Experiment: The Automated Ball-Strike Challenge System*, Houston Chronicle (Feb. 21, 2025), https://www.houstonchronicle.com/sports/astros/article/automated-balls-strikes-system-20179422.php [https://perma.cc/2NDT-5LYN].

[78] *See* Matt Weyrich, *Orioles reset: Some Players in no Rush for Automated Ball-Strike System to Reach MLB*, Balt. Sun (May 28, 2024, 05:00 ET), https://www.baltimoresun.com/2024/05/27/orioles-reset-automated-ball-strike-system/ [https://perma.cc/UV47-9RC7].

[79] *See* Will Walkey & Meghna Chakrabarti, *Are Robo-Referees Making Sports More Fair or Less Fun?*, WBUR (Oct. 2, 2025), https://www.wbur.org/onpoint/2025/10/02/automation-sports-baseball-robot-referee [https://perma.cc/NUR2-VX63].

[80] Owen Kelly, *The Death of the Human Umpire Will Robot Umpires Kill Baseball's Tradition?*, LinkedIn (Oct. 2, 2024), https://www.linkedin.com/pulse/death-human-umpire-robot-umpires-kill-baseballs-tradition-owen-kelly-2txee/ [https://perma.cc/R82S-YWRZ].

[81] *See, e.g.*, WNEP, *Local Fans React to Robot Umpires As MLB Plans Debut*, YouTube (Sep. 24, 2025), https://www.youtube.com/watch?v=MgWGYFXNv1A [https://perma.cc/WZU7-US9C].

IV. The Sense of a Strike

Thus far, I have tried to establish four related propositions. First, truth in baseball is not always 'clear-cut'; it requires an interpretive judgment, even in an activity that appears as mechanical as calling balls and strikes. Second, the exercise of such judgment in baseball is based on certain principles about how the game ought to be played. Third, this state of affairs is not the product of epistemic failure but reflects the way the game is *normatively* understood. And fourth, technology is successful in baseball when it expands and enhances the role of judgment and interpretation, not when it diminishes it.

This line of argument is, I believe, an effective refutation of Chief Justice Roberts's theory of baseball. If judges should "call balls and strikes" just like umpires, as Roberts argued, then they should adjudicate legal cases based on rules *and* principles—judges, like umpires, are not mechanical "passive beings" (à la Montesquieu)[82] but participants in a broader interpretive conversation.

The recognition that baseball has principles and calling balls and strikes is about judgment and interpretation raises further difficult questions: What are these principles? From where do they arise? How do we find them? Do they change over time? And if so, how? While a full treatment of these questions is beyond the scope of this Article, this Part addresses one significant dimension of this interpretive practice: the problem of the umpire's discretion. What does it mean to make an interpretive judgment in baseball? How exactly is this judgment different from an exercise of discretion, as the Third Umpire suggests?

A. The Normativity of Balls and Strikes

The crucial difference between the theory defended in this Article and the theory of the Third Umpire is a belief in the normativity of balls and strikes. According to Stanley Fish (and the Third Umpire) calling balls and strikes is a pure exercise of power.[83] By contrast, as discussed thus far, judgment and interpretation require normative standards.

When we judge or interpret, in the sense proposed, we compare something to a normative standard. We do not merely believe that a pitch was a strike; we claim that we and others *ought to* believe that it was a strike. We do not merely look at what the batter and the pitcher did; we compare what they

[82] *See supra* note 5 and accompanying text.
[83] *See supra* notes 14–17 and accompanying text.

did with what they *ought to have done*. We are interested in the ways in which the play could have been better and more perfect.[84]

Thus, rejecting Chief Justice Roberts's theory of umpiring does not imply rejecting the idea that there are right and wrong calls and concluding that all calls are therefore arbitrary and subjective. We can still believe that there are right and wrong calls but acknowledge, at the same time, that calling them is not a mechanical act but an act of interpretive judgment.

To understand this point more fully, we must examine another mistaken theory of baseball. In one of his early writings, Ronald Dworkin argued that judges do not have discretion, and, to demonstrate this point, he proposed a comparison between law, baseball, and several hypothetical variants of the game.[85] Discretion, Dworkin argued, is when a judge, umpire, or scorer is entitled to decide as they wish.[86] Exercising discretion, for Dworkin, meant choosing an outcome based on the chooser's private preferences rather than on any governing rule or standard. In baseball, Dworkin argued, umpires have no discretion because they may not decide if a pitch is a ball or a strike based on private preferences.[87] In this respect, Dworkin was right. None of the features of umpiring examined thus far fit Dworkin's definition of discretion.

Dworkin then contrasted real-world baseball with an imaginary version of baseball, which he called "Policies." In Policies, the umpire's job is to pursue certain specific policy goals, such as "reducing the number of injuries to players" and "allowing individual players of greater [talent] to become stars."[88] In this game, the umpire makes her calls based on what decision is most conducive to those goals. This is *not* discretion, either—Dworkin argued—because the umpire's decisions may not be based on the umpire's private criteria or preferences. In Policies, the umpire must pursue certain specific goals,

---

[84] I am freely paraphrasing from the brilliant opening paragraph of Christine Korsgaard's most famous book. *See* Christine M. Korsgaard, The Sources of Normativity 1 (1996).

[85] *See generally* Ronald Dworkin, *Judicial Discretion*, 60 J. Phil. 624 (1963).

[86] *Id.* at 626-27. In later works, Dworkin called this form of discretion "discretion in a strong sense." *See* Ronald Dworkin, Taking Rights Seriously 31–33 (2d ed. 1978).

[87] *Id.* We could, however, imagine a variant of baseball, which Dworkin called "Scorer's Discretion," in which umpires call balls and strikes as they wish. Unlike in real baseball, these umpires do have discretion. Dworkin borrowed this imaginary game from H.L.A. Hart. *See* H.L.A. Hart, The Concept of Law 139–42 (1st ed. 1961). However, Hart's version of Scorer's Discretion did not seem to be a variant of a specific real-world game.

[88] Dworkin, *supra* note 84, at 629.

and players are entitled to the correct decision in light of those goals, even if identifying that decision is difficult in practice.

Dworkin's aim was, of course, to show that law is, in this respect, like Policies. If a legal rule does not provide a clear-cut solution to a hard case, it does not follow that judges have discretion to decide the case in whatever way they prefer. The parties are still entitled to the *right* decision, and the judge will have to deliver one, not based on her private preferences, but based on principles of justice.[89] What Dworkin did not appreciate, however, is that baseball is *not* qualitatively different from law or Policies. He described baseball as follows:

> The rules of baseball . . . specify precisely which events are to have which consequences, and the events designated in the rules are the only events having any significance whatsoever. Officials applying such rules therefore concern themselves almost exclusively with making authoritative reports, rather than characterizations, of what has happened. Infrequent disputes about the rules themselves are settled by reference to an authoritative rule book. . . . [A] conflict [between rules], or a material ambiguity, would be regarded as intolerable . . . .[90]

As I have tried to show in this Article, this characterization of baseball is mistaken.[91] In embracing it, Dworkin was not describing the real practice of baseball, but just another imaginary game. In baseball, officials do far more than make "authoritative reports."[92] They engage in an interpretive process of making sense of what has happened based on rules, practices, and normative principles. Most of the time, as in most legal cases, this process is straightforward: the facts fit neatly with the established rules. Sometimes, however, umpires—and everyone else trying to make sense of the game—must engage in a more complex judgment that appeals to a shared normative understanding of the game.[93]

---

[89] *Id.* at 631.

[90] *Id.* at 631.

[91] It is not clear whether Dworkin's theory of baseball evolved over time. In a later article on the same topic, he discussed at length the task of the referee in a game of chess but did not mention baseball. *See* Ronald Dworkin, *Hard Cases*, *in* Taking Rights Seriously 101–04 (1978).

[92] Dworkin, *supra* note 84, at 631.

[93] Recognizing the existence of principles and their important role in umpiring does not mean advocating anti-formalist interpretation. In fact, the principles of a sport may in theory favor a literalist adherence to the rules. *See* Mitchell N. Berman, *On Interpretivism and Formalism in Sports Officiating: From General to Particular Jurisprudence*, 38 J. Phil. Sport 177 (2011).

The way the game is structured, with its discrete actions and a detailed normative grammar that assigns credits and debits to players for each of these actions, continually calls for judgment informed by both rules and principles—much like legal reasoning or the decision-making in the imaginary game of Policies. In fact, rules in baseball sometimes yield to principles. This happens not only when the rules are amended by the governing body of baseball to try make the game more faithful to its principles, but also when umpires try to solve hard cases through principled interpretation rather than mechanical application.

B. An Illustration: October 8, 1956

There are a few famous examples of contentious hard cases in baseball, in which the umpires faced unusual situations that were not plainly resolved by the official rules.[94] But even calling balls and strikes, where the rules are apparently clear, is ultimately subject to principles. In a beautiful essay, evolutionary biologist and lifelong baseball fan Stephen Jay Gould discussed a famous episode in the history of baseball which exemplifies this point.[95]

---

[94] Perhaps the most famous of these cases is the Pine Tar Incident of 1983. At the top of the ninth inning, George Brett of the Kansas City Royals hit a winning homerun against the New York Yankees, but the homerun was voided and Brett was called out because his bat had too much pine tar on it, in violation of then-Rule 1.10(b). The Royals appealed the decision to the President of the American League, Lee McPhail, who reversed and ordered the continuation of the game. McPhail reasoned that although Brett's bat was illegal and should have been replaced with a regular bat, the pine tar did not confer any unfair advantage to Brett. The rationale of the rule was an economic one, according to McPhail. Back when there was much less money in baseball, too much pine tar would compromise the ball. The ball needed to be replaced, thus wasting resources. Although Brett's bat should have been replaced, the additional sanctions decided by the umpires were unjust. For an exhaustive story of the incident, its background and its aftermath, see generally Filip Bondy, The Pine Tar Game: The Kansas City Royals, The New York Yankees, And Baseball's Most Absurd and Entertaining Controversy (2015). Scholars of jurisprudence of sport have discussed the case at length. A particularly lucid and enlightening analysis is Mitchell N. Berman, *Our Principled Constitution*, 166 U. Pa. L. Rev. 1325, 1370–76 (2018) (arguing that while the "principle of textual meaning" supported the formalist decision by the umpire, other baseball principles, including the principles of legal intention and athletic excellence, supported the final decision made by Commissioner McPhail).

[95] *See* Stephen Jay Gould, *The Strike That Was Low and Outside*, N.Y. Times, (Nov. 10, 1984), https://www.nytimes.com/1984/11/10/opinion/the-strike-that-was-low-and-outside.html [https://perma.cc/2L3Z-GF3G].

It was October 8, 1956, and the Brooklyn Dodgers were playing the New York Yankees at Yankee Stadium in the fifth game of the World Series.[96] At the mound for the Yankees was Don Larsen, a 27-year-old pitcher from Indiana, in his third season in the big leagues. Larsen pitched eight innings without conceding a single base to the Dodgers.[97] At the top of the ninth, the Dodgers were still baseless, and the first two batters were put out: Furillo hit a fly ball to the right fielder, and Campanella grounded out.

The third batter for the Dodgers was Dale Mitchell, a veteran left-fielder at the end of his career, who had been recently acquired by the Dodgers to be employed as a reliable pinch hitter.[98] Mitchell was the last batter who could prevent Larsen from completing the first perfect game in the history of the World Series.[99] "With a count of one ball and two strikes," Gould writes, "Larsen delivered a pitch low and outside—close, but surely not, by any technical definition, a strike."[100]

The plate umpire was Babe Pinelli. Born Rinaldo Angelo Paolinelli, the son of immigrants from Lucca, Italy,[101] Pinelli had an incredible career. He umpired four All-Star Games, six World Series, and many historic

---

[96] I refer, of course, to the old Yankee Stadium, built in 1923 and used as home of the Yankees until 2008. I watched my very first live baseball game at the old Shea Stadium, home of the New York Mets, but my encounter with the old Yankee Stadium exercised on me such a strong fascination that for several years I thought I was a Yankees fan. I was wrong.

[97] *See New York Yankees 2, Brooklyn Dodgers 0*, Retrosheet, https://www.retrosheet.org/boxesetc/1956/B10080NYA1956.htm [https://perma.cc/T6N6-6P7A] (last visited Dec. 10, 2025).

[98] *See* Scott Longert, *Dale Mitchell*, Soc'y for Am. Baseball Rsch., https://sabr.org/bioproj/person/Dale-Mitchell/ [https://perma.cc/MVG9-P2A8] (last visited Dec. 10, 2025).

[99] A perfect game in baseball is a game in which a pitcher plays at least nine inning and the opponent team gains no bases at all.

[100] Gould, *supra* note 94. Gould misremembered the play: the ball was high, not low. *See* Charles F. Faber, *October 8, 1956: Don Larsen Throws a Perfect Game in the World Series*, Soc'y Am. Baseball Rsch., https://sabr.org/gamesproj/game/october-8-1956-don-larsen-throws-a-perfect-game-in-the-world-series/ [https://perma.cc/2APR-YD4N]. ("Mitchell thought the ball was high, but umpire Babe Pinelli called him out."). In a later article, Gould recalled being corrected by famous baseball announcer Red Barber. *See* Stephen Jay Gould, *Baseball: Joys and Lamentation*, *in* Triumph and Tragedy in Mudville, 301, 315 (2004) ("Red spent one of his broadcasts correcting me for misidentifying the last pitch of Don Larsen's perfect game in the 1956 World Series (I had called it low and outside, but the pitch was high).").

[101] *See* Larry R. Gerlach, *Babe Pinelli*, *in* The SABR Book of Umpires and Umpiring 107 (Larry R. Gerlach & Bill Nowlin eds., 2017).

games, including the first night game in MLB history (May 24, 1935) and Jackie Robinson's major-league debut with the Brooklyn Dodgers (April 15, 1947).[102]

Larsen's pitch was slightly outside the strike zone, according to Gould and others.[103] Mitchell let the pitch go by, and Pinelli called strike three. Larsen had completed a perfect game. Gould elaborates:

> "Outside by a foot," groused Mitchell later. He exaggerated, for it was outside only a few inches, but he was right. Babe Pinelli, however, was more right. A man may not take a close pitch with so much on the line. Context matters. Truth is a circumstance, not a spot. . . . Truth is inflexible. Truth is inviolable. By long and recognized custom, by any concept of justice, Dale Mitchell had to swing at anything close. It was a strike—a strike low and outside. Babe Pinelli, umpiring his last game, ended with his finest, his most perceptive, his most truthful moment. Babe Pinelli, arbiter of history, walked into the locker room and cried.[104]

There is truth in baseball, but it is not mechanical as Chief Justice Roberts and Ronald Dworkin seemed to believe. We can disagree with Pinelli's (and Gould's) interpretation of what happened that night,[105] but Pinelli's

---

[102] *See id.*

[103] *See* Gould, *supra* note 94. Mitchell remained of the view that the pitch was outside. *See* Scott Ostler, *Dale Mitchell Watched Big One Go By*, L.A. Times (Jan. 7, 1987, 00:00 PT), https://www.latimes.com/archives/la-xpm-1987-01-07-sp-2380-story.html [https://perma.cc/TLQ9-8XCD] (quoting Mitchell saying that "[t]he pitch was high and away. It wasn't a strike. Pinelli retired after that Series. He should have retired before it."). According to Lew Paper, the consensus among the Yankees was that the pitch was outside the zone. *See* Lew Paper, Perfect: Don Larsen's Miraculous World Series Game and the Men Who Made It Happen 308 (2009) ("Berra, Larsen, and Pinelli, of course, had a different opinion. . . . But every other Yankee on the field who had a good look at the pitch agreed with Mitchell.").

[104] Gould, *supra* note 94.

[105] In fact, we can be rightfully suspicious of Gould's interpretation of Larsen's pitch, as Gould was a hardcore Yankees fan. In private correspondence, Mitch Berman observes that Gould (and I) might be conflating "two types of *oughts*…: prudential and normative… Dale Mitchell ought (prudentially) to have swung at that pitch because it was close enough that he risked being called out (as he was). But that doesn't mean he ought (normatively) to have swung, even if he was prepared to take that risk, such that his failure to do so is a reason in favor of the call made." Email from Mitchell Berman, *supra* note 72. Berman may be right about Gould; however, my claim is not that Mitchell ought to have swung according to an unwritten rule, but that the conversation about whether such an unwritten rule existed is a valid conversation, which cannot be silenced by observing that there is no such rule in the official rulebook.

call was neither the certification of a mechanical reality nor an act of mere discretion. It was a principled judgment of what a batter ought to have done in that circumstance, which Mitchell did not do. The strike zone is a delicate balance between the normative ideal of batter's and pitcher's performances. It is about *ought*, not *is*. But claims about what a player *ought to have done* are based on interpretive judgments, not mere recapitulation or acknowledgment of facts. Calling balls and strikes means assigning responsibility and credit.[106] Pinelli judged that Mitchell was to blame.

When judgment enters the picture, everything changes. We are no longer in the realm of mechanical actions but in the realm of value. What has happened is not just a fact but the evaluation of that fact in light of what ought to have happened. Judgment is a mysterious force. Once unleashed, it will unrelentingly try to make sense—normative sense—of everything. Understanding baseball requires understanding how it is a constant, ceaseless exercise of judgment.

C. Another Illustration: June 21, 2025

A personal anecdote might prove instructive.[107] Recently, my older son was trying to learn the fundamentals of scoring and was confused about a play that we had scored differently. Scoring is the quintessential activity of the true baseball fan. It involves interpreting and recording a very large number of plays from start to finish. What happened was that Andrew Knizner, the San Francisco Giants' batter, hit a ground ball to the Red Sox's second baseman David Hamilton; Hamilton did not handle the ball cleanly, and when he threw it to first baseman Toro, it was too late—Knizner had reached first base.

The young scorekeeper next to me marked a single hit for Knizner, but I did not. I thought that Hamilton's handling of the ball was to be considered a defensive error, and therefore the play should not be credited to Knizner but blamed on Hamilton. Hamilton had not done what he *ought to have done*. It was not a hit, but rather a fielding error.

---

[106] Alva Noë puts it well: "[Baseball] is a *forensic* sport . . . [I]n baseball, we are less interested in what happens than in who is liable, or responsible, for what happens; we are interested in apportioning praise and blame." *Supra* note 43, at 51.

[107] Traditionally, personal anecdotes are considered an inappropriate tool for the objective and detached rhetorical posture used in academic writing. This attitude is, I believe, warranted in most circumstances, but exceptions should be allowed.

To distinguish between a hit and an error, the scorer (whether she is a fan or the official scorer of the game) must make a normative judgment. There is a sense in which scoring, with its detailed numerical reporting, is a form of bookkeeping.[108] However, it is not the kind of mechanical bookkeeping employed to report crude facts, as Dworkin thought, but a form of normative judgment, in which what is recorded in the book is an assessment of facts against normative standards. It is more similar, to use some rhetorical flourish, to the kind of bookkeeping evoked in apocalyptic scenes, where the dead are judged "out of those things which [a]re written in the books, according to their works."[109]

My son paused for a moment and thought about it, then looked at me with a smile. "Makes sense," he said. Even if that was the first time he had ever heard of a hit that *was not* a hit because it *ought* to have been an out, he understood why I thought that this was what had happened on the field. It made sense to him. He understood the principles of baseball.

V. Baseball for Foxes

I have argued so far that the principles underlying baseball (including the calling of balls and strikes) are normative in nature. The question remains of what kind of normative propositions they are. In this Part, I will sketch an outline for a possible answer. First, I will discuss how the interpretivist theory of baseball proposed here differs from Dworkin's legal interpretivism. Dworkin's theory is a monistic theory, arguing that law, morality, and justice are all part of one normative system, and the ideal judge—whom Dworkin calls Hercules—should be able to reconstruct and integrate the entire system. In contrast, the theory of baseball proposed here is pluralistic: the principles of baseball are immanent in the game, may be incompatible with normative principles found in other systems, and may evolve and decay. In Dworkin's own figurative language (borrowed from Isaiah Berlin and the ancient poet Archilochus), Dworkin's theory is a theory for hedgehogs, my theory of

---

[108] *See* Roger Angell, *Box Scores*, *in* The Summer Game 4 (1972) ("[E]very player in every game is subjected to a cold and ceaseless accounting; no ball is thrown and no base is gained without an instant responding judgment—ball or strike, hit or error, yea or nay—and an ensuing statistic.").

[109] *Revelation* 20:12 (King James) ("And I saw the dead, small and great, stand before God; and the books were opened: and another book was opened, which is the book of life: and the dead were judged out of those things which were written in the books, according to their works.").

baseball is a theory for foxes. Furthermore, the way umpires make sense of the games is less an analytical reconstruction of the system than a form of trained intuitive knowledge. I will discuss how certain contemporary jurisprudential approaches that borrow from Aristotle's ethics may illuminate these aspects of baseball umpiring.

A. Babe Pinelli Was no Hercules

Dworkin's (misguided) contraposition of baseball and law is premised on the idea that adjudication, unlike umpiring, is based on 'principles of justice.' But, if umpiring is based on principles as well, are these principles of baseball akin to Dworkin's 'principles of justice'? Was Babe Pinelli a Hercules with only a fourth-grade education?[110]

Philosophers of sport have discussed the relevance of Dworkin's theory of law for sports and games.[111] Perhaps the authors who most closely embraced Dworkin's views are Robert Simon and especially J.S. Russell. They argued that in addition to rules and conventions, sports have underlying principles,[112] which express a "coherent and principled account of the point and purposes that underlie the game."[113] This approach to philosophy of sport is similar to the theory of balls and strikes proposed in this Article. However, I would like to outline three important points that suggest a sharp deviation from Dworkin's views.

The first difference concerns the autonomy of baseball principles from broader principles of morality or justice. The argument presented so far does not require that calling balls and strikes be coherent with broader

---

[110] I refer of course to Dworkin's ideal judge, whom he called Hercules to hint at the superhuman tasks Dworkin assigned to him. *See* Ronald Dworkin, Law's Empire 239 (1986). While Dworkin's Hercules had plausibly received a graduate education, Babe Pinelli left fourth grade at age ten to get a job and help his family. *See* Gerlach, *supra* note 100, at 107.

[111] In the past few decades, philosophy of sport has been significantly influenced by legal philosophy. *See* J.S. Russell, *Remarks on the Progress of a Jurisprudence of Sport*, 63 N.Y.L. Sch. L. Rev. 175 (2018). This is unsurprising given that "as formal rule-governed practices, sports and law often pursue similar goals and confront many of the same challenges." Mitchell N. Berman, *"Let 'em Play": A Study in the Jurisprudence of Sport*, 99 Geo. L.J. 1325, 1330 (2011). For the state-of-the-art treatment of the new field, see Berman & Friedman, *supra* note 12.

[112] *See, e.g.*, Robert L. Simon, *Internalism and Internal Values in Sport*, 27 J. Phil. Sport 1, 7 (2000).

[113] J.S. Russell, *Are Rules All an Umpire Has to Work With?*, 26 J. Phil. Sport 27, 35 (1999).

moral values or principles of justice, but simply with intrinsic or immanent principles of the game. Dworkin, especially in his later work, vigorously defended a unitary view of law and morality. He called his approach "justice for hedgehogs,"[114] as a reference to the ancient proverb "The fox knows many tricks, the hedgehog one, but it's a big one."[115] In the twentieth century, this image was famously employed by Isaiah Berlin to contrast pluralistic (foxes) and monistic (hedgehogs) theories of the world.[116] Dworkin's view of law and morality was a monistic one.

Dworkin's hedgehog-like view of law and morality is one in which the principles of legal interpretations are the same principles of morality and justice. But the principles of baseball, as understood in this Article, are to be found within the game itself; they are not necessarily the same principles governing our moral or political lives. Dworkin's interpretivism is often characterized as a way to fill legal gaps with moral principles once the social practice of law 'runs out.' But in baseball there is no external reservoir of principles—moral, political, or otherwise. The principles of baseball are the intrinsic sense of the game. It is a theory of baseball for foxes, not hedgehogs.[117]

The second difference concerns the actual practice of umpiring. Dworkin's ideal judge, Hercules, would approach a difficult interpretive question by first considering different "candidates for the best interpretation."[118] Then, Hercules would exclude those interpretations that do not fit the existing body of law and precedent, and those that conflict with principles of justice.[119] Finally, Hercules would consider "the great network of political structures and decisions of his community" and would ask whether a certain interpretation "could form part of a coherent theory justifying the network as a whole."[120]

---

[114] *See generally* Ronald Dworkin, Justice for Hedgehogs (2011).

[115] Archilochus, *Fragment 201*, *in* Greek Iambic Poetry 217 (Douglas E. Gerber ed., 1999).

[116] *See* Isaiah Berlin, The Hedgehog and the Fox: An Essay on Tolstoy's View of History (2d ed. 2013).

[117] This theory of sports and games has become widely accepted among scholars. Indeed, the philosophy of sport of Simon and Russell is usually referred to as "internalism" or "broad internalism," because of their view that the principles of a sport are internal to the game. *See* John William Devine & Francisco Javier Lopez Frias, *Philosophy of Sport*, *in* Stan. Encyc. Phil. (Edward N. Zalta ed., 2023). To be sure, broad internalists "do not speak with one mind on [what this view entails]." William J. Morgan, *Broad Internalism, Deep Conventions, Moral Entrepreneurs, and Sport*, 39 J. Phil. Sport 65, 65 (2012).

[118] Dworkin, *supra* note 109, at 240.

[119] *See id.* at 242–44.

[120] *Id*. at 245.

Dworkin acknowledges that this method requires superhuman abilities and, nevertheless, suggests that judges should attempt to imitate it.

It would be silly to imagine Babe Pinelli, on October 8, 1956, in the fraction of a moment after Yogi Berra caught Larsen's pitch, intent on parsing the vast complexity of baseball to find the call that best fit and justified the entire system. Pinelli saw the pitch and called it a strike. He did not give any reasons why it was a strike; umpires do not have to explain their judgements. Pinelli did not have to theorize about principles. He was already profoundly enmeshed in the game of baseball. His intuitions and reactions had been trained for decades on tens of thousands of calls. He had officiated "almost a thousand games over the course of twenty-two years."[121] It is reasonable to expect that his calls, just like those of any experienced umpires, were based on a form of intuitive knowledge that is born out of practice and refined by constant attempts to make sense of the game. As I will explain in Part V.B, unlike Hercules's systematic knowledge of the law, the umpire's knowledge of baseball principles closely resembles a form of Aristotelian practical wisdom.

The third difference concerns the dynamic nature of the principles of baseball. Principles are persistent, and certainly more persistent than rules. As we have seen, rules may yield to principles: rules are amended when they no longer accord with principles, and they are re-interpreted to be made consistent with principles. That said, principles are not exogenous forces. They live within the game and emerge from the game.

Dworkin often writes from the point of view of a moral realist, who believes that there are objective moral truths.[122] Therefore, even if he recognized that our best interpretation of the law may evolve over time, his underlying principles of justice should be considered fixed and immutable.[123] In contrast, baseball principles can and do change if the rules and practices of the game keep deviating from them.[124] There is a constant interaction, a feedback loop, between principles, rules, and practices. In normal times, rules yield to principles when they become inconsistent with them. Over time, however, if the inconsistency becomes irreconcilable, principles will inevitably change.

---

[121] Paper, *supra* note 102, at 8.

[122] *See, e.g.*, Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 Phil. & Pub. Affs. 87 (1996).

[123] This is at least how I understand his theory. As H.L.A. Hart thought, Dworkin employed a "fluid and sometimes elusive analytic style," which sometimes makes interpreting what he meant difficult. Nicola Lacey, A Life of H.L.A. Hart: The Nightmare and the Noble Dream 330, 350 (2004).

[124] For a similar conception of principles in legal theory, see Berman, *supra* note 92; Mitchell N. Berman, *How Practices Make Principles and How Principles Make Rules*, 28 J. Ethics & Soc. Phil 299 (2024).

Let us consider the example of technology in baseball. As I argued in Part III, technology is most successful in baseball when it enhances rather than diminishes the role of human judgment. This does not mean that bad technology—that is, technology that reduces the role of human judgment in baseball—cannot transform the game. Indeed, technology is already changing the principles of the game, even if unwittingly.

For example, umpires' calls are now rated on the basis of high-tech ball-tracking systems. This innovation's new role in the game likely stems, at least in part, from the recognition that these systems are engaging and appealing to spectators. When technology is better for the business of baseball (making more money for owners, players, and other workers in the industry), the transformation is more readily accepted. However, the growing practice of using ball-tracking systems to rate umpires inevitably shapes the perception of the game and ultimately its principles.

This use of technology lends support to the view that calling balls and strikes is or should be a mechanical job, which can easily result in the conclusion that umpires should be replaced altogether with automated systems. In the long run, as fans and players get used to electronic strike zones and sophisticated ball-tracking systems, the general understanding of the game could change in a way that more closely resembles Roberts's theory.[125]

B. Aristotle at the Ballpark

The three differences discussed in the previous section between Dworkin's legal interpretivism and the theory of baseball proposed in this Article can perhaps be coherently explained by a concept borrowed from Aristotle: practical wisdom. In the *Nicomachean Ethics,* Aristotle defines practical wisdom (*phronesis*) as some kind of intellectual perception of what is conducive to the good life.[126] It is neither a purely rational skill (such as the one that

[125] The topic of how technology changes the nature of sports is a central one in current work on the jurisprudence of sport. *See, e.g.*, David Pozen, *What Are the Rules of Soccer?*, Balkinization (June 20, 2019), https://balkin.blogspot.com/2019/06/what-are-rules-of-soccer.html [https://perma.cc/3KFV-S53W]; David Pozen, *The Rulification of Penalty Kicks—and a Reform Proposal*, Balkinization (July 23, 2018), https://balkin.blogspot.com/2018/07/the-rulification-of-penalty-kicksand.html [https://perma.cc/GS9H-6ED5]; Harry Collins & Robert Evans, *You Cannot Be Serious! Public Understanding of Technology With Special Reference To "Hawk-Eye"*, 17 Pub. Understanding of Sci. 283 (2008); Harry Collins, *The Philosophy of Umpiring and the Introduction of Decision-Aid Technology*, 37 J. Phil. Sport 135 (2010).

[126] Aristotle, Nicomachean Ethics 107–08 (Roger Crisp ed., 2009).

would produce an analytical list of decision rules) nor a purely practical one (because it works by 'grasping reasons').[127] Practical wisdom is a form of cultivated ability to understand practical situations and to make good decisions in those situations.[128]

The concept is hard to operationalize; indeed, legal theorists who apply it to the practice of law and legal adjudication often employ definitions that may seem too vague to many readers. Lawrence Solum, for example, has defined judicial wisdom (a version of *phronesis* applied to legal adjudication) as "excellence in knowing what goals to pursue in the particular case and excellence in choosing the means to accomplish those goals" and has equated this virtue to what Karl Llewellyn called "situation sense."[129]

Appeals to "practical wisdom" rather than to specific criteria and procedures often sound like appeals to a mysterious, almost esoteric form of insight.[130] But the vagueness is justified. The problem with a transparent list of criteria and procedures is that the world is much messier and unpredictable than what a clear-cut algorithm could comfortably capture. We cannot simply have clear-cut rules for every possible situation.[131]

Yet, the lack of an exhaustive list of criteria and procedures ex ante does not mean that the wise adjudicator is not capable of providing precise reasons for her decision ex post. Quite the contrary: a practically wise adjudicator should be able to explain why she believes her decision to be the right one given the circumstances.[132] In other words, there are well-defined reasons behind a decision based on practical wisdom; the problem is that they cannot be fully specified in advance for all possible permutations of the world.

---

[127] *See* Herbert McCabe, On Aquinas 134 (Brian Davies ed., 2008) ("[P]ractical wisdom cannot be simply an intellectual disposition like mathematics, or for that matter any other science; it must involve also our sense knowledge and sense experience.").

[128] For discussions of Aristotle's *phronesis*, see Richard Kraut, *Aristotle's Ethics*, *in* Stan. Encyc. Phil. (Edward N. Zalta ed., 2022); Rosalind Hursthouse & Glen Pettigrove, *Virtue Ethics*, *in* Stan. Encyc. Phil. (Edward N. Zalta ed., 2022); Daniel C. Russell, *Phronesis and the Virtues (NE VI 12–13)*, *in* The Cambridge Companion to Aristotle's Nicomachean Ethics 203 (Ronald Polansky ed., 2014).

[129] Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 Metaphil. 178, 192 (2003).

[130] *See* Claudio Michelon, *Practical Wisdom in Legal Decision-Making*, *in* Law, Virtue, and Justice 29, 37 (Amalia Amaya & Ho Hock Lai eds., 2013).

[131] *See* McCabe, *supra* note 126, at 56–57 ("[P]ractical wisdom . . . has to deal with concrete individual situations, for all human actions are individual and unique.").

[132] *See* Neil MacCormick, Practical Reason in Law and Morality 17 (2009).

What does any of this have to do with baseball? In Part IV, I argued that the calling of balls and strikes is not based just on written rules but on unwritten principles, and what umpires do is to try to make sense of the pitch in light of rules, practices, and principles. Then, in Part V.A, I argued that this way of understanding baseball differs from Dworkin's interpretivism in at least three relevant respects: the principles of baseball are intrinsic, an umpire's judgements are based on intuitive knowledge, and the principles are subject to change over time as the game evolves. These three aspects of umpiring can be better explained by practical wisdom. Let me offer a very brief sketch of this argument.

First, I argued that baseball's principles are immanent in the game; they are not part of a unitary body of principles that governs morality, law, or other domains of human life. This idea of an internal logic of a given practice—law, baseball, or morality—is close to the Aristotelian concept of *telos*, i.e. the intrinsic goal or purpose of something, which determines what is "excellence" in a particular context.[133] A good umpire knows the rules but has also a deep and nuanced grasp of what the game is about and what excellence in the game looks like.

Second, I argued that in making their principle-based interpretive judgments, umpires do not build comprehensive theories of baseball but react almost intuitively, based on years of experience. This is precisely how Aristotle thought of practical wisdom, as a *habitus* that allows the decision-maker to make good decisions.[134] What Babe Pinelli saw on October 8, 1956, is not a mystery: it can be explained and discussed. Indeed, a plausible version of such an explanation can be found in Part IV.B. Yet Pinelli was able to make that decision not because the specific situation had been regulated somewhere in advance, but because he was immersed in the principles and practice of baseball. With a much more prosaic metaphor, Karl Llewellyn called this skill "horse-sense," that "extraordinary and uncommon kind of experience, sense

[133] Another way to express this idea is that baseball is a "practice," in the sense proposed by MacIntyre. *See* Alasdair MacIntyre, After Virtue 187 (1997) ("By a practice I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.").

[134] On the distinction between habit and *habitus* and its relevance for practical wisdom, see McCabe, *supra* note 126, at 56–57.

and intuition which was characteristic of an old-fashioned skilled horse trader in his dealings either with horses or with other horse traders."[135]

Third, I argued that baseball's principles are subject to change. Rules yield to principles, but over time principles may and do change, to the point that fans may not recognize the game they used to know. Practices, including baseball, can and do deteriorate to the point that they become something else altogether. Echoes of this idea that practices are vulnerable to change and decay can be found in contemporary thinkers who have engaged in depth with the concept of practical wisdom.[136]

C. A Final Illustration: December 28, 1883

In Ken Burns's *Baseball*, the following amusing statement is attributed to Charles Eliot, President of Harvard from 1869 to 1909:

> This year I'm told the team did well because one pitcher had a fine curve ball. I understand that a curve ball is thrown with a deliberate attempt to deceive. Surely this is not an ability we should want to foster at Harvard.[137]

The quotation is probably apocryphal, but a less pithy version of it was likely uttered by Charles Eliot Norton, Professor of History of Art at Harvard and a cousin of the more famous Charles Eliot.[138] During the Christmas holidays of 1883, faculty members and administrators of elite universities met in New York to discuss the thorny topic (then as well as now) of college sports.[139] On this occasion, Norton criticized how pitchers in baseball "use[d] every

---

[135] Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 201 (1960). On the connection between Llewellyn's "prudential realism" and Aristotle's practical wisdom, see Anthony T. Kronman, The Lost Lawyer 209–25 (1993).

[136] *See generally* MacIntyre *supra* note 132; Kronman, *supra* note 134.

[137] *Baseball* (PBS Prods. 1994).

[138] *See* Richard Hershberger, *With a Deliberate Attempt to Deceive: Correcting a Quotation Misattributed to Charles Eliot, President of Harvard*, Baseball Res. J. (Spring 2017), https://sabr.org/journal/article/with-a-deliberate-attempt-to-deceive-correcting-a-quotation-misattributed-to-charles-eliot-president-of-harvard/ [https://perma.cc/MQ3V-R2DT].

[139] *Id.* (quoting New York Clipper, Jan. 19, 1884). I believe that the meeting in question is the one discussed in Ronald A. Smith, Sports and Freedom: The Rise of Big-Time College Athletics 136–137 (1988).

effort to deceive [the batter] by curving … the ball."[140] For Norton, this was a perversion of the game "in the direction of fraud and deceit."[141]

To modern readers, these words sound quaintly amusing because curveballs—alongside many other types of "deceitful" pitches—are a common tool of the game.[142] The mere association of curveballs and immorality would strike fans as ridiculous. But Norton's view of curveballs, while already a minority opinion in 1883, would not have sounded strange a few decades earlier, when pitchers were expected to throw balls that could be hit by most pitchers most of the time, in order to put the ball in play.[143]

This anecdote well illustrates the points outlined in the previous section. Baseball's principles do not necessarily coincide with the principles of personal morality—trying to deceive someone is wrong according to the latter but not to the former, at least when it comes to pitching. The fox knows when deceit is morally permissible (or even obligatory) and when it is not. Furthermore, baseball's principles are not immutable. They change and evolve with the game. What seemed obvious in the 1850s became old fashioned in the 1880s and ridiculous a few decades later.

The same thing may happen, and is probably already happening, with the role of human judgment and interpretation in calling balls and strikes, due to the increasing habituation of fans and players to the use of ball-tracking systems. Chief Justice Roberts's "balls-and-strikes" theory could, after all, become an accurate theory of baseball, but only because baseball will have turned into something different.

Conclusion

In this Article, I have argued that Chief Justice Roberts's metaphor of judges as umpires raises complicated questions not only for legal adjudication but also for the role of umpires in baseball. Although Roberts and his critics sharply disagree on how legal adjudication works, they seem to agree that umpires in baseball are mechanical reporters of clear-cut truths. My thesis in

---

[140] Hershberger, *supra* note 137.

[141] *Id.*

[142] For a similar observation, see Berman & Friedman, *supra* note 12, at 485 ("Today, the view that all deception is cheating, or should be prohibited, will strike most people as someplace between quaint and crackpot.")

[143] The original Knickerbocker rules of 1845 stated that the ball "must be pitched, and not thrown, for the bat." *See* Thorn, *supra* note 29, at 74 ("[T]the pitcher . . . was not regarded as an adversary to the batter, but merely a server; the batter's true opponents were the fielders.").

this Article is that this theory of baseball is wrong. Umpires are not like Montesquieu's "passive beings" but rather active participants in a complex practice of judgment and interpretation.

Indeed, all the three umpires from an old story on the philosophy of baseball are somewhat mistaken. The First Umpire ("I call them as I see them") is wrong because a call is not just a matter of accurate or inaccurate perception; it is more than an epistemic and technological problem. Technology in baseball is successful only when it expands, not when it narrows, the scope for human judgment. The Second Umpire ("I call them as they are") is wrong because balls and strikes do not always exist as clear-cut truths codified in written rules. They are also the result of interpretation, grounded in complex practices and principles. Finally, the Third Umpire ("They ain't nothing until I call them") is wrong because balls and strikes are not a matter of pure discretion or power. When umpires interpret the strike zone, they are trying to get the call right. They do not base their calls on private criteria or personal preferences but rather on principles that they believe make normative claims on themselves and others.

We need a new version of the story, one which includes a Fourth Umpire. Her line should be: "I call them to make sense of the game."

Babe Pinelli's last call is a great real-world example of this Fourth Umpire. He thought that Dale Mitchell *ought to have swung*, and therefore the pitch was a strike. We can argue about the merits of this specific call, but it would be clearly wrong to think that the pitch was a strike based on clear-cut rules, or that it was perceived as such by Pinelli, or that Pinelli decided that it was a strike based on his own whims or private preferences. It was a strike, according to Pinelli (and to many others who watched or thought about that game), because that call was consistent with the rules, practices, and principles of baseball. The call *made sense*.

However, baseball's principles, unlike Dworkin's principles of justice, are not a branch of morality. Rather, they are part of the intrinsic logic of the game, and umpires have a good grasp of them thanks to years of practical experience. The way umpires make their call is a form of practical wisdom: a *habitus* that allows them to make good decisions in the most disparate situations. If we had to appoint a famous philosopher as a patron saint of this theory of baseball, Aristotle would be a better candidate than Ronald Dworkin.

Rules in baseball sometimes yield to principles, but when practices keep deviating from the principles, principles eventually change. In other words, baseball's principles are fragile and can be distorted or perverted. Those who care about them should be vigilant: practices can deteriorate to the point that they become unrecognizable.

Can this theory of baseball teach us something about legal adjudication? Can Chief Justice Roberts's metaphor be re-interpreted in in the sense that judges, just like umpires, should go beyond the formalistic application of clear-cut rules and try to make sense of the law by cultivating and exercising practical wisdom? Perhaps judges should indeed be like umpires, but if that is the case, the implication would be very different from what Roberts meant. While a fuller discussion of these implications is beyond the Article's ambitions, the metaphor can still offer fertile ground for thinking about law and adjudication.

Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

The Myth Revisited: Obscenity Law Since 2015

Jennifer M. Kinsley*

Abstract

Over the past decade, the legal doctrine of obscenity has undergone a quiet transformation, challenging the widespread assumption of its obsolescence. While legal scholars have often dismissed obscenity law as a relic, recent enforcement patterns reveal its persistent—if evolved—role in American jurisprudence. This Article systematically examines federal and state obscenity prosecutions from 2015 to 2025, revealing a marked shift in both the targets and rationales of enforcement.

At the federal level, traditional obscenity prosecutions against adult content producers have all but disappeared. In their place, federal authorities now invoke obscenity statutes primarily as adjuncts to child pornography cases, repurposing these laws to address offenses involving minors rather than consensual adult expression. This development signals a departure from earlier decades, when federal prosecutors focused on commercial purveyors of adult material, particularly those operating online.

State-level enforcement has also changed course. Rather than pursuing large-scale distributors, state prosecutors increasingly apply obscenity statutes to cases involving non-consensual creation or dissemination of sexually explicit content—commonly referred to as "revenge porn." These cases typically involve individualized harm, such as the unauthorized sharing of intimate images via social media or personal devices, rather than the mass distribution of commercial pornography. As a result, obscenity law at the state level now functions as a tool for remedying interpersonal violations, foregrounding issues of privacy and autonomy.

---

* Judge, Ohio First District Court of Appeals. Professor of Law, Northern Kentucky University Salmon P. Chase College of Law. I thank the Salmon P. Chase College of Law for its generous support of my research and the participants in the International Free Speech & Media Law Discussion Forum for their helpful feedback on the Article. I also acknowledge Prof. Tobe Liebert, Assistant Director of the Chase College of Law Library, for his invaluable research assistance.

This Article situates these enforcement trends within a broader political and constitutional context. Recent calls for renewed enforcement of the Comstock Act—a 19th-century federal statute that criminalizes the mailing of obscene materials and abortion-related products—have elevated obscenity law's political significance. Also, legislative blueprints, like Project 2025, advocate for aggressive federal action against all forms of pornography, echoing historical cycles of heightened obscenity enforcement. These developments suggest that obscenity law may be poised for resurgence, with implications for both sexual expression and reproductive rights.

Through detailed case cataloging and statistical analysis, the Article provides a descriptive account of obscenity prosecutions over the past decade, enabling comparison across jurisdictions and illuminating the shifting geography of enforcement. Notably, state and local prosecutions now occur more frequently in Northern states and urban centers, defying traditional expectations of rural or religious locales as enforcement hotspots.

Normatively, the Article argues that the contemporary application of obscenity law reflects a reorientation from community morality to the protection of individual victims. This evolution has intertwined obscenity doctrine with ongoing debates about privacy, autonomy, and free speech. By tracing enforcement patterns and their underlying rationales, the Article demonstrates that obscenity law remains a dynamic and consequential force in American legal and political discourse. Understanding its current trajectory is essential for anticipating future developments and for informing broader conversations about the boundaries of lawful sexual expression.

In recent decades, obscenity law has shifted towards the protection of individual victims and away from the prosecution of adult entertainment. But this changing landscape has reinvigorated the perspective that obscenity and collective morality are intertwined. Thus, as the Article concludes, the obscenity doctrine retains ongoing legal, political, and social significance despite the myth of its demise.

Introduction

The last decade has witnessed a quiet but profound repurposing of obscenity law—from community morality to personal privacy enforcement. Despite this significant shift, legal academics tend to treat the obscenity doctrine as a relic of the past, assuming that it is rarely or never enforced. But as I discussed a decade ago in *The Myth of Obsolete Obscenity*, obscenity prosecutions of large-scale adult content producers occurred with some regularity in both state and federal courts through at least the mid-2010's.[1] This phenomenon

[1] *See generally* Jennifer M. Kinsley, *The Myth of Obsolete Obscenity*, 33 Cardozo Arts & Ent. L.J. 607 (2016).

was typified by cases like *United States v. Extreme Associates*[2]—in which the government alleged that Extreme Associates shipped a number of fetish films to an undercover postal inspector in Pittsburgh—and *United States v. Paul Little*[3]—in which Little and his company were alleged to have mailed obscene videos to postal inspectors in Tampa. As these examples demonstrate, federal obscenity prosecutions in the 2000s and 2010s tended to be brought in large metropolitan areas against large-scale, commercial producers of adult material.[4] Federal prosecutors in the early twenty-first century also tended to focus their efforts on online content, with undercover agents typically accessing material from producers' mail-order websites.[5] In contrast, state obscenity prosecutions during that time period targeted brick-and-mortar distribution outlets that had a physical presence in prosecutors' home communities.[6] Even at the state level, though, obscenity cases tended to charge commercial pornography sold by retail purveyors.[7]

As this Article explains, those patterns have changed over the last decade. At the federal level, obscenity prosecutions of online adult content, or what one might typically call pornography, have entirely vanished. While federal obscenity cases do still occur, those few cases in which federal obscenity charges have been filed since 2015 have all involved the presence of children rather than consenting adults. In these cases, obscenity charges merely duplicate child pornography charges.[8] Thus, over the past decade, obscenity enforcement at the federal level has become an alternative mechanism for addressing child pornography and child sexual abuse. This represents a

---

[2] *See* 431 F.3d 150, 152 (3d Cir. 2005).

[3] *See* 365 Fed. Appx. 169 (11th Cir. 2010).

[4] Kinsley, *supra* note 1, at 639–40.

[5] *Id.* at 640 ("In terms of content, federal prosecutors have almost exclusively targeted online content or material that could be mail-ordered through the web, perhaps due to the federal focus on regulating interstate commerce. This aspect of the federal obscenity agenda has allowed prosecutors to forum-shop cases into virtually any federal district.").

[6] *Id.* at 641 ("Typically, state and local authorities levy obscenity charges against retail businesses and their owners and not the producers or online distributors of pornography.").

[7] *Id.*

[8] *See, e.g.*, United States v. Fraley, No. 22-5057, 2023 WL 409700, at *1, 3 n.3 (6th Cir. Jan. 26, 2023) (noting that Fraley was charged with obscenity under 18 U.S.C. § 1465 in addition to eleven counts of production, distribution, receipt, and possession of child pornography and that obscenity count was severed and later dismissed after Fraley was convicted of all child pornography counts).

departure from previous uses of the obscenity doctrine, which focused more heavily on material made by and for adults.[9]

But for a few notable exceptions, state obscenity prosecutions have also shifted away from targeting the commercial production of obscenity. Instead, over the past decade, state-level obscenity prosecutions have increasingly attacked what might be colloquially referred to as "revenge porn"—the creation or distribution of sexually-explicit content without a participant's consent.[10] Rather than being mass-produced and commercially distributed, this content tends to be circulated individually by cell phone, social media, or other personalized method of communication.[11] By focusing on cases of individual creation, obscenity law at the state level has therefore become a mechanism for remedying interpersonal—rather than perceived societal—harm.

These changes are significant for several reasons. First, they represent a shift in the governmental interests being advanced by the obscenity law enforcement, nationally and locally. Courts and scholars have long debated the underlying purposes of excluding obscenity from First Amendment protection.[12] While no

---

[9] *See, e.g.*, Kinsley, *supra* note 1, at 646 app. (cataloging state obscenity charges from 2000 to 2015).

[10] *See, e.g.*, Alexandra Benisek, *What is Revenge Pornography?*, WebMD (Nov. 4, 2024), https://www.webmd.com/sex-relationships/revenge-porn/ [https://perma.cc/U6KR-DZH6] (last visited June 3, 2025) (defining revenge porn as "a type of digital abuse in which nude or sexually explicit photos or videos are shared without the consent of those pictured").

[11] *See infra* Appendix A: State Obscenity Prosecutions Since 2015 (Alphabetical by State) (cataloging obscenity cases brought at the state level and describing the method of distribution).

[12] In *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 57–60 (1973), for example, the Supreme Court discussed with approval the idea that community-based interests support the government's criminalization of obscenity: "In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests 'other than those of the advocates are involved.' These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime. Quite apart from sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickel:

> 'It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there . . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you

one justification has emerged as the sole basis upon which the government may prosecute obscenity, the historic rationales for criminalizing obscene speech tend to focus on themes of decency, morality, and community preservation.[13] Obscenity prosecutions brought through the early 2010s reflected these values: by removing commercial pornography from the marketplace, government actors attempted to sanitize communities of allegedly indecent expression.[14] But current patterns of obscenity enforcement eschew these traditional rationales. Instead, modern obscenity prosecutions appear to reflect a desire to protect an individual victim from tangible sexual harm.[15]

Secondly, the manner in which the government currently enforces obscenity law secures its relevance to ongoing legal and political developments. As one example, members of Congress recently called for the renewed enforcement of the Comstock Act, an 1873 law that makes the distribution of obscene material a federal crime.[16] The Comstock Act weighs heavily in the

---

> will, but accessible to all—with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not.'
>
> As Mr. Chief Justice Warren stated, there is a 'right of the Nation and of the States to maintain a decent society.'

(citations omitted). Picking up on these themes, Professor Andrew Koppelman argues that the obscenity doctrine exists to eliminate the potential moral harm caused by exposure to illicit sexual depictions, a goal he contends obscenity law is ill-equipped to accomplish. *See generally* Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 Colum. L. Rev. 1635 (2005).

[13] *See supra* note 12 and accompanying text; *see generally* Matthew Benjamin, *Possessing Pollution*, 31 NYU Rev. L. & Soc. Change 733 (2007) (tracing the morality justification in obscenity regulation and case law from the nineteenth century to late twentieth century).

[14] Kinsley, *supra* note 1, at 640 ("[V]iewed in concert with recent Congressional enactments, the prioritization of online obscenity appears to be part of a broader effort at the federal level to sanitize and censor the Internet.").

[15] *See, e.g.*, State v. Cranford, 279 N.C. App. 512, ¶¶ 2, 3, 32 (N.C. Ct. App. 2021) (upholding obscenity conviction where defendant circulated photographs of himself and his ex-girlfriend engaging in sexual acts to friends and acquaintances after their breakup); State v. Pollock, 78 N.E.3d 373, 376 (Ohio Ct. App. 2017) (upholding obscenity conviction where defendant emailed three female coworkers unsolicited images of him "pumping" his penis, some of which included visible semen or masturbation aids).

[16] *See* Letter from U.S. Sens. to Merrick B. Garland, Att'y Gen., Congress U.S. (Jan. 25, 2023), https://www.documentcloud.org/documents/24834197-20230123-letter-on-comstock-to-doj/ [https://perma.cc/4JPU-6R76].

current political and constitutional landscape, given that it simultaneously prohibits mailing both obscene material and abortion-related products.[17] Because this single piece of legislation links the suppression of obscenity and reproductive freedom, there is renewed interest from both scholars and the general public in understanding its history.[18] In that context, this Article helps trace how the Comstock Act and its state law counterparts are currently being used to target allegedly obscene material, a critical data point in the ongoing discourse about the Act's broader societal impacts.[19]

In addition, the eradication of pornography features prominently in Project 2025, a blueprint for legislative and administrative action by the federal government formally presented in the Heritage Foundation's "Mandate for Leadership: The Conservative Promise."[20] This document calls for the criminalization of all pornography and for serious consequences, including imprisonment and sex offender registration obligations, for those who distribute it.[21] Similar calls to action followed periods of heavy obscenity enforcement by the federal government in the past.[22] Thus, if history is any guide, the current political landscape may be a harbinger of forthcoming obscenity indictments.

---

[17] 18 U.S.C. § 1461 (1873).

[18] *See, e.g.*, Reva B. Siegel & Mary Ziegler, *Abortion's New Criminalization—A History-and-Tradition Right to Health-Care Access After* Dobbs, 111 Va. L. Rev. 413 (2025); Luke Vander Ploeg & Pam Belluck, *What to Know About the Comstock Act*, N.Y. Times (May 16, 2023), https://www.nytimes.com/2023/05/16/us/comstock-act-1978-abortion-pill.html [https://perma.cc/K5R5-CVZC].

[19] *See infra* Section II.A (containing data on federal obscenity enforcement from 2015 to present); Appendix A: State Obscenity Prosecutions Since 2015 (Alphabetical by State) (cataloging state obscenity cases from 2015 to present).

[20] *See* Ryan T. Beckwith, *Project 2025's Plan to Criminalize Porn Has a Sinister Subplot*, MS NOW (July 12, 2024, 16:42 ET), https://www.msnbc.com/opinion/msnbc-opinion/project-2025-porn-ban-lgbtq-transgender-rcna161562 [https://perma.cc/423R-7EMQ] ("Pornography should be outlawed. The people who produce and distribute it should be imprisoned. Educators and public librarians who purvey it should be classed as registered sex offenders. And telecommunications and technology firms that facilitate its spread should be shuttered." (quoting Heritage Found., Mandate for Leadership: The Conservative Promise 5 (Paul Dans & Steven Groves eds., 2023)).

[21] *Id.*

[22] *See* Jacob Sullum, *Porn Pause*, Reason (Aug.–Sep. 2011), https://reason.com/2011/06/19/obscene-investigations/ https://perma.cc/DCM4-NG2D] (describing 2011 letter from Senator Orrin Hatch to then-Attorney General Eric Holder encouraging more aggressive obscenity enforcement).

Against this backdrop, this Article explores the application of the obscenity doctrine by state and federal authorities from 2015 to the present. It begins in Part I with an overview of the obscenity doctrine and obscenity enforcement patterns through 2015. Incorporating the seminal cases of *Roth v. United States*[23] and *Miller v. California*,[24] this Part traces the formation of the obscenity doctrine in the Supreme Court alongside the trend of aggressive obscenity law enforcement by federal and state prosecutors from the 1960s to the 1990s.[25] But, as this Part points out, obscenity enforcement continued even when the Supreme Court's involvement in the doctrine came to a halt. The development of obscenity jurisprudence concluded in 1987, when the Supreme Court heard its most recent obscenity case.[26] But the end of the doctrine's evolution did not signal the end of its enforcement. Despite the Supreme Court's silence, obscenity prosecutions actively continued in the lower courts in the ensuing decades, up to and including the year 2015, the last year tracked by *The Myth of Obsolete Obscenity*.[27] Part I summarizes this tradition. Further, it includes an overview of the scholarly literature on obscenity enforcement and its changing view of the relevance of obscenity doctrine.

Part II of the Article then discusses data, trends, and significant obscenity cases at the state and federal levels over the decade spanning the years 2015 to 2025.[28] The primary purpose of this Part is to catalog and describe the cases in which defendants have been prosecuted for obscenity offenses. Further, it contains statistical data points that track obscenity enforcement patterns as well. All of the state obscenity cases discussed in Part II are cataloged in Appendix A, which lays out key information—including the type of material, the nature of the charges, the case outcome, and the length of the defendant's sentence, if any—to enable comparison across state lines. This effort serves a descriptive function, one that enables researchers, policy-makers, and the general public to be better informed about the realities of obscenity law.

---

[23] 354 U.S. 476 (1957).

[24] 413 U.S. 15 (1973).

[25] *See* P. Brooks Fuller, Kyla P.G. Wagner & Farnosh Mazandarani, *Porn Wars: Serious Value, Social Harm, and the Burdens of Modern Obscenity Doctrine*, 28 Am. U. J. Gender, Soc. Pol'y & L. 121, 123 (2020).

[26] *See* Kinsley, *supra* note 1, at 612 (identifying the Supreme Court's decision in *Pope v. Illinois*, 481 U.S. 497 (1987), as its final foray into obscenity law).

[27] Kinsley, *supra* note 1.

[28] *See also* Appendix A: State Obscenity Prosecutions Since 2015 (Alphabetical by State) (cataloging and summarizing state obscenity prosecutions during the same time period).

Part III then makes normative observations about obscenity enforcement patterns over the past decade. Comparing recent use of the obscenity doctrine to older enforcement trends, the article unearths new truths about how federal and state prosecutors view obscenity law in the fully digital age. As the consumption of pornography has migrated online, obscenity cases have become increasingly individualized and less commercialized. As a result, prosecutors today tend to focus less on large suppliers of adult content and more on cases with a perceived victim. Perhaps for this reason, obscenity prosecutions from 2015 to 2025 have defied traditional geographic and political expectations.[29]

Together, these shifts—in governmental interest, enforcement patterns, and the national political landscape—have resulted in an inextricable link between obscenity, privacy, and autonomy in the modern legal discourse. Examining the current status of the obscenity myth therefore exposes the obscenity doctrine's enduring relevance to the broader concept of free speech and the public's perception of freedom.

I. The Criminalization of Obscenity

A. The Supreme Court's Obscenity Jurisprudence

Obscene expression is not protected by the First Amendment, and, as a result, its production, distribution, and sale can be made a crime.[30] Today, the federal government and nearly all states criminalize obscenity in some form.[31] But defining what expression constitutes obscenity is not so easy. In fact, the Supreme Court wrestled with this question for three decades, and unresolved questions remain in the lower courts still today.[32]

---

[29] Rather than occurring in rural or Southern communities, today's obscenity prosecutions more frequently occur in Northern states and cities. *See id.* (cataloging, for example, four obscenity cases since 2015 in Pennsylvania and four in Indiana, whereas only three occurred in North Carolina and none in Alabama, Mississippi, South Carolina, Arkansas, or Tennessee during the same time period).

[30] *See, e.g.*, 18 U.S.C. § 1461 (criminalizing the act of mailing obscene material); Ohio Rev. Code Ann. § 1907.32 (2024) (making it a felony to pander obscenity).

[31] Kinsley, *supra* note 1, at 612. Oregon separately protects obscenity under its state constitution; therefore, obscenity is not a crime in Oregon. *See* State v. Henry, 302 Or 510, 513, 732 P.2d 9, 10 (1987).

[32] *See, e.g.*, Tyler Breland Valeska, *Speech Balkanization*, 65 B.C. L. Rev. 903, 941 (2024) ("Despite a longstanding lower court split in interpreting [the community standards aspect of the obscenity test], the Court has not returned to the issue of

The Supreme Court predominantly developed its obscenity doctrine between 1957, when it definitively held in *Roth v. United States* that obscenity is unprotected by the First Amendment,[33] and 1987, when it last modified the legal standards for what constitutes obscenity.[34] Over time, the Court has struggled to define the universe of material so devoid of constitutional protection that it constitutes obscenity, with one Justice famously quipping "I know it when it see it."[35] Nonetheless, in 1973, the Court adopted the *Miller* test for obscenity.[36] This three-part standard queries: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to a prurient interest in sex; (2) whether, applying contemporary community standards, the work depicts or describes sexual conduct, as defined by state law, in a patently offensive way; and (3) whether the work, taken as a whole, lacks serious literary, scientific, artistic, or political value.[37]

Over the next 15 years, subsequent Supreme Court decisions clarified components of the *Miller* test. In *Smith v. United States*, the Court held that the contemporary community standards used to judge whether work appeals to a prurient interest and depicts sexual conduct in a patently offensive way are determined by the jury and cannot be defined by state law.[38] And in *Pope v. Illinois*, the Court clarified that only the first two prongs of the *Miller* test—the prurient interest and patent offensiveness prongs—are to be judged using contemporary community standards.[39] The third prong—whether the works lacks serious value—is judged by a reasonable person standard.[40]

Nevertheless, the vagueness of the *Miller* test has been the subject of much criticism and consternation in the more than 50 years since its adoption.[41] Lower courts have struggled to apply the *Miller* test, particularly in

---

whether a national standard is required to prevent online distributors from leveling down.").

[33] 354 U.S. 476, 492 (1957).

[34] *See* Pope v. Illinois, 481 U.S. 497, 500–01 (1987) (holding that *Miller* standard for whether a work taken as a whole lacks serious literary, scientific, artistic, or political value must be judged taking the material as a whole).

[35] Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1973) (Stewart, J., concurring).

[36] *See generally* Miller v. California, 413 U.S. 15 (1973).

[37] *Id.* at 24.

[38] 431 U.S. 291, 305 (1977).

[39] 481 U.S. at 500–01 (1987).

[40] *Id.* at 501.

[41] *See generally* Alan D. Miller, *The Problem of Obscenity*, 16 Wash. U. Juris. Rev. 185 (2024) (arguing that community standards under *Miller* cannot and do not exist); John Tehranian, *Sanitizing Cyberspace: Obscenity, Miller, and the Future of Public*

light of the changing landscape by which allegedly obscene material is distributed. Despite these difficulties, the Supreme Court has not altered the *Miller* test, nor has it reviewed a case in which the test was at issue, since 1987.[42]

B. The Scholarly Approach to Obscenity

Scholars actively engaged with the obscenity doctrine during its early development by the Supreme Court.[43] But in more recent decades, obscenity has taken a back seat to other topics in the First Amendment literature.[44] Those few scholars who continued to write about obscenity law—prominent among them, Geoffrey Stone—tended to do so from a historical lens.[45] As a result, and for a time, the predominant view in the academy was that obscenity cases were rarely filed,[46] that the doctrine was ineffective and obsolete,[47] and that, in the words of Amy Adler, "[i]n the escalating war against pornography, pornography has already won."[48]

Discourse on the Internet, 11 J. Intel. Prop. L. 1, 4 (2003) (criticizing *Miller* for prioritizing criminalization of sexually explicit speech rather than sexually harmful action).

[42] *See Pope*, 481 U.S. at 497. In 2025, the Supreme Court decided *Free Speech Coalition, Inc. v. Paxton*, which upheld a Texas law requiring websites that publish certain sexually explicit content to verify the ages of their users. It did so on the basis that states have a separate and important interest in protecting minors from accessing obscenity. 606 U.S. 461, 495–99 (2025). While ostensibly discussing the obscenity doctrine, to the extent that protecting minors from viewing obscenity justified Texas's age-verification requirement, the *Paxton* decision left traditional obscenity principles unaltered. It is therefore not, in the literal sense, an obscenity case.

[43] *See generally* Frederick Schauer, *Speech and 'Speech'—Obscenity and 'Obscenity': An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979).

[44] A widely discussed topic in modern First Amendment literature is social media content moderation. *See, e.g.*, Evelyn Douek & Genevieve Lakier, *Lochner.com?*, 138 Harv. L. Rev. 100 (2024); Richard Ashby Wilson & Molly K. Land, *Hate Speech on Social Media: Content Moderation in Context*, 52 Conn. L. Rev. 1029 (2021).

[45] *See, e.g.*, Geoffrey Stone, *Sex and the First Amendment: The Long and Winding History of Obscenity Law*, 17 First Amend. L. Rev. 134 (2018).

[46] Brian L. Frye, *The Dialectic of Obscenity*, 35 Hamline L. Rev. 229, 235 (2012) ("After *Miller*, obscenity prosecutions gradually slowed to a trickle").

[47] *See, e.g.*, John Copeland Nagle, *Pornography as Pollution*, 70 Md. L. Rev. 939, 940 (2011) ("Legal scholars say the law has failed to control Internet pornography. It is hard to argue with them."); Amy Adler, *All Porn All the Time*, 31 N.Y.U. Rev. L. & Soc. Change 695, 703 (2007); Koppelman, *supra* note 12, at 1639 (describing the "inevitable clumsiness" of First Amendment jurisprudence related to pornography).

[48] Adler, *supra* note 47, at 695.

But the scholarly view of obscenity law is changing. One reason for obscenity law's resurgence is its close ties to the Comstock Act, a federal statute which simultaneously bans the mailing of obscenity and abortion-related products.[49] The Comstock Act was originally adopted in 1873 and has been on the books ever since.[50] Despite its criminalization of particular methods of abortion access, it largely went unnoticed outside of First Amendment circles until the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, reversing its precedent and holding that there is no constitutional right to an abortion.[51] Prior to *Dobbs*, the abortion products strand of the Comstock Act had not been enforced, given the then-existing constitutional protection for a pregnant person's right to abortion access.[52] But as that protection evaporated, and the possibility of Comstock Act enforcement against abortion providers became prescient, the historical enforcement of the Act against obscenity purveyors became all the more relevant. Understanding how the Comstock Act has been used to target sexually-oriented expression therefore helps sharpen the focus on how it might be used to target previously-protected reproductive autonomy.

Against this political and legal backdrop, scholars have recently begun highlighting the common history between the Comstock Act's two strands.[53] For example, leading reproductive freedom scholars Mary Ziegler and Riva Siegel argue that the extension of obscenity crimes to abortion products originated from a common governing interest: the desire to enforce sexual purity standards against women.[54] Other scholars' research gives credence to this hypothesis. For example, citing the early application of the Comstock Act against Victoria Woodhull, an advocate for women's sexual self-determination, at least one researcher has suggested that the Comstock Act actually inspired the creation of the women's rights movement.[55] These pieces are not about obscenity law *per se*. But they demonstrate the connectivity of the

---

[49] *See* 18 U.S.C. § 1461.

[50] Reva Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Threaten It Again*, 134 Yale L.J. 1068, 1071 (2025).

[51] *Id.* at 1074–75.

[52] *Id.* at 1158.

[53] *See, e.g.*, *id.*; Lars Noah, *Medication Abortion and the Mails: The Ghost of Anthony Comstock Rides Again?*, 41 Ga. St. U. L. Rev. 913 (2025).

[54] Siegel & Ziegler, *supra* note 50, at 1085–86.

[55] *Id.* at 1089–90 (describing Woodhull indictment); Isabella Haslinger Johnson, *The Comstock Law: Retaliation and Liberation*, 21 Viewpoints 146, 152–53 (2025) (on file with author) (arguing that early use of the Comstock Act to silence women's voices contributed to evolution of reproductive freedom as a prominent political issue).

Comstock Act's obscenity and contraceptive regulations. The reemergence of the Comstock Act in modern scholarly discourse demonstrates the importance of tracking obscenity enforcement patterns, as obscenity law is borne out of the same regulatory foundation.[56]

The modern literature on the subject further supports renewed interest in obscenity law as divorced from its Comstock Act origins and implications. Even separated from its impact on reproductive decision-making, scholars today recognize the potential of the obscenity doctrine to incorrectly suppress expression at the margins. Far from declaring pornography the victor in the so-called "porn wars," the current literature takes a much apprehensive view about the reach and impact of obscenity law.[57] One such voice is John Felipe Acevedo, who speaks to the "capricious" nature of federal obscenity prosecutions.[58] Given its focus on the trier of fact's subjective beliefs about sex—or what Acevedo calls the object-gaze—the *Miller* test entirely ignores the perspective of the models and actors depicted in allegedly obscene materials.[59] Acevedo argues that the exclusive object-gaze of the obscenity standard unjustly silences those whose sexual practices and bodies are represented, thus improperly shifting the focus from the subject of the material to its viewers.[60]

Kendra Albert also highlights the unworkability of the *Miller* test for obscenity in today's online environment.[61] They point to ongoing confusion in defining the relevant community—be it a larger online one or the one geographically defined by the district of prosecution.[62] Given the potential of obscenity prosecutions to result in criminal sanctions, they argue that the risk of incorrectly determining the community has led content producers to self-censor.[63]

---

[56] Siegel & Ziegler, *supra* note 50, at 1181 ("The postal obscenity law came to demonstrate the kind of government overreach – 'Comstockery' – that has taught Americans the meaning of liberty.").

[57] The term "porn wars" was coined to refer to intense feminist debates in the 1970s and 1980s about the role of sexually-oriented material vis-à-vis the standing of women in society. *See* Cheryl B. Preston, *Consuming Sexism: Pornography Suppression in the Larger Context of Commercial Images*, 33 Ga. L. Rev. 771, 771 n.1 (1997). At least one scholar writing actively in the early 2000s declared that pornography had won the "porn wars." Adler, *supra* note 47, at 695.

[58] John Felipe Acevedo, *Law's Gaze*, 25 J. Race & Gender Just. 45, 47–48 (2022).

[59] *Id.* at 54–55.

[60] *Id.* at 85–87.

[61] *See generally* Kendra Albert, *Imagine a Community: Obscenity's History and Moderating Speech Online*, 25 Yale J.L. & Tech. 59 (2023).

[62] *Id.* at 71–73.

[63] *Id.* at 73 ("Even beyond state level prosecutions, perceptions of what constitutes obscenity, often a far cry from the actual material that was held legally obscene in the 2010s, have come to shape the production of pornography and sexually explicit materials of all types.").

Albert therefore contends that obscenity is not dead, whether enforced or not, because it exerts ongoing force in the online marketplace.[64]

Even law students remain interested in the modern application of the obscenity doctrine. Zoey Miller, a law student at the time, wondered whether a film she watched as part of her college curriculum could be vulnerable to the obscenity doctrine.[65] It was a valid question, given that the only objective guardrail *Miller* places on the scope of material that can be considered to be obscene is whether it depicts sexual conduct as defined by state law.[66]

The obscenity doctrine is therefore just as relevant today as it was in 1973 when the Supreme Court decided *Miller*. Prosecutions still occur, and the obscenity statutes maintain ongoing power over expression. Tracking enforcement patterns at the federal and state levels is therefore a useful endeavor that informs ongoing discussions about reproductive autonomy, personal decision-making, and the government's role in policing sexual harm.

C. Historical Enforcement Patterns

Enforcement of the obscenity doctrine began almost immediately after its advent. In the wake of *Roth*, which eliminated the argument that the Constitution protects obscene expression,[67] the Supreme Court issued dozens of obscenity opinions. In each, the Court determined whether the material deemed obscene by the lower courts was in fact obscenity under its

---

[64] *Id*. at 73–75. Potentially relevant to Albert's hypothesis is a fascinating empirical study undertaken by Carnegie Mellon researcher Marty Rimm in the early days of the internet. *See* Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 Geo. L.J. 1849 (1995). Rimm studied pornography exchanged on internet bulletin boards in the mid-1990s. He discovered that availability of sexual imagery depicting vaginal sex exceeded demand at the time, which was relatively small, and that the demand for paraphilic, or extreme, sexual content exceeded the supply. *Id.* at 1890–91. Although decades old, Rimm's empirical results support Albert's theory that obscenity law may drive content creators away from the edges and towards more mainstream content.

[65] Zoey Miller, Note, *Do You Know It When You See It: Cinema, Pornography, and the First Amendment,* 101 Tex. L. Rev. 509, 510–11 (2022) (querying whether Anne Severson's film *Near the Big Chakra*, which consists entirely of close-ups of thirty-eight vaginas, constitutes legitimate film to be studied in college film studies course or pornography that is eligible for obscenity treatment and how to define the difference).

[66] Miller v. California, 413 U.S. 15, 21 (1973).

[67] Roth v. United States, 354 U.S. 476, 485 (1957).

newly-fashioned test.[68] As final arbiters on the question of whether a particular work was obscene, the Justices and their clerks routinely gathered to view these sexually explicit films in their entirety.[69]

Obscenity enforcement reached a peak in the 1980s and early 1990s during the so-called "porn wars."[70] Buoyed by the feminist movement on the left and Christian conservatives on the right, federal and state prosecutors during this time period took aim against the commercial pornography industry by initiating obscenity cases in rural jurisdictions like Broken Arrow, Oklahoma.[71] These geographic choices were not an accident. The common conception at the time was that Southern Bible belt communities maintained more puritanical standards on matters of sex and were more likely to deem even bland adult material obscene under *Miller*'s flexible standards.[72]

The so-called "porn wars" resulted in some moderate degree of success for anti-obscenity advocates.[73] Congress expanded the scope of federal racketeering laws to include asset forfeiture provisions for the trafficking of obscene materials.[74] And in 1986 the Department of Justice commissioned a study,

---

[68] Michael Kent Curtis, *Obscenity: The Justices' (Not So) New Robes*, 8 Campbell L. Rev. 387, 392 (1986) ("Between 1957 and 1968, thirteen Supreme Court obscenity decisions produced fifty-five separate opinions. . . . Between 1967 and 1973 the Court reversed thirty-one obscenity convictions without benefit of opinion.").

[69] Matt Ford, *The Hilariously Twisted History of the Supreme Court and Porn*, New Republic (Jan. 17, 2025), https://newrepublic.com/article/190355/supreme-court-pornhub-free-speech [https://perma.cc/DG2Q-MTVM].

[70] P. Brooks Fuller, Kyla P. Garrett Wagner & Farnosh Mazandarani, *Porn Wars: Serious Value, Social Harm, and the Burdens of Modern Obscenity Doctrine*, 28 Am. U. J. Gender Soc. Pol'y & L. 121, 123 (2020).

[71] Todd Lochner & Dorie Apollonio, *Karma Police: Prosecutorial Strategies in Obscenity Cases and the Broader Culture War*, 2 Syracuse J.L. & Civ. Engagement (2014), https://slace.syr.edu/issue-2-on-life-and-death/lochner-karma-police/# [https://perma.cc/7RSV-5ATV].

[72] *See, e.g.*, *id.* ("Interview respondents also argued that conservative communities were more likely to convict under the *Miller* standard, and that probability of success was a critical component to these prosecutions."). Advocates for more aggressive obscenity enforcement by prosecutors today are also in favor of pursuing cases in conservative jurisdictions on the theory that jury pools in these locations are more likely to convict. *See, e.g.*, *Combatting Obscenity on the Internet: A Legal and Legislative Path Forward*, Ctr. Renewing Am. (Dec. 15, 2022), https://americarenewing.com/issues/combating-obscenity-on-the-internet-a-legal-and-legislative-path-forward/ [https://perma.cc/DWC6-42RV] ("[T]he single most effective legal strategy to combat online obscenity is to promote and bring more obscenity cases in conservative parts of the country.").

[73] Fuller, Wagner & Mazandarani, *supra* note 70.

[74] *Id.* at 139 (citing 130 Cong. Rec. 5434 (1984) (statement of Senator Helms)).

known as the Meese Report, that purported to track the harmful social effects of pornography.[75]

Obscenity enforcement at the federal level waned during the Clinton Administration.[76] But by the early 2000s, the federal government once again aggressively enforced its obscenity statutes against commercial pornography producers and retailers, even creating and funding a special prosecutorial unit to pursue these cases.[77] Consistent with this effort, federal prosecutors acting under President George W. Bush initiated a number of prosecutions against large-scale commercial adult-content producers in large metropolitan areas.[78] Some of these prosecutions had success, while others were dismissed pretrial.[79] Upon taking office in 2009, President Obama dismantled the special obscenity unit.[80] His administration completed the obscenity cases that were pending at the time, but did not initiate more.[81]

From a numerical standpoint, there were 309 federal obscenity indictments from 1996 to 2006.[82] No state-level database exists to provide precise data on obscenity prosecutions over time. Nonetheless, researchers studying prosecutorial discretion in obscenity cases have used newspaper archives, attorney interviews, and other sources of public information to approximate the number of state obscenity cases.[83] They estimate that 108 state obscenity prosecutions occurred between 1990 and 2006.[84] Thus, historically speaking,

---

[75] *Id.* at 140.

[76] *See* Robert D. Richards & Clay Calvert, *Obscenity Prosecutions and the Bush Administration: The Inside Perspective of the Adult Entertainment Industry & Defense Attorney Louis Sirkin*, 14 Vill. Sports & Ent. L. J. 233, 239, 275 (2007) (indicating that obscenity enforcement was largely abandoned during the Clinton presidency and quoting Larry Flynt stating "We didn't have any federal obscenity prosecutions when Clinton was president. Clinton was smart—he knew that it was an uphill battle, and there were other things that he should be spending his time on.").

[77] Kinsley, *supra* note 1 at 639 ("[T]he establishment of a centralized Department of Justice obscenity task force under Pres. George W. Bush's tenure has been well-documented.").

[78] *Id.* at 640 (indicating that federal obscenity prosecutions under the Bush Administration occurred in Washington, D.C., Phoenix, Pittsburgh, Tampa, and Los Angeles).

[79] *See id.* at app. A; *see also* United States v. Paul Little, 365 Fed. App'x 159 (11th Cir. 2010) (affirming Little's federal obscenity conviction); United States v. Stagliano, 693 F. Supp. 2d 25 (D.D.C. 2010) (acquitting defendants of federal obscenity charges).

[80] Kinsley, *supra* note 1 at 639.

[81] *Id.*

[82] Lochner & Apollonio, *supra* note 71.

[83] *Id.*

[84] *Id.*

the federal government has traditionally been more likely to enforce obscenity laws than the states.

II. Obscenity Prosecutions: 2015 to 2025

Moving from this historical context to the present, how have obscenity laws been enforced over the past decade? How have the Trump and Biden Administrations compared to their predecessors in terms of obscenity enforcement patterns? And have state prosecutors followed or broken with the enforcement decisions of their federal counterparts during that time period?

This Article seeks to answer these questions, at least to the extent that reliable data is available. At the federal level, the Bureau of Justice reports the number of indictments issued under each federal criminal statute each year, including those statutes that criminalize obscenity.[85] Subsection A below documents how the federal government has enforced each statute that criminalizes obscenity over the past decade, year by year.

At the state level, there is no singular source of information that reports obscenity enforcement activity by state and local prosecutors.[86] As a result, any effort to document each and every obscenity prosecution at the state level will undoubtedly be incomplete today. I therefore do not attempt to compare data at the federal and state levels, nor do I purport to document all state obscenity cases over the last decade. What follows is instead a snapshot from which no state obscenity case was purposely excluded.

Cataloged in Appendix A are state obscenity cases decided between 2015 and 2025, listed alphabetically state by state. The cases listed in the Appendix were discovered from a variety of sources. First, I searched the primary legal research databases (Westlaw and Lexis) for cases citing each state's obscenity statute, the term "obscenity," and relevant obscenity cases like *Miller* that were released during the relevant time period. I excluded from consideration any obscenity case that charged a defendant with distributing obscenity to a minor or possessing or creating obscene materials depicting minors, as the legal standards for obscenity involving minors are understandably different.[87] Second, because searching in legal databases would only yield results tied to written opinions, either published or unpublished, I also searched legal

---

[85] *See Federal Criminal Case Processing Statistics Tool*, Bureau of Just. Stat. http://bjs.ojp.usdoj.gov/fjsrc/ [https://perma.cc/JKD9-AWLG] (last visited Aug. 9, 2025).

[86] Lochner & Apollonio, *supra* note 71.

[87] *See* New York v. Ferber, 458 U.S. 747, 764–65 (1982) (adjusting *Miller* test as to child pornography).

publications, including those targeting a mainstream audience, for articles discussing obscenity during the relevant time period. Third, I consulted with practitioners who routinely represent clients charged with obscenity offenses around the country to solicit their input and to determine whether there were any state obscenity cases my first two lines of inquiry had not revealed.[88] These are essentially the same steps taken by researchers in the past to uncover the number of state-level obscenity indictments in the 1990s and early 2000s.[89]

A. Federal Prosecutions

1. 18 U.S.C. § 1461

This provision of federal law contains the Comstock Act. Since 2015, there has been only a single federal prosecution under 18 U.S.C. 1461,[90] which prohibits mailing obscene articles.[91] On November 13, 2015, Zachary Foss was charged by information in the United States District Court for the Northern District of Ohio with a single count of mailing obscenity.[92] The information identifies the allegedly obscene material as "involving the lewd display of [Foss's] genitals."[93] In 2016, he promptly pleaded guilty without filing any motions or otherwise challenging the charge against him, and, as a result, the record of his case contains very little information about its facts.[94] Nonetheless, a sentencing memorandum filed by his attorney suggests that Foss mailed material from Ohio to Arizona to a teenage girl who represented herself to be of age.[95] Foss was sentenced to a year-and-a-day in federal prison for this offense.[96]

---

[88] *See, e.g.*, In-Person Interview with H. Louis Sirkin, Att'y, Santen & Hughes (April 23, 2024).

[89] Lochner & Apollonio, *supra* note 71.

[90] *See Federal Criminal Case Processing Statistics Tool*, *supra* note 85. Statistical reporting by the Bureau of Justice cuts off at the year 2023. At the time of publication, no information is available for the years 2024 or 2025.

[91] *See* 18 U.S.C. § 1461 ("Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.").

[92] United States v. Foss, No. 3:15-CR-419 (N.D. Ohio filed Nov. 15, 2015).

[93] *Id.*

[94] *Id.* (docket sheet on file with author).

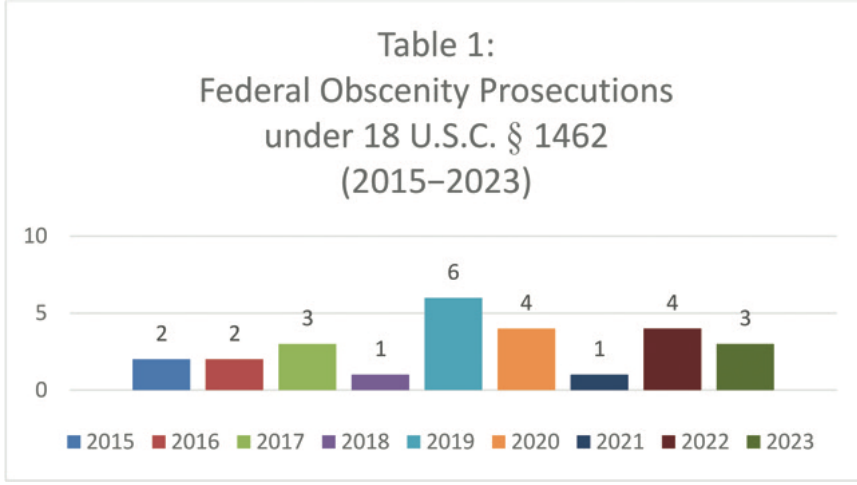
[95] *Id.* (sentencing memorandum on file with author).

[96] *Id.* (docket sheet on file with author).

2. 18 U.S.C. § 1462

Since 2015, the federal government has pursued a slightly higher number of cases under 18 U.S.C. § 1462, which prohibits the importation or transportation of obscenity, than it has under 18 U.S.C. § 1461.[97] From 2015 to 2023, federal prosecutors averaged 2.89 § 1462 cases per year, with a high of 6 cases brought in 2019.[98] Actual numbers of cases per year are represented in Table 1 below.

All § 1462 charges during the relevant time period involved children and were often paired with a child pornography charge.[99] For example, in *United States v. Christianson*, the defendant was charged with transporting an obscene children's book he authored and for transporting child pornography.[100]



3. 18 U.S.C. § 1465

Similarly low prosecution rates exist for charges brought under 18 U.S.C. § 1465, which criminalizes the production or transportation of

---

[97] *See* 18 U.S.C. § 1462 ("Whoever brings into the United States . . . or knowingly uses any express company or other common carrier or interactive computer service . . . for carriage in interstate . . . commerce . . . any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . . [s]hall be fined under this title or imprisoned not more than five years, or both.").

[98] *See Federal Criminal Case Processing Statistics Tool*, *supra* note 85.

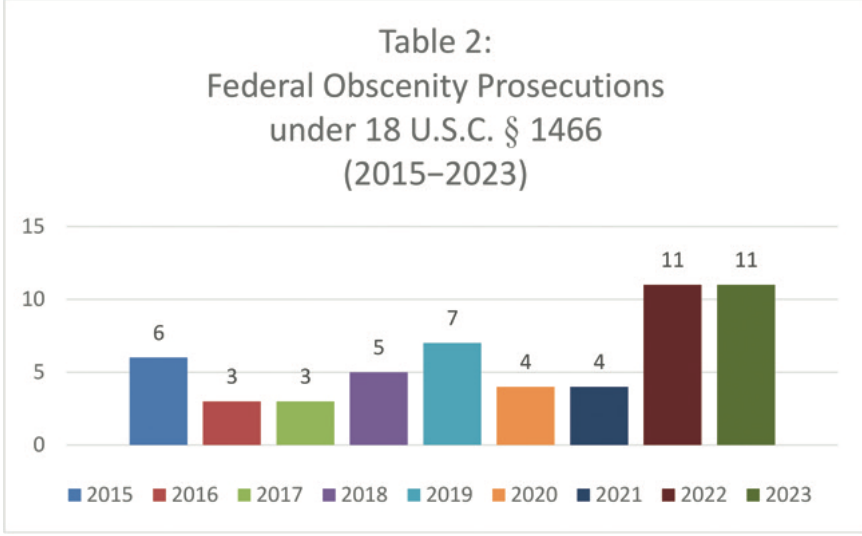
[99] *See, e.g.*, United States v. Christianson, 2020 WL 4226583, at *1 (N.D. Ind. July 23, 2020).

[100] *Id.*

obscene material for sale.[101] Only three total charges were brought under this statute during the relevant time period, all in 2016.[102]

4. 18 U.S.C. § 1466

Federal prosecutors were the most active from 2015 to 2023 in pursuing charges for engaging in the business or selling of obscenity under 18 U.S.C. § 1466. In total, 54 charges were pursued under this statute during the stated time period. Table 2 below reflects the distribution of the charges by year.



Similar to the other obscenity statutes, charges under 18 U.S.C § 1466 are often brought in child pornography cases where the defendant is alleged to have exchanged sexually explicit material of minors for money or other things of value.[103]

---

[101] *See* 18 U.S.C. § 1465 ("Whoever knowingly produces with the intent to transport, distribute, or transmit in interstate or foreign commerce, or whoever knowingly transports or travels in . . . interstate or foreign commerce or an interactive computer service . . . for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy [material] shall be fined under this title or imprisoned not more than five years, or both.").

[102] *See Federal Criminal Case Processing Statistics Tool*, *supra* note 85.

[103] *See, e.g.*, United States v. Arthur, 2024 WL 747250, at *1 (5th Cir. Feb. 23, 2024) (indicating that Arthur was convicted of child pornography offenses and engaging in the business of selling obscenity under 18 U.S.C. § 1466 based on his operation of a website that depicted the graphic sexual abuse of children);

5. Obscenity-Adjacent Federal Law

While the federal government has essentially refrained from initiating new obscenity prosecutions over the past decade, the impact of prior obscenity convictions remains. One interesting case decided by the United States District Court for the Northern District of Ohio in 2018 highlights the point.[104] In 1962, Gerald Belfer was charged in federal court with two counts of obscenity in violation of 18 U.S.C. § 1461.[105] Belfer was alleged to have mailed an obscene advertisement, although the precise details of what he mailed and to whom were not in the record because he pleaded guilty rather than taking his case to trial.[106] He was sentenced to five years of probation and a $3,000 fine.[107] In 2018, nearly fifty-five years after he completed his probationary term, Belfer moved the federal court to expunge his conviction.[108] He argued that the material in his case would not meet today's contemporary community standards under *Miller* and that his conviction was therefore unconstitutional.[109]

The district court rejected Belfer's argument.[110] It held that *Miller* is time-bound by its application of *contemporary* community standards to the obscenity question.[111] And it noted the absence of evidence to suggest that the advertisement Belfer mailed would have been adjudicated not to be obscene under the relevant community views of 1962.[112] The court accordingly denied Belfer's expungement request and left his obscenity conviction intact.[113] As Belfer's case exemplifies, even an obscenity case brought over five decades ago can have enduring and life-altering consequences.

Another case demonstrates the federal government's willingness to utilize alternative approaches to obscenity prosecutions in addressing

---

United States v. Guy, 2019 WL 1034191, at *1 (S.D. Ohio March 5, 2019) (combining 18 U.S.C. § 1466 charge with child pornography offenses).

[104] *See* United States v. Belfer, No. 1:62-CR-329, 2018 WL 3374069 (N.D. Ohio July 11, 2018).

[105] *Id.* at *1.

[106] *See id.* at *1, *3.

[107] *Id.* at *1.

[108] *Id.*

[109] *Id.*

[110] *Id.* at *3.

[111] *Id.* ("However, the *Miller* Court's test for determining if material is 'obscene' uses the contemporary community standards at the time the charge is made." (citing Miller v. California, 413 U.S. 15, 24 (1973))).

[112] *Id.*

[113] *Id.*

online exploitation. In *United States v. Three Hundred Three Virtual Currency Accounts*, a federal district court in Washington, D.C. granted default judgment in an in rem action seeking civil forfeiture of two domain names and 303 currency accounts.[114] The websites were alleged to depict obscene content, including sexual assault.[115] While the court ultimately ordered forfeiture based on the allegation that the websites contained child pornography rather than obscenity, the inclusion of an obscenity allegation in the complaint highlights the federal government's willingness to enforce obscenity law outside the bounds of a traditional criminal prosecution.[116]

B. State Obscenity Prosecutions

Unlike the federal landscape, obscenity prosecutions of adult-oriented material have continued at the state level over the past decade unmoored from child pornography. Appendix A catalogs relevant obscenity prosecutions alphabetically by state. As explained previously, Appendix A includes cases discovered from three sources: (1) searches of legal databases, (2) searches of legal publications, and (3) interviews of attorneys who defend obscenity cases.[117] The search results excluded cases involving obscenity depicting or displayed to minors, given the differing legal standards that distinguish obscenity as to children from obscenity depicting and viewed by adults.[118]

The appendix excludes cases that contain the term "obscenity" or "obscene" but that do not apply the *Miller* doctrine in reaching an obscenity determination. These included cases construing state laws that prohibit obscene gestures; disorderly conduct based on obscenities, cyberstalking, and harassment; and the display of sexually-oriented material to children, typically to entice them to engage in sexual activity with an adult.

A careful review of the number, location, and type of obscenity case filed by state prosecutors reveals changing patterns of enforcement at the state level.

---

[114] No. 20-cv-712, 2021 WL 663190, at *1 (D.D.C. Feb. 19, 2021).

[115] *Id.* at *1, *4 n.3.

[116] *Id.* at *5, *4 n.3.

[117] *See supra* Section II.

[118] *Compare* Miller v. California, 413 U.S. 15 (1973), *with* Ferber v. New York, 458 U.S. 747, 761 (1982) ("The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.").

1. Numerosity

While the precise number of state obscenity prosecutions is unknowable, given the lack of a unified national tracking system, the number of state obscenity cases appear to be on the decline as compared to the fifteen-year period tracked in *The Myth of Obsolete Obscenity*.[119] In that article, I reported a total of twenty-five state obscenity cases from 2000 to 2015.[120] In contrast, Appendix A contains sixteen state obscenity cases over the past decade.[121] But two of these are probation revocation proceedings in which the defendants were alleged to have possessed obscene material in violation of a probation term, rather than traditional obscenity prosecutions.[122] Thus, based on the cases I have collected, the overall number of state obscenity prosecutions appears to be slightly decreasing compared to the early 2000s.

2. Geographic Distribution

An additional change in the pattern of obscenity enforcement at the state level is its geographic distribution. In *The Myth of Obsolete Obscenity*, I observed the likelihood of Southern "Bible Belt" states to pursue outright obscenity charges more often, while Northern states tended to utilize obscenity offenses more sparingly as a means of brokering plea bargains in sex-related cases.[123] Data collected by political scientists studying obscenity prosecutions from 1990 to 2006 supports these conclusions.[124] According to that data, roughly ninety percent of state and local obscenity cases prior to 2004 occurred in red and purple state obscenity hot spots, with only eight percent of obscenity cases being filed in blue states like New York and Illinois.[125]

This is no longer the case. As Appendix A demonstrates, obscenity prosecutions have occurred with far more regularity over the past decade in

---

[119] *See* Kinsley, *supra* note 1, at 610.

[120] *Id.* app. at 658–70.

[121] *See infra* Appendix A: State Obscenity Prosecutions Since 2015 (Alphabetical by State).

[122] *See generally* Dummich v. State, 251 N.E.3d 561 (Ind. Ct. App. 2024); Bennett v. State, 119 N.E.3d 1057 (Ind. 2019) (both probation revocation cases based on obscenity allegations).

[123] Kinsley, *supra* note 1, at 641. Data collected by political scientists studying obscenity prosecutions from 1990 to 2006 supports these conclusions. *See* Lochner & Apollonio, *supra* note 71.

[124] *See id.* at 10,27 (Table 1 including state-specific case numbers).

[125] *Id.*

Northern states like Ohio, Indiana, and Pennsylvania and are far less likely in Southern states.[126]

3. Case Type

With regard to case content, unlike the previous decade, where state obscenity tended to target brick-and-mortar distribution channels of pornographic material, obscenity prosecutions by state prosecutors from 2015 to 2025 focus much more heavily on the individual distribution of self-created material.[127] Some of the cases involve what might be called "revenge porn."[128]

This represents a change in objective. Historically, the obscenity doctrine was rooted in moralism and a desire to mandate sexual purity.[129] But over the past decade, state obscenity enforcement patterns have adopted a new form of moralism, one that focuses on interpersonal rather than community-based harm. Prosecutors in the modern era tend to label as obscene material that is either filmed or circulated without the consent of its participants or that is displayed to individuals who do not consent to its viewing. In this regard, the degree of autonomy and choice seem to be key factors in determining whether to pursue an obscenity prosecution. Moreover, obscenity cases of the past decade appear to have an identifiable "victim"—the person whose sexual conduct or body is shown without permission or the person who is exposed to sexual material against their wishes.[130] These characteristics distinguish modern obscenity cases from the more traditional prosecutions—for

---

[126] *See, e.g.*, State v. Burks, No. 106639, 2018 WL 6271685 (Ohio Ct. App. Nov. 29, 2018); Commonwealth v. Alexander, 258 A.3d 474 (Pa. Super. Ct. 2021).

[127] *See* Kinsley, *supra* note 1 at 640–41.

[128] *See, e.g.*, State v. Southern, 268 N.C. App. 326 (N.C. Ct. App. 2019) (defendant convicted of state obscenity offense and sentenced to thirty six to fifty six months in prison for creating fake Facebook profile of his ex-girlfriend and publicly posting pictures of her exposed breast and genitalia); State v. Burks, No. 106639, 2018 WL 6271685 (Ohio Ct. App. Nov. 29, 2018) (defendants convicted of pandering obscenity and other felonies and sentenced to seven years in prison for recording themselves engaged in sexual intercourse with alleged rape victim and publishing the material on Facebook when the victim threatened to come forward to authorities about the alleged sexual assault).

[129] *See, e.g.*, Benjamin, *supra* note 13 (tracing the morality justification in obscenity regulation and case law from the nineteenth to late twentieth century).

[130] *See, e.g.*, Burks, 2018 WL 6271685, at *1–2 (identifying victim of obscenity offense a woman who was present at a birthday party with defendants and whom defendants subsequently videoed during nonconsensual sexual encounter).

example, where an undercover police officer secretly purchases material from a retail establishment and lacks any identifiable victim.[131]

Although not technically an obscenity prosecution, the North Dakota Supreme Court's opinion in *State v. Gunn* highlights the shifting use of obscenity doctrine to address interpersonal harm.[132] Gunn was found guilty by a jury of attempted gross sexual imposition, a Class A felony, based on electronic messages she sent to a man she met on a dating app.[133] The messages contained explicit instructions on how to groom and sexually assault identifiable children.[134] Gunn argued that the messages were protected by the First Amendment and therefore could not form the basis of her conviction.[135] But the trial court rejected this argument, finding her communication to constitute unprotected obscenity under the *Miller* test.[136] The North Dakota Supreme Court upheld this finding.[137]

In addition, some state prosecutors continue to use obscenity charges as a mechanism for securing guilty pleas in child pornography cases. For example, in *Commonwealth v. Foster*, a defendant who was originally charged with possessing child pornography entered a negotiated guilty to an obscenity offense instead.[138]

The patterns of obscenity enforcement have therefore dramatically changed in the past decade. Federal obscenity enforcement is virtually nonexistent, and state obscenity enforcement no longer targets commercial creators of sexually explicit expression.

III. Observations From The Past Decade: Obscenity Prosecutions 2015-2025

A. Current Obscenity Trends

What has driven these shifts? And where might obscenity law be headed in light of these changes? Even when obscenity statutes were being more

---

[131] *See, e.g.*, Kinsley, *supra* note 1 at 629 (discussing the obscenity prosecution of Dan Sasha Birman who was alleged to have sold obscene videos to undercover officers at his video store in Ruston, Louisiana).

[132] State v. Gunn, 909 N.W.2d 701 (N.D. 2018).

[133] *Id.* at 703.

[134] *Id.*

[135] *Id.* at 705.

[136] *Id.* at 706–07.

[137] *Id.* at 707.

[138] Commonwealth v. Foster, No. 1811 WDA 2015, 2017 WL 1201526, at *1 (Pa. Super. Ct. Mar. 31, 2017).

vigorously enforced, scholars called attention to the question of resource prioritization, highlighting the increasing futility of obscenity cases as the availability of pornography became more widespread.[139] Because an obscenity prosecution only has the power to label specific, defined material as obscene, its utility in creating system-wide impact is inherently limited.[140] Enter the internet, and a legal action to criminalize a handful of videos seems essentially useless.[141] The perceived futility of the obscenity endeavor is a likely contributor to its decline, particularly at the federal level.

The reintroduction of private causes of action has also likely sidelined the prosecutorial role in traditional obscenity enforcement. In states like Virginia, for example, a private citizen can initiate an action to declare a specific piece of work obscene, rendering its future distribution a crime if successful.[142] In recent years, these mechanisms have grown in popularity with special interest groups who seek to remove identified materials from school libraries and other places of public access by having them declared obscene.[143] The participation of private actors in obscenity enforcement may disincentivize state prosecutors from using limited law enforcement resources on these cases.

B. The Future of Obscenity Prosecution

Where might obscenity law be headed next? In light of recent shifts, it is fair to question whether obscenity enforcement is truly a relic of the past or if prosecutors, particularly at the federal level, may target commercial pornography more aggressively in the future.

Two recent political developments have bearing on this question. One is Project 2025, a blueprint for reshaping the federal government spearheaded

---

[139] *See* Stone, *supra* note 45 at 142 (observing that, with changing distribution patterns, "it became less sensible for government officials to expend scarce prosecutorial resources on what increasingly came to be seen as an essentially futile effort to suppress the market for such expression").

[140] *Id.*

[141] *Id.*

[142] VA. Code Ann. § 18.2-384 (2024).

[143] *See, e.g.*, Moms for Liberty of Wayne Cnty. v. State Educ. Dep't., 86 Misc. 3d 1185, 1192–93 (N.Y. Sup. Ct. 2025) (rejecting challenge to school board determination that certain books contained in school library were not obscene because, despite the fact they contained sexually explicit content that some readers might find "shocking," the books possessed serious scientific, literary, artistic, or political value under *Miller*).

by the Heritage Foundation.[144] Project 2025 proposes fully outlawing all forms of pornography, not just that which is obscene.[145] It also proposes harsh punishment for any individual engaged in the distribution of pornography, even of the noncommercial sort.[146] In service of that objective, its forward states:

> Pornography, manifested today in the omnipresent propagation of transgender ideology . . . is as addictive as any illicit drug and as psychologically destructive as any crime. Pornography should be outlawed. The people who produce and distribute it should be imprisoned. Educators and public librarians who purvey it should be classed as registered sex offenders. And telecommunications and technology firms that facilitate its spread should be shuttered.[147]

In June of 2025, the Southern Baptist Convention, the nation's largest protestant denomination, included a ban on all pornography as a key component of its annual agenda.[148] Similar calls to action against pornography coincided with aggressive federal obscenity enforcement during the George W. Bush Administration.[149] For example, in 2001, in comments to the House Judiciary Committee, then-Attorney General John Ashcroft foreshadowed more aggressive obscenity enforcement against online providers of sexually-explicit content.[150] And, outside pro-family organizations like the Family

---

[144] Melissa Quinn & Jacob Rosen, *What is Project 2025? What to Know About the Conservative Blueprint for a Second Trump Administration*, CBS News (Nov. 8, 2024, 16:52 ET), https://www.cbsnews.com/news/what-is-project-2025-trump-conservative-blueprint-heritage-foundation/ [https://perma.cc/YP6A-JJQN].

[145] Arwa Madhawi, *The Far Right's Crusade Against Porn is a Red Herring – It's Actually a Crusade Against Progress*, Guardian (July 13, 2024, 09:00 ET), https://www.theguardian.com/commentisfree/article/2024/jul/13/project-2025-porn [https://perma.cc/9S7P-LSAY].

[146] *Id.*

[147] *Id.*

[148] Peter Smith, *Southern Baptists Target Porn, Sports Betting, Same-Sex Marriage and 'Willful Childlessness'*, AP News (June 9, 2024), https://apnews.com/article/southern-baptists-pornography-sports-betting-gay-marriage-aac48e558ea4b7f1c3b869b917e6eea2 [https://perma.cc/MBK9-NC75]

[149] *See* Kinsley, *supra* note 1, at 609 n.4 (citing Senator Orrin G. Hatch, *Fighting the Pornification of America by Enforcing Obscenity Laws*, 23 Stan. L. & Pol'y Rev. 1, 16 (2012)).

[150] Declan McCullagh, *Ashcroft's Hard Line on Hardcore*, Wired (June 9, 2001, 02:00), https://www.wired.com/2001/06/ashcrofts-hard-line-on-hardcore/ [https://perma.cc/BE4E-WMYB].

Research Council and Focus on the Family engaged in public campaigns to encourage Bush-era obscenity actions.[151]

Today, a potentially similar political and social pressure mounts on the federal government to take action. It remains to be seen whether the Department of Justice will elevate obscenity cases among its priorities. If the past decade is indicative of the future, the federal government is abandoning obscenity law as a means of policing commercial sexual expression between consenting adults on the internet.

The other political development that may have some bearing on future obscenity patterns is the suggestion post-*Dobbs* that the Comstock Act should be more frequently enforced. One hundred forty-five Republican members of Congress recently advocated for exactly that outcome in an *amicus* brief submitted to the Supreme Court.[152] But a vocal group of scholars disagrees.[153] They point to the Comstock Act's complicated history and its origins in repressing female voices in particular, as reasons for contemplation before action.[154]

---

[151] Joe Mozingo, *Obscenity Task Force's Aim Disputed*, L.A. Times (Oct. 9, 2007, 00:00 PT), https://www.latimes.com/archives/la-xpm-2007-oct-09-me-obscene9-story.html [https://perma.cc/TZS7-YY5H] (describing letter sent by ninety-three politically conservative leaders to Bush Administration to advocate for greater enforcement of obscenity law).

[152] Benjamin Weiss, *Lock, Comstock and Barrel: In Effort to Strip Abortion Pill Approval, Republican Lawmakers Brush Off 150-Year-Old Anti-Vice Law*, Courthouse News Serv., (Mar. 22, 2024) https://www.courthousenews.com/lock-comstock-and-barrel-in-effort-to-strip-abortion-pill-approval-republican-lawmakers-brush-off-150-year-old-anti-vice-law/ [https://perma.cc/6WM4-GX82]; Brief of 145 Members of Congress as Amici Curiae in Support of Respondents and Affirmance at 19–21, FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024) (Nos. 23-235, 23-236) (identifying Comstock Act as longstanding federal policy on the illegality of mailing abortion products).

[153] *See, e.g.*, Johnson, *supra* note 55, at 152–53; Siegel & Ziegler, *supra* note 50, at 1131; Lauren MacIvor Thompson, *Women Have Always Had Abortions*, N.Y. Times (Dec. 13, 2019), https://www.nytimes.com/interactive/2019/12/13/opinion/sunday/abortion-history-women.html [https://perma.cc/52G6-7GXT] (discussing the Comstock Act ban on mailing abortion products and ways women historically defied it to obtain abortion care).

[154] *See, e.g.*, Siegel & Ziegler, *supra* note 50 at 1080–81 (describing 1873 obscenity prosecution of "free love" advocate Victoria Woodhull); *id.* at 1120–24 (describing early twentieth century prosecutions of birth control advocate Margaret Sanger under Comstock-like state laws and federal Comstock Act); *id.* at 1124–32 (describing 1920s Comstock Act prosecution of Mary Ware Dennett).

If nothing else, this dialogue reinforces the continued relevance of the obscenity doctrine. Even as patterns of enforcement have shifted at the federal and state levels to prioritize perceived individual harm, the obscenity doctrine remains a centerpiece of national policy debate. Its shared history with reproductive regulation necessarily implicates concepts of privacy and autonomy. The Comstock Act's origins—as a mechanism for suppressing women's voices and means of self-determination—informs the shifting enforcement landscape now, as state obscenity law has become a tool primarily for reclaiming a person's bodily autonomy. Tracking how obscenity law is enforced over time is therefore critical to understanding its true historical significance.

Conclusion

Given important shifts in the legal and political landscape, obscenity law is anything but dead. While the Supreme Court completed its creation of the obscenity doctrine in 1987,[155] prosecutors at the federal, state, and local levels continue to enforce obscenity statutes today. They are doing so, however, in ways that the *Miller* Court may not have anticipated when it crafted a definition of obscene material in 1973.[156]

For decades, federal and state prosecutors used obscenity law to target the commercial distribution of sexually explicit material.[157] They did so initially and ostensibly as a means to protect community standards by preserving aesthetic life and enforcing moral norms.[158] With the advent of the internet, federal prosecutors focused more heavily on online methods of distribution, leaving state and local prosecutors to police retail distribution outlets in their communities.[159] But through 2015, the target of obscenity enforcement was largely those who profited from the sale of sexually explicit content.[160]

Over the last decade, however, enforcement patterns have shifted. Federal prosecutors no longer use obscenity statutes to charge the commercial distribution of sexual content to adults.[161] Instead, obscenity charges at the federal level now essentially function as companion charges to child

---

[155] Pope v. Illinois, 481 U.S. 497 (1987).

[156] Miller v. California, 413 U.S. 15, 24 (1973).

[157] *See* Lochner & Apollonio, *supra* note 71.

[158] *See* Paris Adult Theater I v. Slaton, 413 U.S. 49, 57–60 (1973) (discussing community aesthetics justification for obscenity law); Koppelman, *supra* note 12 (arguing that obscenity law enforces moral code).

[159] *See* Kinsley, *supra* note 1, at 640–41.

[160] *Id.* at app. A.

[161] *See supra* Section II.A.

pornography offenses.[162] With few notable exceptions, state prosecutors too have abandoned their focus on commercial pornography, instead using obscenity law to prosecute "revenge porn" offenses with an identifiable victim.[163]

The result is a different obscenity landscape than that which existed ten years ago. Particularly at the state level, obscenity law has transformed into a tool for addressing interpersonal sexual victimization, rather than a means of policing a community's ideas about sexual expression. This shift is significant, in that it exposes the power of the obscenity doctrine to be reimagined over time. Because a prosecutor's rationale in pursuing a particular case is not a part of the test for obscenity, existing jurisprudence places no guardrails on how obscenity law might be repurposed to solve new societal problems.[164]

Changing prosecutorial priorities might also be indicative that community standards have changed. As the chief law enforcement officers of their communities, prosecutors may have determined that the dissemination of sexually explicit material to consenting adults no longer tests the bounds of *Miller*'s community standards. Thus, the abandonment of traditional, commercially-focused obscenity prosecutions in favor of reimagined, victim-focused ones may say as much about the acceptability of adult online content in today's society as it does about a desire to protect individual privacy.

This observation—and careful study of obscenity enforcement—is critical to the post-*Dobbs* discourse around the Comstock Act and the overlap between its obscenity and abortion strands. Only by studying the ongoing enforcement of obscenity law can we truly understand its enduring impacts.

---

[162] *Id.*

[163] *See supra* Section State Obscenity *Prosecutions*.

[164] *See* Miller v. California, 413 U.S. 15, 24 (1973).

Appendix A: State Obscenity Prosecutions Since 2015 (Alphabetical by State)

Indiana

1. *Dummich v. State*, 251 N.E.3d 561 (Ind. Ct. App. 2024)

   Jurisdiction: Indiana Court of Appeals (appeal); Decatur Circuit Court (trial)

   Date: June 17, 2022, incident date

   Defendant(s): William Dummich

   Obscenity Charge(s): Probation Revocation for violation of sex offender probation condition that prohibited possession of obscenity

   Accompanying Charge(s): None

   Type of Material: YouTube video of naked woman lying face down on a table receiving a massage, other YouTube videos of a nonspecific sexual nature including naked yoga videos and videos of women's vaginas

   Method of Distribution: YouTube and cell phone

   Outcome: Probation revoked. Reversed on appeal based on insufficient evidence that the YouTube videos on defendant's phone depicted sexual conduct as required to constitute obscenity.

   Sentence: 900 days incarceration

2. *Prater v. State*, 65 N.E.2d 648 (Ind. Ct. App. 2016)[165]

   Jurisdiction: Indiana Carroll County Superior Court (trial) (no appeal)

   Date: May 18, 2015, incident date

   Defendant(s): Terik Prater

   Obscenity Charge(s): Misdemeanor distribution of obscenity in violation of I.C. 35-49-3-1(2)

   Accompanying Charge(s): Felony dissemination of matter harmful to minors

   Type of Material: Defendant sent photographs of his erect penis via the Facebook Messenger app to a minor child who was the daughter

[165] Additional information about this case originates from Defendant's appellate brief, 2016 WL 7509256.

of his friend. Defendant claimed he accidentally sent the message to the wrong person.

Method of Distribution: Facebook Messenger

Outcome: Convicted by jury. No appeal of misdemeanor obscenity conviction.

Sentence: Aggregate sentence of 2.5 years in prison

3. *Bennett v. State*, 119 N.E.3d 1057 (Ind. 2019)

Jurisdiction: Indiana Supreme Court (appeal); Indiana Superior Court, Marion County (trial)

Date: 2017 incident date

Defendant(s): Nathaniel Bennett

Obscenity Charge(s): Probation Revocation for violating term of probation that prohibited defendant from possessing obscene matter in violation of Ind. Code 35-49-2-1

Accompanying Charge(s): None

Type of Material: Pictures of defendant and a naked woman and videos of a man and a women engaged in sexual intercourse

Method of Distribution: Cell phone

Outcome: Trial court revoked defendant's probation based on his possession of obscene material and sentenced him to 4 years in prison. Probation revocation overturned on appeal.

Sentence: 4 years

4. *Macy v. State*, 87 N.E.3d 1165 (Ind. Ct. App. 2017)

Jurisdiction: Indiana Court of Appeals (appeal); Clinton Circuit Court (trial)

Date: Late May or early June 2016 incident date

Defendant(s): Maddox Macy

Obscenity Charge(s): One count of distribution of obscenity in violation of I.C. 35-49-3-1(2)

Accompanying Charge(s): Dissemination of matter harmful to minors

Type of Material: Defendant displayed pornographic images of unspecified content, which at the very least included male nudity and sexual activity, in a residential window that could be seen by her neighbor.

Method of Distribution: Window display in a residence

Outcome: Convicted by bench trial. Convictions affirmed on appeal.

Sentence: 365 days in prison, with all but two days suspended to a term of probation

Massachusetts

1. *Commonwealth v. Shimkoski*, 104 Mass.App.Ct. 1113 (2024)

Jurisdiction: Massachusetts Appeals Court (appeal); Worcester District Court (trial)

Date: late 2020 or early 2021

Defendant(s): Jeffrey Shimkoski

Obscenity Charge(s): One count of disseminating obscenity in violation of G.L. c. 272, sec. 29

Accompanying Charge(s): None

Type of Material: After his romantic advances were rebuffed, defendant presented a female barista at a coffee shop where he had ordered coffee with his cell phone, which was playing a video of a man touching his genitalia. Defendant had schizophrenia diagnosis and recent mental health interventions.

Method of Distribution: Cell phone

Outcome: Convicted by bench trial. Conviction upheld on appeal despite the fact the material alleged to be obscene was not admitted into evidence.

Sentence: One-year supervised probation

New Jersey

1. *State v. Lomato*, No. A-5273-16T4, 2019 WL 5168592 (N.J. Super. Ct. App. Div. Oct. 15, 2019)

Jurisdiction: New Jersey Superior Court, Appellate Division (appeal); Superior Court of New Jersey, Law Division, Ocean County (trial)

Date: April 22, 2014, incident date

Defendant(s): David Lomanto

Obscenity Charge(s): Public communication of obscenity in violation of N.J.S.A. 2C:343-4(b)

Accompanying Charge(s): Obstructing a criminal investigation, disorderly conduct

Type of Material: Defendant was watching an iPad-type device in his car while parked at a fast-food restaurant. A mother of a 12-year-old boy who went inside observed a woman giving a man a blow job on the iPad. When police arrived, an officer observed a screen that depicted a woman pulling a sheet over herself in what appeared to be a live interaction on the iPad.

Method of Distribution: iPad/tablet

Outcome: Convicted by jury of obscenity and obstruction. Convicted by trial court of disorderly conduct. Convictions affirmed on appeal.

Sentence: Five days in jail with credit for time served. Two concurrent terms of one year probation.

North Carolina

1. *State v. Stokes*, 289 N.C. App. 631 (N.C. Ct. App. 2023)

Jurisdiction: North Carolina Court of Appeals (appeal); Onslow County, NC Superior Court (trial)

Date: June 8 to 11, 2018 incident dates

Defendant(s): Derrick Brandon Stokes

Obscenity Charge(s): Three counts of disseminating obscenity

Accompanying Charge(s): Disclosing private images, obtaining habitual felon status

Type of Material: By consent, defendant recorded videos of victim engaging in sexual activity when they were dating. After their relationship ended, defendant, without consent, sent Facebook messages to victim's employer accusing her of "doing porn" and attaching the previously recorded videos.

Method of Distribution: Facebook

Outcome: Convicted by jury. Conviction upheld on appeal.

Sentence: Consolidated term of 38–58 months in prison

2. *State v. Cranford*, 279 N.C. App. 512 (2021)

Jurisdiction: North Carolina Court of Appeals (appeal); Lincoln County, NC Superior Court (trial)

Date: September 3, 2017, and May 21, 2018, incident dates

Defendant(s): Robert Bradley Cranford

Obscenity Charge(s): Two counts of disseminating obscenity

Accompanying Charge(s): None

Type of Material: On two different occasions, Defendant sent a total of 24 photographs of himself and an ex-girlfriend engaged in consensual sexual activity to a mutual friend after they terminated their relationship. The photographs depicted the ex-girlfriend's genitalia and the couple engaged in oral intercourse and masturbation.

Method of Distribution: Facebook Messenger

Outcome: Convicted by bench trial. Convictions upheld on appeal.

Sentence: 4 to 14 month suspended sentence, 24-month term of supervised probation

3. *State v. Southern*, 268 N.C.App. 326 (N.C. Ct. App. 2019)[166]

Jurisdiction: North Carolina Court of Appeals (appeal); Forsyth County, NC Superior Court (trial)

Date: January 11, 2015, incident date

Defendant(s): Shan Southern

Obscenity Charge(s): Disseminating obscenity in violation of N.C. Gen. Stat. 14-190.1(c)

Accompanying Charge(s): Obtaining habitual felon status

Type of Material: Defendant created fake Facebook profile of his ex-girlfriend and publicly posted pictures of her exposed breast and genitalia.

Method of Distribution: Facebook

Outcome: Convicted by jury of obscenity. Guilty plea to habitual felon status.

Sentence: Aggregate sentence of 36 to 56 months in prison

Ohio

1. *State v. Burks*, No. 106639, 2018 WL 6271685 (Ohio Ct. App. Nov. 29, 2018)

Jurisdiction: Ohio Court of Appeals for the Eighth District (appeal); Cuyahoga County, OH Court of Common Pleas (trial)

Date: October 29, 2016, incident date

[166] Additional information on this case originates from Defendant's appellate brief, 2018 WL 6984384.

Defendant(s): Daryl Burks and Raynard Rivers

Obscenity Charge(s): Pandering obscenity in violation of R.C. 2907.32(A)(2)

Accompanying Charge(s): Extortion, intimidation of a crime victim

Type of Material: Defendant and co-defendant recorded themselves engaged in sexual intercourse with alleged rape victim. They published the material on Facebook when the alleged rape victim threatened to come forward to authorities about the alleged sexual assault.

Method of Distribution: Facebook

Outcome: Convicted by jury. Convictions upheld on appeal.

Sentence: 7-year aggregate prison term, one year of which was imposed on the pandering obscenity count

2. *State v. Pollock*, 78 N.E.3d 373 (Ohio Ct. App. 8th Dist. 2017)

Jurisdiction: Ohio 8th Dist. Court of Appeals (appeal); Ohio Court of Common Pleas, Cuyahoga County (trial)

Date: March 2012 to December 2013 incident dates

Defendant(s): Walter Pollock

Obscenity Charge(s): 27 felony counts of pandering obscenity in violation of O.R.C. 2907.32(A)(2)

Accompanying Charge(s): Menacing by stalking, telecommunications harassment, public indecency

Type of Material: Defendant emailed three female coworkers unsolicited pictures of himself "pumping" his penis, some of which contained visible semen and others of which contained devices defendant used to aid in masturbation.

Method of Distribution: Email

Outcome: Convicted by jury. Conviction upheld on appeal.

Sentence: 6 months in jail followed by two years of probation. Defendant ordered to register as Tier I sex offender.

Pennsylvania

1. *Commonwealth v. Benson*, 296 A.3d 589 (Pa. Super. Ct. 2023)

Jurisdiction: Pennsylvania Superior Court (appeal); Pennsylvania Court of Common Pleas, Lycoming County (trial)

Date: June 23, 2020, incident date

Defendant(s): Wayne Franklin Benson

Obscenity Charge(s): One count of creating obscenity in violation of 18 Pa.C.S. 5903(a)(3)(ii)

Accompanying Charge(s): Photographing a minor performing a sexual act, possession of child pornography, criminal use of a communication facility, invasion of privacy

Type of Material: Defendant

Method of Distribution: Defendant surreptitiously photographed his minor stepdaughter using the bathroom by hiding his iPhone in the bathroom closet and using his iWatch to operate the phone's camera feature.

Outcome: Convicted on all counts by a jury. Obscenity count reversed on appeal because the photographs were deleted and could not be assessed under the *Miller* test. Remaining counts upheld. Case remanded for resentencing.

Sentence: Combined sentence of 16 to 32 months in prison followed by three years probation

2. *Commonwealth v. Alexander*, 258 A.3d 474 (Pa. Super. Ct. 2021)

Jurisdiction: Superior Court of Pennsylvania (appeal); Pennsylvania Court of Common Pleas for Lycoming County (trial)

Date: December 21, 2018, incident date

Defendant(s): Andrew Thomas Alexander

Obscenity Charge(s): One count of obscenity in violation of 18 Pa.C.S. 5903(a)(3)(i)

Accompanying Charge(s): None

Type of Material: Sexually explicit text messages, ostensibly sent by defendant to an adult he met on a dating website. The messages were sexual in nature ("I'm rubbing my cock right now," "Can I see that pretty pussy?") and intimated that both the sender and the recipient may be underage ("so you in high school?" followed by an emoji with heart eyes; "you at school now?," "I never talked to a young girl like you before," "sorry my mom came home. I am supposed to be in bed, LOL school."). Alexander claimed he was engaging in a fantasy-type role play.

Method of Distribution: Text message

Outcome: Convicted by bench trial. Overturned on appeal for lack of sufficient evidence of obscenity.

Sentence: 6 to 24 months in prison, followed by 3 years probation

3. *Commonwealth v. Brooks*, 240 A.3d 968 (Pa. Super. Ct. 2020)

   Jurisdiction: Pennsylvania Superior Court (appeal); Pennsylvania Court of Common Pleas, Alleghany County (trial)

   Date: August 8, 2018, incident date

   Defendant(s): Michael James Brooks

   Obscenity Charge(s): Displaying obscenity in violation of 18 Pa.C.S. 5903(a)(3)(i)

   Accompanying Charge(s): Harassment, terroristic threats, intimidating witnesses

   Type of Material: Defendant posted three pictures of victim engaged in sex acts with him on his Facebook page, along with sexually explicit and critical comments of her, following their breakup.

   Method of Distribution: Facebook

   Outcome: Convicted by bench trial. Convictions upheld on appeal.

   Sentence: Aggregate sentence of two to four years in prison, followed by four years of probation

4. *Commonwealth v. Winters*, No. 756 WDA 2018, 2019 WL 32477178 (Pa. Super. Ct. July 19, 2019)

   Jurisdiction: Pennsylvania Superior Court (appeal); Pennsylvania Court of Common Pleas, Erie County (trial)

   Date: August 8, 2017, incident date

   Defendant(s): Timothy Winters

   Obscenity Charge(s): One count of obscene materials

   Accompanying Charge(s): Simple assault, unlawful dissemination of an intimate image, criminal mischief

   Type of Material: Defendant broke into the home of his estranged wife while she was having sex with another man and livestreamed her naked from the waist down.

   Method of Distribution: Facebook Live

   Outcome: Convicted by jury trial. Convictions affirmed on appeal.

   Sentence: Aggregate sentence of 28 to 56 months in prison, 16 to 32 months of which was imposed on the obscene materials count, followed by 90 days probation

Virgin Islands

1. *People v. Roebuck*, No. ST-2020-CR-00289, 2021 WL 409157 (V.I. Super. Jan. 15, 2021)

   Jurisdiction: Superior Court of the Virgin Islands, Division of St. Thomas and St. John (trial)

   Date: October 23, 2020

   Defendants: Elmo D. Roebuck, Jr.

   Obscenity Charge(s): One count of obscenity in violation of 14 VIC 1022(a)(3)

   Accompanying Charge(s): None

   Type of Material: Defendant was alleged to have hid in a closet and recorded a person he was dating at the time engaged in the act of masturbation. When the relationship ended, the defendant allegedly circulated the video to other people.

   Method of Distribution: Cell phone

   Outcome: Motion to dismiss granted by trial court on the grounds that the material was not obscene as a matter of law

   Sentence: N/A

Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

Preserving a Tradition or Creating a New One? The Legal Benefits of an Enhanced Educational Model for College Sports

Gabriel A. Feldman* and Eric J. Blevins**

Abstract

This Article examines the seismic shift underway in intercollegiate athletics, focusing on the growing disconnect between college sports and education. The Article explains how this disconnect has diminished the longstanding judicial deference afforded to college athletics, and increased vulnerability to labor and antitrust scrutiny. The Article proposes a new Enhanced Educational Model for college athletics to recenter the inherent value and experience of a rigorous education and mitigate legal risk to college athletics programs.

Introduction

We are in the midst of a seismic shift in intercollegiate athletics. The relationship between the National Collegiate Athletic Association ("NCAA"), colleges, and college athletes is likely to undergo a more significant transformation in this decade than at any other point in the NCAA's history. Although critics have long contended that the very existence of college athletics is under threat from commercial interests, frustration over unchecked

* Sher Garner Professor of Sports Law, Paul and Abram B. Barron Professor of Law, Director, Tulane Sports Law Program, Tulane Law School.

** Sports Law Program Manager, Tulane Center for Sport; Adjunct Lecturer, Tulane University Freeman School of Business. The authors would like to thank Tulane Sports Law Program alumni Paige Etherington, Lily Argyle, Nicholas Brown, and Alex Crow for their assistance researching this article.

spending and diminished emphasis on education has reached a new zenith.[1] "Complaints about big-time college sports interfering with the academic integrity of universities" are louder than ever.[2]

Many of the recent changes have provided significant—and long overdue—benefits for college athletes, including stipends to cover their "full cost of attendance," access to multi-year scholarships, and the ability to receive compensation for the use of their name, image, and likeness ("NIL"). Meanwhile, the influx of money into big-time college sports shines an ever-brighter spotlight on skepticism about commercial interests in college sports and the disregard for the universities' educational missions.[3]

The disconnect between college *athletics* and college *education* not only presents an existential question about the future of college sports, but also is one of the primary issues raised in the antitrust and labor attacks against the NCAA. Over the last century, the operative test under antitrust law is whether NCAA rules are reasonably necessary to maintain college sports as distinct from professional sports. Recently, federal courts (including the Supreme Court) have noted that college sports have become less distinct from professional sports and are, therefore, entitled to less deference under the law than they have received in the past.[4]

Complaints about the disconnect between college athletics and education will likely only accelerate. Consider the Football Bowl Subdivision ("FBS"), one of two football classifications within Division I college athletics and the one containing the highest-profile and highest-revenue-earning

---

[1] *See* Gabe Feldman, Reimagining The Role Of Intercollegiate Sports In Higher Education 3 (Arnold Ventures), http://craftmediabucket.s3.amazonaws.com/uploads/AVCollegeSportWhitePaper_HigherEd-v4b-1.pdf [https://perma.cc/V9FZ-JYNT] (last visited Dec. 8, 2025).

[2] *Id.*; *see, e.g.*, Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, Aspen Institute (Apr. 23, 2018), https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/ [https://perma.cc/46MH-4DQW].

[3] Feldman, *supra* note 1, at 3; *see, e.g.*, Knight Comm'n on Intercollegiate Athletics, Connecting Athletics Revenue with the Educational Model of College Sports 2 (5th ed. 2025) (orig. pub. 2021), https://www.knightcommission.org/wp-content/uploads/2021/09/CAREModel.pdf [https://perma.cc/Y3FV-V3VH] ("College sports in Division I, most notably in Football Bowl Subdivision (FBS) football, are in the midst of a runaway financial race that threatens to upend and undermine the educational model of college athletics.").

[4] *See, e.g.*, NCAA v. Alston, 594 U.S. 69, 82–83 (2021) (finding that the NCAA failed to set forth "any coherent definition" of amateurism); Johnson v. NCAA, 108 F.4th 163 (3d Cir. 2024).

programs.[5] The total annual athletics revenue generated by FBS public institutions is projected to increase to $20.9 billion by 2032[6] Additionally, the proposed *House* class action settlement opens the door for colleges and universities to directly pay their athletes up to $20.5 million each year.[7] As the gap continues to widen between college athletics and education, the NCAA and its institutions will remain vulnerable to antitrust and labor lawsuits and invite broader attacks on the collegiate model, creating a vicious cycle that deepens the athletics-vs-education divide, which in turn might continue to decrease the legal deference afforded to college athletics. This might continue until college athletics is completely severed from the academy.

Although several high-profile athletic departments are embracing this brave new world, many schools are struggling to reconcile "[t]he seemingly paradoxical coexistence of academics and sports-as-entertainment" and are seeking a different path.[8] This Article proposes a new college sports model—the Enhanced Educational Model ("EEM")—which can help harmonize collegiate sports and a university's academic mission and, in turn, minimize some of the legal risk that the existing runaway-spending model has created.

The EEM does not preclude 'big-time college sports' under a revenue-centric model in which athletes are paid. Nor does this Article presume that big-time college sports will or even should abandon a revenue-centric model. Rather, both models can operate in parallel— perhaps even within the same institution, with major sports like football and basketball operating under a revenue-centric model, and other sports following the EEM.

However, the EEM also does not offer a solution to the legal issues facing the revenue-centric model. Big-time college sports are a valuable part of the college athletics fabric, but treating them differently from non-revenue

---

[5] *See Football Bowl Subdivision*, Knight-Newhouse Coll. Athletics Database, https://knightnewhousedata.org/fbs [https://perma.cc/4GWY-JKYX] (last visited Dec. 8, 2025) (containing revenue breakdowns).

[6] *See* Knight Comm'n on Intercollegiate Athletics, Financial Projections Through 2032 for Division I FBS Program 22 (2023), https://www.knightcommission.org/wp-content/uploads/2023/09/cla_financial_projections_report_2023.pdf [https://perma.cc/RF33-HXFU].

[7] Dan Murphy, *Judge OK's $2.8B Settlement, Paving Way for Colleges to Pay Athletes*, ESPN (June 6, 2025, 21:28 ET), https://www.espn.com/college-sports/story/_/id/45467505/judge-grants-final-approval-house-v-ncaa-settlement [https://perma.cc/XF62-SP2L] ("The annual cap is expected to start at roughly $20.5 million per school in 2025-26 and increase every year during the decade-long deal. These new payments are in addition to scholarships and other benefits the athletes already receive.").

[8] Feldman, *supra* note 1, at 3.

sports can prevent the non-revenue sports from being engulfed by the legal issues facing revenue-centric sports, primarily football and basketball.[9]

Thus, the EEM offers a potential path to alleviate withering legal attacks on the majority of college athletics programs (those outside the realm of big-time college sports). The EEM accomplishes this by removing the economic engine—which is the chief source of antitrust and labor law scrutiny—from a school's athletics program and replacing it with a rigorous academic experience that captures the inherent educational value of sports.

Part I of this Article provides an overview of the history and early criticisms of the connection between college athletics and education. Part II examines the history of judicial deference afforded to college athletics. Part III explores the growing divide between college athletics and education and the consequent diminished judicial deference. Finally, Part IV discusses the proposed EEM and how it could lead to renewed legal protection for college athletics.

I. Early History and Criticisms of the Relationship Between College Athletics and Education

The NCAA was formed in 1905 in response to a series of fatalities that occurred during college football games and initially positioned itself as "an advisory body that promoted amateurism and discouraged commercialism."[10] This new governing body articulated standards for intercollegiate athletics,

---

[9] The idea of separating the top football programs into a new league has been raised widely. *See, e.g.*, Paolo Uggetti, *UCLA's Chip Kelly Advocates for Single Power 5 Conference*, ESPN, (Dec. 17, 2023, 01:57 ET), https://www.espn.com/college-football/story/_/id/39130831/ucla-chip-kelly-advocates-single-power-five-conference [https://perma.cc/F992-FS78]; Brandon Marcello, *After the House v. NCAA Settlement: Is a 'Super League' College Football Realignment's Inevitable Final Form?*, CBS Sports (Aug. 6, 2025, 11:50 ET), https://www.cbssports.com/college-football/news/after-the-house-v-ncaa-settlement-is-a-super-league-college-football-realignments-inevitable-final-form/ [https://perma.cc/NT85-QT69]. One proposal, dubbed "Project Rudy," could create an approximately seventy-team league with a new scheduling system, television broadcast deal, and expanded postseason. *See* Ross Dellenger, *While SEC and Big Ten Leaders Mull Major Changes, a New Super League Concept Could Radically Alter College Sports*, Yahoo! Sports (Oct. 8, 2024), https://sports.yahoo.com/while-sec-and-big-ten-leaders-mull-major-changes-a-new-super-league-concept-could-radically-alter-college-sports-130031473.html [https://perma.cc/VD33-SYVU].

[10] Brian M. Ingrassia, The Rise of Gridiron University: Higher Education's Uneasy Alliance with Big-Time Football 58–59 (Univ. Press of Kan. ed.,

including a prohibition on "promised pay in any form" in return for athletic performance.[11] Over time, however, the NCAA loosened its restrictions and expanded the scope of permissible benefits to include athletic scholarships and, eventually, room, board, books, fees, and the athlete's "full cost of attendance,"[12] as well as certain payments incidental to athletic performance and education-related benefits.[13]

Today, the NCAA's membership includes approximately 1,100 colleges and universities, organized into three competitive divisions.[14] Division I, the highest level of intercollegiate competition, encompasses approximately 350 schools.[15] Division I football programs are further subdivided into the FBS and the Football Championship Subdivision ("FCS").[16] FBS football and men's basketball generate the vast majority of collegiate athletic revenue and media attention.[17]

Throughout its history, the NCAA has long stated that its mission is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body" thereby preserving "a clear line of demarcation between intercollegiate athletics and professional sports."[18] Until 2022, the NCAA Constitution also stated that "[s]tudent-athletes shall be amateurs," that "their participation should be

---

2012) (discussing creation of the Intercollegiate Athletic Association of the United States, later renamed the National Collegiate Athletic Association).

[11] NCAA v. Alston, 594 U.S. 69, 77 (2021).

[12] *See* O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015) (affirming that NCAA rule prohibiting athletes from receiving their "full cost of attendance" was illegal under antitrust law).

[13] *Alston*, 594 U.S. at 77–78.

[14] *See Overview*, NCAA, https://www.ncaa.org/sports/2021/2/16/overview.aspx [https://perma.cc/HUT6-WL7R] (last visited Dec. 8, 2025).

[15] *See Our Division I Members*, NCAA, https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx [https://perma.cc/2UUW-N6FW] (last visited Dec. 8, 2025) (displaying data from the 2025-26 academic year).

[16] *Football Bowl Subdivision*, *supra* note 5.

[17] *See* Andrew Zimbalist, *Analysis: Who Is Winning in the High-Revenue World of College Sports?*, PBS News (Mar. 18, 2023, 19:14 ET), https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports [https://perma.cc/QGF8-LSS4].

[18] *See* NCAA, 2024-2025 NCAA Division I Manual 1 (2024) ("The National Collegiate Athletic Association is . . . committed to the well-being and development of student-athletes, to sound academic standards and the academic success of student-athletes . . . . Member institutions and conferences believe that intercollegiate athletics programs provide student-athletes with the opportunity to participate in sports and compete as a vital, co-curricular part of their educational experience.").

motivated primarily by education," and that they "should be protected from exploitation by professional and commercial enterprises."[19]

Despite these lofty goals, the tension between college athletics and education emerged well before the NCAA's formation and has persisted ever since.[20] An 1852 boating contest between Harvard and Yale is widely considered the first collegiate athletic competition, and the first intercollegiate football game was held in 1869 between Princeton and Rutgers.[21] Football in particular grew quickly in popularity. By the 1890s, Thanksgiving Day championship games in New York City routinely drew crowds exceeding 40,000 fans.[22] By the early 1900s, college sports had become a commercial enterprise "attract[ing] hundreds of thousands of paying spectators and millions of dollars to arenas throughout the nation."[23]

Even this earliest commercialization of college sports was accompanied by violations of amateur ideals. Although institutional bylaws adopted in 1906 declared that "no student shall represent a college or university in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money or financial assistance,"[24] schools had begun using "paid ringers" by the 1880s.[25] The "absence of academic residency requirements gave rise to 'tramp athletes,'" who traveled between institutions in pursuit of better financial opportunities, often with little connection to the educational mission of the schools they represented.[26]

Some schools made efforts to keep athletics within the university's academic units.[27] In 1907, a future University of Michigan regent predicted he'd "live to see the day when the athletic department w[ould] be conducted the same as the department of Greek, the department of Physics, or any other

---

[19] NCAA Const. art. 2, § 9 (1997). As part of a comprehensive rewrite, the NCAA removed this article in 2022. *See New NCAA Constitution*, *Division I Proposal - BOG-2022-1*, NCAA, https://web3.ncaa.org/lsdbi/search/proposalView?id=106135 [https://perma.cc/ST2F-UKCT] (last visited Dec. 8, 2025).

[20] *See* Feldman, *supra* note 1, at 2.

[21] Guy Lewis, *The Beginning of Organized Collegiate Sport*, 22 Am. Q. 222, 224–29 (1970).

[22] James L. Shulman & William G. Bowen, The Game of Life: College Sports and Educational Values 6 (2001).

[23] Ingrassia, *supra* note 10, at 115.

[24] Robert J. Romano, *The Concept of Amateurism*: *How the Term Became Part of the College Sport Vernacular*, 1 UNH Sports L. Rev. 29, 36 (2022) (quoting Intercollegiate Athletic Ass'n U.S. Const. By-Laws art. VII, § 3 (1906)).

[25] NCAA v. Alston, 594 U.S. 69, 75 (2021).

[26] *Id.*

[27] Ingrassia, *supra* note 10, at 137–38.

department on campus."[28] From the 1910s into the 1930s, Ohio State placed its athletic department under faculty control; Iowa made its coaches tenured faculty members within the physical education department; and Illinois housed athletics within its "School of Physical Education."[29] These experiments, however, proved short-lived as commercial pressures and institutional incentives increasingly separated athletics from academic governance.

Criticism of this divergence was both immediate and sustained.[30] In 1893, Harvard University's president observed:

> With athletics considered as an end in themselves, pursued either for pecuniary profit or popular applause, a college or university has nothing to do. Neither is it an appropriate function for a college or university to provide periodical entertainment during term-time for multitudes of people who are not students.[31]

A decade later, in 1903, Stanford University's president stated that "he would prefer that college football be banished for a decade and 'athletic fields closed . . . for fumigation than to see our colleges helpless in the hands of athletic professionalism.'"[32] By the 1920s, commentators framed the issue in even starker terms. Upton Sinclair famously proclaimed that "[c]ollege athletics, under the spur of commercialism, has become a monstrous cancer, which is rapidly eating out the moral and intellectual life of our educational institutions."[33] The 1929 Carnegie Foundation echoed these concerns, concluding that "[t]he admission to the university of students who are financed because of their athletic prowess and because of their ability to round out winning athletics teams, cannot do otherwise than result in disaster to our educational program and to its standards of scholarship."[34]

---

[28] *Id.* at 137.

[29] *Id.* at 136.

[30] *See* Feldman, *supra* note 1, at 2.

[31] *See id.* at 2 (quoting Charles T. Clotfelter, Big-Time Sports in American Universities 10 (2011)).

[32] *See id.* at 3 (alteration in original) (quoting Ingrassia, *supra* note 10 at 53).

[33] *See* Feldman, *supra* note 1, at 3 (quoting Steven Mintz, *The Uncertain Future of College Sports*, Inside Higher Ed (Apr. 16, 2021), https://www.insidehighered.com/blogs/higher-ed-gamma/uncertain-future-college-sports [https://perma.cc/G955-77RM]).

[34] *See* Howard J. Savage et al., *American College Athletics*, Carnegie Found. for the Advancement of Teaching, 1929, at 32, http://www.thecoia.org/wp-content/uploads/2014/09/Carnegie-Commission-1929-excerpts-1.pdf [https://perma.cc/F78C-VH6Q]); Knight Comm'n on Intercollegiate Athletics, *supra* note 3, at 2 ("College sports in Division I, most notably FBS football, are in the midst of

Indeed, most of the problems raised nearly a century ago "are still with us, and in barely altered forms," including whether athletic scholarships are appropriate, the purported character education of college sports, how to fund college sports, and the role of third-party boosters.[35]

II. Antitrust and Labor Judicial Deference to the Educational Model of College Sports

A. Antitrust Background and Judicial Deference

Federal antitrust law, principally the Sherman Act,[36] prevents business competitors with market power from entering agreements, creating rules, or otherwise acting to restrain economic competition.[37] In the context of sports, courts most commonly apply the Rule of Reason, an analysis that balances the procompetitive benefits of the challenged conduct with its anticompetitive effects and whether those justifications could be achieved through less restrictive means.[38] Despite the early criticisms and repeated antitrust legal attacks, the NCAA's athletic/academic model received broad and virtually unwavering support from the courts for nearly a century.

Judicial deference to this model reached a peak in *NCAA v. Board of Regents of the University of Oklahoma*, where the Supreme Court declared that the "academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable."[39] The Court added that "the NCAA plays a vital role" in

---

a runaway financial race that threatens to upend and undermine the educational model of college athletics."); *see also* Charles T. Clotfelter, Big-Time Sports in American Universities 26 (2011) ("Big-time college athletics has little to do with the nature or objectives of the contemporary university. Instead, it is a commercial venture, aimed primarily at providing a entertainment for those beyond the campus and at generating rewards for those who stage it."). Further along these lines, in some cases, athletes are higher paid in college than professional sport. *See, e.g.*, NCAA v. Alston, 594 U.S. 69, 77 (2021) (noting that Hugh McElhenny, a halfback at the University of Washington in the 1940s, "became known as the first college player ever to take a cut in salary to play pro football" and that he reportedly said: "A wealthy guy puts big bucks under my pillow every time I score a touchdown. Hell, I can't afford to graduate.").

[35] Shulman & Bowen, *supra* note 22, at 8.

[36] 15 U.S.C. § 1, *et seq*.

[37] *Alston*, 594 U.S. at 96.

[38] *Id.* at 96–97.

[39] 468 U.S. 85, 101–02 (1984).

preserving this tradition, that its rules "widen consumer choice—not only the choices available to sports fans but also those available to athletes."[40] In perhaps its most enduring—and consequential—dictum, the Court also stated:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.[41]

The Court further framed the NCAA's role as safeguarding "a tradition that might otherwise die."[42]

For nearly four subsequent decades, lower courts consistently invoked this language to justify great deference to NCAA regulations, particularly those limiting athlete compensation, because of the educational value of college athletics to college athletes.[43] Courts reasoned that such restrictions were procompetitive because they preserved the "unique atmosphere" of intercollegiate sports and promoted the educational welfare of student-athletes.[44] As one court observed in 1990, there remained "validity to the Athenian concept of a complete education derived from fostering full growth of both mind and

---

[40] *Id.* at 102.

[41] *Id.* at 120.

[42] *Id.*

[43] *See, e.g.*, McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988) ("The goal of the NCAA is to integrate athletics with academics."); *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1083 (N.D. Cal. 2019) ("[T]he evidence shows that student-athletes benefit from receiving a college education."); *cf.* Albach v. Odle, 531 F.2d 983, 985 (10th Cir. 1976) ("The educational process is a broad and comprehensive concept with a variable and indefinite meaning. It is not limited to classroom attendance but includes innumerable separate components, such as participation in athletic activity."); Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004) ("The evidence further shows that these justifications are in keeping with the NCAA principles of amateurism and recruiting that aim to promote education and keep student athletics separate from professional sports."); Colo. Seminary (Univ. of Denver) v. NCAA, 417 F. Supp. 885, 898 (D. Colo. 1976) ("The objectives of the NCAA have been previously stated. They include maintaining intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body."); Ass'n for Intercollegiate Athletics for Women v. NCAA, 558 F. Supp. 487, 494 (D.D.C. 1983) ("[The NCAA] exist[s] primarily to enhance the contribution made by amateur athletic competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity.").

[44] Gaines v. NCAA, 746 F. Supp. 738, 744 (M.D. Tenn. 1990).

body," and the NCAA rules were therefore justified by their role in maintaining "competition between 'student-athletes,'" rather than professional laborers.[45]

B. Labor & Employment Law Deference

Labor and employment law poses two related inquiries for collegiate athletics: (1) whether college athletes qualify as "employees" entitled to minimum wage and other benefits under the Fair Labor Standards Act ("FLSA");[46] and (2) whether college athletes are entitled to organize unions and collectively bargain under the National Labor Relations Act ("NLRA").[47] The benefits offered by each law apply only to workers who meet the legal definition of an "employee."

The NCAA's judicial deference also extended to labor and employment cases, where courts consistently held that college athletes were not employees, citing in part the academic foundation of college athletics. In FLSA cases, courts often emphasized the amateur and extracurricular nature of collegiate sports. In *Berger v. NCAA*, for example, the United States Court of Appeals for the Seventh Circuit applied an "economic reality" test and leaned on what it described as the NCAA's "revered tradition of amateurism."[48] The court concluded that, as a matter of law, college athletes were not FLSA employees because they did not perform "work" for their schools.[49]

The *Berger* Court relied heavily on the Department of Labor's Field Operations Handbook, which excludes extracurricular activities like college sports from FLSA coverage when they are "conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution."[50] The court reasoned that "the long tradition of amateurism in college sports, by definition, shows that student athletes—like all amateur athletes—participate in their sports for reasons

---

[45] *Id.*

[46] 29 U.S.C. §§ 201–19.

[47] 29 U.S.C. §§ 151–69.

[48] 843 F.3d 285, 290 (7th Cir. 2016).

[49] *Id.* ("[T]o qualify as an employee for purposes of the FLSA, one must perform 'work' for an 'employer.'" (quoting NCAA v. Bd. of Regents Univ. Okla., 468 U.S. 85, 120 (1984))).

[50] *Id.* at 292–93 (citing Wage & Hour Div., U.S. Dep't of Lab., Field Operations Handbook § 10b03(e) (2016) [hereinafter "Field Operations Handbook"]).

wholly unrelated to immediate compensation. . . . Simply put, student-athletic 'play' is not 'work,' at least as the term is used in the FLSA."[51]

Treatment of college athletes under the NLRA is procedurally distinct from the FLSA. The NLRA protects and governs employees' right to organize and collectively bargain with their employers, i.e., to unionize; it also establishes the National Labor Relations Board (NLRB), the body charged with overseeing collective bargaining procedures and hearing grievances.[52] Challenges under the NLRA must proceed first through the NLRB, beginning with a regional director's decision and potentially culminating in review by the full Board.[53] Only after the Board issues a final ruling may the dispute reach the federal courts.

To date, the full Board has never squarely resolved the issue of whether college athletes qualify as "employees" under the Act—although it has gotten close, as discussed below.

The first serious attempt to gain NLRA "employee" status for college athletes came from Northwestern University football players in 2014. Applying the common-law agency test, the NLRB regional director concluded that the players were employees because they (1) performed services for the university's benefit (including generating significant football revenue and reputational benefits); (2) received compensation for that work in the form of athletic scholarships and other benefits; and (3) were subject to extensive control over their daily schedules.[54] On appeal, however, the full Board declined to assert jurisdiction and expressly did not decide whether college athletes qualify as employees; it did notably observe that the Northwestern players "receive no academic credit for their football endeavors."[55]

---

[51] *Id.*

[52] *See* 29 U.S.C. §§ 153, 157; *National Labor Relations Act*, Nat'l Lab. Rels. Bd., https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act [https://perma.cc/7H8B-3XVC] (last visited Dec. 12, 2025).

[53] *See* 29 U.S.C. §§ 153, 157; *National Labor Relations Act*, *supra* note 52.

[54] *See* Nw. Univ., No. 13-RC-121359, 2014 WL 1246914, at *12–14 (N.L.R.B., Region 13 Mar. 26, 2014).

[55] Nw. Univ., 362 N.L.R.B. 1350, 1351 (2015). In 2021, then-NLRB General Counsel Jennifer Abruzzo issued a formal memorandum taking the position that "scholarship football players at Division I FBS private colleges and universities, and other similarly situated Players at Academic Institutions, are employees under the NLRA." Off. of Pub. Affs., *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, Nat'l Lab. Rels. Bd. (Sep. 29, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of [https://perma.cc/53AZ-6GPQ]. On February 14, 2025, the new Acting NLRB General Counsel,

Taken together, antitrust and labor jurisprudence long reflected a broad judicial willingness to accept the NCAA's assertion that college athletics are meaningfully distinct from professional sports because of their educational foundation. That deference persisted despite decades of criticism regarding commercialization, athlete exploitation, and the growing economic stakes of Division I athletics.

In recent years, however, courts have increasingly questioned the factual and legal premises underlying that deference, discussed further in section III(B).

The next Part of this Article highlights the forces driving the increasingly blurred distinctions between college and professional sports and analyzes how those developments are reshaping judicial treatment of the NCAA's regulatory authority.

III. Diminished Judicial Deference to the NCAA

A. The Explosion of Athletic Spending and Further Professionalization of College Sports

Although intercollegiate athletics has been heavily influenced by commercial interests since its inception, the Supreme Court's 1984 decision in *NCAA v. Board of Regents of the University of Oklahoma*, which opened the door to market-based revenue from television broadcasting rights, can be seen as a fountainhead for the revenue that has dramatically altered college athletics in the decades since. Especially in recent years, growth in media revenue—particularly at the top tier of Division I football—has accelerated to a level that increasingly resembles professional sports.

The most striking example is the College Football Playoff ("CFP"). Its initial television agreement generated approximately $5.64 billion over twelve years; in March 2024, that agreement was replaced with a new six-year deal valued at roughly $7.8 billion.[56] Conference-level media contracts also reached new heights, with the Big Ten and Southeastern Conference ("SEC")

William Cowen, formally rescinded Abruzzo's 2021 memorandum. *See* Off. of Pub. Affs., *GC 25-05 Rescission of Certain General Counsel Memoranda*, Nat'l Lab. Rels. Bd. (Feb. 14, 2021), https://www.nlrb.gov/news-outreach/news-story/gc-25-05-rescission-of-certain-general-counsel-memoranda [https://perma.cc/7X3R-WJTB].

[56] *See* Kristi Dosh, *Current College Sports Television Contracts*, Bus. of Col. Sports, (Mar. 19, 2024), https://businessofcollegesports.com/current-college-sports-television-contracts/ [https://perma.cc/ELR2-MHAE].

deals far eclipsing those of other conferences. For example, each school in the Big 12 Conference will receive approximately $31.7 million per year through the 2030–31 season, while schools in the Big Ten and SEC are expected to receive annual distributions approaching—or exceeding—$70 million per school over comparable periods.[57]

Division I men's college basketball has also seen explosive growth. From 1982 to 1984, CBS paid approximately $16 million per year to televise the NCAA men's basketball tournament.[58] Twenty years later, the rights fees were over $1 billion per year.[59] In 2024, the NCAA signed an eight-year television deal totaling $115 million per year for forty NCAA championships (twenty-one women's events and nineteen men's events), which tripled the value of the prior contract.[60]

The revenue disparity in the conference television deals has spurred massive conference realignment, especially in recent years, with several schools leaving their traditional, regional-based rivals to chase more lucrative football media contracts. As one example, in 2023, most of the schools in the Pac-12 Conference—a group of elite athletic universities founded in 1915 and located on the West Coast—exited to join the ACC, Big 12, or Big Ten, conferences of elite athletic universities primarily located in the East Coast and Midwest.[61] The moves were inarguably driven by a desire to increase their revenue from the more lucrative conference football television deals, not a desire to improve the educational experience of their athletes.

Of the many deleterious impacts these conference realignments had on college athletes, perhaps none is more striking and illustrative than the University of Oregon men's basketball team. For the 2024–25 season, the

---

[57] *Id.*

[58] Gordon S. White, *N.C.A.A. Title Basketball Sold to CBS for $48 Million* (Mar. 5, 1981), https://www.nytimes.com/1981/03/05/sports/ncaa-title-basketball-sold-to-cbs-for-48-million.html [https://perma.cc/9JN4-Y4PQ].

[59] *See* NCAA v. Alston, 594 U.S. 69, 93 (2021).

[60] Dosh, *supra* note 56.

[61] *See* Jacob Lev & Homero De la Fuente, *5 Universities Announce Departure from Pac-12 Conference on Friday, Leaving its Future in Question*, CNN (Aug. 4, 2023, 23:32 PM ET), https://www.cnn.com/2023/08/04/sport/oregon-washington-big-ten [https://perma.cc/X6JY-7D7Y]; Pete Thamel, *ACC adding Stanford, Cal, SMU as New Members in 2024*, ESPN (Sept. 1, 2023, 8:04 AM ET), https://www.espn.com/college-sports/story/_/id/38304694/sources-acc-votes-invite-stanford-cal-smu [https://perma.cc/9TTY-LEBA]; *see also* Peter A. French, Ethics and College Sports 105–06 (2004) (discussing restructuring of the Big East and dissolution of the Southwest Conference, driven primarily by member institutions pursuing more lucrative television contracts).

team traveled nearly 27,000 miles to compete in eighteen out-of-state games, including five trips exceeding 1,500 miles.[62] As a result of extensive travel demands, every player on the team was required to enroll exclusively in online-only courses, raising questions about whether the structure of major college sports remains meaningfully tethered to the academic mission of universities or more closely resembles professional sports.[63]

During this same period, state legislators took notice of the enormous and growing economic realities of college sports and opened the door for college athletes to receive compensation for their NIL. California enacted the first such law in September 2019.[64] More than thirty states have followed suit, and in 2021 the NCAA abandoned its long-standing prohibition on college athletes receiving NIL compensation from third parties.[65] Since then, college athletes have reportedly received hundreds of millions of dollars from third parties under this new compensation regime.[66]

Recently, NCAA rule changes have gone even further, permitting "levels and types of student-athlete compensation that have never been permitted in the history of college sports, while also very generously compensating

---

[62] The prior year, the team traveled 7,327 miles. *See* Laine Higgins, *They're Going to March Madness—but Only After Circumnavigating the Planet*, Wall St. J. (Mar. 14, 2025, 07:00 ET), https://www.wsj.com/sports/basketball/oregon-ducks-big-ten-travel-march-madness-8ead1b8d [https://perma.cc/ZKL3-GH3Z].

[63] *Id.*

[64] Dan Murphy, *California Defies NCAA as Gov. Gavin Newsom Signs into Law Fair Pay to Play Act*, ESPN (Sep. 30, 2019, 10:31 ET), https://www.espn.com/college-sports/story/_/id/27735933/california-defies-ncaa-gov-gavin-newsom-signs-law-fair-pay-play-act [https://perma.cc/HD86-T55A].

[65] Elizabeth Frost Hemann & Mark R. Butscha, Jr., *Trouble in the Huddle – Uncertainty and Opportunity with the NCAA'S NIL Rules*, Thompson Hine (Mar. 28, 2024), https://www.thompsonhine.com/insights/trouble-in-the-huddle-uncertainty-and-opportunity-with-the-ncaas-nil-rules/ [https://perma.cc/G6J9-QPKF].

[66] For example, Duke University men's basketball star Cooper Flagg garnered NIL deals worth a reported $2.6 million in his first year. Ryan Haley, *Cooper Flagg becomes first men's college basketball player with Gatorade endorsement deal*, USA TODAY Sports (Oct. 29, 2024 13:49 ET), https://dukewire.usatoday.com/story/sports/college/duke/mens-basketball/2024/10/29/cooper-flagg-gatorade-nil-endorsement-deal/75918107007/ [https://perma.cc/C5J6-GQQB]. Also, Louisiana State University women's basketball Star Flau'jae Johnson has a reported $1.5 million NIL valuation. Lindsey Darvin, *Women Athletes Are Reshaping College Sports' Financial Landscape Through NIL Success*, Forbes, (Oct. 29, 2024 11:42 ET), https://www.forbes.com/sites/lindseyedarvin/2024/10/28/women-athletes-are-reshaping-college-sports-financial-landscape-through-nil-success/ [https://perma.cc/55RP-CCTN].

Division I student-athletes who suffered past harms."[67] There is no indication that the nation's desire for big-time college sports is waning, and it would be no surprise if other, new developments continue to increase the revenue in the college sports ecosystem in the ensuing years and decades.

B. Commercialization and Diminished Antitrust Deference

Given the changes summarized above, it is perhaps unsurprising that courts have begun to view the collegiate athletic experience, particularly in football and basketball, as increasingly indistinct from professional sports. The diminished distinction has led to the rapid erosion of judicial deference to the NCAA over the last two decades in both antitrust and labor disputes.

The modern turning point came in 2014 in *O'Bannon v. NCAA*.[68] In an opinion written by Judge Wilken (the same judge who presided over the *House* settlement and the *Alston* trial), the district court struck down NCAA rules that barred schools from compensating FBS and Division I men's basketball players for their "full cost of attendance," or from paying them up to $5,000 per year in deferred compensation for the use of their NIL.[69] Judge Wilken's decision was "the first by any federal court to hold that any aspect of the NCAA's amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices."[70]

On appeal, the Ninth Circuit affirmed the portion of the injunction that permitted full cost-of-attendance scholarships but reversed the portion permitting additional NIL compensation.[71] Despite the narrow ruling, the Ninth Circuit made clear that the NCAA athlete restrictions at issue could not be deemed legal as a matter of law under *Board of Regents* and "reaffirm[ed] that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason."[72]

The Supreme Court's 2021 decision in *NCAA v. Alston* marked an even more significant turning point. There, the Court described modern college sports as a "sprawling enterprise" and a "massive business," explicitly rejecting the NCAA's argument that its rules warranted abbreviated or special antitrust

---

[67] *In re* Coll. Athlete NIL Litig., No. 20-CV-03919 CW, 2025 WL 1675820, at *2 (N.D. Cal. June 6, 2025).
[68] 802 F.3d 1049 (9th Cir. 2015)
[69] *Id.* at 1053.
[70] *Id.*
[71] *Id.* at 1075–76.
[72] *Id.* at 1079.

scrutiny by virtue of "amateurism."[73] In doing so, the Court disavowed prior dicta suggesting that NCAA compensation restraints were presumptively lawful and made clear that the NCAA's rules are instead subject to ordinary Rule of Reason analysis.[74]

Specifically, the Court characterized prior references to amateurism in *Board of Regents* as "stray comments" that "do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions."[75] Although the *Alston* Court affirmed the district court's narrow injunction of certain NCAA restraints "on education-related benefits—such as those limiting scholarships for graduate school, payments for tutoring, and the like," it underscored that industry-specific exemptions from antitrust law are matters for Congress, not the judiciary.[76]

Despite the narrow ruling, Justice Kavanaugh added a scathing concurrence to "underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."[77] Further, Justice Kavanaugh noted that "[t]he NCAA's business model . . . of using unpaid student athletes to generate billions of dollars in revenue for the colleges . . . would be flatly illegal in almost any other industry in America" and succinctly asserted that "[t]he NCAA is not above the law."[78]

Following *Alston*, a wave of antitrust litigation has attacked virtually every type of NCAA restriction, including athlete eligibility rules,[79] limits on

---

[73] NCAA v Alston, 594 U.S. 69, 79, 108 (2021).

[74] *Id.* at 92–93.

[75] *Id.* at 92–93. As Justice Kavanaugh explained, "[t]he Court makes clear that the decades-old 'stray comments' about college sports and amateurism made in [*Board of Regents*] were dicta and have no bearing on whether the NCAA's current compensation rules are lawful." *Id.* at 108 (Kavanaugh, J., concurring). The Court added that the NCAA's unique nature does not "categorically exempt its restraints from ordinary rule of reason review." *Id.* at 90 (majority opinion).

[76] *Id.* at 96, 103 (internal quotation marks omitted).

[77] *Id.* at 108 (Kavanaugh, J., concurring).

[78] *Id.* at 109–10, 112. Although this quote received much attention, others had previously reached the same conclusion. *See, e.g.*, NCAA v. Bd. of Regents Univ. Okla., 468 U.S. 85, 120 (1984); O'Bannon v. NCAA, 802 F.3d 1079, 1063–64 (9th Cir. 2015) ("The amateurism rules' validity must be proved, not presumed. . . . The NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules."); Hennessey v. NCAA, 564 F.2d 1136, 1149 (5th Cir. 1977) ("The court holds that the NCAA is not entitled to a total exclusion from anti-trust regulations on this ground.").

[79] *See, e.g.*, Fourqurean v. NCAA, 143 F.4th 859, 868–71 (7th Cir. 2025) (reversing lower court's grant of plaintiff motion for temporary restraining order); Pavia v. NCAA, 760 F. Supp. 3d 527, 535–45 (M.D. Tenn. Dec. 18, 2024) (enjoining NCAA

scholarships,[80] amateurism rules,[81] restrictions on NIL compensation,[82] athlete transfer rules,[83] and prohibitions on athletes accepting prize money in non-NCAA competitions.[84]

In some of these cases, the courts enjoined the NCAA from enforcing long-standing "amateurism" rules in light of the increasing professionalization of college sports.[85] For example, in *Ohio v. NCAA*, multiple state attorneys general challenged the NCAA's transfer eligibility rule, which required athletes transferring schools to sit out a season before competing at their new school.[86] The district court began by outlining the substantial revenues generated by the NCAA and Division I conferences and held that the rule unlawfully limited athletes' ability to choose a school "that provides the best environment for their academic, mental, *and economic* well-being."[87] The court's analysis reflected a broader judicial shift away from categorical deference and toward a more skeptical examination of NCAA rules that constrain athlete mobility and economic opportunity.

---

from restricting duration of athlete's eligibility based on time spent at junior college), *dismissed as moot by* Pavia v. NCAA, 154 F.4th 407 (6th Cir. 2025).

[80] Cornelio v. NCAA, No. 24-cv-02178 (D. Colo. filed Aug. 6, 2024).

[81] *See* Tennessee v. NCAA, 718 F. Supp. 3d 756, 761–66 (E.D. Tenn. 2024) (granting preliminary injunction preventing NCAA from enforcing rules restricting booster involvement in NIL negotiations; enjoining NCAA from enforcing its "NIL recruiting ban"); *Tennessee Attorney General Announces Settlement in Principle with NCAA to Protect Student-Athletes' Rights*, Att'y Gen. & Rep. (Jan. 31, 2025 15:19 CT), https://www.tn.gov/attorneygeneral/news/2025/1/31/pr25-6.html [https://perma.cc/RV2S-TH6P] (announcing settlement that maintains injunction in *Tennessee v. NCAA*).

[82] *See In re* Coll. Athlete NIL Litig., No. 20-cv-03919 CW, 2023 WL 8372787 (N.D. Cal. Nov. 3, 2023); *see also* Fontenot v. NCAA, No. 23-cv-03076 (D. Col. filed Nov. 20, 2023) (not part of the *House* settlement).

[83] Ohio v. NCAA, 706 F. Supp. 3d 583, 594 (N.D. W.Va. 2023) (enjoining NCAA "one-year-in-residence" requirement for transfer students). The NCAA reached a settlement with the U.S. Department of Justice that eliminated the rule at issue. *See* Mike Scarcella, *NCAA Settles US, States' Antitrust Lawsuit over Athlete Transfer Rules* (May 30, 2024, 16:57 CDT), https://www.reuters.com/legal/government/ncaa-settles-us-states-antitrust-lawsuit-over-athlete-transfer-rules-2024-05-30/ [https://perma.cc/2M4L-N2J5].

[84] *See* Brantmeier v. NCAA, No. 24-cv-00238, 2024 WL 4433307, at *2–6 (M.D. N.C. Oct. 7, 2024) (denying plaintiff's motion for preliminary injunction).

[85] *See* Pavia, 760 F. Supp. 3d at 535–45; Tennessee v. NCAA, 718 F. Supp. 3d at 759; Ohio v. NCAA, 706 F. Supp. 3d at 594.

[86] 706 F. Supp. 3d 583, 588–90 (N.D.W. Va. 2023).

[87] *Id.* at 588–89, 592 (emphasis added).

The most consequential among these challenges was the consolidated NIL antitrust litigation, commonly known as the "*House* case."[88] In 2020, a class of college athletes challenged NCAA rules that had restricted them from earning money for their NIL.[89] In June 2025, the Northern District of California approved a settlement to resolve *House*,[90] which provided over $2.5 billion in retroactive NIL compensation for former athlete class members and created a future compensation model governing schools' sharing of revenue directly with their athletes over the succeeding ten years.[91] Over 100,000 athletes submitted claims for past damages payments, with approximately ninety-five percent of retroactive compensation allocated to football and men's and women's basketball players from Power Five schools.[92] The combined value of existing benefits (e.g., athletic scholarships) to Division I athletes and future athlete payments over the ten-year period are estimated to total $19 billion, which represents approximately half of Division I athletic revenues, "similar to the share of professional sports revenue that is shared with professional athletes."[93]

The *House* settlement represents only the beginning of a major shift in the legal and economic structure of college sports, and a significant amount of further litigation is certain to follow. As the court noted in approving the settlement, "Because this action is being settled instead of being litigated through trial, the question[] of whether the . . . conduct permitted under the terms of the [settlement agreement] violate[s] the Sherman Act will remain unresolved and unadjudicated."[94] It is clear that the *House* settlement, while an enormous undertaking and an impressive step in many regards, is only the beginning of a long road of legal uncertainty in collegiate athletics.

C. Diminished Labor & Employment Deference to the Collegiate Athletics Model

The erosion of judicial deference to the NCAA is also evident in the labor and employment law context. Recent challenges to athlete employment

---

[88] *See In re* Coll. Athlete NIL Litig., No. 20-cv-03919 CW, 2025 WL 1675820, at *1 (N.D. Cal. June 6, 2025).

[89] *See id.*

[90] *Id.*

[91] *Id.* at *5–6 (detailing specific types and amounts of past damages claims).

[92] *Id.* at *22 (detailing how total payment to each athlete ranges from $80–$91,000 depending on sport played and other factors).

[93] *Id.* at *18.

[94] *Id.* at *37.

status under the FLSA and efforts to unionize college athletes under the NLRA reflect growing skepticism toward the assumption that Division I college athletics are primarily educational rather than economic by nature.

In *Johnson v. NCAA*, college athletes—including FCS football players and athletes participating in Division I baseball, soccer, swimming, diving, and tennis—filed suit seeking FLSA benefits such as minimum wage.[95] The NCAA moved to dismiss, arguing that it is settled law that college athletics are "conducted primarily for the benefit of the educational opportunities provided to the students by the school or institution and are not work of the kind contemplated by the FLSA."[96]

The district court denied the motion to dismiss, holding that the complaint plausibly alleges that Division I athletics are "not conducted primarily for the benefit of the student athletes who participate in them, but for the monetary benefit of the NCAA and the colleges and universities that those student athletes attend."[97] The court further emphasized allegations that the demands of college sports "interfere with the student athletes' abilities to participate in and get the maximum benefit from the academic opportunities offered by their colleges and universities."[98]

In July 2024, the Third Circuit affirmed this ruling in part, issuing an opinion that significantly narrowed the NCAA's long-standing reliance on amateurism in employment litigation. The court held "that college athletes cannot be barred as a matter of law from asserting FLSA claims simply by virtue of a 'revered tradition of amateurism' in [Division I] athletics."[99] The Third Circuit rejected the *Berger* analysis, refusing to "use a 'frayed tradition' of amateurism with such dubious history to define the economic reality of

---

[95] Johnson v. NCAA, 108 F.4th 163, 185 (3d Cir. 2024).

[96] Johnson v. NCAA, 556 F. Supp. 3d 491, 502 (E.D. Pa. 2021) (quoting Field Operations Handbook, *supra* note 50, § 10b03(e)).

[97] *Id.* at 506.

[98] *Id.* The court also noted that *Alston* undercuts NCAA's reliance on "amateurism" and rejected NCAA's "argument that Plaintiffs are not employees entitled to minimum wages pursuant to the FLSA because there is a long-standing tradition of amateurism in NCAA interscholastic athletics that defines the economic reality of the relationship between Plaintiffs and [NCAA/schools]." *Id.* at 501.

[99] *Johnson*, 108 F.4th at 182 (rejecting employment test applied by district court, announcing new test to determine employment status of college athletes, and remanding case back to district court to apply new test; under new *Johnson* test, college athletes may be employees under FLSA when they "perform services for another party;" "necessarily and primarily for the [other party's] benefit;" "under that party's control or right of control;" "in return for 'express' or 'implied' compensation or 'in-kind benefits'").

athletes' relationships to their schools."[100] While the court agreed with *Berger* to the extent that it considered "'the economic realities of the relationship' between college athletes and their schools or the NCAA,"[101] it clarified that the relevant inquiry is whether an athlete's participation crosses the legal line from recreational play into compensable work.[102] In other words, the *Johnson* test is designed "to identify athletes whose play is *also* work."[103]

The Third Circuit remanded and called into question the academic value of the existing college sports model.[104] The court observed that "interscholastic athletics are not part of any academic curriculum"[105] and credited allegations that "the sports played are actually *detrimental* to [the athletes'] academic performance because athletic performance provides no academic benefits, they are frequently precluded from enrolling in hundreds of courses that conflict with their athletic obligations, and they are unable to declare their preferred majors."[106]

On the NLRA front, NLRB regional directors have twice ruled that college athletes qualify as "employees" entitled to form a union, although the full Board has never addressed that question.[107] The first arose in the 2014 *Northwestern* case discussed above. A decade later, in 2024, an NLRB regional director concluded that Dartmouth men's basketball players qualified as employees under the NLRA despite the absence of athletic scholarships because the school received benefits from the players' work and the players were compensated in other ways.[108] Although the Dartmouth players withdrew their unionization petition before an appeal reached the full Board, the decision further signaled diminishing institutional confidence in the categorical non-employee status of college athletes.[109]

---

[100] *Id.*

[101] *Id.* at 177 (quoting Martin v. Selker Bros., 949 F.2d 1286, 1293 (3d. Cir. 1991)).

[102] *Id.*

[103] *Id.* at 178.

[104] *Johnson*, 108 F.4th at 182.

[105] *Id.* (contrasting college athletics with "properly designed unpaid internships," where work "can greatly benefit interns, as the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment.").

[106] *Id.*

[107] *See* Nw. Univ., No. 13-RC-121359, 2014 WL 1246914, at *12–14 (N.L.R.B., Region 13 Mar. 26, 2014); Trs. of Dartmouth Coll., No. 01-RC-325633, slip op. 18–21 (N.L.R.B. Feb. 5, 2024).

[108] *See Dartmouth Coll.*, No. 01-RC-325633, at 18–20.

[109] Associated Press, *Dartmouth Men's Basketball Players End Attempt to Unionize*, ESPN (Dec. 31, 2024, 13:10 ET), https://www.espn.com/mens-college-basketball/

The recent message from the courts and the NLRB is clear: college sports have become less distinct from professional sports and are thus entitled to less deference under the law than they have received in the past. Rather than preserving an education-centered "tradition that might otherwise die,"[110] the perception is that significant commercialization has hollowed out the very rationale on which judicial deference once rested. The courtroom defeats may continue to grow as more money pours into collegiate athletics and the demarcation between professional and college sports continues to blur.[111]

In response, many schools are seeking an alternative path to athletics that is sustainable, legally defensible, and more consistent with their educational mission. "College sports can provide a vehicle for individualized, innovative, experiential and traditional classroom learning. Recognizing, extracting, and enhancing the educational value of sports can be an important step toward transforming college sports into a key pillar—rather than an obstacle—of higher education."[112] This transformational approach can strengthen college athletics, solidify its role on college campuses, and restore some of the judicial deference previously afforded to college sports. The next Part provides a brief description of this approach—the proposed EEM—and highlights some of its key legal benefits.

IV. A New Enhanced Educational Model for College Sports

A. Overview of the Enhanced Educational Model

The concept of integrating athletics and education is not new. The ancient Greeks recognized that athletic participation was a key component of education.[113] In the American context, similar ideas emerged as early as the

---

story/_/id/43237303/dartmouth-men-basketball-players-end-attempt-unionize [https://perma.cc/C3SD-HQ6S].

[110] *See* NCAA v. Bd. of Regents Univ. Okla., 468 U.S. 85, 120 (1984).

[111] One notable example: the University of North Carolina leadership recently proclaimed their football program the "33rd Team" of the NFL, which has thirty-two teams. *See* Blake Silverman, *UNC Football GM Drops Bold NFL's '33rd Team' Moniker for Bill Belichick-Led Program*, Sports Illustrated (Feb. 12, 2025), https://www.si.com/college-football/unc-football-gm-bold-33rd-nfl-team-moniker-bill-belichick-program [https://perma.cc/F26U-WXB6].

[112] Feldman, *supra* note 1, at 7.

[113] *See id.* at 2. Isocrates argued that physical training and rhetoric (training of the mind) are one and convergent, rejecting a separate education of mind and body. Debra Hawhee, Bodily Arts: Rhetorics and Athletics in Ancient Greece 5

nineteenth century. In 1869, a representative of Amherst College observed that the school "intended physical culture to become part of the curriculum, just like Latin, Greek, or mathematics," recognizing the belief that physical activity was akin to other traditional academic subjects.[114] Early football coaches "often employed the rhetoric of science and pedagogy"[115] and published manuals and articles emphasizing the pedagogical value of football.[116] Coaches used these writings "to claim a quasi-disciplinary university space by arguing that they were athletic experts and educators, not agents of popular culture or mere entertainers."[117]

More recently, former NCAA President Myles Brand published a highly influential article, *The Role and Value of Intercollegiate Athletics in Universities*, in which he articulated "an 'Integrated View' of college athletics," proposing that athletic participation could merit academic credit, "just [like] students who participate in music, dance, or dramatic arts."[118] Brand's approach "spurred a wave of . . . research exploring the legitimacy of his conceptual framework and its practical implementation. . . ."[119] Professors Weight and Harry—two of the pioneers in this growing field—cite numerous studies demonstrating that college athletics "align closely with the broader missions of higher education to foster intellectual growth, instill personal and social

(quoting *Antidosis* 180–83). Later, Socrates likewise rejected the idea that the arts develop the mind while athletics developed the body. *See* Drew Hyland, *The Sweatiest of the Liberal Arts*, Point Mag. (Apr. 30, 2011), https://thepointmag.com/examined-life/sweatiest-liberal-arts/ [https://perma.cc/435X-GMF4]. In fact, to the Greeks, "the real point of education in athletics is less to develop the body than to develop the soul," and virtues like courage and self-discipline are best, or perhaps only, learned in athletics. *Id.* at 4.

[114] *See* Feldman, *supra* note 1, at 2 (quoting Ingrassia, *supra* note 10, at 21).

[115] *See id.* (quoting Ingrassia, *supra* note 10, at 118).

[116] *See id.* (citing Ingrassia, *supra* note 10, at 115). For example, Amos Alonzo Stagg, then-football coach at the University of Chicago, published the "Scientific and Practical Treatise on American Football for Schools and Colleges." *Id.* (quoting Ingrassia, *supra* note 10, at 124).

[117] *See id.* (quoting Ingrassia, *supra* note 10, at 115).

[118] *See id.* at 2, n.24 (citing Myles Brand, *The Role and Value of Intercollegiate Athletics in Universities*, 33 J. Phil. Sport 9 (2006)).

[119] Erianne A. Weight & Molly Harry, Reimagining College Sport in an Era of Transformation: A Narrative Review of Scholarship & Examples of Sport-Centric Curricula Within Higher Education 2 (rev. 2025), https://www.knightcommission.org/wp-content/uploads/KCIA_Narrative-Literature_Review_of_Integrating_Athletics_into_Higher_Education.pdf [https://perma.cc/NBK7-P5QV].

responsibility, and prepare students for lifelong learning."[120] As they explain, Brand's Integrated View "positioned athletics as essential to the mission of universities, emphasizing its role in holistically developing students and aligning with broader educational goals."[121]

Building on these concepts, Weight, Harry, and other scholars have proposed various paths to further integrate athletics within the academy, including awarding academic credit for athletic participation;[122] athletics-centric course design;[123] recognizing sports as both an art and a science;[124] and the establishment of a sports major.[125] For example, a school may pair its athletics program with "courses in sport psychology, coaching principles, exercise physiology, community service, sport analytics, group dynamics, and biomechanics, among others."[126] Or a school may create a liberal arts-oriented athletics major, like the performing arts, requiring three years of varsity athletics participation paired with courses in "natural sciences, social sciences, and humanities."[127] These examples are merely illustrative, and other permutations are also possible. Such programs would be faculty-led, subject

---

[120] *Id*. Two such modern areas of research include embodied cognition and Experiential Learning Theory ("ELT"), which reveal a striking similarity to the Greek mind-body concepts in describing the relationship between physical activity and learning. *See, e.g.*, Feldman, *supra* note 1, at 5–6; Andrea Schiavio et al., *Optimizing Performative Skills in Social Interaction: Insights from Embodied Cognition, Music Education, and Sport Psychology*, 10 Front. Psychol. 6 (2019); Michael Rifenburg, Chapter 1: Introduction, *in* The Embodied Playbook: Writing Practices of Student-Athletes (2018).

[121] Weight & Harry, *supra* note 119, at 1.

[122] *See id*. at 7; Erianne A. Weight & Matt R. Huml, *Education Through Athletics: An Examination of Academic Courses Designed for NCAA Athletes*, J. Intercollegiate Sport 372–73 (2016); *see generally* Lou Matz, *Turning Intercollegiate Athletics into a Performance Major Like Music*, 42 J. Phil. Sport 283 (2020).

[123] Weight & Harry, *supra* note 119, at 3; Weight & Huml, *supra* note 122, at 372.

[124] Weight & Harry, *supra* note 119, at 5; Erianne Weight, *Time to Embrace the Art and Science of College Sports*, Chron. Higher Educ. (Mar. 23, 2015), https://www.chronicle.com/article/time-to-embrace-the-art-and-science-of-college-sports/?sra=trueat [https://perma.cc/RF9Z-BEZ4].

[125] Weight & Harry, *supra* note 119, at 4; Matz, *supra* note 122, at 9–13; Lou Matz, *How to Better Justify Intercollegiate Athletics*, Inside Higher Ed (Aug. 1, 2024), https://www.insidehighered.com/opinion/views/2024/08/01/how-better-justify-intercollegiate-athletics-opinion [https://perma.cc/73L5-NLJ4]; Weight & Huml, *supra* note 122, at 373.

[126] Weight & Harry, *supra* note 119, at 4.

[127] Matz, *supra* note 122, at 11; *see* Weight & Harry, *supra* note 119, at 5–6.

to standard curricular approval processes, and periodically reviewed under ordinary academic governance structures.[128]

The specific contours of any such program are beyond the scope of this article and may vary between schools, but the core of the EEM is its treatment of college athletics as a rigorous academic discipline, enhancing the legitimacy of athletics as an educational endeavor. This approach would require a fundamental shift in how universities view the educational value of athletic performance, but such shifts are not unprecedented, "as the breadth of serious academic disciplines has expanded exponentially from traditional subjects to performative, professional, and technical fields."[129]

The integration of athletics into the academy is not without its critics. Some believe that athletics is simply incompatible with a university's mission to "transmit and add to the sum of human knowledge."[130] However, much of this criticism is directed not at athletics per se, but at the economic machinery driving big-time college athletics.[131] There is far less criticism of the non-revenue-generating athletics programs in, for example, Division III. The EEM responds directly to these concerns by decoupling athletics from professional-style revenue streams and re-centering them within a rigorous pedagogical experience. In practice, the EEM will likely create a division between commercially-driven college athletics programs and those that adopt an education-centered model. Accordingly, the most lucrative television contracts, athlete NIL deals, and the like would remain concentrated in major Division I sports and outside the EEM. Implementing the EEM, therefore, removes much of the professional-type revenue streams and alleviates most of these concerns over commercial influences.

---

[128] Matz, *supra* note 122, at 10; *see* Feldman, *supra* note 1, at 7.

[129] Feldman, *supra* note 1, at 4.

[130] French, *supra* note 61, at 5 (quoting Robert L. Simon, *Intercollegiate Athletics: Do They Belong on Campus*, *in* Rethinking College Athletics 46 (1991)); *see id.* at 5–7; Randolph Feezell, *Branding the Role and Value of Intercollegiate Athletics*, 42 J. Phil. Sport 185, 192–94 (2014); Robert L. Simon, Cesar R. Torres & Peter F. Hager, *Sports on Campus: Intercollegiate Sports and Their Critics*, *in* Fair Play: The Ethics of Sport 75 (4th ed. 2014) (Simon is not himself a proponent of what he terms the Incompatibility Thesis, but he summarizes and addresses it aptly).

[131] *See* French, *supra* note 61, at 80–81, 105 ("Clearly, and without apology, the elite sports . . . are in partnerships with major commercial companies because those sports provide an audience, an exposure, to sell their products. . . . Television . . . contracts drive intercollegiate athletics at the Division I level."); Feezell, *supra* note 130, at 185–87, 204–05.

Others remain skeptical of integrating athletics into academics on a practical level given the lengthy history of academic scandals in college athletics.[132] These concerns are well-founded, as "[b]ig-time college sports are uniquely vulnerable to academic integrity issues because of the pressure to keep athletes academically eligible . . . ."[133] However, these issues may be addressed through prophylactic measures such as "specialized accreditation for sports-performance based courses, faculty, curricula, and programs"; placement of such programs under traditional administrative and faculty oversight separate from athletic departments; and "[instruction] by trained academicians."[134] Properly designed, these measures would align athletics with existing academic standards rather than exempting them from scrutiny.

As Professors Weight and Harry explain, "[b]y adopting innovative approaches such as creating athlete-focused courses and developing minors and majors in sport, colleges and universities can reposition competitive athletics to be part of the academic curriculum and narrow the growing academic-athletic divide by formally integrating athletics within the academy."[135] While academics and athletics have long had a strained relationship, integrating them further will help solve these issues, rather than exacerbate them, by replacing the existing economic-related incentives with a genuine academic structure, like music or performing arts academic programs.[136]

B. Legal Benefits of an Enhanced Academic Model of College Sports

In addition to reorienting college athletics squarely within the academic mission of universities, the EEM could offer meaningful legal advantages. It strengthens the doctrinal distinction between college and professional

---

[132] *See* Feldman, *supra* note 1, at 6–7. For example, one high-profile case is the "paper classes" academic fraud scandal at the University of North Carolina in the 2010s. *See* Sara Ganim & Devon Sayers, *UNC Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN (Oct. 23, 2014, 10:28 ET), https://www.cnn.com/2014/10/22/us/unc-report-academic-fraud/index.html [https://perma.cc/V5FT-4633]. And in 2015, NPR reported that the NCAA disclosed that it was investigating twenty schools for academic misconduct. *See* NPR staff, *Academic Foul: Some Colleges Accused of Helping Athletes Cheat*, NPR (June 13, 2015, 17:07 ET), https://www.npr.org/2015/06/13/414188857/academic-foul-some-colleges-accused-of-helping-athletes-cheat [https://perma.cc/CP7V-4B7Z].

[133] Feldman, *supra* note 1, at 6.

[134] *Id.* at 6–7.

[135] Weight & Harry, *supra* note 119, at 1.

[136] *See* Feldman, *supra* note 1, at 6–7.

sports—a distinction courts have repeatedly emphasized as foundational to judicial deference in both antitrust and labor contexts. By embedding athletics within a bona fide academic curriculum, the EEM not only "preserve[s] a tradition that might otherwise die,"[137] but also offers a principled framework for restoring the dwindling judicial deference to the NCAA's legacy model.

1. Legal Benefits under Antitrust Law

Even during the NCAA's recent judicial losing streak, courts have continued to recognize the value of an educational model of college sports and charted a course for renewed deference. The EEM reinvigorates this value into athletic programs that adopt it by reshaping those programs into an educational department, like a performing arts department. The specific contours of such an academic-athletic program are up to the discretion of individual schools, as discussed above. Nevertheless, any formulation that implements genuine, rigorous academic study of athletics in conjunction with academic credit for on-field play should shift the legal analysis in favor of the schools. By making athletic participation part of a credit-bearing curriculum overseen by faculty, the EEM strengthens the argument that athletics advance educational objectives rather than merely serving commercial ends. In doing so, it aligns with courts' prior analysis of the procompetitive benefits of college athletics that justify judicial deference—much like requirements for students in performing arts departments.

The historic antitrust analysis has long permitted the NCAA to regulate college sports to the extent necessary "to preserve the unique atmosphere of competition between 'student-athletes.'"[138] Even recent judicial decisions that have been hypercritical of the NCAA have not rejected this core principle. Instead, they have rejected the particular methods by which the NCAA has sought to achieve its purported educational goals, finding that NCAA restrictions are either overly restrictive or pretextual.[139] The problem, in other words, lies less with the educational justification itself than with its increasingly tenuous connection to the NCAA's commercial reality.

Maintaining a model of college sports distinct from professional sports still constitutes a legitimate defense to antitrust challenges.[140] For example,

---

[137] NCAA v. Bd. of Regents Univ. Okla., 468 U.S. 85, 120 (1984).

[138] Gaines v. NCAA, 746 F. Supp. 738, 744 (M.D. Tenn. 1990).

[139] *See* NCAA v. Alston, 594 U.S. 69, 82–84 (2021).

[140] *See id.* ("The NCAA's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur

in *Alston*, the Supreme Court noted that the "status of the NCAA's members as schools and the status of student-athletes as students may be relevant in" determining the legality of restraints on athletes.[141] Even Justice Kavanaugh, in his sharply critical concurrence, acknowledged that "[e]veryone agrees that the NCAA can require student athletes to be enrolled students in good standing."[142] And, in *O'Bannon*, the Ninth Circuit held that, "to borrow the Supreme Court's analogy, the market for college football is distinct from other sports markets and must be 'differentiate[d]' from professional sports lest it become 'minor league [football].'"[143]

The EEM not only deepens the distinction between college and professional sports but is further distinct from the NCAA's legacy conception of "amateurism." In the EEM, athletes enter a robust academic curriculum that incorporates on-field play with traditional classroom experience—an innovation never adopted in the legacy NCAA model. The emphasis on the professionalization of the athletics program is replaced by the focus on faculty instruction of the athletes (who still play for traditional coaches on the field) within a credit-bearing curriculum. The obligations applied to athletes under the EEM are similar to those imposed on performing arts students in terms of academic, practice, and performance requirements.[144] As a result, the EEM

college sports as distinct from professional sports."); *Id.* at 87–88 ("The NCAA . . . argues that it is a joint venture and that collaboration among its members is necessary if they are to offer consumers the benefit of intercollegiate athletic competition. We doubt little of this.").

[141] *Id.* at 94. The Court also noted that judges "should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities." *Id.* at 92; *see, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015) ("[W]e agree with the Supreme Court and our sister circuits that many of the NCAA's amateurism rules are likely to be procompetitive."); *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1102–03 (N.D. Cal. 2019) ("Most of the benefits that student-athletes can gain from attending college are caused . . . by the education itself and by other rules and policies, such as those relating to academic eligibility requirements, tutoring, academic support, living conditions, and the scheduling of athletic practice and events.").

[142] *Alston*, 594 U.S. at 110 (Kavanaugh, J., concurring).

[143] 802 F.3d at 1049 (quoting NCAA v. Bd. of Regents Univ. Okla., 468 U.S. 85, 102 (1984)).

[144] *See generally* Erianne A. Weight, Molly Harry, Kristina Navarro & Megan Lewis, *Integrating Athletics Within the Academy: Educational Experiences of Athletes, Musicians, and Traditional Students*, 13 J. Issues Intercollegiate Athletics 143 (2020). In fact, studies show that music students on average spend *more* time on music than their athlete classmates spend on athletics. *Id.* at 160.

offers an even stronger case for judicial deference than the NCAA's legacy model.

The EEM also addresses a structural weakness in the NCAA's legacy antitrust defense: its reliance on procompetitive benefits only in one market (the "seller-side consumer market") to justify anticompetitive harms in another (the "buyer-side labor market").[145] In other words, under the legacy NCAA model, consumers benefit from a differentiated college sports product at the expense of the athletes, whose compensation is restricted. Amici in *Alston* and the Court highlighted this concern, noting "that a court should not 'trade off' sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one." Although the Court declined to resolve that issue,[146] it underscores a growing discomfort with a system in which athletes disproportionately shoulder the burdens of preserving college sports' distinctiveness. At the heart of ongoing debates over whether athletes should be paid are questions of fairness, particularly when the system generates billions of dollars in revenue and athletes, until recently, received no share of it.

The EEM also alleviates this significant issue because the procompetitive benefits of college athletics in the EEM are enjoyed not only by consumers (who get an additional product), but also by the athletes, who gain an additional choice in pursuing their college athletic career. College athletes may choose between pursuing their sport within the EEM or competing in the big-time, revenue-sharing, commercialized model of college sports. Within the EEM, athletes receive academic credit tied to their athletic participation and, because EEM programs are unlikely to generate significant revenue, questions about revenue sharing and athlete compensation become less significant. This more balanced allocation of benefits further strengthens the EEM's position under antitrust scrutiny.

2. Legal Benefits under Labor & Employment Law

The EEM also alters the labor and employment analysis of college athletes, potentially giving schools further support for the position that athletes in the EEM do not qualify as "employees" under either the FLSA or the NLRA. Although these statutes employ different doctrinal tests, both ultimately seek to determine whether an athlete's "play" constitutes "work" that benefits the school or whether it benefits athletes "as part of the [school's]

[145] *Alston*, 594 U.S. at 82.
[146] *Id.* at 87.

educational opportunities" and is primarily pursued for noncommercial reasons.[147] The former facts lend themselves to employment status; the latter disfavor it. In other words, employment status turns on the "economic reality" of the relationship.[148]

The EEM completely alters the nature of college athletes' practices, games, and other on-field pursuits by integrating them into a rigorous, credit-bearing academic program. In the EEM, the "economic reality" is drastically different than the current college athletics model—under which athletes receive no academic credit for their athletic performance and, instead, participate in a multi-billion-dollar market. Although the EEM does not prevent athletes from monetizing their NIL, the most significant financial opportunities will likely be at the major programs under the revenue-sharing model. As a result, the overall flow of money through the EEM ecosystem will be drastically lower, creating a vastly different "economic reality" than for athletic programs in a revenue-centric, big-time college sports model.

Admittedly, the NLRB regional director's recent *Dartmouth* decision complicates this analysis. As discussed above, the regional director concluded that Dartmouth's men's basketball players were employees despite the absence of athletic scholarships and the fact that Dartmouth made little or no profit from the team.[149] *Dartmouth* relied in part on a prior NLRB opinion regarding graduate teaching assistants at Columbia University, which ruled that the key inquiry is whether an employment relationship exists, "rather [than] on whether some other relationship [*i.e.*, as a student] between the employee and employer is the primary one."[150] "In other words, a graduate student may be both a student *and* an employee; a university may be both the student's educator *and* employer."[151] Applying this reasoning could possibly render college athletes statutory employees, even in the EEM.

However, the *Dartmouth and Northwestern* NLRB regional director decisions that found college athletes to be employees relied, at least in part,

---

[147] Johnson v. NCAA, 108 F.4th 163, 177 n.58 (3d Cir. 2024) ("[T]he NLRA and FLSA have distinct policy goals, but their shared history often inspires courts to draw interchangeably from each statute's caselaw to answer fundamental questions related to the equitable regulation of the American workplace.").

[148] *See id.* at 180 ("Ultimately, the touchstone remains whether the cumulative circumstances of the relationship between the athlete and college or NCAA reveal an economic reality that is that of an employee-employer.").

[149] Trs. of Dartmouth Coll., No. 01-RC-325633, slip op. 18–21 (N.L.R.B. Feb. 5, 2024).

[150] Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1084 (2016).

[151] *Id.* at 1086.

on the fact that college athletes' participation in sports simply was not academic in nature. This is an important distinction from the EEM, where time spent on the field or court *is* "indistinguishable from academic work"[152] because the athletes receive course credit for it, especially when paired with traditional classroom instruction. Thus, athletes in the EEM receive "academic direction" in a program overseen by legitimate faculty and are pursuing athletics to "further their own academic purposes."[153] This makes athletes in the EEM distinguishable from, and less likely to be employees than, the athletes in *Dartmouth*, *Northwestern*, or *Johnson*.

In the EEM, a primary purpose of the athletes' work on the field is to receive an education and earn an academic degree, like theater and music students. Contrast the EEM with the facts of *Northwestern*, *Dartmouth* and *Johnson*, where the athletes "receive[d] no academic credit for their football endeavors;"[154] the athletics programs were not designed to "further their own academic purposes;"[155] and were "not part of any academic curriculum."[156] Although still an open question, this distinction at least improves the argument that college athletes in the EEM are not "employees" of their school. In a *Johnson* concurrence, Judge Porter of the Third Circuit indicated that some athletes in certain sports (e.g., football) may qualify as employees while others may not.[157] The EEM leverages that doctrinal flexibility by offering a model in which athletic participation is primarily educational rather than commercial.

Importantly, adoption of the EEM need not be uniform across all sports or institutions. Some schools may adopt the EEM entirely, while others forgo it for a revenue-centric model, while still others may operate a hybrid model with some sports in the EEM and other sports (such as football and basketball) in a revenue-sharing model. Properly implemented, the EEM offers a means of protecting "the rest" of college sports and preventing the whole

---

[152] *Dartmouth Coll.*, No. 01-RC-325633, at 21.

[153] Mass. Inst. of Tech., Case 01-RC-304042, slip op. 2, 10 (N.L.R.B. March 13, 2023) (finding that MIT graduate fellows were not employees of the university where "the work performed is indistinguishable from academic work and the direction is indistinguishable from academic direction").

[154] Nw. Univ., 362 N.L.R.B. 1350, 1351 (2015).

[155] *Mass. Inst. of Tech.*, Case 01-RC-304042, at 2.

[156] Johnson v. NCAA, 108 F.4th 163, 180 (3d Cir. 2024).

[157] *See id.* at 192 ("I tend to agree with Judge Hamilton's intuition that the economic-reality question probably shakes out differently for FBS football players and March Madness-level men's basketball players than it does for other student-athletes); Berger v. NCAA, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring).

college sports enterprise from being swallowed up by the legal issues plaguing the heavily commercialized, big-time college sports.

Conclusion

Intercollegiate athletics are in the midst of the most dramatic transformation in their history. As college sports have grown increasingly commercialized, courts have become correspondingly skeptical of the NCAA's claims that its regulatory regime meaningfully advances educational objectives. That skepticism has driven court rulings adverse to the NCAA in both antitrust and labor contexts and has placed the traditional model of college athletics under enormous legal pressure.

Colleges and universities have an opportunity to reaffirm the distinction between college and professional sports by refocusing on education and, in the process, mitigating substantial legal risks.[158] An EEM for college athletics can accomplish those goals. By embedding athletics within a rigorous academic curriculum, the EEM deepens the distinction between college and professional sports, strengthens procompetitive justifications under antitrust law, and improves the argument that athletes are students first, pursuing their sport within a rigorous academic curriculum and apart from the heavily commercial elements that courts have questioned under labor and employment law. Accordingly, the EEM could help revive the lingering vestiges of judicial deference and provide renewed justification for protecting college athletics programs from the most destabilizing legal challenges facing college athletics today.

[158] *See* Feldman, *supra* note 1, at 1.

Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

Swimming's Flip Turn: New Technology Regulation in Sports

Sam Spurrell*

Abstract

Sports governing bodies ("SGBs") are responsible for regulating technology in their sport(s). The decision to allow a new technology can profoundly alter both the experience of participating in a sport and, ultimately, the legitimacy of the competition itself. From 2000 to 2009, swimming underwent a rapid transformation as high-tech, performance-enhancing swimsuits proliferated without meaningful regulation by FINA, swimming's SGB. By 2008–09, swimming was in crisis, with world records falling at unprecedent levels and swimsuits determining outcomes disproportionately to athletes' abilities. On January 1, 2010, FINA partially banned these suits but left its record book untouched. This Article uses swimming as a case study to understand how SGBs can better approach new technology regulation. The Article concludes that SGBs' decisions to allow new technologies must be tied to a vision for the future of their sport(s).

Introduction

There is no baseball without a bat, no hockey without skates, and no tennis without a court. The use of technology[1] is integral to sports competition,

* Associate, Hogan Lovells US LLP. Thanks to Prof. Carfagna for his mentorship and his stewardship of the HLS sports law community; to each and every editor who generously gave their time and thoughts; and, most of all, to my partner Sam for her encouragement and ceaseless support.

[1] The use of technology is inescapable in sports. For the purposes of this Article, "technology" is defined as anything used in competition that is created by humans and which does not already exist in the natural world. For example,

and changes to sports technology have the potential to reshape sports themselves. In the 2000s, swimming underwent a metamorphosis as the Fédération internationale de natation ("FINA")[2] authorized a novel technology: the full-body tech suit. Instead of regulating these competition swimsuits, FINA allowed them to become increasingly performance-enhancing over a decade-long period. In 2009, FINA ultimately responded to global outrage at the state of the sport by partially banning these suits and establishing a new regulatory regime for competition swimwear.

Through the lens of FINA's management of tech suits, this Article seeks to understand how sports governing bodies ("SGBs")[3] can better regulate new

---

open-water swimming events take place in rivers, lakes, oceans, or water channels, World Aquatics, *Competition Reguls.* pt. 3 art. 1.1 (2025), https://resources.fina.org/fina/document/2025/07/01/ed3110a4-2291-411d-8526-6f641bd9237a/Competition-Regulations_June-2025_Clean-updated-01.07.2025-.pdf and [https://perma.cc/2KX7-VP2T], whereas traditional swim meets typically occur in pools; in this facet of the respective sports, open-water swimming does not rely on technology while traditional swimming does (i.e., pools are technology while open water bodies are not). This definition of "technology" primarily includes athletes' apparel, athletes' and officials' equipment, and the competition environment, such as playing surfaces and facilities. Every sport makes use of technology to varying degrees; to draw from the same example, consider the use of wetsuits or goggles in open-water swimming.

[2] FINA was the international governing body for swimming. In December 2022, FINA adopted a new name: World Aquatics ("W.A."). *See FINA Becomes World Aquatics as New Brand Launched*, World Aquatics (Dec. 12, 2022, 09:25), https://www.worldaquatics.com/news/2979029/fina-becomes-world-aquatics-as-new-brand-launched [https://perma.cc/JN78-VAM8]. The organization is referred to by the temporally appropriate name in this Article.

[3] SGBs are non-profit, non-governmental organizations responsible for the development, regulation, and promotion of a single sport or set of sports. They include international sports federations (e.g., W.A.), which administer sports on a global level, and national governing bodies (e.g., USA Swimming), which must comply with rules set by their respective international sports federation and administer sports on a national level. *See, e.g.*, Jörg Krieger, Lindsay Parks Pieper & Ian Ritchie, *International Federations and National Governing Bodies: The Historical Development of Institutional Policies in Response to Challenging Issues in Sport*, 51 Sport Hist. Rev. 1, 1–3 (2020). Both international sports federations and national governing bodies regulate technology in their sports, albeit on global versus national scopes. *See, e.g.*, Karen Crouse, *Swimming Bans High-Tech Suits, Ending an Era*, N.Y. Times (July 24, 2009), https://www.nytimes.com/2009/07/25/sports/25swim.html [https://perma.cc/PV4P-H5QC] (discussing FINA enacting global regulation on swimwear); *FINA Approved Tech Suits Approved for 12 Under Use*, USA Swimming (Aug. 25, 2020), https://www.usaswimming.org/docs/default-source/rules-regulations/tech-suit-restrictions/12-under-approved-suits-2-18-21.pdf [https://perma.cc/EE7K-HNY3] (containing USA Swimming's list of approved competition swimwear for athletes

technology in their sport(s). The ideal model for the regulation of new technology in sport has yet to be determined, likely because there is no "ideal" model—what is best for a sport may boil down to what the decision-maker subjectively believes is best. However, the FINA full-body tech suit case study provides a unique example of an SGB under-regulating new technology in its sport, from which lessons can be drawn to inform an improved model of new technology regulation.

This analysis develops in four Parts. Part I contextualizes technology's role in sports and why new technology regulation is a crucial function of SGBs. Part II provides a history on the development of tech suits, the effect of tech suits on swimming, and how FINA responded to their proliferation in the sport. Part III discusses how new technology regulation impacts a variety of factors, such as fairness and public interest, and how these factors manifest in swimming. Part IV then analyzes how FINA's ban on full-body tech suits in 2009 impacted the factors mentioned in Part III. This Article concludes that SGBs can better regulate new technology by developing a long-term vision for the future of their sport and tying this into their new technology regulation strategy.

I. Technology's Role in Sports

A. Technological Doping

Any change in a sport's technology alters the sport itself. When these changes are minimal, the differences may be imperceptible to even top athletes, but drastic alterations can cause the sport to no longer resemble its previous form. An illustrative example of technology's potential to reshape a sport is pole vaulting. The gold-medalist pole vaulter at the first Olympic Games in 1896 used a wooden pole to leap 3.30 meters.[4] When metal poles were first introduced in 1950, the world record immediately shot up by a half

---

ages twelve and under, following a 2020 ban that limited competition swimwear for athletes in this age group to inexpensive suits). Although professional sports leagues are not SGBs (for a variety of reasons, but chiefly because their goal is to profit and not solely to govern a sport), they deal with similar issues as SGBs vis-à-vis technology regulation.

[4] *See* Jon Bardin, *Is Technological Doping the Strongest Force in the Olympics?*, L.A. Times (July 24, 2012, 00:00 PT), https://www.latimes.com/science/la-xpm-2012-jul-24-la-sci-sn-is-technological-doping-the-strongest-force-in-the-olympics-20120724-story.html [https://perma.cc/UQT8-FPL4].

meter.[5] With no rules limiting pole materials,[6] the introduction of glass and carbon fiber poles helped the most recent gold medalist, and current men's world record-holder, reach 6.30 meters.[7] How the first and most recent gold medalists would have measured up against each other, or even if they truly participated in the same sport, is wholly unclear.

The use of new technology in sports also creates concerns over legitimacy. Sports rely on the premise of fair competition to be considered legitimate and, accordingly, are governed by rules that promote this end.[8] Yet athletes are incentivized to use all tools available to them to improve their performance or competitiveness, and some athletes will inevitably cheat to gain an advantage.[9] The most obvious example of cheating is the use of performance-enhancing drugs ("PEDs"), a practice long prohibited by SGBs.[10]

When athletes use technology to improve their competitiveness, though, the boundary for what is acceptable becomes murkier. On one end of the spectrum is "technological doping"—the concept that the use of certain technologies should be banned because they corrupt a sport in a manner similar to PEDs.[11] Oscar Pistorius, a double-amputee known as the "Blade Runner" for the prosthetics he wore when competing in track events, was accused of technological doping when he participated in the 2012 Olympic Games.[12] In the following years, academic debate raged over whether his prosthetics gave

---

[5] *Id.*

[6] *Id.*

[7] The record of 6.30 meters was set on September 15, 2025, by Armand Duplantis. *See Pole Vault*, World Athletics, https://worldathletics.org/records/by-discipline/jumps/pole-vault/outdoor/men [https://perma.cc/T7Z3-REF3] (last visited Oct. 14, 2025).

[8] *See generally* Robert L. Simon, Cesar R. Torres & Peter F. Hager, Fair Play: The Ethics of Sport (4th ed. 2018).

[9] *See generally* Erin E. Floyd, *The Modern Athlete: Natural Athletic Ability or Technology at Its Best*, 9 Jeffrey S. Moorad Sports L.J. 155 (2002) (discussing how sports have become infused with technology and noting athletes' incentives to use technology to their benefit).

[10] *See, e.g.*, Robert Alexandru Vlad, Gabriel Hancu, Gabriel Cosmin Popescu & Ioana Andreea Lungu, *Doping in Sports, a Never-Ending Story?*, 8 Advanced Pharm. Bull. 529, 530 (2018) (noting the first instance of PED regulation at the Olympics occurred at the 1972 Games).

[11] *See, e.g.*, Sarah J. Wild, *On Equal Footing: Does Accommodating Athletes with Disabilities Destroy the Competitive Playing Field or Level it?*, 37 Pepp. L. Rev. 1347, 1364 (2010) (discussing how innovation in sports can be perceived as an ethical threat).

[12] *See* Sieg Lindstrom, *Oscar Pistorius*, Britannica (Sep. 16, 2024), https://www.britannica.com/biography/Oscar-Pistorius [https://perma.cc/Y9J6-FJFF].

him an unfair advantage over his able-bodied competitors.[13] On the other end of the spectrum are a multitude of examples involving the use of technology that is widely considered fair and which every high-level athlete can choose to use, such as sprinting in spikes or wearing a mouthguard in contact sports. The use of technology in a sporting context is not inherently nefarious and, in most instances, is considered reasonable.

Even among technologies that plainly seem legitimate, accusations of technological doping arise. For example, there is no debate on whether marathon runners should be allowed to compete in running shoes. Yet, beginning in 2016, the "Battle of the Super Shoe" erupted between shoe manufacturers when Nike unveiled its "Vaporfly 4%" shoe, named as such because it purported to improve running efficiency by four percent.[14] Critics of "super shoes" alleged that athletes sponsored by the manufacturer of the best super shoe—and, thus, who could wear that shoe in races—possessed an unfair advantage over runners who were unable to wear the same shoe because they were sponsored by a different manufacturer.[15]

---

[13] The debate concerning Pistorius focused chiefly on whether his prosthetic legs' performance was superior to that of typical human limbs. *See, e.g.*, D. A. Baker, *The "Second Place" Problem: Assistive Technology in Sports and (Re) Constructing Normal*, 22 Sci. Eng. Ethics 93 (2016); Gregor Wohlbring, *Paralympians Outperforming Olympians: An Increasing Challenge for Olympism and the Paralympic and Olympic Movement*, 6 Sports Ethics Phil. 251 (2012); Anne Marcellini, Sylvain Ferez, Damien Issanchou, Eric De Léséleuc & Mike McNamee, *Challenging Human and Sporting Boundaries: The case of Oscar Pistorius*, 1 Performance Enhancement & Health 3 (2012).

[14] *See* Shaun Creighton & Kumudu Ramasundara, *Sports Technology, Law and Regulation - The Battle of the Super Shoe*, Lexology (Sept. 27, 2023), https://www.lexology.com/ (subscription required). Super shoes have characteristically thick soles. *See id.*

[15] *See* Michael Martin, *Nike Vaporfly Shoes Controversy*, NPR (Feb. 23, 2020, 17:11 ET), https://www.npr.org/2020/02/23/808681604/nike-vaporfly-shoes-controversy [https://perma.cc/S2ZL-GLX4]; Linda Geddes, *Did Tigist Assefa's 'Super Shoes' Make Her a Record-Breaking Marathon Winner?*, Guardian (Sept. 25, 2023, 12:41 ET), https://www.theguardian.com/world/2023/sep/25/tigist-assefa-super-shoes-record-breaking-marathon-winner-ethiopian-berlin [https://perma.cc/5CSJ-F6XH]. There is significant evidence that super shoes improve runners' performance. Of note, since the outset of the "Battle of the Super Shoe" in 2016, both the men's and women's marathon world records have not only improved precipitously (the women's record improved by three minutes and thirty-two seconds and the men's by two minutes and twenty-two seconds), but the men's rate of improvement also increased from the previous decade (from 2006 to 2016, there was no improvement in the women's world record, while the men's record improved by one minute and twenty-nine seconds). *See World Record Progression of Marathon*, World Athletics, https://worldathletics.

Controversies centered on technological doping arise out of a perceived failure by SGBs to adequately regulate technology in their sport. SGBs are responsible for determining what technology is allowed in competition, and their decisions can have a profound impact on their sport and their athletes. If Major League Baseball, for example, were to allow composite bats instead of exclusively wood bats, offensive production would increase so significantly that record books would be rewritten.[16] Due to the potential magnitude of the impact resulting from a change in a sport's technology, how SGBs make decisions about technology in their sport is critically important to the sport's legitimacy and, ultimately, its future.

B. The Value of the FINA Case Study

For the purposes of better understanding optimal new technology regulation by SGBs, the tech suit controversy is a particularly instructive case study for three reasons. First, swimming is a competition in a high-drag environment. A human body moving through water experiences approximately 780 times more drag than it does moving through air.[17] This inefficiency means the impact of new technology in swimming can be larger than in other sports;[18] in this regard, full-body tech suits were indeed monumentally impactful. Accordingly, the decisions made by FINA concerning full-body tech suits were exceptionally consequential to the sport of swimming.

---

org/records/by-progression/17427 [https://perma.cc/D5AB-B6ER] (last visited Oct. 26, 2024); *Women's World Record*, Marathon Shoe History, https://www.marathonshoehistory.com/womens-world-record/ [https://perma.cc/CLV9-S7YP] (last visited Oct. 26, 2024). In the absence of performance-enhancing technology, one would expect to see the rate of improvement decrease, rather than increase, as runners near the fastest marathon possible by a human.

[16] *Why Do MLB Players Use Wood Bats*, Bat Digest (May 2, 2023), https://www.batdigest.com/blog/why-do-mlb-players-use-wooded-bats/ [https://perma.cc/WEQ5-DXEF].

[17] John D. Barrow, *Why Ban Full-Body Olympics Swimsuits? A Scientist Explains Polyurethane*, Daily Beast (July 25, 2012, 04:45 ET), https://www.thedailybeast.com/why-ban-full-body-olympics-swimsuits-a-scientist-explains-polyurethane [https://perma.cc/LJL8-Z7PK].

[18] Ross Tucker & Jonathan Dugas, *The Battle of the Suits Continues in Rome: Swim Suit Analysis*, Sci. Sport (July 29, 2009), https://web.archive.org/web/20120502070203/http://www.sportsscientists.com/2009/07/swimming-world-records-not-good-day-for.html [https://perma.cc/UHT8-NK8Z].

Second and relatedly, FINA's decisions were also high-stakes in that swimming's legitimacy relies on its authenticity. Swimming is traditionally viewed as a 'pure' sport where technology is an afterthought.[19] Competition in swimming occurs on two levels simultaneously: athletes compete against both each other and the record book. Their performance is attributed to their natural characteristics, not to the technology involved. While this view ignores a variety of ways technology has permeated swimming, such as wake-reducing pool gutters and water temperature control systems, the introduction of tech suits nevertheless profoundly altered the perception of the sport of swimming.[20] A particular technology both became necessary for all elite competitors to use and, eventually, called into question whether they were competing in 'swimming' at all.[21]

Lastly, FINA's handling of the tech suit issue stands alone. SGBs typically abide by their decision to allow a new technology. FINA, on the other hand, first allowed tech suits in 1999, permitted manufacturers to engage in essentially unregulated innovation for ten years, and then reversed course by partially banning the suits (as discussed in much greater depth in Part II). This unique—and, arguably, turbulent—approach allows for greater insight into how SGBs' regulatory decisions impact their sports.

---

[19] Brent Rushall, *A Serious Threat to the Very Nature of Competitive Swimming or Not?*, Am. Swim Coaches Ass'n Online (Dec. 19, 1999), https://web.archive.org/web/20111010194047/http://www.swimmingcoach.org/articles/200002/20002_1.htm [https://perma.cc/W3KV-U8UB] (discussing the concept of "swimming as a pure sport."); Tara Magdalinski, Sport, Tech. and Body 111 (2009) ("[S]wimming appears to be an 'authentic' sport that simply requires athletes to churn through the water, pitting their bodies against nature's elements. Traditionally immune from the technological advances and attendant controversies that have plagued other elite sports such as cycling and athletics, swimming has instead offered a forum where performance seems to be a pure 'human v water contest' . . . .").

[20] Magdalinski, *supra* note 19, at 111.

[21] Michael Cowley, *Frustrated Phelps Threatens Boycott Over Suits,* Sydney Morning Herald (July 29, 2009, 18:01), https://www.smh.com.au/sport/frustrated-phelps-threatens-boycott-over-suits-20090729-gdtnqt.html [https://perma.cc/TA8W-9DS9] (quoting Michael Phelps: "The one thing that has really, really changed over the last few years has been the technology in the sport. It's changed the sport completely. [N]ow it's not swimming. The headlines are always who is wearing what suit. It's not swimming and I'm looking forward to the day when we can call our sport swimming again."); *see generally* Mitchell N. Berman & Richard D. Friedman, The Jurisprudence of Sports 23–38 (2021) (introducing the idea that sports have essences and changing something in a sport could possibly change its essence).

II. Swimming History: 1896–2010

A. The Fastskin

At the 1896 Olympics, swimming events took place in the Mediterranean.[22] The sport has evolved ever since, and swimwear with it. From early heavy woolen suits that ran from the shoulders to the knees emerged lighter, more efficient silk and cotton suits.[23] In 1928, the company that would become Speedo introduced the first-ever competition suit, which incorporated an open "Racerback" style with open shoulders and an exposed back to allow for greater range of motion in the water.[24] Over time, Speedo's brand became synonymous with industry-leading innovation in swimming—again transforming the sport in 1957 by introducing nylon suits.[25]

By the 1990s, the prevailing swimsuit philosophy had become 'less is more.'[26] Male swimmers at the 1996 Barcelona Games competed in minimalist briefs,[27] their rationale being that suit fabric created more drag than skin.[28]

---

[22] *Swimming at the 1896 Summer Olympics*, Olympedia, https://www.olympedia.org/editions/1/sports/SWM [https://perma.cc/R8RH-VLFP] (last visited Oct. 26, 2024).

[23] Alfonso Trinidad Morales, Javier Antonio Tamayo Fajardo & Higinio González-García, *High-Speed Swimsuits and Their Historical Development in Competitive Swimming*, Frontiers in Psych. 1,1 (2019); *see also Swimsuits Through the Ages*, Guardian *(July 29, 2009, 08:33 ET),* https://www.theguardian.com/sport/gallery/2009/jul/29/swim-suits-supersuits-history-michael-phelps [https://perma.cc/KR6L-9MWA]; Jacob Roberts, *Winning Skin*, Distillations Mag. (Feb. 9, 2017), https://www.sciencehistory.org/stories/magazine/winning-skin/ *[*https://perma. cc/ZKA6-MR6C].

[24] David Meyer, *The Need for Speed: How High-Technology Swimsuits Changed the Sport of Swimming*, SwimSwam (last visited Oct. 26, 2024), https://swimswam.com/wp-content/uploads/2013/06/The-Need-for-Speed-How-High-Technology-Swimsuits-Changed-the-Sport-of-Swimming.pdf [https://perma.cc/98RJ-M7P2]; *see* Julia Day, *The Speedo Story*, Guardian (Feb. 26, 2001, 12:39 ET), https://www.theguardian.com/media/2001/feb/26/marketingandpr.comment [https://perma.cc/K92A-XM3D].

[25] Day, *supra* note 24; Jenny Johnson, *How to Engineer a Record-Breaking Swimsuit*, Illumin Mag. (Oct. 24, 2022), https://illumin.usc.edu/how-to-engineer-a-record-breaking-swimsuit/ [https://perma.cc/9E2X-E6W5].

[26] Jennifer Craik, *The Fastskin Revolution: From Human Fish to Swimming Androids*, 3 Culture Unbound: J. Current Cultural Rsch. 71, 78 (2011) ("American swimmer, Jenny Thompson, observed: 'People thought that the less material the better, the skimpier the swimsuit the faster.'").

[27] Briefs are perhaps more commonly known as 'speedos' but 'briefs' are used herein to avoid confusion between the brand Speedo and the genericized suit shape 'speedo.'

[28] Craik, *supra* note 26; Roberts, *supra* note 23. For additional context, swimmers both at that time and to this day shave most of their skin to reduce drag. This is an

Yet, in November 1999, that philosophy was turned on its head as FINA approved Speedo's revolutionary tech suit, aptly named the "Fastskin."[29]

The appearance of swimming as a sport radically changed between the 1996 Barcelona and 2000 Sydney Olympic Games. *Out* were briefs and the idea that skin was faster than fabric, and *in* was an extremely tight-fitting,[30] full-body suit with various drag-reduction mechanisms, including shark skin-inspired textile and muscle compression (which also decreased muscle fatigue and assisted swimmers in maintaining a streamlined position in the water).[31] As eight-time gold-medalist Jenny Thompson described in 2000:

---

effective means of drag reduction, so the 1990s swimmers' belief was well-founded. *See generally* Rick L. Sharp, Anthony C. Hackney, Sheila M. Cain & Richard J. Ness, *The Effect of Shaving Body Hair on the Physiological Cost of Freestyle Swimming*, 4 J. Swimming Rsch. 9 (1988).

[29] Arguably, the first tech suit was Speedo's S2000, which launched in 1992. Speedo followed up the S2000 with the Aquablade in 1996. Both incorporated technologies that purported to reduce drag. However, scholars generally agree that the Fastskin represented the real revolution in competition swimwear as the Fastskin was the first suit that was faster than human skin. *See, e.g.*, Craik, *supra* note 26 at 73; Roberts, *supra* note 23; Magdalinski, *supra* note 19, at 111–12.

[30] For context, swimmers would typically wear a full-body suit that was two sizes smaller than their usual size to maximize the suits' compressive benefits. Craik, *supra* note 26 at 73. These suits would also frequently tear. *Id.* For athletes, full-body compression was highly uncomfortable and the experience of wearing these suits was miserable. *See infra* notes 57 and 58.

[31] *20 Years of Speedo Fastskin*, SwimSwam (Dec. 7, 2020), https://swimswam.com/20-years-of-speedo-fastskin/ [https://perma.cc/6SNS-P94A]; Magdalinski, *supra* note 19, at 115. Interestingly, the science of exactly how and the degree to which tech suits help swimming performance has yet to be fully answered. *See* Morales, Fajardo & González-García, *supra* note 23. Although the Fastskin's shark skin-inspired fabric was extensively marketed by Speedo, later studies showed it to provide negligible drag reduction. Peter Reuell, *A Swimsuit Like Shark Skin? Not so Fast*, Harv. Gazette (Feb. 9, 2012), https://news.harvard.edu/gazette/story/2012/02/a-swimsuit-like-shark-skin-not-so-fast/ [https://perma.cc/7DN7-JUNU]. For the purposes of this Article, it is safe to assume that tech suits provided significant performance benefits to their wearers such that elite competitors had to wear a tech suit to be competitive. *See, e.g.*, Patricia Zettler, *Is it Cheating to Use Cheetahs?: The Implications of Technologically Innovative Prostheses for Sports Values and Rules*, 27 B.U. Int'l L.J. 367, 378–80 (2009); Morales, Fajardo & González-García, *supra* note 23; Jean-Claude Chatard & Barry Wilson, *Effect of Fastskin Suits on Performance, Drag, and Energy Cost of Swimming*, 40 Med. & Sci. Sports & Exercise 1149 (2008); Vladimir Issurin, Vitali Pushkar-Verbitsky & Oleg Verbitsky, *Effect of High-Tech Swimsuits on the Swimming Performance in Top-Level Swimmers*, 54 J. Sports Med. & Physical Fitness 383 (2014); Leon Foster, David James & Steve Haake, *Influence of Full Body Swimsuits on Competitive Performance*, 34 Procedia Eng'g 712 (2012); *cf.* Ray Stefani, *Olympic Swimming Gold: The Suit or the Swimmer in the Suit?*, 9

"Now because the material is so fast, it's the more material the better."[32] At the 2000 Sydney Olympics, Fastskin-wearers won eighty-three percent of all swimming medals and set thirteen out of the fifteen world records broken.[33] The era of the tech suit had begun.

FINA's decision to approve the Fastskin in 1999 was rife with controversy, primarily along two lines. First, some argued that the Fastskin violated FINA Rule 10.7, which stated: "*No swimmer shall be permitted to use or wear any device that may aid his speed, buoyancy or endurance during a competition (such as webbed gloves, fins, etc). Goggles may be worn.*"[34] These critics claimed that the Fastskin was a performance-enhancing "device" under Rule 10.7 and should be banned.[35] The Australian Olympic Commission ultimately filed an appeal in 2000 with the Court of Arbitration for Sport ("CAS") to overturn FINA's approval of the Fastskin.[36] This appeal failed, however, with the CAS arbitrator ruling that FINA's approval of the Fastskin was binding and that CAS lacked jurisdiction over FINA's decision.[37] With that said, calling FINA's decision an "approval" facially gave it more weight than it deserved; in fact, FINA itself acknowledged "there is no specific rule regulating [competition swimsuits]" and that the Fastskin was approved simply because it violated no other FINA rules (presumably because a suit was not a "device").[38]

Many of the critics who argued the Fastskin violated Rule 10.7 are better understood as swimming purists. Their belief that the Fastskin was a step too far in swimming equipment underpinned their quest to have the Fastskin

---

Significance 13 (2012) (arguing that "high-tech suits actually had little significant impact on improved swimming performances").

[32] Craik, *supra* note 26, at 78; *see also* Roberts, *supra* note 23 ("The more skin covered, Speedo's logic went, the faster a swimmer would be.").

[33] *20 Years of Speedo Fastskin*, *supra* note 31; Roberts, *supra* note 23. Swimming world records mentioned herein refer to those set in fifty-meter pools, also known as Olympic size pools.

[34] Austl. Olympic Comm., Advisory Opinion CAS 2000/C/267, Court of Arbitration for Sport, ¶ 22 (May 1, 2000), https://jurisprudence.tas-cas.org/Shared%20Documents/267.pdf [https://perma.cc/5H3Z-HZAW].

[35] *See, e.g.*, Rushall, *supra* note 19.

[36] Lisa Dillman, *As Swim Records Fall, High-Tech Suit Faces Scrutiny*, L.A. Times (Mar. 27, 2008, 07:00 PT), https://www.latimes.com/archives/la-xpm-2008-mar-27-sp-swim27-story.html [https://perma.cc/5KDR-L7DX]; Austl. Olympic Comm., *supra* note 34.

[37] *See* Austl. Olympic Comm., *supra* note 34, ¶¶ 25–70. CAS could only have jurisdiction if the arbitrator found that FINA's decision was unreasonable, but the arbitrator held that FINA "acted within the limits (i.e. did not act unreasonably) of the rules." *Id.* ¶ 67.

[38] *Id.* ¶ 21.

banned. They argued that the suit was doing a significant part of the effort of racing and would determine the outcome more than competitors' natural differences, giving swimming essentially a Formula 1 model.[39] By 2000, swimming had adopted a variety of technical innovations that distanced the sport from its 1896 version, including lane lines and goggles. To purist critics, these technologies were a non-issue, however, as they existed to fairness's benefit rather than its detriment.[40] For example, when anti-wave lane lines entered the sport, they reduced water turbulence between lanes such that swimmers' performances were less affected by who they swam next to.[41] Goggles, meanwhile, increased eye safety.[42] Both lane lines and goggles more so reduced externalities affecting swimmers' performance, rather than serving as performance enhancers. To purists, the Fastskin and tech suits like it were technologies that significantly determined the competitive outcome and, as such, were harmful to the sport by reducing athletes' reliance on factors inherent to each competitor.[43]

---

[39] Tucker & Dugas, *supra* note 18; Ross Tucker & Jonathan Dugas, *Swimming's Technology Debate as the Ban Approaches*, Sci. Sport (Dec. 30, 2009), https://scienceofsport.blogspot.com/2009/12/ [https://perma.cc/GP6K-GFZZ]. Formula 1 involves a racing competition pairing engineers and drivers; engineers seek to build the fastest car for their drivers. Drivers' cars are not built equally, and cars' engineering is often determinative of drivers' performance. Unlike in swimming, however, Formula 1 has two championships: (i) the Drivers' Championship, which awards the top driver, and (ii) the Constructors' Championship, which awards the top team and, thus, the top engineers. *The Beginner's Guide to the F1 Drivers' Championship*, F1 (2025), https://www.formula1.com/en/latest/article/the-beginners-guide-to-the-f1-drivers-championship.53MjXJzTDxQnfxfoCLnxNZ [https://perma.cc/9GLD-ECCY]; *The Beginner's Guide to the F1 Constructors' Championship*, F1 (2025), https://www.formula1.com/en/latest/article/the-beginners-guide-to-the-f1-constructors-championship.66nTfWSqrUYv3bnbosPkHV [https://perma.cc/GH3V-D8QZ]. Swimming solely has a Drivers' Championship equivalent, and the engineering component is unrecognized.

[40] *See* Rushall, *supra* note 19.

[41] Ross Tucker & Jonathan Dugas, *Two Points of View, as the Swimsuit Debate Continues*, Sci. Sport (July 30, 2009), https://web.archive.org/web/20120502070210/http://www.sportsscientists.com/2009/07/swimsuit-debate-differing-perspectives.html [https://perma.cc/3J7E-NLNB] (quoting John Leonard, then-Executive Director of the American Swimming Coaches Association: "[L]ane lines "maximize" the opportunity of the athlete to swim fast, with minimum turbulence in the lane. [Y]ou should have seen the waves in the pool back in the 60's and 70's[.]").

[42] Zeke Rozell, *Is it Bad to Open Your Eyes in the Pool?*, All About Vision (Jan. 10, 2023) (rev'd by Dr. Sonia Kelley, OD, MS), https://www.allaboutvision.com/conditions/swimmers-eye/ [https://perma.cc/XZ5J-Q64E].

[43] *See* Tucker & Dugas, *supra* note 41; Rushall, *supra* note 19.

A second line of criticism of FINA's decision focused on the unfairness of the Fastskin due to a lack of availability. Speedo first began testing the Fastskin in 1999 with a small group of elite swimmers from Speedo-sponsored national teams who were provided customized Fastskins.[44] At the time of FINA's approval, the Fastskin was not available to most competitors who sought it.[45] To be sure, elite competitors wanted the Fastskin because of its performance benefits and were relatively unconcerned with the purists' objections,[46] but they were simply unable to obtain the suit; in turn, this created a situation where some elite swimmers had a marked advantage over others. USA Swimming even initially banned the Fastskin at its 2000 National Trials out of fairness concerns.[47] By the 2000 Olympics, however, the fairness controversy had died down as most competitors from dominant (and Speedo-sponsored) swimming nations like the United States and Australia were provided with customized Fastskins.[48] The Fastskin and similar full-body tech suits had become normalized.[49]

---

[44] Tara Magdalinski, *Performance Technologies: Drugs and Fastskin at the Sydney 2000 Olympics*, 97 Media Int'l Austl. Incorporating Culture & Pol'y 59, 66 (2000) ("[Australian National Team members were] upset that not all swimmers were provided with Fastskin, as Speedo, a major sponsor of the Australian Swimming Team, revealed the suits when they were still being tested. During this phase, only a handful of Speedo-sponsored elite swimmers were provided with custom-designed bodysuits to assist in their development.").

[45] *Id.* at 66 ("[T]he issue of 'fairness' was more about production, delivery and exclusive sponsorship arrangements."); Magdalinski, *supra* note 19, at 112 ("[W]hen open access to customised suits was in doubt, only then were many alarmed at the possible violation of sport's 'level playing field.'"); Rushall, *supra* note 19 (published on December 19, 1999 and writing that "[it] has been reported that there are only eight Speedo suits constructed to date.").

[46] Magdalinski, *supra* note 19, at 112 ("Swimmers were certainly keen to obtain these suits in order to secure an edge over their competitors[.]"); Craik, *supra* note 26, at 72 ("Swimmers largely embraced the suits as enhancing their performances and transforming the sport of swimming: 'You feel so streamlined through the water. It's like you're cutting through the water like a hot knife through butter,' [Grant] Hackett said. 'This suit is a real advancement and evolution for the sport[.]'").

[47] Magdalinski, *supra* note 19, at 112.

[48] Speedo did not offer customized Fastskins to non-Speedo-sponsored countries and athletes, who were offered only generic, non-customized Fastskins. Roberts, *supra* note 23; *see* Magdalinski, *supra* note 44, at 59.

[49] Magdalinski, *supra* note 45, at 59.

B. The "Rocket" Launch

Following the introduction of the Fastskin in 1999, competition swimsuit innovation stagnated until 2008. Although Speedo unveiled the Fastskin II prior to the 2004 Athens Olympics and the Fastskin Pro in 2007, both failed to offer significant performance benefits over the original Fastskin.[50] Speedo, undeterred and ever the pioneering innovator, thus embarked on a three-year project to make the Fastskin line obsolete.[51]

On February 12, 2008, Speedo's project came to fruition as it unveiled the LZR Racer ("LZR").[52] Co-designed by NASA,[53] Speedo boldly marketed the $550 suit[54] as creating the next stage of human evolution.[55] Speedo's audacious claim was well-founded, though—the LZR was the fastest competition swimsuit ever made by a significant margin.[56] Like the Fastskins, the LZR was

---

[50] Morales, Fajardo & González-García, *supra* note 23; Roberts, *supra* note 23.

[51] *See* Roberts, *supra* note 23 ("Leading up to the 2008 Beijing Olympics, Speedo began toying with a whole new way of making swimsuits, an approach that would make the Fastskin look slow.").

[52] *Industry News: Speedo LZR RACER Debuted in London, Sydney; New York Debut Soon*, Swimming World (Feb. 12, 2008), https://www.swimmingworldmagazine.com/news/industry-news-speedo-lzr-racer-debuted-in-london-sydney-new-york-debut-soon/ [https://perma.cc/R7UC-5EX7]. "LZR" is pronounced "laser."

[53] *Space Age Swimsuit Reduces Drag, Breaks Records*, NASA Spinoff (2008), https://spinoff.nasa.gov/Spinoff2008/ch_4.html [https://perma.cc/HZ9P-BXU9]; Emma Betuel, *Olympics Flashbacks: How a NASA-Designed Swimsuit Rocked the 2008 Games*, Inverse (Aug. 5, 2020), https://www.inverse.com/innovation/olympic-glory-week-lzr-swimsuits [https://perma.cc/48LE-FFFW].

[54] Sindy K. Y. Tang, *The Rocket Swimsuit: Speedo's Lzr Racer*, Science News (Sept. 15, 2008), https://sitn.hms.harvard.edu/flash/2008/issue47-2/ [https://perma.cc/BB3S-USXK]; Dillman, *supra* note 36. Adjusted for inflation, the suit was worth $828 in 2025. *Inflation Calculator*, US Inflation Calculator, https://www.usinflationcalculator.com/ [https://perma.cc/E9MY-9G3Q] (last visited Oct. 14, 2025).

[55] *LZR advertisements featured Michael Phelps as the Vitruvian Man, in Industry News: Speedo LZR Racer Debuted in London, Sydney; New York Debut Soon, supra* note *52.*

[56] The best evidence of how the LZR definitively outmatched other tech suits on the market at the time (also discussed later in this footnote) is how swimmers and their coaches described feeling forced to either wear the LZR or lose races. *See* Associated Press, *Swimmers Might Have to Choose Between Sponsor or Faster Speedo*, ESPN (Apr. 12, 2008, 11:56 ET), https://www.espn.com/olympics/swimming/news/story?id=3343400 [https://perma.cc/K5AU-4NE4]; Betuel, *supra* note 53 ("The coach of the Japanese national swimming team broke an existing sponsor agreement to allow his athletes to wear the suit: 'If swimmers don't wear the LZR Racer, they won't be able to compete,' he said."). Additionally, following the introduction of

skin-tight[57] to reduce drag and muscle fatigue and improve body positioning in the water,[58] such that it had to be replaced before every meet to reap the most compression benefits. Unlike the Fastskins, however, the LZR was constructed using a seamless woven elastane-nylon and polyurethane fabric called the LZR Pulse.[59] The LZR Pulse fabric, combined with additional pure polyurethane panels, trapped tiny pockets of air that made the wearer more

---

the LZR, world records began falling at an unprecedent rate. *See* Kelli Anderson, *The War of the Swimsuits*, Sports Illustrated (June 23, 2008), https://vault.si.com/vault/2008/06/23/the-war-of-the-swimsuits [https://perma.cc/FZM4-KEHQ] ("In the first six months of 2004, the last Summer Olympic year, one long-course world record was broken. Twenty such marks have fallen [in the five months following the LZR's introduction], 19 of them to swimmers wearing LZR Racers."). Scientific evidence also showed the LZR offered meaningful drag reduction over the Fastskin. *See Space Age Swimsuit Reduces Drag, Breaks Records*, *supra* note 53 ("The LZR Racer reduces skin friction drag 24 percent more than the Fastskin.").

[57] To give a sense of how tight the LZR and its peer suits were, it would typically take athletes thirty to forty-five minutes to put these suits on and required at least one other person's assistance. One study found the arduous process of inching the suit up one's body gave fifty to eighty percent of wearers blisters on their fingers. Margo Mountjoy, Iouli Gordon, Joseph T. McKeown & Naama W. Constantini, *Medical Complications of an Aquatic Innovation*, 43 Brit. J. Sports Med. 979, 979 (2009). Also, because compression was so important to how these suits functioned and use would stretch them out, top-level swimmers replaced their suits every one to two meets. *See How Tech Suits Helps You Swim Faster*, MySwimPro (2019), https://blog.myswimpro.com/2019/04/17/how-tech-suits-helps-you-swim-faster/ [https://perma.cc/UYL6-MMMD] ("[Tech suits'] lifetime is short. If you wear your suit more than a handful of times, they won't hold their compression as much.").

[58] Also like the full-body Fastskins, the LZR was extremely uncomfortable to put on and wear. A writer for Slate described her experience donning a LZR for the first time: "I was expecting the LZR Racer to be as hard to put on as the wetsuits I've worn for open-water racing—a pain-in-the-ass wriggle that makes you confront some of the more problematic parts of your body. But getting into the Speedo suit is much harder, like a lobster trying to molt backward." Sarah Dickerman, *Full Speedo Ahead*, Slate (Aug. 06, 2008, 14:39), https://slate.com/culture/2008/08/can-the-speedo-lzr-racer-make-me-a-better-swimmer.html [https://perma.cc/3TBC-8RUT]. Twelve-time Olympic medalist Dara Torres recounted having to "sit on the floor and inch it on like panty hose." Keith Naughton, *Speedo: Making a Splash*, Newsweek (June 20, 2008), https://www.newsweek.com/speedo-making-splash-90567 [https://perma.cc/4D2X-V5YV].

[59] Meyer, *supra* note 24, at 9. Polyurethane is a plastic material that first saw widespread use as a rubber substitute in World War Two. *What is Polyurethane?*, Polyurethanes, https://polyurethanes.org/what-is-it/ [https://perma.cc/M88H-YKCJ] (last visited Oct. 26, 2024).

buoyant in the water.[60] The polyurethane was also hydrophobic, such that water would simply run off the swimmer rather than the suit becoming wet.[61] These innovations significantly reduced drag and earned the LZR the nickname of the "rubber suit."[62]

If the original Fastskin made waves in the swimming world, the LZR created a tsunami. "It literally feels like you are a rocket," gushed Michael Phelps when discussing the LZR.[63] Less than two months after its February 2008 launch, eighteen out of nineteen new world records were set by LZR wearers, prompting immediate outcry regarding the LZR's fairness.[64] FINA responded by claiming the LZR had passed a series of tests as part of its "very rigorous" approval system, and that these tests showed "no scientific proof that [the LZR] helps [swimmers' buoyancy] somehow, to the best of FINA's knowledge."[65] This claim was doubtful given both the broad consensus that

---

[60] The extent to which the LZR made swimmers more buoyant is a subject of scholarly debate. *See, e.g.*, Morales, Fajardo & González-García, *supra* note 23 (describing conflicting findings regarding buoyancy); *cf.* Meg Maher, *The Impact of Invention on Sport*, Lemelson Ctr. Study Invention & Innovation (Sept. 9, 2019), https://invention.si.edu/impact-invention-sport [https://perma.cc/4Y8M-Z5FS] ("Here's how [the LZR] worked: inflexible, girdle-like polyurethane panels positioned in the lower back and abdomen helped improve posture, repelled water, and trapped air, helping athletes be more buoyant in the water."); Mountjoy, *supra* note 57, at 979 ("Many [believe] that the new swimsuit materials in combination with the design improve buoyancy in the water."); Barrow, *supra* note 17 ("[Polyurethane suits] enclosed tiny pockets of gas that made the swimmer wearing the suit to be far more buoyant."); *see also Rival Swimsuit Approved*, Australian Broad. Corp. (June 4, 2008), https://www.abc.net.au/news/2008-06-05/rival-swimsuit-approved/2460182 [https://perma.cc/9PGC-AT5Y] (noting how Speedo rival Arena marketed its new suit, launched in response to the LZR, as having "polyurethane sections which boost floatability." The suit was approved by FINA.).

[61] Roberts, *supra* note 23; Eric Wilson, *Swimsuit for the Olympics is a New Skin for the Big Dip*, N.Y. Times (Feb. 13, 2008), https://www.nytimes.com/2008/02/13/sports/othersports/13swim.html [https://perma.cc/XQ3T-DNGK] (quoting Michael Phelps discussing the LZR: "The water completely runs off the suit.").

[62] Johnson, *supra* note 25.

[63] Wilson, *supra* note 61.

[64] Associated Press, *FINA Decides Not to Ban New High-Tech Swimsuits*, Taipei Times (Apr. 10, 2008), https://www.taipeitimes.com/News/sport/archives/2008/04/10/2003408867 [https://perma.cc/4F6V-PQRX].

[65] *Id.*; *see* Associated Press, *FINA Disagrees With Critics That New Suit Gives Swimmers Edge*, ESPN (Apr. 8, 2008, 18:53), https://www.espn.co.uk/olympics/swimming/news/story?id=3336132 [https://perma.cc/LSB3-A8P3].

the LZR aided buoyancy[66] and the fact that, at the time, FINA lacked rules prohibiting suits from enhancing athletes' speed, buoyancy, and endurance.[67]

Like in 2000, the fairness debate surrounding the LZR largely focused on its creation of an uneven playing field due to a lack of access, albeit due to sponsorship conflicts and less so supply issues.[68] Both Canada and Italy's national swimming bodies banned the use of the LZR at their Olympic trials,[69] but could not stop other nations' athletes from donning the LZR at the 2008 Beijing Games. National teams and athletes sponsored by Speedo's rivals thus faced a choice: breach their sponsorship agreements, wear the LZR and be competitive, or forgo the LZR and be at a marked disadvantage.[70] As it turned out, this was not much of a choice for those who had dedicated their lives to the pursuit of swimming glory.[71] Despite being sponsored by Speedo competitor brands—among them Nike, Arena, and Adidas—national teams and individual athletes alike chose to break their sponsorships to wear the LZR in Beijing.[72] Speedo's suit was perceived as being so much better that Nike proactively allowed its swimmers to wear the LZR in Beijing, believing its own suit could not compete.[73]

---

[66] *See supra* note 60 and accompanying text.

[67] Crouse, *supra* note 3 ("Before [July 2009], FINA did not have a bylaw expressly forbidding swimsuits that might aid speed, buoyancy and endurance").

[68] Craik, *supra* note 26, at 113 ("[T]he primary concern about fairness again focused on the 'level playing field' in terms of access.").

[69] *Id.*; *Associated Press*, *supra* note 65.

[70] Martin Petty, *Space-Age Suits Race into Uncharted Waters*, Reuters (Apr. 15, 2008, 06:30 MT), https://www.reuters.com/article/us-swimming-bodysuits/space-age-suits-race-into-uncharted-waters-idUSSP21700020080415/ [https://perma.cc/6PPM-S8YX] ("Mark Schubert, who has coached the United States team at every Olympics since 1980, said the $550 LZR was 'better than anything seen before' but it left swimmers contracted to other brands with a huge dilemma."); Bardin, *supra* note 4 ("[A] coach told reporters that 'if swimmers don't wear the LZR Racer, they won't be able to compete' in the Beijing Olympics").

[71] Craik, *supra* note 26, at 113 ("Athletes agreed that 'the choice . . . between Olympic success or lucrative rival sponsorships' was a 'no-brainer.'").

[72] Bardin, *supra* note 4 ("The advantage given to racers by the LZR Racer was so great that Japanese authorities decided to break exclusive sponsorship agreements with other companies to allow their racers to use the suits."); Craik, *supra* note 26, at 113 ("South Africa's swimming captain, Gerhard Zandberg, declared he was 'not going to sacrifice performance' and noted that 'Olympic gold is worth much more' than the monetary fine he faced from his sponsor.").

[73] Associated Press, *Nike Allows Swimmers to Wear Speedo's LZR Racer Suit at Olympics*, ESPN (July 30, 2008, 16:41 ET), https://www.espn.com/olympics/summer08/swimming/news/story?id=3511559 [https://perma.cc/8SYC-6B54] ("[Nike] felt it was fair to extend the offer it made in June allowing its swimmers to wear

The 2008 Beijing Games are best known for Michael Phelps's domination in the pool. Less recognized, but arguably just as impressive as Phelps's eight gold medals, was Speedo's domination in the field of swimsuit manufacturers. At the Beijing Games, swimmers wearing the LZR set twenty-three out of the twenty-five new world records, won eighty-nine percent of all medals, and won ninety-four percent of gold medals (including one hundred percent of gold medals in men's events).[74] The last Games at which more records were broken occurred in 1976, when goggles were first introduced to the sport.[75]

C. The Rocket Loses the Arms Race

Speedo and its LZR seemed unstoppable, but their reign would be short. In the months following the Beijing Games, many of Speedo's competitors took the LZR's polyurethane concept and amplified it. The resulting suits, among them the Arena X-Glide and the Adidas Hydrofoil, were made of pure polyurethane (as opposed to the LZR Pulse's polyurethane blend) and were both faster and more buoyant than the LZR.[76] In 2008, 105 world records were broken, with seventy-nine of them broken by swimmers wearing the LZR;[77] yet, within a year of its launch, the LZR was outclassed.

By early 2009, the swimming world was wracked with an existential crisis. Its record books had been almost entirely rewritten and were continually

---

Speedo's suit at the U.S. Olympic Trials. 'It is about putting their performance and their focus first,' [a Nike spokesperson] said."). In September 2008, Nike would pull out of the competitive swimwear market entirely. Darren Rovell, *Nike Pulls Out of Olympic Swimwear Battle*, CNBC (Aug. 5, 2010, 13:28 ET), https://www.cnbc.com/id/26827098 [https://perma.cc/RQ55-4AWG].

[74] *Phelps Secures His Place in the History Books After Landing His Eighth Gold Medal!*, Speedo (Aug. 17, 2008), https://web.archive.org/web/20140519093141/http://www.speedo.com/swimming_news/newsroom/swimming_news117.html [https://perma.cc/A5HB-2LA8].

[75] Coleman Hodges, *The History of World Records Getting Broken at World Championships*, SwimSwam (Aug. 3, 2023), https://swimswam.com/the-history-of-world-records-getting-broken-at-world-championships/ [https://perma.cc/K8N3-KY8T]; Tang, *supra* note 54.

[76] Roberts, *supra* note 23; Amy Shipley, *FINA Opts to Ban All High-Tech Swimsuits*, Reachforthewall.com (July 24, 2009), https://web.archive.org/web/20110715160336/http://reachforthewall.com/2009/07/24/suit-story/?hpid=artslot [https://perma.cc/R73M-NP4L].

[77] *FINA extends Swimsuit Regulations*, BBC, http://news.bbc.co.uk/sport2/hi/olympic_games/7944084.stm [https://perma.cc/VZE7-V892] (last updated Mar. 19, 2009).

being rewritten,[78] which reduced the significance of record-setting performances themselves.[79] Competing required an expensive, uncomfortable suit that needed to be frequently replaced. Perhaps worst of all, these suits' performance-enhancing features were altering the nature of swimming itself. As two-time gold medalist and Hydrofoil-wearer Britta Steffen explained: "This suit is of a different world[.] You don't die in the last meters and you feel no pain."[80] Michael Phelps's coach, Bob Bowman, further noted that swimmers' strokes were changing because they no longer needed to work to maintain their buoyancy.[81] To some, the sport in which they competed was no longer swimming.[82] In less than a decade, and particularly in the preceding year, the experience of competing in swimming had been profoundly altered.

FINA, for its part, failed to take any significant action to regulate full-body tech suits as they became ubiquitous between 1999 and early 2009. Despite FINA's responsibility to govern swimming, FINA's Executive Director admitted in July 2009 that FINA had "been looking at this issue for six months only."[83] In March 2009, FINA adopted new rules for suits, limiting, among a variety of regulations, their buoyancy and thickness,[84] but would almost entirely retract these rules three months later due to challenges with

---

[78] Only two pre-2008 world records remained unbroken in 2008 and 2009. Steve Connor, *Swimming: World Records Unlikely to be Broken 'For Decades', Warns Expert*, Indep. (Sept. 16, 2011, 00:00 BT), https://www.independent.co.uk/sport/general/others/swimming-world-records-unlikely-to-be-broken-for-decades-warns-expert-2355421.html [https://perma.cc/8YL7-DVEN].

[79] For most professional swimmers, swimming is not a lucrative career. *See infra* note 133 (the highest annual salary of a 2019-20 United States National Team swimmer was $38,928). Given the absence of strong financial incentives, most professional swimmers likely compete out of a love for the sport. For this intrinsically motivated population, the meaning behind attaining a world record significantly explains why they have pursued professional swimming. Harming the meaning of world records, then, hurt professional swimmers' *raison d'être*.

[80] Michael Cowley, *Does My Stroke Look Big in This? Let the Swimsuit Games Begin*, Sydney Morning Herald (July 25, 2009, 10:00), https://www.smh.com.au/sport/swimming/does-my-stroke-look-big-in-this-let-the-swimsuit-games-begin-20090725-gdtnho.html [https://perma.cc/63B7-SWKM].

[81] Amy Shipley, *Swimsuits Cause More Questions Than Answers at World Championships*, Wash. Post (Aug. 3, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/08/02/AR2009080201983.html [https://perma.cc/F4F6-95PD].

[82] Cowley, *supra* note 21.

[83] Crouse, *supra* note 3.

[84] Associated Press, *FINA Adopts New Rules for Swimsuits*, ESPN (Mar. 14, 2009, 13:10 ET), https://www.espn.com/olympics/swimming/news/story?id=3980056 [https://perma.cc/5VAD-RSW3].

efficiently testing buoyancy.[85] On July 24, 2009, however, FINA's Congress voted to take significant steps to regulate tech suits (the "Ban"), with 168 nations in favor and only six against.[86] The Ban included limiting suits' coverage of the body from the knees to the navel for men[87] and knees to the shoulders for women, as well as requiring that suits only be made of "textile."[88] The definition of "textile" was left to be determined by an independent swimwear expert, Dr. Jan-Anders Mansson,[89] but was generally understood to not include materials like polyurethane or even zippers, which had been used on all full-body suits going back to 1999.[90] In effect, gone would be the days of full-body tech suits, though non-full-body tech suits would still remain.[91] Unchanged, however, were the record books, which still kept records regardless of the suit worn.[92]

These new regulations were not implemented until 2010,[93] which left a single major swim meet where virtually any suit could be worn. The 2009

---

[85] FINA Communications Department, *PR46 – FINA Executive Meeting / Swimsuits*, World Aquatics (June 22, 2009, 03:00), https://www.worldaquatics.com/news/1914335/pr46-fina-executive-meeting-swimsuits [https://perma.cc/CM6G-GFXL].

[86] Tucker & Dugas, *supra* note 41.

[87] This shape of this suit is called a "jammer."

[88] Tucker & Dugas, *supra* note 41.

[89] To this day, Dr. Mansson is responsible for determining swimwear approval at World Aquatics. Jan-Anders E. Mansson, *Biography*, Purdue U. (Apr. 2024), https://engineering.purdue.edu/ChE/people/files/jan-anders.e.mansson.1/CV/MANSSON_BIO-CV_240416e.pdf [https://perma.cc/V6MQ-M8GN].

[90] *FINA World Championships, Swimming: Flash! FINA Bureau Announces Swimsuit Decisions; Speedo Releases Statement*, Swimming World (July 28, 2009, 11:35), https://www.swimmingworldmagazine.com/news/fina-world-championships-swimming-flash-fina-bureau-announces-swimsuit-decisions-speedo-releases-statement/ [https://perma.cc/5NYS-9NVG].

[91] The suits permitted by the Ban are still known as "tech suits." The distinguishing element of pre-Ban tech suits was their full-body coverage.

[92] Andrew Mooney, *Swimming on Steroids: The Suits that Brought Down Records*, Harv. Sports Analysis Coll. (July 21, 2012), https://harvardsportsanalysis.wordpress.com/2012/07/21/swimming-on-steroids-the-suits-that-brought-down-records/ [https://perma.cc/6Y3Y-9L76]; Rachel MacDonald, *"Doping on a Hanger": Regulatory Lessons From the FINA Elimination of the Polyurethane Swimsuit Applied to the International Anti-Doping Paradigm*, 51 Colum. J. L. & Soc. Probs. 275, 276 (2017) ("Despite some experts' calls to distinguish those records set by swimmers wearing polyurethane suits, FINA ultimately did not choose to differentiate or nullify the records.").

[93] *New Swimsuit Rules Valid From January: FINA*, Reuters (July 31, 2009, 11:07), https://web.archive.org/web/20210519000105/https://www.reuters.com/

World Aquatics Championships, dubbed the "Plastic Games,"[94] featured a staggering forty-three new world records; the next-highest record-breaking meet, the 1976 Olympic Games where goggles were first used, had twenty-nine world records.[95] Phelps's, as a Speedo athlete, was forced to wear a now-obsolete LZR. After losing in the 200 meter freestyle to Paul Biedermann, who wore an X-Glide and beat Phelps's world record by 0.96 seconds,[96] the man who won eight gold medals in a partially polyurethane suit changed his tune on them, threatening to boycott swimming until polyurethane suits were no longer in the sport.[97] FINA had loosely set a goal of implementing the Ban by May 2010; just two days after Phelps' threat, FINA accelerated the implementation of the Ban by four months.[98] On January 1, 2010, the full-body tech suit era officially ended.

---

article/us-swimming-world-suits-sb-idUSTRE56U4FW20090731/ [https://perma.cc/5RMM-9G9N].

[94] Karen Crouse, *Redefining Fast at the 'Plastic Games'*, N.Y. Times (Aug. 3, 2009), https://www.nytimes.com/2009/08/04/sports/04swim.html [https://perma.cc/T2TT-QTEA].

[95] Hodges, *supra* note 75. For additional context, there are fewer than forty Olympic swimming events across both men's and women's competition. Prior to the polyurethane era, records were broken approximately every four years. Roberts, *supra* note 23. During the polyurethane era, records were being broken several times over within a single meet—first in preliminary heats and then again in the finals of the same event. *Id.* This was highly unusual as top swimmers typically hold back in preliminary heats to conserve energy for finals, but the suits were so performance-enhancing that these athletes broke world records even in preliminary heats. *Id.*

[96] *Brilliant Biedermann Beats Phelps*, BBC (July 28, 2009), http://news.bbc.co.uk/sport2/hi/other_sports/swimming/8172708.stm [https://perma.cc/6WWG-FGUN]. Biedermann was a relative no-name compared to Phelps, yet he beat Phelps by 1.22 seconds. While not a blowout, 1.22 seconds in the 200-meter freestyle is a large margin of victory. *Id.* Biedermann's performance was staggering, both in regard to his victory over Phelps, in setting a new world record, and relative to Biedermann's past performances. A year prior, at the Beijing Games, Biedermann was fifth in the 200-meter freestyle while Phelps was first. Tucker & Dugas, *supra* note 18. In a single year, Biedermann shaved four seconds off his 200-meter freestyle, an extremely rare feat at his level; besting a world record by nearly a second in a relatively short race like the 200-meter freestyle was equally rare. *Id.* Biedermann attributed much of his success to the X-Glide. *Id.*

[97] Cowley, *supra* note 21. In 2008, Bob Bowman said for a story on Phelps and the LZR: "The swimmer makes the suit, not the other way around." Naughton, *supra* note 58.

[98] *New Swimsuit Rules Valid from January: FINA*, *supra* note 93.

D. Decision-making at FINA/W.A.

Since 2010, the essential components of the Ban have remained in effect and are strictly enforced: suits cannot extend past the knees or above the navel for men or past the knees or above the shoulders for women,[99] and cannot aid swimmers' speed, buoyancy, or endurance.[100] FINA/W.A. have further built out a substantial regulatory scheme for competition swimwear. All suits worn in competitions must be approved by W.A.[101] To be approved, suits must comply with a variety of specific regulations that limit their body coverage,[102] structure,[103] type of material (i.e., only "textile Fabric(s)"),[104] thickness,[105] permeability,[106] and construction.[107] Suits may not be customized.[108] All suit testing for compliance with these regulations is performed by an independent swimwear expert.[109] To avoid conflicts of interests, this expert is barred from having relationships with suit manufacturers and cannot have had a relationship with them within the five years preceding their appointment.[110] Suits must also be widely available for purchase to be used in competition.[111]

W.A. itself is an imperfect organization. It oversees many watersports worldwide, including swimming, water polo, and diving. Despite its far-reaching responsibilities, it is underfunded[112] and suffers from similar corruption experienced by other SGBs.[113] W.A.'s highest legislative body is its

---

[99] World Aquatics, *supra* note 1, at pt. 2, art.§ 15.2.

[100] *Id.* pt. 2, art. 15.3.

[101] *Id.* pt. 1, arts. 7.2.1, 7.5.

[102] *Id.* pt. 1, art. 7.5.1.1.2.

[103] *See id.* pt. 1, art. 7.5.1.2.

[104] *See id.* pt. 1, art. 7.5.1.4.1.

[105] *See id.* pt. 1, art. 7.5.1.5.1.

[106] *See id.* pt. 1, art. 7.5.1.5.2.

[107] *See id.* pt. 1, art. 7.5.1.6. Suits can, however, have any color or combination of colors. *See id.* pt. 1, art. 7.5.1.3.

[108] *See id.* pt. 1, art. 7.5.7.5.

[109] *See id.* pt. 1, art. 7.2.3. The current independent swimwear expert is Dr. Mansson. *See* Mansson, *supra* note 89.

[110] *See* World Aquatics, *supra* note 1, pt.1, art. 7.2.4.

[111] *See id.* pt. 1, arts. 7.2.7, 7.5.7.1.2.

[112] For example, W.A.'s 2022 revenue was a mere $43 million, with a net deficit of $16.4 million and the majority of its expenditures going to hosting sports events. *See* World Aquatics Financial Report 2022 (2023), https://resources.fina.org/fina/document/2023/06/23/73e99383-46ee-4349-844e-10d5a94cc2fc/World-Aquatics-2022-Financial-report-final-signed-.pdf [https://perma.cc/CQQ5-XE7Q].

[113] *See* MacDonald, *supra* note 92, at 312–13*; see also* Andy Bull, *Poison in the Pool: Can Scandal-Hit Swimming be Trusted in Rio?*, Guardian (Aug. 4, 2016), https://www.

Congress, the same entity that voted in favor of the Ban. W.A. has 209 member countries,[114] and each member state has two representatives at Congress;[115] member states with larger swimming communities have no greater voting power than their smaller peers.

The means through which decisions are made at W.A. is considerably opaque. To be sure, W.A. has some formal structures, such as the tech-suit approval process overseen by the independent swimwear expert. Another example is the Swimming Technical Committee, which is tasked with "investigat[ing], study[ing], and [providing recommendations] on matters dealing with standard equipment and specifications of competitive pools."[116] However, some decision-making likely also occurs informally, with votes held as mere formalities.[117] This, combined with allegations of corruption, make

---

theguardian.com/sport/2016/aug/04/poison-pool-swimming-scandal-trust-rio-2016-olympics-fina [https://perma.cc/LEC4-EF4D] (describing evidence of rampant corruption within FINA leadership); James Sutherland, *FINA President Al-Musallam Under Investigation for Corruption in FIFA Case*, SwimSwam (Sept. 3, 2021), https://swimswam.com/fina-president-al-musallam-under-investigation-for-corruption-in-fifa-case/ [https://perma.cc/GS3T-T47G] (reporting on a 2021 corruption investigation into the President of FINA, Husain Al-Musallam, who continues to hold this role today); *see also Swimming Hit by Corruption Charges*, Radio France Int'l (July 19, 2017), https://www.rfi.fr/en/sports/20170719-swimming-hit-corruption-charges [https://perma.cc/KF34-AME5] (reporting on 2017 International Olympic Committee and FBI investigations for corruption into Husain Al-Musallam); *see also* Liam Morgan, *FINA to Set Up Integrity Unit After Report Highlights "Significant Issues" with Governance*, Inside the Games (Oct. 11, 2021), https://www.insidethegames.biz/articles/1114085/fina-reform-report-criticises-governance [https://perma.cc/TJ59-X7PY] (summarizing 2021 report by the FINA Reform Committee, which found "significant issues" in FINA's governance; further, noting the FINA Reform Committee was established by Husain Al-Musallam.); *see also* Taylor Brien, *FINA is Doomed*, Swimming World (Sept. 21, 2015), https://www.swimmingworldmagazine.com/news/fina-is-doomed/ [https://perma.cc/9SXJ-T9AC] (describing an ultimately fruitless effort by a cadre of American swim coaches to establish new international swimming SGB to replace FINA due to FINA's perceived corruption).

[114] *See Overview and History*, World Aquatics, https://www.worldaquatics.com/about [https://perma.cc/VB6N-XUJD].

[115] *See* World Aquatics Const. art. 13.5 (2023).

[116] *Swimming Technical Committee*, World Aquatics, https://www.worldaquatics.com/swimming/technical-committee [https://perma.cc/EJ88-HEAM]. Recommendations made by the Technical Swimming Committee are passed to another body called the "Bureau," which is second in authority only to the Congress but has a much wider purview. *See id.*; World Aquatics Const., *supra* note 115, art. 17.

[117] For example, the 2021 FINA General Congress held fourteen votes; for thirteen of these votes, representatives had the option to vote (i) "yes," (ii) "no," or (iii) "abstain." *Scrutineers Confirmation of Elections and Voting Results*, FINA (June 6, 2021),

the actual decision-making processes at W.A. unclear. Although Congress successfully passed the Ban through its democratic process, only insiders know which of W.A.'s decisions occur as a result of democratic means or otherwise.

III. Regulatory Considerations

Before FINA's decision-making concerning tech suits can be analyzed, it is worth discussing how SGBs generally make decisions around new technologies. Regulation of technology in sports affects a combination of one or more of the following factors: (1) the 'levelness' of the playing field, measured by the accessibility and affordability of the technology; (2) safety while playing the sport; (3) the tradition of the sport and the extent to which the sport reflects societal conditions; (4) the market for the particular technology, implicating both the manufacturer and the athletes and SGBs sponsored by the manufacturer; and (5) the general public's interest in the sport.[118] Although safety is largely a non-issue in swimming,[119] the four remaining factors are further discussed below.

A. The Level Playing Field

Sports are not fair, though the perception of fairness is key to sports' legitimacy. While many of Michael Phelps's accomplishments can be attributed to his work ethic, he was also genetically predisposed to swimming success, carrying a six-foot four-inch frame and having unusually long arms.[120] Phelps' competitors did not have the same genetic makeup and thus lacked the same

---

https://resources.fina.org/fina/document/2022/01/20/96e8a19b-3679-4c2c-84b5-0ba93973e7a6/Scrutineers-Confirmation-of-Results-Doha-General-Congress.pdf [https://perma.cc/37P9-7VW5]. In these thirteen votes, the most contentious had ninety percent "yes" votes; all other votes had a higher percentage of "yes" votes. *Id.* Representatives from 183 members states attended the 2021 FINA General Congress, many of which vary considerably in their population, economic status, and swimming success. *Id.* Presumably, member states have competing interests, so the near-unanimity displayed at the 2021 FINA General Congress indicated decisions may have been made at an earlier time. *See id.*

[118] *See* World Aquatics, *FWAC 2014: Jan Anders Manson*, YouTube (Mar. 25, 2015), https://www.youtube.com/watch?v=wJ-JImReDYo [https://perma.cc/VC2R-KVA6] (detailing these factors).

[119] *Id.*

[120] *Is it a Genetic Flaw that Makes Phelps's the Greatest?*, Sydney Morning Herald (Aug. 16, 2008, 10:00), https://www.smh.com.au/sport/

advantages he benefited from. While this may have been unfair, it did not affect the legitimacy of the sport of swimming—that is, in a competition to determine who is the best swimmer, Phelps' genetic advantages did not affect the perception that he was legitimately the superior swimmer.

The 'level playing field' is the best approximation of fairness. If a sports contest's goal is to measure who is the best performer, then the competition rules must impose the same burdens on each competitor.[121] As further explained by sports philosopher James Keating: "To the extent that one party to the contest gains a special advantage, unavailable to his opponent[,] then that advantage is unfair."[122] That "special advantage," though, must come from external factors, not those innate to the athlete. Accordingly, a sport can achieve a level playing field, and, thus, legitimacy as a competition, when all competitors have access to the same technological advantages.

B. The Tradition of the Sport of Swimming

There is no such thing as 'pure' swimming.[123] In this, tech suits could not corrupt swimming simply because they altered the sport. Sports are a reflection of society and evolve as society does,[124] and evolution can be positive for a sport. Some, however, have gone so far as to argue that the integrity of the sport of swimming dictates that swimmers compete as close to in the nude as possible, because human skin has been the only constant factor in swimming for millennia.[125] This view misunderstands how swimming has changed over time.

Since the beginning of the modern Olympic era in 1896, swimming has constantly evolved. Even the physical activity itself has changed. Present-day swimming includes four strokes (butterfly, backstroke, breaststroke, and

---

is-it-a-genetic-flaw-that-makes-phelps's-the-greatest-20080816-gdsqwk.html [https://perma.cc/KW6X-9LQ7].

[121] James W. Keating, *Sportsmanship as a Moral Category*, 75 Ethics 25, 33–34 (1964).

[122] *Id.*

[123] *But see supra* note 19 and accompanying text.

[124] *The Importance of Sports in Society*, Ark. State Univ. (May 7, 2020), https://degree.astate.edu/online-programs/business/master-of-science-sports-administration/the-importance-of-sports-in-society/ [https://perma.cc/FEN6-GDTA].

[125] Roberts, *supra* note 23 ("The one thing that hasn't changed since the Olympics were first held in ancient Greece is human skin. If FINA really wants to maintain the integrity of the sport, perhaps they should have swimmers compete the same way the Greeks once did: in the nude.").

freestyle) as well as medley events, where competitors swim all four strokes in a single race.[126] Yet breaststroke was not introduced to the Olympics until 1904,[127] butterfly until 1956,[128] and medleys until 1964.[129] The sport of swimming has ranged from competing in the frigid Mediterranean to temperature-controlled pools,[130] from wearing wool to polyurethane suits, from one stroke to four and a medley, and beyond. The notion that swimming is pure—no more than a competition of man versus water—ignores the ever-present change occurring in the sport.

There is, however, merit to this view insofar as there are essential components of the sport that make it 'swimming.' Although swimming has evolved, so too have some constants remained. For there to be swimming, there must be humans moving their bodies in water to determine who can traverse a distance the fastest. FINA itself stated that "[swimming's] main and core principle [is] a sport essentially based on the physical performance of the athlete."[131] This is to say that swimming must be a sport where athletes' personal attributes determine the outcome, and not the equipment they use. Additionally, a core component of swimming is its grueling nature.[132] With the exception of the shortest event, the fifty-meter freestyle, athletes in every race experience significant pain from trying to maintain their pace while being exhausted.[133] Swimming is an endurance sport, and this necessarily entails enduring pain.

---

[126] World Aquatics, *supra* note 1, pt. 2, arts. 5–9.

[127] *The History of Breaststroke Swimming*, Swim Eng. Swimming, https://www.swimming.org/sport/history-of-breaststroke/ [https://perma.cc/PN9E-BVCU] (last visited Oct. 26, 2024). The first Olympic breaststroke competition was 440 yards, a distance that is also no longer used; the 100- and 200-meter breaststroke are the only current Olympic breaststroke events. *Id.*

[128] *The History of Butterfly Swimming*, Swim Eng. Swimming, https://www.swimming.org/sport/history-of-butterfly/ [https://perma.cc/PZD6-VXVU] (last visited Oct. 26, 2024).

[129] *The History of Individual Medley Swimming*, Swim Eng. Swimming, https://www.swimming.org/sport/history-of-individual-medley/ [https://perma.cc/JTD6-NRQJ] (last visited Oct. 26, 2024).

[130] *The History of Olympic Swimming*, Int'l Olympic Comm. (Dec. 17, 2018, 05:40 GMT), https://olympics.com/en/news/the-history-of-olympic-swimming [https://perma.cc/GUK8-XRPF] ("[Athletes were] exposed to temperatures of 13°C in the Mediterranean (a modern Olympic pool is around 25–28°C).").

[131] *FINA Adopts New Rules for Swimsuits*, *supra* note 84.

[132] Charles Hartley, *Pain is the Essence of Swimming*, SwimSwam (Aug. 8, 2017), https://swimswam.com/pain-essence-swimming/ [https://perma.cc/3BDD-GNRP].

[133] *Id.*; *see* Olivier Poirier-Leroy, *Bring the Pain: How to Deal with the Agony of Hard Swim Practices and Races*, YourSwimBook, https://www.yourswimlog.com/bring-the-pain/ [https://perma.cc/6VQT-KMPB] (last visited Oct. 26, 2024)

Lastly, as a timed sport, swimming relies on its record book more than most sports.[134] At the top levels of swimming, races are two-dimensional: competitors race against those in the pool with them and every swimmer who raced before them. The same arguments regarding the fairness of tech suits in a race can be used in the record book context; a competitor using an unfair advantage damages the legitimacy of a competition, be it one where the athletes are still wet or one against every swimmer who has ever competed in that event. If the record book is rewritten through illegitimate means, why should anyone still care?

C. The Market for a Technology

Although this factor is fairly self-explanatory, the relationship between SGBs, swimmers, and suit manufacturers must be described. Swimsuit manufacturers are the primary sponsor and source of income for most professional swimmers;[135] this was a key reason behind why swimmers' decision to break their sponsorships to wear a faster suit in 2008 and 2009 was so consequential. Manufacturers are also significant sponsors of swimming governing bodies, including FINA/W.A. and USA Swimming.[136] Notably, Speedo was

---

(quoting five-time gold medalist Don Schollander: "If you can push yourself through that pain barrier into real agony, you're a champion."); Alan Goldberg, *Managing the Pain & Fatigue of Oxygen Debt in Practice and During Races*, USA Swimming News (Apr. 22, 2022), https://www.usaswimming.org/news/2022/04/22/managing-the-pain-fatigue-of-oxygen-debt-in-practice-and-during-races [https://perma.cc/WTM4-YKGD].

[134] Written the day after Biedermann's world record 200-meter freestyle, the author describes how "swimming relies heavily on history and world records for its interest [and] so generations are often compared by [records]." He then laments that "[the] current swimsuit situation negates that comparison entirely." Ross Tucker, *Swimming World Records – Not a Good Day for Speedo*, Sci. Sport (July 29, 2009), https://web.archive.org/web/20240416114204/https://sportsscientists.com/2009/07/swimming-world-records-not-a-good-day-for-speedo/ [https://perma.cc/H85V-ATNM?type=image].

[135] Tucker & Dugas, *supra* note 18. For additional context, the most a 2019–20 United States National Team swimmer could expect to be compensated by USA Swimming was $38,928. *See 2020 Quad Athlete Support Program*, SwimSwam, https://swimswam.com/wp-content/uploads/2019/08/2020-quad-athlete-support-program-post-update_2.pdf [https://perma.cc/38S2-97N6].

[136] *See, e.g.*, Michael Long, *Speedo Dives in for Fina Swimming World Cup Series*, SportsPro (Aug. 5, 2015), https://www.sportspromedia.com/news/speedo_dives_in_for_fina_swimming_world_cup_series/?zephr_sso_ott=kd9BbZ [https://perma.cc/9RQK-Y3TS]; Associated Press, *Italian Swimsuit Company Signs on as*

FINA's exclusive swimwear sponsor from 2004 to 2008.[137] For manufacturers, tech suits do not represent a core revenue stream but, coupled with sponsorships, serve more so as a helpful marketing tool that gives manufacturers credibility.[138]

D. Public Interest in Swimming

Except for during the Olympic Games, swimming is not a popular sport.[139] In the United States, for example, there are approximately three times as many high school soccer players and four times as many high school track and field athletes as there are high school swimmers.[140] There are a variety of reasons that explain swimming's relative lack of popularity. For one, unlike the 162-game MLB season, the eighty-two-game NHL and NBA seasons, and even the seventeen-game NFL season, swimming's World Championships only occur every two years and the Olympics, every four years.[141] There

---

FINA Sponsor, San Diego Union-Tribune (Jan. 24, 2014), https://www.sandiegouniontribune.com/sdut-italian-swimsuit-company-signs-on-as-fina-sponsor-2014jan24-story.html [https://perma.cc/97Y8-YMVZ]; *USA Swimming, Arena Partnership Extended Through 2024*, USA Swimming (Feb. 21, 2023), https://www.usaswimming.org/news/2023/02/21/usa-swimming-arena-partnership-extended-through-2024 [https://perma.cc/R8FH-Y7CN]; Craik, *supra* note 26, at 77 (quoting then-FINA Executive Director Cornel Marculescu:"[T]he health and wealth of the sport of swimming is inter-linked with the fortunes of the swimwear industry which makes a significant contribution to the federations and athletes in terms of promotion and financial support.").

[137] *Speedo Signs New Deal with the Int'l Federation of Swimming*, Sports Bus. J. (Aug. 23, 2004), https://www.sportsbusinessjournal.com/Daily/Issues/2004/08/23/Sponsorships-Advertising-Marketing/Speedo-Signs-New-Deal-With-The-Intl-Federation-Of-Swimming.aspx [https://perma.cc/5CPT-J6G2].

[138] Naughton, *supra* note 58 ("[The] LZR Racer is a pretty small part of our business, under 5 percent," says [Speedo parent company] president Helen McCluskey. "But it's what gives us credibility. It's the couture version of Speedo.").

[139] Rian Covington, *Making Swimming a More Spectator-Friendly Sport*, Swimming World (Nov. 14, 2022, 12:12), https://www.swimmingworldmagazine.com/news/making-swimming-a-more-spectator-friendly-sport/ [https://perma.cc/D9QH-RP86].

[140] *High School Athletics Participation Survey*, Nat'l Fed'n State High Sch. Ass'ns, https://www.nfhs.org/media/5989280/2021-22_participation_survey.pdf [https://perma.cc/H4YE-LVVN].

[141] Arguably, the other sports' championships would be a more suitable analog. However, the World Championships and the Olympics are some of the only occasions where swimming is broadly televised, whereas even regular season baseball,

are a limited number of high-level competitions because athletes must train (as opposed to race) the vast majority of the time to be competitive.[142] Access to pools is also a critical issue, even in developed countries like the United States, and is particularly felt along socio-economic lines.[143] For most people, swimming only comes to mind during the Olympics.

Swimming is also not particularly audience-friendly. Swim meets are rarely televised, and watching in-person often means persevering through humid and chlorinated air to watch dozens of heats before the top competitors swim; even if watching a televised swim meet, the fact remains that most people find it boring.[144] There is no contact, no team play outside of relays, and water obscures spectators' viewing experience. Relative to even its closest peer sport, track and field, swimming is slower-paced and less exciting.

Because of these shortcomings, swimming has two critical means of driving interest in the sport. The first is, of course, the Olympic Games. When people are exposed to Olympic swimming, many become interested in it. USA Swimming's membership, for example, surges four to twelve percent

---

hockey, basketball and football are frequently nationally televised. *Why Nobody Cares About Swimming*, MySwimPro, https://blog.myswimpro.com/2023/07/24/why-nobody-cares-about-swimming/ [https://perma.cc/F5WK-FGQ7].

[142] For important meets, athletes train for months or even years before reducing their training for a one-to-four-week period prior to their meet (called a "taper"). *A Guide to Swimming Tapering*, EatSleepSwimCoach (Nov. 21, 2022), https://www.eatsleepswimcoach.com/swimming-tapering/ [https://perma.cc/SX37-C2KX]. The effect of this regimen means that elite swimmers can only produce top times on a few occasions at most per year.

[143] A 2017 study conducted by the University of Memphis and University of Nevada-Las Vegas found that "79 percent of children in families with household income less than $50,000 have no/low swimming ability," and "children who qualify for free or reduced school lunch programs are 63 percent less likely to have good swimming ability." USA Swimming Foundation, *USA Swimming Foundation Announces 5-10% Increase in Swimming Ability Among U.S. Children*, PR Newswire (May 25, 2017, 09:16 ET), https://www.prnewswire.com/news-releases/usa-swimming-foundation-announces-5-10-increase-in-swimming-ability-among-us-children-300463644.html [https://perma.cc/6J2K-4E97].

[144] *Why Nobody Cares About Swimming*, *supra* note 141 ("A lot of people don't care about swimming because it's *boring*. To the majority of people, swimming just isn't fun to watch.").

in post-Olympic years.[145] Second, world records are key.[146] The experience of watching a world record-setting performance involves witnessing human history. World records also create a headline, which is useful for a sport that gets little attention. However, the opposite is also true: a lack of new world records at the Olympic Games is viewed as disappointing by the public[147] and may lead to a lack of renewed interest in swimming.

E. On SGBs' Purpose and Goals

There is no 'right' way for SGBs to balance the factors described above when deciding how to regulate a new technology in their sport(s). Goggles are widely considered an acceptable technology as chlorine is harmful to eyes,[148] yet there remains a reasonable argument that the use of goggles in the 1976 Olympics was unfair to the world record holders from the goggle-less 1972 Olympics, among them Mark Spitz.[149] Although most would agree that safety should take priority over a level playing field in this instance, the fact remains that 1976 Olympians used technology that was unavailable to Spitz and his peers.[150] Even in non-edge cases like goggles, there is room for debate.

---

[145] 2021 Membership Demographics Report – Athlete, Club and Non-athlete Membership, USA Swimming (Feb. 2022), https://www.usaswimming.org/docs/default-source/governance/governance-lsc-website/membership-demographics/2021-membership-demographics-report.pdf?sfvrsn=80510b32_10 [https://perma.cc/53PS-R5ZE].

[146] *See* Tucker & Dugas, *supra* note 18.

[147] *See, e.g.*, Shane Keating, *Just One Swimming World Record Has Fallen at the Paris Olympics. Is the Pool to Blame?*, Guardian (Aug. 1, 2024), https://www.theguardian.com/sport/article/2024/aug/01/paris-olympics-2024-swimming-world-records-less-slow-pool [https://perma.cc/XHH2-3YHE].

[148] Rushall, *supra* note 19.

[149] *Mark Spitz*, World Aquatics, https://www.worldaquatics.com/athletes/1149730/mark-spitz [https://perma.cc/M233-EKAU]. Mark Spitz was an American swimmer who won seven gold medals, each in world-record time, at the 1972 Games. *Id.*

[150] To be clear, the fact that a technology increases safety does not automatically mean it should be allowed in a sport. The use of a pitching machine could guarantee baseball batters would have no risk of being hit by a pitch, but it would be ruinous to baseball tradition. In the goggles example, goggles are viewed as acceptable because the safety benefits are so high relative to the modest harm to the level playing field and swimming tradition.

IV. Analyzing FINA's Ban

The Ban was FINA's attempt to recreate a level playing field and return to the traditions of swimming.[151] FINA found itself in an unenviable position in 2009 as it faced a multifaceted problem. The swimming community wanted to do away with full-body polyurethane suits, but professional swimmers, FINA, and national SGBs were more financially dependent on their manufacturer sponsorships than ever before, likely as a result of the proliferation of these same suits.[152] Moreover, the record books had been nearly completely rewritten in 2008 and 2009, and any regulations that curbed the suits' effectiveness risked world records not being broken for decades, or perhaps ever.[153] Lastly, FINA needed a solution that would prevent another technology from leapfrogging polyurethane and creating unfair dominance once more.

To some, the Ban was a success story.[154] They praised the administrability of the Ban's bright-line rules regarding suits' body coverage[155] and how, despite corruption within FINA, the organization was still able to successfully regulate itself to promote fairness. To their credit, the Ban's essential components of limiting body coverage and suits' performance enhancement remain in place today.

Fifteen years following the Ban, however, the results appear less satisfactory. Although the Ban obviously addressed swimming's most pressing issue (i.e., full-body tech suits), it failed to address the still-open question: how to adequately limit performance-enhancing technology in swimming. As other

---

[151] *See* Roberts, *supra* note 23 ("The ban was nominally made in the interest of equal access to equipment, but it was also a clear attempt to maintain the sense of gradual progression in the sport.").

[152] Morales, Fajardo & González-García, *supra* note 23 ("[The tech-suit arms race] produc[ed] a growing advertising war to capitalize on the potential benefits of gold medals and sponsorships.").

[153] Connor, *supra* note 78 (quoting the Director of the Centre for Sports Engineering Research at Sheffield Hallam University: "A ban on swimsuits has created an insurmountable rift in performance at the highest levels of the sport. In the fastest swimming events, competitors are at such a disadvantage that the current world records could remain unbroken for decades."). As noted in Sections III(B) and III(D) *supra*, world records are important both to the tradition of swimming and for driving fan interest.

[154] *See, e.g.*, MacDonald, *supra* note 92, at 278 ("Upon realizing polyurethane swimsuits stood to radically change swimming, FINA implemented regulation that swiftly and successfully eradicated the problem.").

[155] *Id.* at 299–300.

forms of technology enter the sport in the post-Ban era,[156] the Ban is better understood as only a half-measure requiring additional regulation, which, in turn, has not materialized.

A. Evening the Playing Field at the Highest Levels of Swimming

The uneven playing field that attracted the most media attention was how the competitive advantage of full-body tech suits forced swimmers to choose between wearing the fastest suit or remaining loyal to their sponsor. To some extent, the Ban succeeded in this regard. Of the tech suits that followed the Ban, none have been alleged to provide a material advantage relative to their peer tech suits. As a result, top athletes can now be sponsored by whichever manufacturer they choose, without having to worry about the risk of serious competitive disadvantage.

Nevertheless, the lack of allegations of unfairness does not mean there is not still potential for abuse. While customized suits are banned,[157] Speedo now brings to market tech suits that are designed for a particular athlete. For example, Speedo's LZR Pure Intent was made in collaboration with and to the specifications of seven-time gold medalist Caeleb Dressel.[158] Dressel thus swims in a de facto customized suit while his competitors do not, giving Dressel an unfair advantage.[159]

---

[156] *Infra* note 180.

[157] World Aquatics, *supra* note 1 pt. 1, art. 7.5.7.5.

[158] *Caeleb Dressel's Secret Weapon? The Suit He Helped to Design*, TheNewsMarket (July 31, 2021), https://web.archive.org/web/20210813224417/https://www.thenewsmarket.com/news/caeleb-dressel-s-secret-weapon--the-suit-he-helped-to-design/s/29b05e75-45d6-423d-909e-81d8a30ce038 [https://perma.cc/UX8M-7YYS].

[159] "[T]ailor-made" tech suits are curiously, but expressly, permitted under W.A.'s Competition Regulations, provided that such tailor-made suits are "accessible on the market to any athletes." Word Aquatics, *supra* note 1, at pt. 1, art. 7.5.7.5. "No customisation" of suits is permitted, though the only difference between custom versus "tailor-made" suits appears to be their availability for purchase on the market; neither term is defined within the Competition Regulations. *Id*. W.A.'s justification for this, perhaps, lies in tech suits' post-Ban effectiveness. Because tech suits' body coverage is so limited post-Ban, the extent to which tech suits help swimmers is also limited. This is particularly true for male swimmers. Dressel enjoys an advantage, but it may be miniscule. There is also always the chance that Speedo or other manufacturers develop suits for other athletes. This seems unlikely, though, as no manufacturer has unveiled a similarly customized suit since 2021 and Dressel, as the top American male swimmer, is particularly monetizable, thus creating more of a business case for making him a customized suit. *See* Pat Forde, *2021 Athlete of the Year: Seven-Time*

The Ban's more wide-reaching impact vis-à-vis establishing a level playing field, though, was its entrenchment of cost for participants in the sport. For athletes sponsored by a suit manufacturer, tech suit costs are less relevant as these athletes typically receive suits for free. However, for all non-sponsored athletes—the vast majority of competitive swimmers—cost remains a real consideration.

A sport can only be accessible to the extent that it is affordable. Elite swimming carries unavoidable expenses; daily practices, team and coaching fees, traveling to and from meets, healthcare, and nutrition pose financial burdens.[160] However, the introduction of tech suits created a new cost to participants that could, and did, easily stretch into the thousands of dollars per year. The Ban allowed tech suits to remain in the sport and, in doing so, cemented additional costs for participants; many of the best tech suits today cost between $300 to $500 for men[161] and $400 to $650 for women.[162] These suits often last for just two meets.[163] Additionally, tech suits designed for only a single stroke have begun to proliferate,[164] requiring swimmers

---

Olympic Gold Medalist Caeleb Dressel, Sports Illustrated (Dec. 8, 2021), https://www.si.com/sportsperson/2021/12/08/caeleb-dressel-tokyo-olympics-si-athete-of-the-year [https://perma.cc/4E6J-EKHJ].

[160] *See, e.g.*, *Michael Phelps' 10000 Calories Diet: What the American Swimmer Ate While Training for Beijing Olympics?*, Int'l Olympic Comm. (May 16, 2021, 05:36 GMT), https://olympics.com/en/news/michael-phelps-10000-calories-diet-what-the-american-swimmer-ate-while-training- [https://perma.cc/YM6C-SJ7F].

[161] *See, e.g.*, *Racing Suits*, Arena, https://www.arenasport.com/en_us/men/swimwear/racing-suits.html [https://perma.cc/F2HU-4CG7] (last visited Oct. 26, 2024); *Mens Elite Swimwear*, Speedo, https://us.speedo.com/men/elite-competition-swimwear.list [https://perma.cc/9KS5-2LAW] (last visited Oct. 26, 2024).

[162] *See, e.g.*, *Racing Suits*, Arena, https://www.arenasport.com/en_us/women/swimwear/racing-suits.html [https://perma.cc/YBL6-XJQG] (last visited Oct. 26, 2024); *Womens Elite Tech Suits*, Speedo, https://us.speedo.com/women/elite-competition-swimwear.list [https://perma.cc/Y2QR-LXQT] (last visited Oct. 26, 2024).

[163] *See How Tech Suits Helps You Swim Faster*, *supra* note 57. Tech suits' primary performance-enhancing feature is their compression; when these suits are worn, they can stretch out and lose their compression fairly quickly.

[164] *See, e.g.*, *Men's Fastskin LZR Pure Intent Backstroke Edition Jammer Tech Suit Swimsuit*, Swimoutlet.com, https://www.swimoutlet.com/products/speedo-mens-fastskin-lzr-pure-intent-backstroke-edition-jammer-tech-suit-swimsuit-8211191/?color=blackrosegold [https://perma.cc/DEH3-GP5T] (last visited Oct. 26, 2024); *Men's Fastskin LZR Pure Valor 2.0 Jammer - Fina Approved*, Speedo, https://us.speedo.com/men-s-fastskin-lzr-pure-valor-2.0-jammer/14990653.html [https://perma.cc/6FMX-DVX5] (last visited Oct. 26, 2024) ("[This] jammer offers greater flexibility and may be preferred by breaststroke and IM swimmers.").

who swim multiple strokes to either purchase additional tech suits or be at a disadvantage.[165]

Tech suits may make swimming cost-prohibitive for many people. There is circumstantial evidence that USA Swimming believes cost is a significant barrier to entry to swimming; in 2020, it banned the use of tech suits for all athletes ages twelve and under.[166] American athletes thirteen and over, though, must still purchase tech suits in order to be competitive.[167] Further, this cost barrier to participate in the sport may have a greater impact on non-American swimmers in the 209 member states governed by W.A. For example, one of the newest W.A. members, Bhutan, only had hotel pools when it joined FINA in 2017,[168] and only in 2021 did it sign an agreement with FINA to build its first-ever competition swimming pool,[169] which was completed in 2024.[170] With so few available pools to train in the country, the participation cost for swimmers in Bhutan is not solely related to equipment but, more fundamentally, to the high cost of pool access itself. For some W.A. member states, as illustrated by the Bhutan case, cost sensitivities are felt long before tech suit costs enter the picture.

---

[165] To be sure, the precise impact of these stroke-specific tech suits has yet to be measured in publicly-available sources. Regardless, a backstroke swimmer wearing a backstroke-tailored suit may benefit from a placebo effect of knowing they have the best possible suit, whereas a swimmer who lacks a stroke-specific suit may perceive themselves to be at a disadvantage and hurt their performance.

[166] Tom Avischious, *Tech Suit Information for Officials*, USA Swimming (2020), https://www.usaswimming.org/docs/default-source/officialsdocuments/misc-officials/tech-suit-for-officials.pdf [https://perma.cc/246W-D79S].

[167] Wall Street Journal, *The Cost of Becoming an Olympic Swimmer for Team USA | WSJ*, YouTube (July 30, 2021), https://www.youtube.com/watch?v=OAFc_CA2YQg [https://perma.cc/3P3S-9B3P] (stating (i) a competitive swimmers' annual spend on tech suits can easily stretch into the thousands of dollars, (ii) by the time a competitive American swimmer reaches the collegiate level, they will have spent between $16,000 to $40,000 on club team dues alone, and (iii) expenses for Olympic swimming hopefuls typically range from $25,000 to $40,000 annually).

[168] Braden Keith, *FINA Announces Kingdom of Bhutan as 208th Member Federation*, SwimSwam (June 10, 2017), https://swimswam.com/fina-announces-kingdom-of-bhutan-as-208th-member-federation/ [https://perma.cc/66ZV-ABHC].

[169] *FINA President Signs Two Pioneering Agreements with Bhutan and South Africa*, World Aquatics (June 24, 2021), https://www.worldaquatics.com/news/2178105/fina-president-signs-two-pioneering-agreements-with-bhutan-and-south-africa [https://perma.cc/CW6U-7YDT].

[170] Charlotte Wells, *Bhutan Opens Nation's First Ever Competition Swimming Pool: World's Highest*, SwimSwam (May 18, 2024), https://swimswam.com/bhutan-opens-nations-first-ever-competition-swimming-pool-worlds-highest/ [https://perma.cc/S3YC-UX3D].

The unavoidable costs of participating in competitive swimming—and, for that matter, in any sport—already create an uneven playing field. Swimmers must be able to spend to participate and be competitive; those who are unable to spend are unable to compete.[171] This unfortunate reality is exacerbated by the Ban's permission of tech suits, which are virtually necessary and therefore represent an additional unavoidable cost for elite athletes. Thus, the Ban both largely evened the playing field for swimmers with sponsorships and perpetuated an uneven playing field for anyone unable to afford the best suits.

B. Returning to Swimming Tradition, but Not Really

The Ban was a partial success in returning swimming to its roots. With no more full-body polyurethane suits, performance outcomes became more dependent on swimmers' personal attributes rather than the particular suit they wore. So too did races become more of a challenge as the suits did less work for the swimmers. Six-time Olympic medalist Matt Grevers commented prior to the Plastic Games: "[W]hen we roll back [on full-body suits], racers are going to hurt a lot more than they hurt currently[.]"[172] The Ban also stymied any chance of a faster material than polyurethane being introduced to the sport and corrupting swimming tradition more than polyurethane had.

The Ban failed to level the playing field, however, in that the post-Ban tech suits are still performance-enhancing, albeit less so than the LZR, X-Glide or Hydrofoil. While polyurethane was especially effective, it was not the only mechanism tech suits possessed to improve swimmers' speed. After all, the original Fastskin did not have polyurethane and it still changed the face of swimming. Today's tech suits continue to be extremely tight-fitting, and the compression provides the same benefits that it always did, just to a lesser extent.[173]

The means by which W.A. established the legality of tech suits post-2010 is curious. Similar to the former Rule 10.7, W.A. Competition Regulations Rule 15.3 now states: "No swimmer shall be permitted to use or wear any device or swimsuit that may aid his/her speed, buoyancy or endurance during a competition."[174] Dating back to 2000, manufacturers and their

---

[171] Unavoidable disparities in swimming include access to a pool, as illustrated by the Bhutan example.

[172] Crouse, *supra* note 3.

[173] Morales, Fajardo & González-García, *supra* note 23 ("Body compression has been considered to be the main cause of the improvement in performance.").

[174] World Aquatics, *supra* note 2 pt. 2, art. 15.3.

sponsored athletes were careful to present the first tech suits as "optimizing" athletes' performances, but not "enhancing" them.[175] According to this view, tech suits only manage existing forces instead of creating new ones;[176] in other words, tech suits do not make athletes faster by themselves, they merely reduce drag affecting the swimmer.[177] This view ignores the significant body of scientific evidence that shows that compression alone improves swimmers' endurance.[178] Even without scientific evidence, 'managing existing forces' seems to be a prima facie means of "aid[ing] speed" under W.A. Competition Regulations Rule 15.3. In a sport characterized by its high-drag environment, reducing drag necessarily enhances performance.

Perpetuating this counterintuitive view may have been necessary, though. If FINA had enacted a full ban on tech suits, such that men returned to competing in briefs, many swim records may never have been broken. As it is, with the Ban limiting tech suits' effectiveness but not eliminating tech suits altogether, one women's record set in a full-body tech suit remains unbroken, while six men's records persist, including Biedermann's 200 meter freestyle at the Plastic Games.[179] Allowing tech suits to remain legal in the sport preserved the dimension of elite swimming in which athletes are motivated by the pursuit of making swimming history. Then again, FINA could have opted to

---

[175] Magdalinski, *supra* note 19, at 1 ("In 2000, after trialling a 'fastskin' for Adidas, Ian Thorpe announced to a press conference that the new full-length swimsuit certainly 'optimised' his performance but carefully pointed out that it did not 'enhance' it."). Although there is only circumstantial proof of this, Speedo's decision to name its first tech suit the "Fastskin" suggests it was trying to emphasize its suit was simply an improved version of human skin, and not an unnatural performance-enhancer.

[176] Bryce Dyer, *The Controversy of Sports Technology: A Systematic Review*, 4 SpringerPlus 524, 531 (2015) ("[A] defence was provided by Speedo that suggested the suit only improved the management of existing forces rather generating new ones.").

[177] Swimmers struggled at times to convey this message. For example, seven-time Olympic medalist and Speedo-sponsored Grant Hackett said that athletes deserve the credit for their performances, not the LZR, but moments later contradicted himself: "Of course, the suit contributes to performance." *Swimmers Might Have to Choose Between Sponsor or Faster Speedo*, *supra* note 56.

[178] *See* Morales, Fajardo & González-García, *supra* note 23 (detailing studies conducted between 2001 and 2014 analyzing tech suits' effect).

[179] World Aquatics tracks 20 events swum in Olympic size pools for each gender. *Women Freestyle World Records*, World Aquatics, https://www.worldaquatics.com/swimming/records?recordCode=WR&eventTypeId=&region=&countryId=&gender=F&pool=LCM [https://perma.cc/5NYE-Q6ZD] (last visited Oct. 26, 2024); *Men Freestyle World Records*, World Aquatics, https://www.worldaquatics.com/swimming/records?recordCode=WR&eventTypeId=&region=&countryId=&gender=M&pool=LCM [https://perma.cc/5KEW-APQ3] (last visited Jan. 10, 2026).

enact a full ban and wipe its record books clean,[180] or used some other means of differentiating records set in full-body tech suits.

While some records set in full-body tech suits remain unbroken, the majority have been eclipsed. That fact is a curiosity. The discrepancy between the single remaining women's record and the six unbroken men's records is most easily explained by how the Ban allowed tech suits to continue to cover female athletes' bodies much more than their male peers. As a result, the Ban reduced tech suits' effectiveness more for male athletes. However, even in the men's record book, the majority of records set in full-body tech suits have been broken.

This, in turn, calls into question how such a feat is possible. Perhaps athletes and athletic training have improved such that they can now outcompete their 'supersuited' predecessors. While generational talents like Katie Ledecky have emerged post-2009, this explanation alone is insufficient. Michael Phelps, for example, is another generational talent who set world records on thirty-nine occasions during his career,[181] yet he is no longer an individual record-holder despite having competed in a suit that put him at a marked advantage relative to competitors today.

The more likely explanation for this phenomenon is that, although suits are now less performance-enhancing than in the 2000s, other forms of performance-enhancing technology in swimming have bridged the performance gap.[182] The years immediately following the Ban saw the lowest rates of world

---

[180] *Cf.* After a new javelin was introduced in the 1980s, the sport of javelin successfully restarted its record book. Tucker & Dugas, *supra* note 18. Some advocated for this approach in swimming. *See* Crouse, *supra* note 3 ("Mark Schubert, the general manager of the United States national team, . . . said the records should be stricken because they were artificially aided.").

[181] *Most World Records Set for Swimming (Male)*, Guinness World Records, https://www.guinnessworldrecords.com/world-records/63391-most-world-records-held-for-swimming-males [https://perma.cc/K8T7-TXD6] (last visited Oct. 26, 2024).

[182] For example, since 2009, FINA has approved a wedge to improve backstroke starts, increased mandatory pool depth, and legalized wearable technology. Jess Geriane, *A History of the Backstroke Start and Backstroke Wedge*, Swimming World (Oct. 19, 2023, 08:31), https://www.swimmingworldmagazine.com/news/a-history-of-the-backstroke-start-and-backstroke-wedge/ [https://perma.cc/P9DA-DGTD]; Natalie Venegas, *Is Olympics Swimming Pool Too Shallow for World Records?*, Newsweek (July 31, 2024, 18:08 ET), https://www.newsweek.com/olympics-swimming-pool-too-shallow-world-records-1932665 [https://perma.cc/CJM4-C8MK]; Mel Stewart, *FINA to Allow Wearable Technology in Races Starting Jan 1st 2023*, SwimSwam (Oct. 16, 2022), https://swimswam.com/fina-to-allow-wearable-technology-in-races-starting-jan-1st-2023/ [https://perma.cc/CNE2-HYSQ].

record performances in history.[183] Given the importance of new world records to awareness and excitement about the sport, W.A. was incentivized to increase the use of performance-enhancing technology, not to lessen it, post-2009. Although there is no similar outcry today about technology's impact on swimming, top swimmers now generally outcompete those from 2008 and 2009—an era where there was concern about whether the sport was really 'swimming' at all.

C. The Market Persists

The Ban allowed for the tech suit market's status quo to persist. Although manufacturers were unhappy with the Ban, it allowed them to continue innovating and, more importantly, selling tech suits for hundreds of dollars each.[184] This was also desirable for professional swimmers and SGBs, who continued to receive sponsorships from suit manufacturers.[185] In 2011, Speedo unveiled its newest post-Ban offering, the "Fastskin3 Racing System," which included a tech suit, goggles and a cap.[186] Prices ranged from $40 for the cap to $560 for the women's suit.[187] From a tech suit market perspective, little changed.

---

[183] Elan Ness-Cohn, *Disruptive Sports Tech: Exploratory Analysis of Swim World Record Data*, Nw. Univ. (July 3, 2019), https://sites.northwestern.edu/elanness-cohn/2019/07/03/disruptive-sports-tech-exploratory-analysis-of-swim-world-record-data/ [https://perma.cc/955V-K5VL].

[184] *See, e.g.*, Associated Press, *Speedo Says Decision Could Hurt Sport*, ESPN (July 24, 2009, 18:48 ET), https://www.espn.com/olympics/swimming/news/story?id=4356078 [https://perma.cc/UB3X-GUU8] (quoting Speedo's statement regarding the Ban: "Any move which seems to take the sport back two decades -- such as a possible return to the traditional female swimsuit and male jammer -- is a retrograde step that could be detrimental to the future of swimming."); Purdue University, *Full Video Interview | Jan-Anders Mansson, Exec. Director of the Ray Ewry Sports Engineering Center*, YouTube (July 25, 2024), https://www.youtube.com/watch?v=fn3PTpcBzK0 [https://perma.cc/66MM-TT4T] (where Dr. Mansson states that "there were a lot of companies that did not like [the Ban].").

[185] These sponsorships created, and continue to create, a conflict of interest for FINA and national SGBs. Suit manufacturers give money to SGBs and, perhaps not coincidentally, FINA's decision kept suit manufacturers' revenue streams intact. As an international SGB, FINA is vulnerable to the same potential for corruption as larger SGBs like FIFA, though there is no proof of corruption directly relating to the Ban.

[186] Warnaco Group, Annual Report (Form 10-K) (Feb. 15, 2011).

[187] Jean E. Palmieri, *Speedo's New Weapon: Fastskin3 Racing System*, Women's Wear Daily (Dec. 1, 2011, 00:01), https://wwd.com/feature/speedos-new-weapon-fastskin3-racing-system-5404134-765695/ [https://perma.cc/RYW2-YEED].

It is unclear whether maintaining the tech suit market was necessary, though. Some argued that banning tech suits altogether would cripple the sport of swimming because manufacturers' investment in the sport would dry up.[188] However, from 1896 through 1996, tech suits did not exist. It is much more challenging to argue that swimming could not function without the tech suit market when a century of evidence shows otherwise. Moreover, tech suits did not make up an essential revenue stream for suit manufacturers,[189] and completely banning the tech suits could have simply pressured manufacturers to innovate swimming products outside of suits.[190]

D. Public Interest in Swimming

There may not be a strong correlation between the rate at which world records are set and swimming's popularity. Post-Ban, the opposite proved true: between 2010 and 2017, for example, USA Swimming's membership increased by twenty percent,[191] despite fewer world records being broken during this time than ever in the history of the sport.[192] Thus, despite the belief that world records are important for driving interest in swimming, their impact may be overstated.[193]

---

[188] *See, e.g.*, Tucker & Dugas, *supra* note 41 ("I believe that for FINA to ban the suits outright would drive a stake through the commercial heart of the swimming world. . . . [W]hy would a swimsuit manufacturer even consider a sponsorship of an individual swimmer (or a national federation) when all suits are the same and as basic as possible? Answer - they wouldn't."); Craik, *supra* note 26 at 77 ("[T]he health and wealth of the sport of swimming is inter-linked with the fortunes of the swimwear industry.").

[189] Naughton, *supra* note 58 ("LZR Racer is a pretty small part of our business, under 5 percent.").

[190] For example, even with the partial ban, Speedo incorporated goggles and caps into its Fastskin3 line, creating "the world's first Racing System, engineering cap, goggles and suit to work in harmony." *Fastskin3 Elite Mirrored Goggle*, Speedo, https://us.speedo.com/fastskin3-elite-mirrored-goggle/13236166.html [https://perma.cc/2CUM-2LGJ] (last visited Oct. 26, 2024).

[191] 2021 Membership Demographics Report, *supra* note 145.

[192] Ness-Cohn, *supra* note 183.

[193] Granted, USA Swimming's membership figures are just one of many possible metrics for measuring swimming's popularity. Another valuable metric, Olympic swimming viewership, is not publicly available.

Conclusion

Swimming is not baseball, hockey, or tennis. Technology is an essential element of those sports. Swimming, as much as it may employ technology, is not so similarly reliant. Whereas there can be no baseball without a bat, there can be swimming without any form of technology involved. At its root, swimming is a competition of human versus water. As swimming incorporates new technology, then, so too does it stray further from its tradition.

The use of technology in swimming itself does not risk a crisis of legitimacy within the sport, however. Since its Olympic debut in 1896, swimming has evolved to incorporate pools, starting blocks, lane lines, and goggles, to name only a few examples. These technologies impacted the sport in a variety of ways yet did not call into question the legitimacy of swim competition.

However, swimming's evolution between 1999 and 2009—and, particularly, the crisis from 2008 to 2009—animated such questions over legitimacy. Over the course of a decade, swimming became a sport that no longer resembled traditional, more 'pure' conceptions of swimming. Through the use of full-body tech suits, so much performance-enhancing technology was adopted by the sport that swimming itself became unrecognizable and, in the eyes of many, illegitimate. The 2008–09 crisis evinced how the scope of permissible technological innovation in swimming is finite: there must be limit to performance-enhancing technology in swimming. Given its tradition as a sport that is not reliant on technology, the existence of such a ceiling makes sense.

In its role as the regulator of technology in swimming, W.A. must balance several interests. To satisfy its sponsors, keep itself liquid, and make way for new world records, W.A. must allow for new technologies to enter the sport. But, in order to keep swimming true to its tradition, W.A. cannot do so indefinitely.

These conflicting interests place W.A. in an unsustainable position. For the moment, W.A. appears poised to continue allowing new technologies, albeit in an incremental fashion. Nevertheless, there is a finite amount of performance-enhancing innovation that can occur outside of suits. If the superior aim is for new world records to be achieved regularly, there will come a time when the pursuit of world records will require rewriting the Ban to allow for the reintroduction of full-body tech suits. The problem with this outcome has already been demonstrated by the full-body tech suit saga of the 2000s.

Full-body tech suits are a proven step too far, yet W.A.'s incremental management strategy threatens to steer swimming back in that very direction.[194]

There are three crucial takeaways that can be extrapolated from the full-body tech-suit case study. First, for sports that are traditionally viewed as not relying on technology, the regulation of new technology is necessary. Athletes and manufacturers alike are incentivized to achieve the highest possible performance through the use of technology, and SGBs must act as a regulator to prevent their sport(s) from evolving in undesirable ways. Second, for these sports, there is an upper boundary to the acceptable amount of performance-enhancing technology involved. Although this ceiling is subjective, the 2008–09 crisis evinces how swimming can accept only a finite amount of performance-enhancing technology before the community for the sport revolts.

Third, SGBs must develop a technology-regulation strategy that underpins their long-term vision for their sport(s). Without a more purposeful direction in their sports' evolutions, SGBs' regulation of new technology risks steering their sports in directions untethered from their roots, as was the case with FINA and full-body tech suits. W.A. need not necessarily freeze all approvals of new technology, but the future of swimming cannot be a hyper-technological sport.[195] Absent a more purposeful technology-regulation strategy by W.A., swimming is poised to return to troubled waters.

---

[194] Even if the reintroduction of full-body tech suits went smoothly, it would be no more than a short-term fix to the problem W.A. faces. The only way to ensure world records regularly fall is to continually add new performance-enhancing technology, and something else would need to come after full-body tech suits.

[195] To be sure, W.A. could freeze all new technology approvals. Although world record progression would stagnate, this appears inevitable. However, this is not the approach this Article argues for (nor is there any particular approach this Article argues for). Additionally, a complete freeze is not likely economically feasible for W.A. One could imagine alternative scenarios where, for example, W.A. creates two levels of competition, one with tech suits banned in their entirety and another with full-body tech suits allowed. Powerlifting uses such an approach, where "raw" and "equipped" competitions have separate record books.