"Makeup Calls" in Sports & Courts

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In the world of professional sports where teams pay players millions of dollars in an effort to prevail or where individual athletes compete for millions, it is both unfair and embarrassing if the outcome is influenced, let alone determined, by a refereeing error. Yet we know more clearly today than in previous generations that refereeing mistakes happen. High-definition slow motion video replay technology allows viewers to see clearly that the referee got it wrong: the runner's hand did not beat the tag at second; the defender blocking the shot got only the ball, not the shooter's wrist; and the safety hit the receiver before the ball arrived, not at the same time. Many controversial calls at a crucial moment in an important game that would have been forever a subject of debate can now be seen to have been wrong.

What can be done to prevent refereeing errors from tilting the outcome of a contest? The ideal would be tennis, where an interlocutory challenge procedure using technology comes very close to eliminating refereeing errors. Tennis employs a set of calibrated sensors aimed along each line and feeding into a computer system that allows players to challenge line calls and learn almost immediately whether any part of the ball touched the line.

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But tennis represents an ideal that most other sports can never reach. Refereeing decisions in tennis are two-dimensional and the technology is extremely accurate. Other sports involve much more complicated rules and much more subjective rulings.

Despite these obstacles, professional football has pioneered an interlocutory review system using slow motion video replay that allows coaches to challenge some refereeing. But it is a system of limited review because some important penalties, such as pass interference and holding, are considered by the NFL to be "judgment calls" and not subject to review.

A second limitation to video review in the NFL is that many controversial decisions in football involve the failure to call a penalty and these are not reviewable. Thus, no matter how clearly video replay shows that an offensive player held a defensive lineman so as to prevent the defender from tackling a runner who then scored, there can be no review.

But football is, by comparison, fortunate in being able to correct at least some important refereeing errors through video review. Other sports, such as basketball and hockey, require a continuous flow to the game that requires that players shift quickly from offense to defense and back again, with few (and short) breaks in the action. To interrupt the flow of the game for video review would change the nature of the sport by undercutting the advantage that a better-conditioned or a quicker team should have in the contest. For sports such as these, even the limited review system used in the NFL seems unworkable.

"Makeup Calls" in Sports

So what can be done in an imperfect world where referees make mistakes, there is a lot at stake, and there is no challenge procedure that might permit errors to be corrected? There is no alternative for coaches and managers but to do what they have always done in these situations. NFL coaches must continue to slam their headsets on the ground, the better to run onto the field to confront the nearest referee to protest the unfairness of a call or non-call. In the NBA, coaches must continue to sprint along the sideline next to the

offending referee to give voice to the injustice of what just transpired. And, finally, baseball managers must run as best they can onto the field and go chest to chest with an umpire – without quite touching him – to protest the call. When this yields no change in the ruling, the manager must do something quite beautiful and extraordinary. He must kick a small amount of dirt onto the pants of the offending umpire. For an older and portly manager who never played soccer as a child, the symbolic kicking of dirt can be difficult if the ground is damp or hard. But it must be done to say to the umpire, "I do not respect your decision and, therefore, I must increase your dry cleaning bill."

What is the point of vehemently protesting rulings that the protesters know well cannot and will not be reversed? Obviously, they plead their case in the hope that the referee will see the injustice of what he has done and give the offended team the benefit of the doubt on the next close ruling. (Notice that the berating of linespersons – "What?! Are you blind?" – such a common occurrence in the John McEnroe era, has largely disappeared from tennis matches when the new technology is employed.)

But do referees pay attention to these protests? Of course they do. While it is easy to philosophize that referees should turn a deaf ear since mistakes will balance out in the long run, we don't have the long run at hand. Instead, we have a specific contest and no referee wants to be in the position of having decided a hard fought contest by denying a team a touchdown or by giving possession of the ball to the wrong team as the result of a refereeing error. Hence the need to argue for a call that will balance out the injustice of a prior ruling. These calls that are intended to atone for a previous error or a possible error have come to be known in sports vernacular over the last twenty years as "makeup calls."

It is perhaps not surprising that the term "makeup call" had its origins in the period when jumbotron screens in sporting venues became ubiquitous. These screens replay immediately what has just taken place so that everyone, including the offending referee, can see why a ruling clearly was wrong. This puts additional pressure on

referees to try to balance out the injustice if they can later in the game.

The term "makeup call" is most closely and controversially linked to basketball, a sport where often a refereeing error in the waning seconds can directly determine the outcome. Commentators contend that sometimes when, for example, a referee has erroneously given possession of the ball to team A, the referee will quickly whistle a "makeup call," such as traveling or an improper zone defense on team A in order to restore possession to team B.[1] This is a controversial assertion as it insists that referees sometimes assess fictional penalties in order to right a previous wrong. League officials deny that this happens, yet players and coaches insist that it does.

But whether or not this extreme form of makeup call happens, there can be no dispute that everyone associated with sports including players, coaches, and sports writers often use the term "makeup call" to explain rulings in which – in their opinion – a referee called a penalty in a marginal situation to balance out the inequities caused by a previous ruling that was wrong. Whether the professional sport is football,[2] baseball,[3] soccer,[4] or hockey,[5] you will find newspaper articles, even sports headlines, describing particular penalties as having been "makeup calls."

So accepted is the existence of makeup calls that the Subway chain of sandwich franchises ran a national TV ad during the 2008 Super Bowl season in which a head referee in what appears to be a real game (there is crowd noise in the background) steps to the center of the field, turns to the camera, turns on the switch to his mi-

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[1] Jan Hubbard, *Flawed Rule A Perfect Fit for Imperfect NBA*, FORT WORTH STAR-TELEGRAM, November 17, 2006, D10.

[2] Mark Potash, *Quarterly report*, CHICAGO SUN-TIMES, September 19, 2005, 123.

[3] See, e.g., *Baseball: Hitting Leadoff*, ATLANTA JOURNAL AND CONSTITUTION, April 3, 2007, D11.

[4] See, e.g., Len Ziehm, *Makeup call dooms Fire: Chivas USA 2, Fire 1*, CHICAGO SUN TIMES, August 13, 2006, A68

[5] E.g., Mark Zwolinski, *Leafs let Sabres slip away: Club laments referees' 'makeup' calls; Maurice happy with effort despite loss*, TORONTO STAR, November 23, 2006, D01.

crophone, and announces in slow referee-speak, "I totally blew that call. In fact, it wasn't even close. But don't worry. I will penalize the other team. For no good reason. In the second half. To even things up."[6] The ad then shifts to the advertising message: "This fresh moment deserves another … ."

Part of the reason this fictitious ruling strikes us as comical is the fact that referees cannot speak with candor "on the record" on these matters. Thus, refereeing supervisors are required to deny the existence of makeup calls. But everyone familiar with professional sports not only *sees* makeup calls, but accepts them as a part of sports.

MAKEUP CALLS IN THE LEGAL SYSTEM

Judges are in a position analogous to sports referees in that they must make decisions quickly, the rules are complicated, interlocutory review is not possible for most rulings, and many decisions involve judgment calls. The difference between the two realms of refereeing is, of course, that the legal system cannot tolerate a game the outcome of which was distorted by a ruling that was wrong. For this reason, we have an appellate system to review what happened at trial.

Usually, appellate courts are good at seeing individual rulings in broader contexts so that a denial of a certain discovery request may have been balanced out by more liberal rulings on other requests. Or perhaps a very generous evidentiary ruling for one side at trial was balanced by a similar showing of latitude to the opposing side on a request to admit certain evidence. Appellate courts understand that even the most conscientious trial judges are not perfect; they make mistakes. But mistakes often balance out.

There are times, however, when appellate courts ignore the way the "game" is played at trial and refuse to see individual rulings in a broader context. Instead, they place a single ruling in isolation under their microscope and see the ruling as serious error, when, in context, the error may have been balanced out by other rulings.

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[6] The whole commercial can be viewed at www.youtube.com/watch?v=PcFtcoo0ic4.

To illustrate my point, let me turn to *Shane v. Commonwealth*,[7] a decision of the Kentucky Supreme Court handed down at the very end of 2007, reversing a conviction because a judge made a jury selection error in not removing a particular juror for cause. Because the defense had to use a peremptory challenge to remove this particular juror, the impact of the error, the court concluded, was to leave the defense one challenge short of the nine to which it was entitled and this was automatic reversible error.

Not all jurisdictions view the loss of a peremptory as automatic reversible error, but many jurisdictions do, including Vermont, Colorado, Virginia, and California.[8] *Shane* is thus typical of many appellate cases that focus all their attention on a single ruling at the jury selection stage with no appreciation that rulings on challenges are often interrelated.

The issue in *Shane* is not complicated. The defendant, Timothy Shane, was in a Colorado prison in 2003 when DNA evidence extracted from cigarette butts left at the crime scene linked him to a 1993 Kentucky burglary/sexual assault. He was charged, brought to Kentucky and convicted of burglary as well as of being an habitual offender ("Persistent Felony Offender" under Kentucky law). The issue on appeal concerned the failure of the trial judge to remove for cause Juror 138.

Juror 138 was a police officer who had not been a police officer at the time of the crime, but who had worked in the same district as two of the officers who had been involved in the investigation (one of whom testified at trial). He said his past association with police officers would not affect his ability to be an impartial juror, but he also said that he was "absolutely" pro-police and he did not believe police would lie under oath because they took the oath more seriously. The defense asked the judge to remove Juror 138 for cause and, when the judge refused, the defense used a peremptory on Juror 138.

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[7] Shane v. Commonwealth, No. 04-CR-000977 (Ky. December 20, 2007).

[8] See generally William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AMER. CRIM. L. REV. 1391 (2001).

Let's assume the court is wrong on Juror 138: he gave some "good" answers and some "bad" answers, but, on balance, he should have been struck for cause. So what? Maybe this was a makeup call. Perhaps the judge was thinking to himself, "I have given the defense three very favorable rulings on challenges for cause. One of them, in particular, I think was definitely not necessary. This is another close one, but I think this is a conscientious person who can be fair so I will make the defense use a peremptory." So maybe the defense never lost a peremptory in the end because the calls on challenges for cause balanced out.

I realize that the "official" position of any spokesperson for the judiciary, just like the official position of Major League Baseball, the National Football League, and the National Basketball League, has to be to insist that makeup calls are a myth and could never happen in an American court. Judges, the spokesperson would assure us, are made of sterner stuff than the rest of us so that, even subconsciously, they would never balance equities in this way.

But I think we can be fully confident that makeup calls happen in court just like they happen on the court. The reason is that makeup calls are a part of parenting, of social sports, and of life. We all try to balance the equities, and if we have been harsh on one occasion, we try to be more generous on the next. Thus, we have to understand the error with Juror 138 as part of a series of rulings to appreciate its impact.

Another way in which this ruling may have been a makeup call relates to the way the judge was ruling on the prosecution's challenges for cause. For example, maybe the judge thought to himself, "I have been very tough on prosecution challenges for cause. There were two jurors whom I probably would have dismissed for cause, but I trust people when they say they can be impartial. I made the prosecution use two peremptories on those two jurors. So I am going to be equally tough on the defense."

When a referee has to make rulings that are somewhat subjective, athletes understand that one referee may rule differently from another on the same issue. Baseball players know that some umpires have smaller strike zones than others and basketball players under-

stand that some referees call games "more closely" than others. But what is important is that they call the game the same way for both sides.

The same logic applies to jury selection errors. To understand this error, we need to understand how the judge rules more generally on challenges for cause. Sure, the defense was entitled to nine peremptories under Kentucky law and this error meant the defense only had eight. But maybe the defense lost a peremptory but the prosecution lost two or three?

It may also be the case that the defense didn't really need the additional peremptory. Although the defense exhausted its peremptories, when a state treats an error on a challenge for cause as automatic reversible error, defense lawyers *always* exhaust their peremptories because the possibility of an automatic new trial, no matter how strong the evidence, is so attractive. In my own state, Colorado, which also follows the automatic reversal rule, defense lawyers customarily exhaust their peremptories when they think they have an appealable issue on a challenge for cause that went against them. But sometimes they really like the jurors who are in the twelve seats in the jury box, so they exhaust their peremptories by directing them at the seat designated for the alternate. This means firing the last two or three peremptories at the alternate seat until they have no more challenges remaining. Perhaps that happened here and the alternate was never needed.

Conclusion

In the end, we know some things about Juror 138, but nothing about the rest of the game. We don't know how the judge ruled on other defense challenges or on the prosecution's challenges. I don't think this is fair to the judge. Judges, like referees, have to rule quickly and sometimes they make mistakes. But sometimes a mistake is not as serious in context as it might appear and sometimes it may even be balanced out completely by other rulings that went in favor of the wronged party. At least we ought to look.