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Standards of Review in Law and Sports:
How Instant Replay's Asymmetric Burdens
Subvert Accuracy and Justice

Steve P. Calandrillo*
Joseph Davison**

ABSTRACT

A fundamental tension exists in both law and sports: on one hand, adjudicators must “get the decision right” in order to provide fairness to the parties involved, but on the other, they must issue speedy and certain rulings to avoid delaying justice. The certainty principle dictates that courts follow *stare decisis* in the law even if they believe that an earlier decision was wrong. However, it is often the case that there is a need to reverse earlier decisions or the law itself in order to make the correct call on appeal. Both law and sports are constantly balancing the goals of accuracy, fairness, certainty, and speed by providing for different standards of proof for initial rulings versus appellate review, as well as different burdens in civil versus criminal cases. While asymmetrical burdens in law might be desirable (e.g., to protect the rights of the innocent or to reflect the fact that juries are in a better position to judge credibility than appellate judges), they do not carry

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the same intuitive appeal in sports. The commonly used indisputable evidence standard employed by professional sports leagues for reviewing and reversing referee decisions only leads to unnecessary inaccuracy and unfairness. It requires an enormously high threshold to be met before an official's decision on the field can be corrected, whereas absolutely no evidence at all is required to allow that same call to stand. Sports would be well-served to borrow the lessons of law in order to further the fundamental goal of fairness without compromising certainty or speed, abandoning the asymmetrical indisputable proof burden in favor of a *de novo* standard of review.

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I. INTRODUCTION

For centuries, the appellate process has served as an integral part of America’s justice system.¹ Parties on the losing end of a court’s judgment occasionally claim that the ruling was incorrect in some specific manner. The law usually allows these parties to appeal to a higher court for review of that decision.² The higher court may be able to reverse the decision, affirm it, or remand it back to the lower court for further review.

By comparison, appellate review in the world of professional sports—known ubiquitously to the layman as instant replay review—is a relatively new phenomenon. While fans complained for decades about inaccuracies and injustices created by officiating errors, instant replay review did not truly explode in popularity until the past decade. A fierce debate over the merits of review ensued. On one side, traditionalists feared both the removal of the human element and the imposition of delays in the game. The other side returned fire with myriad arguments in favor of furthering accuracy and justice. Even though it’s “just a game,” most fans and players agree that the outcome should be determined by the merits of each team and not by mistakes made by referees or umpires.

However, one of the most overlooked aspects of instant replay review in sports is the asymmetric burdens that each league imposes on the officials in charge of the review. While appellate courts often examine legal issues *de novo* (meaning no deference is given to the lower court), professional sports leagues take a dramatically different approach. In all such leagues, the standard of review comes far closer to requiring “indisputable visual evidence” before a replay official can overturn a call made on the field.³ On the other hand, absolutely no proof at all is required to uphold the decision. As a direct consequence of this asymmetry, relatively few calls are reversed, even when most observers (including experts) agree based on the visual evidence

¹ See David Rossman, “*Were There No Appeal*”: *The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518 (1990).

² In the federal court system, the levels of judicial decision-making include the district courts, the circuit courts of appeal, and the Supreme Court. State courts are usually organized in a similar manner, though some variances exist.

³ MLB requires *clear and convincing evidence* that the original call made on the field of play was incorrect; the NFL demands *indisputable visual evidence* that warrants the change; the NBA requires *clear and conclusive evidence*; and the NHL requires, unofficially, a *clear view on the video of the opposite or different circumstances*.

that the decision made on the field was likely incorrect. Such a draconian standard in sports does have the limited virtue of reducing challenges and delays in the game, but it comes at the expense of accuracy, fairness, and justice to all parties involved. Witness this year's Super Bowl 50: a crucial incomplete pass call against the Carolina Panthers was allowed to stand after instant replay review even though both of the television announcers, as well as NFL officiating expert Mike Carey, agreed that it was a good catch and that the call should have been reversed. Instead of Carolina driving to take the lead, Denver went on to strip Cam Newton of the football two plays later, completely changing the complexion of America's biggest game and contributing to an incredible upset.

This paper examines why American sports leagues support this continued injustice in sports. America's judicial system does not usually require extraordinary thresholds for reversing most lower court decisions,⁴ even though a person's freedom or entire wealth could be at stake. Why should sports insist on creating a non-level playing field when far less is in play?

At base, asymmetric burdens of review essentially assure a higher level of error than would otherwise be the case.⁵ They bias the reviewer in favor of the decision below, whether or not that decision was accurate and whether or not there is a compelling reason for deference. It is deeply ironic that the standard for reviewing decisions in sports is riddled with structural biases favoring inaccuracy when leagues instituted instant replay to remedy that precise problem in the first instance.

This Article explores the policy justifications in favor of a more balanced standard of review in sports, borrowing from the rationale of the American justice system. We examine the reasoning behind appellate courts' use of the abuse of discretion standard and the clearly erroneous standard, as well as the situations that call for the previously mentioned *de novo*

⁴ With that said, U.S. courts do require high thresholds for reversal of factual determinations made in trial; however, a much lower bar is mandated for reviewing questions of law.

⁵ For a compelling discussion of the pitfalls of imposing asymmetrical burdens of review, see *Cruzan v. Dir. Missouri Dpt. of Health*, 497 U.S. 261, 316 (1990). The *Cruzan* case represents one of the seminal decisions on the right of an incompetent patient to remove herself from life support. In an emotionally gripping dissent, Justice Brennan lamented the asymmetrical burdens imposed on the patient's guardian, as he was required to demonstrate "clear and convincing evidence" that the patient would have preferred removal, whereas no evidence at all was required to be shown by the State of Missouri to continue treatment against the patient's wishes. Brennan argued that "*accuracy . . . must be our touchstone*" and that the rule requiring clear and convincing evidence only served as a barrier to achieving that fundamental goal.

review. While there exist persuasive, legitimate reasons why appellate judges might defer to lower courts or jury determinations (e.g., the trial court is often in the best position to judge the credibility of witnesses and find facts), those same arguments are inapplicable to the world of professional sports. Instant replay officials almost always have access to far greater information than the referees on the field (e.g., multiple camera angles and slow motion replay). This reality militates strongly in favor of a zero-deference policy through a de novo standard of review. Such a standard could maintain the benefits of the current instant replay procedures—such as maintaining game-flow and the human element—while promoting greater accuracy and justice in sports.

It is time that our professional sports leagues learn to borrow the rationales and standards utilized in America's legal system. Otherwise, the extant injustice and inaccuracy that plague our leagues will persist far into the future.

II. BACKGROUND

As an initial matter, it should be observed that there are two archetypal categories of litigation: civil and criminal.⁶ Both types of litigation feature a unique standard of proof in order to determine liability. After a ruling, litigants may appeal specific aspects of the result. The availability of such an appeal depends on several factors, including the party wishing to appeal, the subject matter of that appeal, and certain judicial processes and requirements.⁷ The subject matter of the appeal determines the appellate standards of review and controls the level of deference that the appellate court is to give to the initial ruling. Some commonly utilized appellate review standards include abuse of discretion, clearly erroneous, and de novo review.

Similarly, the major American sports leagues each have an appellate process for on-field rulings called Instant Replay Review. The indisputable visual evidence standard and the clear and convincing evidence standard, among others, govern replay processes. These burdens are noticeably higher than those exercised in appellate litigation and result in infrequent reversals.

⁶ Private individuals or corporations seeking some sort of monetary or equitable relief generally bring civil cases. Local, state, or federal government generally bring criminal cases in response to a potential violation of law. See *Frequently Asked Questions*, BROWARD SHERIFF'S OFFICE, <http://sheriff.org/faqs/displayfaq.cfm?id=ba787291-0b05-4ab2-9840-b9697bba4cce>, {<https://perma.cc/R2W9-S6KV>} (last visited Jan. 15, 2016).

⁷ These requirements include jurisdiction, standing, ripeness, and many others that lay well outside the scope of this Article.

A. *Burden of Proof in Criminal and Civil Cases*

Burden of proof is a casual term typically used to describe the burdens of production and persuasion required in both civil and criminal lawsuits.⁸ Though the two terms are often lumped together, they have distinct meanings.⁹ The burden of production requires the plaintiff to produce sufficient evidence to support all of the essential elements of her claim, allowing the finder of fact to rule in her favor.¹⁰ If the party with this burden produces insufficient evidence, then the judge may rule against her without sending the case to the jury.¹¹ By comparison, the burden of persuasion is typically what a layperson thinks of when considering the burden of proof—and is what this Article will generally refer to when using the latter term.¹² This burden describes “the standard that the finder of fact is required to apply in determining whether it believes that a factual claim is true.”¹³

These burdens are placed on a civil or criminal court prior to the appellate stage. This process is not unlike a referee making the initial call on the field, prior to an instant replay challenge. When making his initial observation of the play, the referee simply makes the call that he believes is most likely correct (similar to the preponderance of the evidence standard described below). This call may be subject to review, just as a trial court’s initial decision made under one of the following burdens may be appealable to a higher court.

1. Criminal: Beyond a Reasonable Doubt

Throughout criminal proceedings a defendant is presumed to be innocent until proven guilty.¹⁴ As such, since the earliest years of the nation, proof beyond a reasonable doubt has been the common law requirement for

⁸ GEOFFREY C. HAZARD, JR., COLIN C. TAIT, WILLIAM A. FLETCHER & STEPHEN MCG. BUNDY, *PLEADING AND PROCEDURE, STATE AND FEDERAL* 642 (10th ed. 2009).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² The Supreme Court explained this in an opinion. “Burden of proof was frequently used [in the past] to refer to what we now call the burden of persuasion—the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose.” *Id.* at 643 (quoting *Dir., Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994)) (alterations in original).

¹³ *Id.* at 642. A party is said to bear the burden of persuasion when a fact finder must hold against that party if it fails to meet a specific standard.

¹⁴ *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978); *Coffin v. United States*, 156 U.S. 432, 453 (1895).

establishing guilt in a criminal case.¹⁵ Under this standard, the defendant is not required to prove that he or she is innocent.¹⁶ In fact, the defendant is not required to prove anything at all.¹⁷

In the seminal case, *In re Winship*, the Supreme Court solidified this heightened standard as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt in a criminal case.¹⁸ The Court gave two reasons for this “indispensable” requirement: (1) defendants may face the loss of liberty if convicted and (2) defendants would be stigmatized by the conviction as having committed immoral acts.¹⁹ Therefore, society requires that the prosecution satisfy a stringent “guilt beyond a reasonable doubt” threshold before a person may be locked away.²⁰

But what *is* beyond a reasonable doubt? This is a difficult question to definitively answer and one that the Supreme Court has grappled with since *Winship*. A combination of case law, model jury instructions, and statistical evidence help illuminate—to the furthest extent possible—a basic definition of the standard. In *Victor v. Nebraska*, the Supreme Court affirmed jury instructions that defined reasonable doubt as “not a mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt.”²¹ The Court also affirmed definitions requiring proof beyond a “moral certainty” and an “actual and substantial doubt.”²²

The Federal Judicial Center, the primary research and education center of the federal judicial system,²³ has proposed a definition for jury instructions that is also widely accepted.²⁴ It states that “[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s

¹⁵ *In re Winship*, 397 U.S. 358, 361 (1970).

¹⁶ *Patterson v. New York*, 432 U.S. 197, 200 (1977).

¹⁷ *Id.*

¹⁸ *In re Winship*, 397 U.S. at 361.

¹⁹ *Id.* at 363.

²⁰ *Miles v. United States*, 103 U.S. 304, 312 (1880) (“The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt.”).

²¹ *Victor v. Nebraska*, 511 U.S. 1, 14–15 (1994).

²² *Id.* at 12, 20.

²³ FED. JUDICIAL CTR, <http://www.fjc.gov>, {<https://perma.cc/QUN6-2WAJ>} (last visited Jan. 15, 2016).

²⁴ *See Victor*, 511 U.S. at 26 (Ginsberg, J. concurring) (“The Federal Judicial Center has proposed a definition of reasonable doubt that is clear, straightforward, and accurate.”).

guilt.”²⁵ Noting that the law does not require certainty, the Center proposes instructing jury members that if, “based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.”²⁶ Many courts, including the Ninth Circuit, follow a similar model in their definition of beyond a reasonable doubt.²⁷

Additionally, the legal community has consistently attempted to quantitatively define the beyond a reasonable doubt standard—much like how judges frequently define the preponderance of evidence standard.²⁸ For example, in *United States v. Fatico*, a judge polled his colleagues to inquire about what percentage of certainty they believe the reasonable doubt standard represents. He found that the group of judges “quantified” the standard as low as 76% and as high as 95%.²⁹

²⁵ FED. JUDICIAL CTR, PATTERN CRIMINAL JURY INSTRUCTIONS § 21 (1988), http://federalevidence.com/pdf/JuryInst/FJC_Crim_1987.pdf, {<https://perma.cc/B6W6-HCX4>}.

²⁶ *Id.*

²⁷ See Ninth Circuit Jury Instructions Committee, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit*, § 3.5 (last updated Dec. 2016), http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2016_12_0.pdf, {<https://perma.cc/DAY2-K952>} (“Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt. A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.”); Criminal Pattern Jury Instruction Committee of the U.S. Court of Appeals for the Tenth Circuit, *Criminal Pattern Jury Instructions*, § 1.05 (2011), http://federalevidence.com/pdf/JuryInst/10th_Crim_2011.pdf, {<https://perma.cc/B7L3-TJXY>} (“Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. . . . A reasonable doubt is a doubt based on reason and common sense after careful and impartial consideration of all the evidence in the case. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.”).

²⁸ *Preponderance of the Evidence*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/preponderance_of_the_evidence, {<https://perma.cc/2SHB-TQYB>} (last visited Jan. 15, 2016) (defining preponderance of the evidence as a “requirement that more than 50% of the evidence points to something”).

²⁹ *United States v. Fatico*, 458 F. Supp. 388, 410 (S.D.N.Y. 1978).

In sum, while descriptions of the beyond a reasonable doubt standard vary, the standard can in broad brush be distilled down to one distinct principle: proof of guilt must be established to a point of very high confidence, after consideration of all reasonable alternatives. Even in this most demanding of legal standards, however, the careful reader will be sure to note that 100% certainty is *not* required, which is unlike the basic threshold for many major review decisions in the world of sports.

2. Civil: Preponderance of the Evidence

In civil litigation, the generally recognized standard of persuasion is by a preponderance of the evidence.³⁰ “[This] standard results in a roughly equal allocation of the risk of error between litigants.”³¹ To understand preponderance of the evidence, one can imagine a balanced scale. To satisfy the standard, a moving party needs to produce the greater weight of evidence, causing the scale to tip in its favor.³² This typically requires establishing that the existence of the contested fact is more probable than not.³³ For example, the Ninth Circuit’s Model Jury Instructions states: “When a party has the burden of proof on any claim [or affirmative defense] by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim [or affirmative defense] is more probably true than not true.”³⁴ Such a standard is frequently enumerated as a 51% certainty.³⁵

³⁰ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983) (“Where . . . proof is offered in a civil action . . . a preponderance of the evidence will establish the case.”).

³¹ *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

³² Michael S. Greger, *Preliminary Questions of Fact for the Judge: The Standard of Proof for Pretrial Admissibility Problems*, 20 SW. U. L. REV. 453, 461 (1991).

³³ Neil Orloff & Jerry Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159, 1159 (1983).

³⁴ Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, § 1.3 (last updated Nov. 2016), http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Civil_Jury_Instructions_2014_6.pdf, {<https://perma.cc/23FX-DCUG>}. See also *General Instructions for Civil Cases*, FED. EVIDENCE REV., http://federalevidence.com/pdf/JuryInst/3d_Civ_Ch1-3_2010.pdf, {<https://perma.cc/DA49-BUDR>}. (“[P]reponderance of the evidence . . . means [plaintiff] has to prove to you, in light of all the evidence, that what [plaintiff] claims is more likely so than not so. To say it differently: if you were to put the evidence favorable to [plaintiff] and the evidence favorable to [defendant] on opposite sides of the scales, [plaintiff] would have to make the scales tip somewhat on [his/her/its] side. If [plaintiff] fails to meet this burden, the verdict must be for [defendant].”) See also Committee on Pattern Jury Instructions District Judges Association - Fifth Circuit, *Fifth Circuit Pattern Jury Instructions- Civil*, § 2.20 (2006), <http://www.lb5.uscourts>

Why do courts employ this balanced burden of proof standard in civil cases? Society believes this burden is warranted because there is no fundamental reason why the default rule should unfairly favor either party, privileging one's interests over the other's.³⁶ Because a decision for either side will only result in the assessment of monetary damages,³⁷ there is no risk of the irreparable harm present in a criminal trial, necessitating a lesser degree of certainty.³⁸

B. *The Steps to an Appeal*

If a party appeals a ruling, it generally does so after the conclusion of litigation; certain exceptions, however, exist.³⁹ Under the Federal Rules of Civil Procedure, an appellant need only file⁴⁰ a notice of appeal in a timely manner.⁴¹ In a criminal case, a convicted defendant may appeal a guilty verdict, but the government may *not* appeal if a defendant is found not guilty.⁴² Again, this asymmetric burden is based on the unique considerations of criminal cases: the accused should not be subject to "double jeopardy."⁴³ That being said, both sides in a criminal case may appeal a

.gov/juryinstructions/fifth/2006CIVIL.pdf, {<https://perma.cc/HQD5-9PV2>} ("A preponderance of the evidence simply means evidence that persuades you that the plaintiff's claim is more likely true than not true.")

³⁵ *Preponderance of the Evidence*, *supra* note 28 (defining preponderance of the evidence as "a requirement that more than 50% of the evidence points to something."); *see also* Jean v. Greene, 523 F. App'x 744, 745 (2d Cir. 2013).

³⁶ *Addington v. Texas*, 441 U.S. 418, 423 (1979) (stating that "society has a minimal concern with the outcome of [] private suits" and thus "litigants [] share the risk of error in roughly equal fashion"); *see also* *Herman & MacLean*, 459 U.S. at 387–90.

³⁷ Greger, *supra* note 32, at 461.

³⁸ *See In re Winship*, 397 U.S. at 363.

³⁹ *HAZARD ET AL.*, *supra* note 8, at 1328 (noting the exceptions for interlocutory appeals under 28 U.S.C. §1292(b), and for appeals from a district court's order after appeal from a magistrate judge).

⁴⁰ In civil cases, the notice must be filed within 30 days of the judgment, whereas in criminal cases, the notice must be filed within 60 days. *Id.* at 1329.

⁴¹ *Id.* at 1327. An appellant may still have to take administrative steps after filing, such as paying fees. But "none of these steps are jurisdictional." *Id.* at 1327–28.

⁴² *Appeals*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/types-cases/appeals>, {<https://perma.cc/AJE2-8UND>} (last visited Dec. 26, 2016).

⁴³ The Fifth Amendment to the United States Constitution provides: "[No] person [shall] be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. Const. amend V.

sentence that is imposed after a guilty verdict.⁴⁴ In a civil case either side may appeal the verdict.⁴⁵

C. *The Virtues and Pitfalls of Stare Decisis*

American courts generally adhere to the principle of stare decisis, which binds them to the holdings of earlier courts. Horizontal stare decisis (a court's own precedent) or vertical stare decisis (the precedent of higher courts) may bind a court.⁴⁶ The doctrine, however, is not understood as a "universal, inexorable command" that enshrines the law as it stands for all eternity.⁴⁷ Rather, stare decisis serves as a means of providing stability and certainty for civilians, litigants, and lawyers alike, who can act with the security that the lessons of past decisions will govern future legal conflicts.⁴⁸ Therefore, when a court determines that a particular case exposes a flaw in legal reasoning so gaping that the benefits of rectifying it outweigh the resulting loss of stability and certainty, it may choose not to follow stare decisis and overturn a prior decision.

The doctrine's proponents proffer more than the certainty argument. In particular, stare decisis promotes judicial economy; courts are freed from needing to reevaluate prior courts' reasoning every time they encounter a legal issue that their predecessors have adjudicated—a task that would be exhaustive and repetitive. In the words of Justice Louis Brandeis, the world of law places such a high value on stare decisis because "in most matters it is more important that the applicable rule of law be settled than that it be settled right."⁴⁹

However, stare decisis is not without its faults. While appellate courts will sometimes overturn prior decisions where previous courts got the law wrong or where society's mores have changed, the rate at which they do so may be inappropriately low. When a particular statutory analysis would deprive a man of, say, his freedom or his life, a court should be deeply certain that it is not just regurgitating a garbled, faulty interpretation. And what of the doctrine's effect on the judicial mindset? To value administrative efficiency over well-reasoned justice is to slowly convert judges from

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Stare Decisis*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/stare_decisis, {<https://perma.cc/6YMU-63SK>} (last visited Jan. 18, 2016).

⁴⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 954 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

⁴⁸ See *Stare Decisis*, *supra* note 46.

⁴⁹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932).

meticulous analysts into mindless civil servants whose purpose is merely to find the law, not critique and reevaluate it when necessary. Likewise, the world of professional sports should be wary about privileging the certainty of referee decisions made on the field over the justice of reaching the right result in the end.

D. Standards of Review in Appellate Cases

Instant replay challenges in the world of sports are in effect “appeals” of the lower officials’ decision on the field, and as such they can be analogized to appellate review in our legal system. It is thus logical to consider the standard of review that the judiciary uses when trial court decisions are challenged and why those standards are appropriate in each context. A standard of review is the measure of deference an appellate court gives to the rulings of the lower court. Sometimes appellate courts will defer to the lower court’s decision and grant great discretion (e.g., reversal only if the trial court ruling was clearly erroneous), whereas at other times appellate jurists offer no such leniency to the initial decision-maker (e.g., *de novo* review). Let us understand these legal standards and the reasons for their imposition, so we can apply their lessons outside the realm of law as well.

1. The Clearly Erroneous Standard

The clearly erroneous standard is a highly deferential measure used to review findings of fact.⁵⁰ Federal Rule of Civil Procedure 52(a)(6) states that “[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”⁵¹ As the Supreme Court explained in *Anderson v. City of Bessemer City, N.C.*, “[a] finding is ‘clearly erroneous’ when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”⁵² This standard “does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.”⁵³

⁵⁰ See *Ornelas v. United States*, 517 U.S. 690, 694 n. 3 (1996) (“‘Clear error’ is a term of art derived from Rule 52(a) of the Federal Rules of Civil Procedure, and applies when reviewing questions of fact.”).

⁵¹ *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

⁵² *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

⁵³ *Id.*

Even if the appellate court is convinced that it would have weighed the evidence differently, it may not reverse the ruling.⁵⁴

What is the reasoning behind appellate courts' deference to trial courts' findings of fact? The rationale supporting the clearly erroneous standard of review recognizes that trial judges' (and juries') "major role is the determination of fact, and with experience in fulfilling that role comes expertise."⁵⁵ A trial judge is present during the witnesses' questioning and thus has greater access to the testimonial evidence than an appellate court. As such, "due regard [is given] to trial court's opportunity to judge the witnesses' credibility."⁵⁶

2. The De Novo Standard

By comparison, questions of law are reviewed de novo.⁵⁷ Under this standard, the appellate court considers the matter anew—the same as if the matter had never been heard and decided before.⁵⁸ Just as the trial court has a unique institutional role in resolving factual disputes, an appellate court has the institutional role of resolving legal questions.

Immediately noticeable is the stark difference between the deference shown by appellate courts to trial courts on findings of fact versus the lack of any deference on issues of law. As explained by the Supreme Court, "[d]istrict judges preside alone over fast-paced trials: of necessity they devote much of their energy and resources to hearing witnesses and reviewing evidence . . . Thus, trial judges often must resolve complicated legal questions without benefit of extended reflection or extensive information."⁵⁹ In contrast, "[c]ourts of appeals . . . are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues."⁶⁰

⁵⁴ *Id.*

⁵⁵ *Id.* at 574.

⁵⁶ Fed. R. Civ. P. 52(a).

⁵⁷ *Valley Natural Fuels v. Comm'r of Internal Revenue*, 990 F.2d 1266 (9th Cir. 1993).

⁵⁸ *Ness v. Comm'r of Internal Revenue*, 954 F.2d 1495, 1497 (9th Cir. 1992) (citing *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988)).

⁵⁹ *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–32 (1991) (internal quotation marks omitted).

⁶⁰ *Id.*

3. The Abuse of Discretion Standard

Discretionary decisions are reviewed under the abuse of discretion standard. “When a district court is vested with discretion as to a certain matter, it is not required by law to make a *particular* decision. Rather, the district court is empowered to make [its own] decision . . . that falls within a range of permissible decisions.”⁶¹ Primarily, abuse of discretion is used as the yardstick for procedural decisions—such as rulings on motions, objections, sentencing, and admissibility of evidence—rather than substantive rules.⁶² Under this standard, the question is not whether the appellate court “would as an original matter have [acted as the trial court did]; it is whether the [trial court] abused its discretion in so doing.”⁶³ A district court “abuses” its discretion when “(1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.”⁶⁴ That being said, as Judge Friendly of the Second Circuit notes, the abuse of discretion standard has no single definition.⁶⁵

In sum, a trial is a complicated process involving a variety of moving parts that interact in distinct ways. Thus, for certain issues, accurate judgments require a judge to have been present in person, as this unique interaction cannot be entirely reflected in the written record available on review. In these circumstances, because the trial judge sees more in the courtroom than any trial record can reflect, an appellate court appropriately gives the trial judge’s discretionary decisions substantial deference.⁶⁶

E. Standards of Review in Major American Sports

Each of the four major professional sports leagues in the United States has recently instituted its own appellate review procedures. In order to formulate a fairer and more accurate standard of review for each sport, it is helpful to understand and explore the current standards of review and the

⁶¹ *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168–69 (2d Cir. 2001) (emphasis in original).

⁶² Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 34 (1994).

⁶³ *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

⁶⁴ *Zervos*, 252 F.3d at 169.

⁶⁵ Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L. J. 747, 783 (1982).

⁶⁶ *Id.*

reasons why instant replay reviews arose to begin with. Only then can we draw analogies to law.

1. National Football League: “Indisputable Visual Evidence”

In 1978, the National Football League (“NFL”) tested instant replay for the first time during seven televised preseason games.⁶⁷ The league and its owners immediately realized that instant replay was too technologically advanced and too costly for immediate use and shelved the idea.⁶⁸ Yet, the benefits of instant replay were now apparent, and support began to build for its implementation.⁶⁹ For example, in the 1979 AFC Championship Game, Houston Oilers’ wide receiver Mike Renfro caught what appeared to be a game-tying touchdown late in the third quarter.⁷⁰ The officials ruled the pass incomplete, but television replays clearly showed that the Oilers had scored a touchdown.⁷¹ This play became the enduring symbol for instant-replay advocates.⁷²

In 1985, the NFL again tested instant replay during the preseason, this time with more success.⁷³ As a result, the owners approved the use of instant replay during the regular season, beginning in the 1986 season.⁷⁴ Only a few seasons after its inception, instant replay made a signature impact. In the 1989 Chicago versus Green Bay rivalry game, the Packers’ quarterback Don Majkowski threw a last-minute touchdown to wide receiver Sterling Sharpe for an apparent victory.⁷⁵ Chicago believed that Majkowski had stepped across the line of scrimmage before throwing the pass, and the game officials initially agreed.⁷⁶ The incomplete-pass call was reviewed and then reversed, resulting in a Packers victory.⁷⁷ The contest

⁶⁷ *History of Instant Replay*, NAT’L FOOTBALL LEAGUE OPERATIONS, <http://operations.nfl.com/the-game/history-of-instant-replay/>, {<https://perma.cc/JL5J-RBH3>} (last visited Jan. 15, 2016).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *A Brief History of—Controversial Calls in the NFL Playoffs*, THE GAME BEFORE THE MONEY (Jan. 9, 2015), <http://www.thegamebeforethemoney.com/calls/>, {<https://perma.cc/7NLW-6TGS>}.

⁷¹ *Id.*

⁷² James Dudko, *The History of Instant Replay in the NFL*, BLEACHER REPORT (June 8, 2013), <http://bleacherreport.com/articles/1666250-the-history-of-instant-replay-in-the-nfl>, {<https://perma.cc/GLP4-S7A9>}.

⁷³ *A Brief History*, *supra* note 70.

⁷⁴ *Id.*

⁷⁵ Dudko, *supra* note 72.

⁷⁶ *Id.*

⁷⁷ *Id.*

was later named “the instant replay game.”⁷⁸ Yet despite these successes, in 1991 the league voted against bringing instant replay back, noting its apparent ineffectiveness—only 13% of the challenged calls had been overturned in the previous five years.⁷⁹

Replay remained absent from the NFL until the late 1990s. In 1998, Detroit Lions owner William Clay voiced a particularly strong opinion about replay after a loss to the New England Patriots, saying, “I’ve never seen a game called like that in my life. I thought it was terrible. I don’t give a (bleep) if the commissioner fines me or not. It’s just terrible. If we don’t get instant replay, I give up.”⁸⁰ Soon after, in 1999, the league approved the current system, subject to frequent modifications aimed at aiding the on-field referees in officiating.⁸¹ In each regular season and playoff football game, both teams are permitted two challenges that will trigger an Instant Replay Review.⁸² A team may challenge a play by throwing a red flag onto the field before the beginning of the next play.⁸³ If a team is successful on both of its initial challenges, a third challenge will be granted as well.⁸⁴ Team challenges are only allowed in relation to certain types of plays, such as complete passes, interceptions, and fumbles.⁸⁵ The league generally prefers to keep “subjective” play calls, such as pass interference and holding penalties, non-reviewable.⁸⁶ All scoring plays trigger an auto-

⁷⁸ *Id.*

⁷⁹ *History of Instant Replay*, *supra* note 67.

⁸⁰ Leonard Shapiro, *Whether Heads or Tails, Steelers Still Lose*, THE WASH. POST, Nov. 28, 1998, https://www.washingtonpost.com/archive/sports/1998/11/28/whether-heads-or-tails-steelers-still-lose/c5523c80-df33-4dc1-9c8b-bea30265b3f4/?utm_term=.4d0395501245, {<https://perma.cc/CH6T-F5RG>}.

⁸¹ *History of Instant Replay*, *supra* note 67.

⁸² 2015 NFL Rulebook, NAT’L FOOTBALL LEAGUE OPERATIONS Rule 15, Section 2, Article 1, <http://operations.nfl.com/the-rules/2015-nfl-rulebook/>, {<https://perma.cc/FZ53-QZA3>} (last visited Jan. 15, 2016).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at Rule 15, Section 2, Article 4.

⁸⁶ Michael David Smith, *Dean Blandino Calls Illegal Bat Calls “Subjective,”* NBC SPORTS PRO FOOTBALL TALK (Oct. 6, 2015, 11:33 AM), <http://profootballtalk.nbc.com/2015/10/06/dean-blandino-calls-illegal-bat-calls-subjective/>, {<https://perma.cc/UC3Q-YKHV>}.

The NFL rulebook does not offer an explanation as to why most penalties and other such subjective calls are not reviewable. Most likely, league officials have chosen this path so as not to open the floodgates to longer and more frequent review delays, which might significantly increase overall game time. That said, if the NFL were to maintain its current number of allowable per-game challenges but make more types of plays reviewable, no such additional delay would result. Alternatively, the main rationale behind the rule might be to limit overall criticism of referee decisions. However, increased opportunities for such criticism

matic Replay Review—one that is distinct from team-initiated challenges.⁸⁷ Additionally, the NFL allows a Replay Official to trigger replay reviews after the two-minute warning of each half and throughout any overtime period.⁸⁸ There is no limit to the number of replays that the Replay Official can initiate.⁸⁹

Once a particular play has been appropriately challenged, the on-field referee conducts a replay review.⁹⁰ All reviewable aspects of the play may be examined and are subject to reversal, even if the aspect in question is not actually specified in a team challenge or the Replay Official's request for review.⁹¹ The on-field referee reviews the play on a sideline monitor for a maximum of sixty seconds,⁹² while officiating experts in the league's New York headquarters consult with him throughout the process.⁹³ A decision will be reversed only when the referee has *indisputable visual evidence*⁹⁴ that warrants the change.⁹⁵ Lacking such indisputable visual evidence, the ruling on the field will stand or be confirmed. To "confirm" the original call means that on replay the referee verified with certainty that the call was correct. If the original call "stands," it means that the evidence on the replay was not sufficient to meet the indisputable evidence standard to over-

might ultimately lead to greater league efficiency at hiring and firing effective referees. Finally, the distinction between penalties and other calls appears to be a distinction without a difference. A team might be equally disadvantaged by an incorrectly assigned penalty as a blown missed catch call.

⁸⁷ 2015 NFL Rulebook, *supra* note 82, at Rule 15, Section 2, Article 2.

⁸⁸ *Id.* at Rule 15, Section 2, Article 2.

⁸⁹ *Id.* at Rule 15, Section 2, Article 2, Note 1.

⁹⁰ *Id.* at Rule 15, Section 2, Article 3.

⁹¹ *Id.* at Rule 15, Section 2, Article 3, Note 2.

⁹² *Id.* at Rule 15, Section 2, Article 3, Note 1.

⁹³ *History of Instant Replay*, *supra* note 67.

⁹⁴ It should be noted that the 2016 NFL Rulebook shifted the pertinent terminology from "indisputable visual evidence" to "clear and obvious visual evidence." 2016 NFL Rulebook, NAT'L FOOTBALL LEAGUE OPERATIONS Rule 15, Section 2, Article 3, <http://operations.nfl.com/media/2224/2016-nfl-rulebook.pdf>, {<https://perma.cc/6K3D-PJWH>} (last visited Jan. 8, 2017). This Article continues to use the term "indisputable visual evidence" to avoid confusion, as it is the most commonly understood phrase and there is no indication that the shift to "clear and obvious visual evidence" is anything more than a modification of title. In addition, the NFL has provided no commentary signaling that "clear and obvious visual evidence" describes a different standard than did "indisputable visual evidence".

⁹⁵ 2015 NFL Rulebook, *supra* note 82, at Rule 15, Section 2, Article 3. For an excellent analysis of the impacts of the NFL's "indisputable visual evidence" standard of review see Mitchell Berman, *Replay*, 99 CAL. L. REV. 1683 (2011).

turn the call, nor could the referee confirm the call.⁹⁶ In fact, a referee might be 95% sure that the call on the field was incorrect after watching the replay, but that would still fall short of satisfying the necessary standard for reversal. Only if there is *indisputable* visual evidence that the call on the field was wrong will the referee overrule the call. In this case, he might make other revisions, such as resetting the clock.

While coaches frequently believe that calls on the field should be overturned, the indisputable visual evidence standard of review has kept the number of reversals well under 50% (as well as drastically limited the number of challenges in the first place).⁹⁷ From 1999–2013, there were 3,816 NFL games.⁹⁸ Over that period of time, there were 4,717 plays reviewed (1.2 per game), 3,096 of them being team challenges.⁹⁹ Of those 3,096 team challenges, 1,702 were reversed, a total of 36%.¹⁰⁰

2. Major League Baseball: Clear and Convincing Evidence

Priding itself on its tradition, Major League Baseball (“MLB”) was the last of the major American sports to introduce replay into its regular-season and post-season games. In 1987, then-Commissioner Peter Ueberroth stated that umpire decisions are “a part of the game and part of the tradition of the game” and that he would rather not see “baseball become plastic with the use of instant replays.”¹⁰¹ Nevertheless, in 2008, under the leadership of Commissioner Bud Selig, the league first instituted replay for disputed home run calls.¹⁰² As then-Cleveland Indians’ General Manager Mark Shapiro said, “[w]e have the technology and ability to get the calls right, so we should.”¹⁰³

⁹⁶ Jarrett Bell, *At NFL’s Command Center, Reviews Must Be Right*, USA TODAY, Nov. 10, 2014, <http://www.usatoday.com/story/sports/nfl/2014/11/10/officiating-command-center-reviews-dean-blandino/18784813/>, {<https://perma.cc/MYU3-8WBN>}.

⁹⁷ *History of Instant Replay*, *supra* note 67.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Marc McFarland, *Baseball Commissioner Peter Ueberroth Said Thursday That Instant Replay . . .*, UNITED PRESS INTERNATIONAL (Oct. 29, 1987), <http://www.upi.com/Archives/1987/10/29/Baseball-Commissioner-Peter-Ueberroth-said-Thursday-that-instant-replay/8240086533250/>, {<https://perma.cc/5F96-TQBQ>}.

¹⁰² Associated Press, *MLB Approves Replay in Series That Start Thursday*, ESPN (Aug. 27, 2008), <http://sports.espn.go.com/mlb/news/story?id=3554357>, {<https://perma.cc/Q3A6-QHA7>}.

¹⁰³ Russ VerSteege & Kimberley Maruncic, *Instant Replay: A Contemporary Legal Analysis*, 4 MISS. SPORTS L. REV. 153, 191 (2015), <http://mssportslaw.olemiss.edu/>

Yet it was not until the 2014 season that the MLB owners approved an extended use of instant replay. Unfortunately, this came several years too late to rectify some of the league's more infamous missed calls, which could have been corrected through instant replay.¹⁰⁴ For example, on June 2, 2010, Armando Galarraga almost became one of fewer than two-dozen players in MLB history to pitch a perfect game. With two outs in the ninth inning, Galarraga faced Jason Donald, who hit a soft ground ball to first base.¹⁰⁵ First baseman Miguel Cabrera quickly threw Galarraga the ball, who touched first base for the out before Donald could get there.¹⁰⁶ Famously, Umpire Jim Joyce ruled Donald safe, giving him an infield single and ending Galarraga's bid for a perfect game.¹⁰⁷ Video replay showed that Galarraga clearly beat Donald to the bag, but the team and umpires were without the option for replay.¹⁰⁸

Partially as a result of the Galarraga injustice, MLB now uses video replay review in all regular and post-season games to provide timely review of certain disputed calls.¹⁰⁹ Each team receives one Manager Challenge at the start of every regular-season game and two Manager Challenges at the start of every post-season game.¹¹⁰ On the one hand, if the team wins its challenge, the team retains the Manager Challenge.¹¹¹ On the other hand, if the Replay Official does not overturn the challenged call, the team loses its ability to appeal future calls in the game.¹¹² Challenges are only allowed after certain types of plays, such as potential home run calls, force/tag play calls, catch plays in the outfield, base running, collisions at home plate, and

files/2015/09/EIC-VerSteege-Edit-FINAL-Macro-p.-153-273.pdf, {<https://perma.cc/FF23-VZT5>} (quoting Stan McNeal, *Upon Further Review . . . Baseball Replay Didn't Arrive on August—As Was Rumored—But It's Still on the Horizon*, THE SPORTING NEWS 76 (Aug. 2008)).

¹⁰⁴ Paul Hagen, *Expanded Replay Approved, to Begin This Season*, MAJOR LEAGUE BASEBALL (Jan. 16, 2014), <http://m.mlb.com/news/article/66737912/mlb-approves-expanded-instant-replay-beginning-with-2014-season>, {<https://perma.cc/AF44-ABMX>}.

¹⁰⁵ *Joyce Behind Plate Day after Blown Call*, ESPN (June 3, 2010), <http://sports.espn.go.com/mlb/news/story?id=5246454>, {<https://perma.cc/6ZDD-QSBG>}.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Replay Review Official Info*, MAJOR LEAGUE BASEBALL, http://m.mlb.com/official_rules/replay_review, {<https://perma.cc/U8UL-T4S8>} (last visited Jan. 15, 2016).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

tag-ups.¹¹³ Approximately 90% of all potential calls are reviewable.¹¹⁴ Additionally, MLB allows the Replay Official to initiate a video replay review of any potential home run call.¹¹⁵ Furthermore, the crew chief may utilize video replay review for any reviewable call beginning in the seventh inning, at his own behest or upon the request of a manager with no remaining Manager Challenges.¹¹⁶

After a challenge has been made, the Replay Official must determine whether there is *clear and convincing evidence* that the original call made on the field of play was incorrect.¹¹⁷ Similar to the NFL, the original decision of the umpire will stand unless the Replay Official definitively concludes that the call on the field was incorrect.¹¹⁸ Without clear and convincing evidence that the call was incorrect there are two things that could happen. First, if there is an absence of conclusive video, the call will stand. Second, if the video provides conclusive evidence to support the call, that call is confirmed.¹¹⁹ If the video replay review results in a change to a call, the crew chief, if possible, will make the appropriate changes to place both teams in the position they would have been in had the call on the field been correct.¹²⁰ The Replay Official's decision is "final and binding . . . and is not subject to further review or revision."¹²¹

On review, MLB calls have been overturned at a slightly higher rate than those in the NFL. Over the course of the 2015 baseball season, there were 1,360 instant replay challenges¹²² over 2,466 games,¹²³ a total of 0.55

¹¹³ *Id.*

¹¹⁴ Paul Hagen, *Instant Replay Review FAQ*, MAJOR LEAGUE BASEBALL (Mar. 26, 2014), <http://m.mlb.com/news/article/70189582/instant-replay-review-faq>, {<https://perma.cc/C5A9-ZYUU>}.

¹¹⁵ *Replay Review Official Info*, *supra* note 109.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Oliver Roeder, *Has Expanded Replay Worked Well in Baseball? Here's Our Call*, FIVETHIRTYEIGHT (Sept. 12, 2014), <http://fivethirtyeight.com/features/has-expanded-replay-worked-well-in-baseball-heres-our-call/>, {<https://perma.cc/8M29-U98S>}.

¹²⁰ *Replay Review Official Info*, *supra* note 109, at Section (II)(J)(3).

¹²¹ *Id.* at Section (II)(D)(6).

¹²² *MLB Instant Replay Database*, https://baseballsavant.mlb.com/replay?challenge_type=&year=2015&challenger=teamchallenging&team, {<https://perma.cc/4NTD-3S6Z>} (last visited Jan. 15, 2016).

¹²³ See *Which Major League Baseball Teams Had the Best Success with Instant Replay Challenges*, MAKEGAMEDAYEVERYDAY (Oct. 9, 2015), <http://www.makegamedayeveryday.com/newsfeed/2015/10/9/10091/which-major-league-baseball-teams-had-the-best-success-with-instant-replay-challenges>, {<https://perma.cc/EG26-45H7>} (indicating that there are 2,430 regular season MLB games); see also *Postseason 2016*

per game. Of those 1,360 challenges, only 669 of them resulted in a reversal (49%).¹²⁴ That success rate has remained relatively consistent over time, as it was 47% the year prior.¹²⁵

3. National Basketball Association: Clear and Conclusive Evidence

The National Basketball Association (“NBA”) began using instant replay after the 2001–2002 season.¹²⁶ Initially, the system was only used to review last-second shots,¹²⁷ but countless missed calls forced the NBA to expand the availability of review. For example, in 2007, the Los Angeles Clippers trailed the Houston Rockets by three points with 2.5 seconds left in the game.¹²⁸ Clippers player Cuttino Mobley was fouled behind the three-point line, but the referee ruled it a two-point shot.¹²⁹ At the time, this call was not reviewable.¹³⁰ As a result, Mobley was only awarded two foul shots and the Clippers lost the game.¹³¹

Replay has since been expanded to include fifteen total scenarios: among them, reviews of flagrant fouls, determinations of whether a field goal attempt was a 2-pointer or a 3-pointer, reviews of possible 24-second shot clock violations, and determinations of which player last touched the ball before it went out of bounds during the last two minutes of regulation and overtime.¹³² A review is triggered when a referee is not reasonably certain that the call on the floor is correct.¹³³

An on-court referee analyzes each reviewed play from a monitor on the sideline of the court. NBA employees at the Referee Operations and Replay

Game Results, MAJOR LEAGUE BASEBALL, <http://m.mlb.com/postseason-schedule>, {<https://perma.cc/Q7JT-6E22>} (last visited Jan. 15, 2016) (indicating that there were 36 postseason MLB games in 2015).

¹²⁴ *MLB Instant Replay Database*, *supra* note 122.

¹²⁵ *Id.*

¹²⁶ *NBA Referee Instant Replay Trigger Outline*, NAT’L BASKETBALL ASS’N, <http://www.nba.com/official/instant-replay-guidelines.html>, {<https://perma.cc/65FM-XS MV>} (last visited Jan. 15, 2016).

¹²⁷ *Id.*

¹²⁸ Steve Perrin, *Instant Replay in the NBA*, SB NATION (June 9, 2010, 11:55 AM), http://www.clipsnation.com/2010/6/9/1509216/instant-replay-in-the-nba?_ga=1.78793428.1505106454.1442899931, {<https://perma.cc/W5G5-5SPT>}.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *NBA Referee Instant Replay Trigger Outline*, *supra* note 126.

¹³³ *See, e.g., id.*

Center in Secaucus, New Jersey aid the referee.¹³⁴ The referees are able to review the play from multiple angles in video that the replay manager at the Replay Center sends to the referees.¹³⁵ If the referees feel they need a different shot, they can request it from the hub, located at NBA Entertainment headquarters.¹³⁶ The crew chief of the three-person referee crew makes the final decision, only overturning a call if there is *clear and conclusive evidence* that the call on the floor was incorrect.¹³⁷ Explanations of every reviewed call and the best video angle are made available online.¹³⁸

In the NBA it is the referee, not one of the participating teams or coaches, who triggers instant replay. It would appear that, because the referees are neutral as to the game's outcome, the NBA has not limited the amount of plays that can be reviewed per game. Because a referee initiates the review, there is no punishment to either team if a call is overturned. Unsurprisingly, there are significantly more reviews per game in the NBA than in any of the other major US sports. During the 2014–2015 season, the Referee Options and Replay Center reviewed roughly 2,162 plays over the course of 1,225 games, coming to 1.76 replays per game.¹³⁹ Of those 2,162 plays, the crew chiefs only overturned 307 (19.2%), a percentage far lower than any of the other major sports.¹⁴⁰

4. National Hockey League: Clear View of the Opposite or Different Circumstances

The National Hockey League (“NHL”) began using instant replay in 1991.¹⁴¹ At the time, replay was limited to a few scenarios surrounding a

¹³⁴ Jessica Golden, *A Look Inside the NBA's New Instant Replay Center*, CNBC (Dec. 8, 2014, 2:35 PM), <http://www.cnbc.com/2014/12/08/basketball-a-look-inside-nbas-instant-replay-center.html>, {<https://perma.cc/2ZGG-APWH>}.

¹³⁵ Chris Johnson, *NBA's New Replay System a Smart Call*, SPORTS ILLUSTRATED (Oct. 29, 2014), <http://www.si.com/nba/2014/10/29/nba-replay-center-review-referees>, {<https://perma.cc/KXZ6-3YWT>}.

¹³⁶ *Id.*

¹³⁷ *NBA Replay Center Overview: 2015–16*, NAT'L BASKETBALL ASS'N OFFICIAL, <http://official.nba.com/2015-16-updates/>, {<https://perma.cc/7LYN-Y8ZQ>} (last visited Jan. 15, 2016).

¹³⁸ *NBA Referee Instant Replay Trigger Outline*, *supra* note 126.

¹³⁹ *See NBA Replay Center Reduces Review Time To 42 Seconds*, NAT'L BASKETBALL ASS'N OFFICIAL, <http://official.nba.com/nba-replay-center-reduces-review-time-to-42-seconds/>, {<https://perma.cc/D9G8-C8XE>} (last visited Mar. 30, 2016).

¹⁴⁰ *Id.*

¹⁴¹ Joe Delessio, *Quest for Perfection*, SPORTS ON EARTH (Jan. 21, 2014), <http://www.sportsonearth.com/article/66886124/nhl-replay-system-flawed-but-fixable/>, {<https://perma.cc/2TB9-K5R9>}.

potential goal: “whether the puck had crossed the goal line, whether it had been kicked or thrown into the goal, whether it went off an official, whether it crossed the goal line before the net was dislodged, and whether it went in before time expired at the end of a period.”¹⁴² NHL replay has since been expanded to include a determination of whether a player hit the puck with a high stick on a potential goal and “to establish that the official game clock has the right time.”¹⁴³

Originally, an in-stadium referee made all replay decisions, but in 2003 the league created an NHL replay center in Toronto known as the “War Room.”¹⁴⁴ There, NHL staffers watch every game live, review disputed goals, and watch for illegal hits that may warrant a suspension or fine.¹⁴⁵ Similar to the NBA, the on-ice referees initiate replays, rather than the coaches or teams.¹⁴⁶ A Video Goal Judge, located in a secluded area of each NHL arena with an unobstructed view of both goals, may also trigger the replay.¹⁴⁷ The NHL does not specifically define the standard of review that the league applies to Instant Replay. However, Mike Murphy, the league’s senior vice president of hockey operations said that a play would require “a clear view on the video of the opposite or different circumstances” to be overturned.¹⁴⁸

In sum, all four major professional sports leagues require that an extremely high threshold be met before an official reviewer can reverse a call made on the field. An impartial observer must note that these standards lie well beyond even the most stringent requirements that appellate courts place on parties in our legal system. That reality comes despite the fact that one might reasonably argue that the stakes in sports are far lower than they

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Wendy Thurm, *What Baseball Can Learn From Hockey’s Video Review ‘War Room,’* SB NATION (June 3, 2012, 10:00 AM), <http://www.sbnation.com/2012/6/3/3057680/what-baseball-can-learn-from-hockeys-video-review-war-room>, {<https://perma.cc/R2X6-6J7M>}.

¹⁴⁵ See Rich Chere, *NHL’s ‘War Room’ a dreamland for die hard hockey fans*, NEWJERSEY.COM (Nov. 24, 2010, 5:00 AM), http://www.nj.com/devils/index.ssf/2010/11/nhls_war_room_a_dreamland_for.html, {<https://perma.cc/52GB-YNLL>}.

¹⁴⁶ Stu Hackel, *NHL Still Wrestling with Expanded Video Replay*, SPORTS ILLUSTRATED (Aug. 19, 2013), <http://www.si.com/nhl/2013/08/19/nhl-expanded-replay>, {<https://perma.cc/2B2P-NLQH>}.

¹⁴⁷ National Hockey League, *Official Rules 2014–2015*, NAT’L HOCKEY LEAGUE, 60–61 (Jan. 15, 2016) <http://www.nhl.com/nhl/en/v3/ext/rules/2014-2015-rule-book.pdf>, {<https://perma.cc/74J8-BVNK>} (Rules 38.4–5).

¹⁴⁸ Helene Elliott, *Upon Further Review, NHL’s Replay System Is Good*, L.A. TIMES, Dec. 19, 2011, <http://articles.latimes.com/2011/dec/19/sports/la-sp-elliott-nhl-20111220>, {<https://perma.cc/4G8T-4BAD>}.

are in courts of law and accurate evidence as to the “correct call” is far more readily available to reviewing parties.

III. ANALYSIS: WHERE A HEIGHTENED BURDEN MAKES SENSE (THE LAW) AND WHERE IT DOES NOT (SPORTS)

In both criminal and civil litigation, the trier of fact has access to all of the information made available at trial—through both evidence and direct observation. The judge or jury may observe a witness’s demeanor, inspect relevant documents, and listen to the party advocates’ arguments. In contrast, an appellate judge must rely only on the written record, lacking any first-hand observation of the proceedings. As such, a high standard of review is often justified, giving appropriate deference to the fact-finder who was present during the trial.

Additionally, a person’s liberty hangs in the balance in a criminal context; no less of an authority than founding father Benjamin Franklin stated as a policy matter, “it is better a hundred guilty persons should escape than [that] one innocent person should suffer.”¹⁴⁹ Hence, the law requires proof of guilt in a criminal courtroom beyond a reasonable doubt. This asymmetric burden on prosecutors seeks to protect the rights of the innocent.

The world of sports, by comparison, presents no such compelling concerns. The task of instant replay officials, while similar to that of appellate judges, is based on substantially different (and better) information. Unlike appellate judges, who have less information than the triers of fact had at the trial level, replay officials have information unavailable to the officials who made the initial call (such as multiple camera angles). As such, it would seem intuitive that the replay officials should be given substantial deference due to their superior information, not the other way around.

The following analysis will consider the policy arguments for maintaining the current standards of review in sports, as well as those in support of changing such standards. In finding that the benefits for changing the standards of review are substantial, this Article will then consider the three common types of appellate review standards previously discussed, identifying which standard best embodies the relevant policy considerations when it comes to the world of sports.

¹⁴⁹ Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), in IX *THE COMPLETE WORKS OF BENJAMIN FRANKLIN* 80, 82 (John Bigelow comp. & ed., New York, G.P. Putnam’s Sons 1888).

A. *Policy Arguments for Maintaining High Thresholds for Reversal*

A primary justification for the extremely high standard of review called for in professional sports leagues is that it discourages coaches from frequently and frivolously challenging calls. In turn, this reduces the amount of disruption and delay imposed during the middle of a competition.¹⁵⁰ Presumably, this makes games more enjoyable to watch and, as a result, attracts new viewers. Preventing this disruption is also beneficial for the players and coaches. The speed with which coaches and players make decisions and adjust to situations is a reflection of skill and preparation, and significantly affects the outcome of games. The psychological effect of a long delay could prove detrimental to the coaches and players, and therefore, the outcomes of the games.¹⁵¹ The benefits to the coaches and players from the minimal disruption also equates to fan utility. Not only are fans able to watch the games without frequent delays, but they also (arguably) witness better performances from the teams, without the psychological detriments from the delay that affect both the participants and the outcome.

Additionally, the current standards maintain, to a significant extent, the human element of sports, which is deeply rooted in tradition. While supplanting referee-made decisions with ones aided by technological mechanisms increases the accuracy of calls—and by extension each sport's commitment to fairness—fans have come to view the referee's authority as a part of the game. Many fans are reluctant to change a system that has worked for decades, if not centuries.¹⁵² Furthermore, not only would having more replay reviews take many calls out of the referees' hands, but it might also provide reduced impetus for making the initial call properly. If the referees knew that the call can always be corrected on replay, this could lead to perverse incentives to pay less attention to the initial call (or to make calls with an eye towards allowing possible reversal).

Finally, someone might argue that fans garner a certain amount of utility from *incorrect* calls that are not changed by review. Controversy provides entertainment to society and the opportunity for discussion and debate amongst passionate fans. Participation on social media and other news out-

¹⁵⁰ VerSteeg & Maruncic, *supra* note 103, at 255.

¹⁵¹ *See id.* at 161.

¹⁵² *See* Carlton Fletcher, *In Sports, I'll Take the Human Element Over Replay*, ALBANY HERALD, May 12, 2014, <http://www.albanyherald.com/news/2014/may/13/carlton-fletcher-in-sports-ill-take-the-human/>, {<https://perma.cc/QN9S-3MCT>}. (“[T]he human element that [the referees] bring to sport is just as much a part of the games as the human factor of the players.”).

lets often explodes in the wake of a questionable call, reflecting this utility.¹⁵³

B. Policy Arguments for a More Lenient Standard of Review.

As the MLB Official Rules encourage the umpires, “[d]o not allow criticism to keep you from studying out bad situations that may lead to protested games. . . . It is better to consult the rules and hold up the game ten minutes to decide a knotty problem than to have the game thrown out on protest and replayed.”¹⁵⁴ Eminent legal scholars like Mitchell Berman at the University of Pennsylvania have offered compelling policy arguments in favor of changing the replay standards to allow for easier reversals and thus more accurate calls.¹⁵⁵ A more lenient standard would have specific benefits for the sports themselves, the referees, the players, and the fans.

1. Benefits for the Overall Health of Each Sport

While sports serve many goals—providing entertainment and discussion-fodder for fans, and employment for players and referees—part of their appeal rests upon a simple promise: the decisions referees and umpires render during the course of gameplay are fair and accurate. An incorrect call draws the ire of all involved parties—cheated players, livid fans, and embarrassed referees. One need look no further than the aghast national reaction to Armando Galarraga’s would-be perfect game (mentioned above) to get a sense of how deeply fans value fair and accurate decisions in professional sports.¹⁵⁶

¹⁵³ See Susan Miller Degnan, *Controversial UM-Duke Finish is Hot Topic on Talk Radio, Social Media, and even T-shirts*, MIAMI HERALD, Nov. 2, 2015, <http://www.miamiherald.com/sports/college/acc/university-of-miami/article42389436.html>, {<https://perma.cc/DJ9T-X5XN>} (“Within a couple of hours after the game ended [with a controversial call], more than 100,000 tweets had already been posted on Twitter regarding the outcome, and as of Monday it seemed like every talking head in sports had mentioned it in some form.”).

¹⁵⁴ Major League Baseball, *Official Baseball Rules 2015 Edition*, MAJOR LEAGUE BASEBALL (2015), http://mlb.mlb.com/mlb/downloads/y2015/official_baseball_rules.pdf, {<https://perma.cc/VLW9-48X4>} (see the “User’s Guide” that accompanies the Official MLB Rules).

¹⁵⁵ See Berman, *supra* note 95 (offering a thorough examination of the NFL’s “indisputable visual evidence” standard and exploring better alternatives).

¹⁵⁶ See Curt Schilling, *Missed Perfection Hurts Pitcher and Umpire*, ESPN (June 3, 2010, 1:45 AM), <http://www.espn.com/IndexPages/news/story?id=5247117>, {<https://perma.cc/G3EE-ZLJY>} (“I watched in horror Wednesday night as Armando Galarraga lost a perfect game because of the blown call by [the] umpire.”);

The goals of fairness and accuracy, in this way, actually serve more than their own ends; they function as vitamins that bolster a sport's overall health. As technologies permitting more accurate review have emerged, fans expect a higher level of officiating quality than they did before such technology existed.¹⁵⁷ A Seattle Seahawks fan dejected by the multiple missed calls that drastically lowered his team's win expectancy in Super Bowl XL¹⁵⁸ might turn away from the sport. Such a reactionary loss of interest might seem unlikely or rare, but every team's fan-base can point to a critical juncture in an important game in which a blown call made its team worse off. As missed calls pile up, a sport might suffer a tiny exodus of frustrated fans, leading to a decrease in ticket, jersey, and other merchandise sales. When a sport's profitability wanes, so too does its ability to attract the best athletes, causing the overall quality of play to eventually falter. Finally, fans who were willing to live with blown calls might be annoyed by less skilled or less athletic overall play and lose interest as well. Fair and accurate calls, therefore, are more critical to a sport's health and longevity than one would think.

2. Benefits for the Referees

In contradiction to the argument that lowering the replay standard will cause referees to worry less about getting their initial call correct, it could just as easily be argued that replay will cause referees to pay *stricter* attention. In this sense, referees can be compared to judges.¹⁵⁹ As legendary Judge Richard Posner explains: "District judges . . . do not like to be reversed. Even though a reversal has no tangible effect on a judge's career . . . it can imply criticism rather than merely disagreement, and no one likes a public rebuke."¹⁶⁰ Posner adds that the threat of reversal "keeps him working carefully . . ."¹⁶¹ It is likely that referees would have a similar motivation

See also Kenneth Plutnicki, *A Perfect Night Ruined*, N.Y. TIMES, June 3, 2010, http://www.nytimes.com/2010/06/04/sports/04leading.html?_r=0, {<https://perma.cc/7ZJZ-FPYM>} (describing the numerous reactions to the blown call).

¹⁵⁷ Rachel Cohen, *Technology means more correct calls, and more scrutiny*, PRO 32 (Jan. 15, 2015, 5:39 PM), <http://pro32.ap.org/zacharytoday/article/technology-means-more-correct-calls-and-more-scrutiny>, {<https://perma.cc/2VQ5-F7FM>}.

¹⁵⁸ Brian Burke, *How Much Did Super Bowl XL's Officiating Affect The Outcome?*, ADVANCED FOOTBALL ANALYTICS (Aug. 7, 2010), <http://archive.advancedfootballanalytics.com/2010/08/how-much-did-super-bowl-xls-officiating.html>, {<https://perma.cc/3LCY-RZ6L>}.

¹⁵⁹ VerSteeg & Maruncic, *supra* note 103, at 245.

¹⁶⁰ RICHARD A. POSNER, *HOW JUDGES THINK*, 141 (2008).

¹⁶¹ *Id.*

in avoiding reversal under a lowered standard (and the accompanying criticism it would entail).

Referees facing split-second decisions also frequently adjust their decisions in pivotal situations to avoid upsetting the status quo.¹⁶² This avoidance can be termed inertia bias and can have a significant impact on crucial game calls. For example, when faced with split-second, ball/strike decisions, baseball umpires subconsciously adjust their calls in order to avoid options that would “significantly shift the expected outcome.”¹⁶³ A recent study by Green and Daniels shows that referees select the pivotal option only 20% of the time, but the non-pivotal option 80% of the time.¹⁶⁴ Such a status quo bias would be seriously mitigated by a more lenient review standard—either allowing a referee to make the call that he believes is best (knowing that it can be reversed if necessary), or by allowing for the reversal of a call made by a referee showing this detrimental tendency.

3. Benefits for the Players

A more lenient review standard would likely have a positive effect on player performance. Knowing that a correct call will eventually be made if the call on the field is incorrect, an individual player may be more likely to make an additional effort, such as diving for a loose ball. Under the current replay standard, such an effort may cause confusion for the referees, who as we have seen are predisposed to maintain the status quo. If players are more confident that reviewers will get the decision correct in the end, then they will know their extraordinary efforts will be rewarded.

Players will also be more likely to play within the rules of the game under a more lenient review standard, knowing that it is far more likely that there will be consequences if their actions are caught on replay review. For example, close football games occasionally end with one team throwing a series of backwards passes in a last-ditch attempt to score as time is running out. Per NFL rules, once the football has passed the line of scrimmage it can only be thrown laterally or backwards.¹⁶⁵ Whether a pass is laterally thrown or illegally thrown forward is often a very close call and is a reviewable play.¹⁶⁶ Throwing a ball forward can be advantageous to the offensive team, potentially leading players to “toe the line” between a lateral throw and a forward pass. Faced with a less stringent review standard, players would be

¹⁶² VerSteeg & Maruncic, *supra* note 103, at 242.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ 2015 NFL Rulebook, *supra* note 82, at Rule 8, Section 1, Article 2.

¹⁶⁶ *Id.* at Rule 15, Section 2, Article 4.

less likely to take such a risk, knowing that the referee can take an unburdened look at the play and more easily overturn the call on the field.

Additionally, despite the popular refrain that a sporting contest is “just a game,” the reality is that whether one wins or loses does have dramatic ramifications in the world of professional sports. Winners are typically rewarded with lucrative contracts, prize money, endorsements, and the opportunity to continue their career. Losing not only puts a person at risk of making less money, but increases the likelihood that he will lose his job.¹⁶⁷ Simpler yet, players have the right to expect that their hard work and preparation will be properly rewarded and that the outcome of the game will depend on its merits and not on chance.

4. Benefits for the Fans

Finally, in addition to the consequences for participants in the competitions, the result of a game also affects fans. Like players, fans have a right to expect that the result of the game will be dependent on their team’s performance and not on a missed or bad call. Fans invest a great deal of time and energy in the performance of their team. Asymmetric burdens of proof in instant replay that prevent decision-makers from fixing an incorrect call on the field provide a powerful disincentive for fans to continue to invest the same kind of energy in their favorite team.

Moreover, a missed call may have more than a mere social and psychological effect on fans; it can also lead to tangible losses. Individuals who have gambled on the game may be adversely affected, potentially to huge degrees, if their team loses because of a bad call. In 2015, people wagered more than \$119 million dollars on the Super Bowl alone.¹⁶⁸ Additionally, businesses that depend on competitive sports competitions will likely be negatively affected, as will the restaurants and stores connected to the sports facility itself.

Finally, in considering the effect that winning has on a community, one need simply posit the return of NBA great LeBron James to the Cleveland Cavaliers in 2014. His return directly correlated with the team’s championship run, not unlike a game-changing call. The team’s new suc-

¹⁶⁷ VerSteeg & Maruncic, *supra* note 103, at 247.

¹⁶⁸ Jason B. Hirschhorn, *Super Bowl Betting 2015: How Much Money Is Wagered on the Game and Prop Bets?*, SB NATION (Jan. 31, 2015, 9:01 AM), <http://www.sbnation.com/nfl/2015/1/31/7923869/super-bowl-2015-betting-prop-bets-gambling-wager-nfl>, {<https://perma.cc/S4AW-GLJZ>}.

cess brought an estimated \$500 million to the Cleveland community.¹⁶⁹ While this estimate is based on an entire season with him on the team, it demonstrates by analogy the impact that a game-changing, or potentially season-changing, call may have. Further yet, this says nothing about the harder-to-quantify psychological benefits of being associated with a winner. Pride surges and communities once divided come together.

C. Sports Should Borrow Standards of Review from the World of Law.

The asymmetric burdens of proof currently utilized in professional sports have the inevitable downside of perpetuating continued inaccuracy and unfairness—ironically, the precise problem for which replay systems were instituted in the first place. The traditional rationale for maintaining these heightened burdens is significantly outweighed by the compelling reasons *contra*. Section III(2), *supra*, highlighted a variety of benefits that would flow from a more lenient standard of instant replay review, most notably:

- (1) less residual frustration from fans that might snowball into decreased interest, declining team and league revenues, a smaller pool of talented players choosing to pursue a professional career in the sport, and an overall worse on-field product league-wide;
- (2) fewer incorrect calls will stand due merely to lack of indisputable proof required for reversal, ensuring greater fairness to players, teams, and fans;
- (3) decreased likelihood of unjust punishment to players and teams due to incorrect calls;
- (4) stricter referee attention to “getting the call correct” in the first instance if it is easier for the calls to be overturned (i.e., greater incentive to avoid facing criticism for making errors); and
- (5) a lower standard mitigates referee tendencies to avoid calls that would “significantly shift the expected outcome” of a game (i.e., overcome referees’ inertia bias).

In considering a new and improved standard of review for the world of sports, the sensible approach would be to analyze and borrow from appellate standards of review in law: the clearly erroneous standard, the abuse of discretion standard, and the *de novo* standard. The following sections will analyze each of these legal appellate standards and consider how effectively they serve the goals of ensuring fairness, accuracy, and justice in sports. Ultimately, *de novo* review makes the most sense for these purposes, despite

¹⁶⁹ Sean Gregory, *Economist: LeBron James Worth Almost \$500 Million to Cleveland*, TIME (July 14, 2014), <http://time.com/2981583/lebron-james-cleveland-cavs-money/>, {<https://perma.cc/5E9Z-Y8SF>}.

the fact that professional sports' instant replay review rules have never even approached such a standard.

1. The Abuse of Discretion Standard

As previously indicated, the abuse of discretion standard is used in reviewing discretionary decisions during the litigation process. Under this standard, the relevant question is not whether the appellate court “would as an original matter have [acted as the trial court did]; it is whether the [trial court] abused its discretion in so doing.”¹⁷⁰ Abuse of discretion is primarily used for procedural matters, such as rulings on sentencing and admissibility of evidence.¹⁷¹

Such a standard would, in large part, be inapplicable to each of the major sports, as nearly all of the discretionary calls made on the field are not reviewable. For example, holding and pass interference calls are not reviewable in the NFL because they are subject to the referee's opinion.¹⁷² This likely constitutes an attempt to maintain the human element in sports. Thus, each major sport would have to make drastic changes to its list of reviewable plays for this standard to be applicable.

Moreover, even if such changes were made, abuse of discretion might prove to be an even stricter standard than the current standard in each of the major sports. Such a standard would allow a replay referee to make a reversal only if no reasonable person would agree with the on-field call. For example, a reversal would be appropriate if a pass was called complete when the ball actually bounced several feet in front of the wide receiver before the catch. While some calls are obviously incorrect, abuse of discretion might make reversals even more infrequent than they currently are, as most obvious calls are correctly called on the field. As such, this standard would be unlikely to result in greater accuracy. With the exception of the most obvious mistakes—which are almost always made correctly on the field—an argument can often be made in favor of either side of a call. That is not a compelling reason to let it stand.

Additionally, an abuse of discretion standard would fail to meet any of the previously identified benefits that could be brought about by a more lenient standard of review. The abuse of discretion standard would not promote fairness and decrease the likelihood of unjust punishment to players and teams, as the number of incorrect calls would be unlikely to decrease

¹⁷⁰ *Metro. Hockey Club, Inc.*, 427 U.S. at 642.

¹⁷¹ Kunsch, *supra* note 62, at 34.

¹⁷² See 2015 NFL Rulebook, *supra* note 82, at Rule 15, Section 2, Article 5.

(they may in fact increase). The standard would also fail to promote fairness to fans who invest energy and money into sports teams, as the ability to reverse incorrect decisions would be seriously limited. It would not encourage referees to pay stricter attention to the original calls, as only the most obvious mistakes would be reversible—mistakes that the referees would likely be able to call without close attention. For the same reason, the new standard would not mitigate referee tendencies to avoid making calls that would “significantly shift the expected outcome” of a game. Finally, abuse of discretion review would not encourage players to play harder or within the rules, as accuracy is unlikely to increase upon review.

2. The Clearly Erroneous Standard

Similarly, the clearly erroneous standard fails to provide the benefits that justify a lower standard of review in sports. This legal standard, used to review findings of fact, permits a reversal only when “the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”¹⁷³ It “does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.”¹⁷⁴ The rationale supporting this standard recognizes that a trial judge is present during the trial and thus has greater access to the relevant information than does an appellate court.

Such a rationale is not applicable to the review process for any of the major sports. As previously argued, it is the instant replay official, not the referee on the field, who has greater access to information, due to the availability of multiple camera angles and slow motion replays. Yet, despite this noticeable fault in rationale, the clearly erroneous standard appears to be most similar to the review standards currently utilized in professional sports—specifically the indisputable evidence standard of the NFL and the clear and conclusive evidence standard of the MLB and NBA. Such a standard would review rulings of fact, such as whether a player’s knee hit the ground before a fumble or whether a ball was a homerun. In considering those decisions, the replay referee would only be able to reverse if he was certain that the original call was wrong, not unlike the indisputable visual evidence standard and very similar to the clear and conclusive evidence standard.

As previously explained, such a standard has a variety of faults that make it insufficient and unacceptable for the review standard in sports.

¹⁷³ Anderson, 470 U.S. at 573 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

¹⁷⁴ *Id.*

Such a standard fails to promote accuracy and fairness, as incorrect calls are likely to be left to stand in the end. The standard disincentivizes referees from paying stricter attention to original calls, as the standard makes it unlikely that they will be overturned. Referees are also perversely encouraged to avoid making calls that would significantly shift the expected outcome of a game, knowing that such an inertia bias is likely to go unpunished and unchanged. As a result, players may put forth less effort (and certainly be angrier at unfair outcomes), knowing that a missed call could take the game out of their hands.¹⁷⁵ This could affect the fans as well, potentially wasting the energy and money that is heavily invested in the success of a particular team.

3. The De Novo Standard

Finally, we examine the merits of the de novo standard, used to review questions of law. Under this standard, the appellate court considers the matter anew—the same as if it had never been heard before and no decision had previously been rendered.¹⁷⁶ The reason for the lack of deference to the trial court is that “[c]ourts of appeals . . . are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues.”¹⁷⁷

i. The De Novo Standard Would Easily Integrate into Major Professional Sports Leagues and Would Provide Benefits that are Unavailable under the Current Standards.

The de novo process would fit seamlessly within the current review process in each of the major sports.¹⁷⁸ Just as appellate judges devote their primary attention to the appellate issues, instant replay review officials are solely concerned with the individual aspect of the play in review. This con-

¹⁷⁵ That said, only a player who has signed a contract worth millions of dollars and effectively secured his finances in the short (or even long) term would reasonably be discouraged from putting forth additional effort. A younger player who has not yet earned a significant paycheck would likely not be dissuaded by mediocre officiating from putting in maximum effort, as even with a bad result, the coaching staff would bear witness to his skill or speed and may even laud him for his effort.

¹⁷⁶ *Ness*, 954 F.2d at 1497.

¹⁷⁷ *Salve Regina Coll.*, 499 U.S. at 231–32.

¹⁷⁸ For an excellent analysis of the benefits and tradeoffs of a de novo standard of review see standard of review in the NFL in Berman, *supra* note 95, at 1702–06.

trasts starkly with trial judges and on-field referees, who must balance a variety of complicated facets during a trial or game. Additionally, review officials have all of the necessary information regarding the play available to them via video, just as the appellate court needs only the trial record. Indeed, instant replay officials have far greater information at their disposal, having the added benefit of multiple camera angles and slow motion replays.

More importantly, the *de novo* standard would prove markedly superior at serving the desired goals of fairness, accuracy, and justice in sports. Considering a play as if no decision had been previously rendered removes asymmetric burdens and presumptions currently favoring the original ruling on the field. Because review officials have superior information compared to on-field referees, this standard will inevitably lead to greater call accuracy. As accuracy is improved, referees would likely pay stricter attention to calls in the first place in an attempt to avoid being frequently reversed (and thereby subjected to the accompanying criticism reversal would entail). Referees would likewise be discouraged from avoiding calls that would significantly shift the expected outcome of a game. If a player knows that such a play call is more likely to be correctly decided in the end, he may be more willing to put forth a greater effort; perhaps diving for a loose ball or sprinting to stretch a double into a triple. The player will know that if his extraordinary effort and the lightning speed of the game cause confusion for the referee, replay can be utilized to ensure the call on the field was correct. Outcomes will better reflect the skill and preparation of the players (as opposed to the luck of benefitting from a poor call), leading to more just rewards for those players and teams who truly deserve them. Finally, while some fans garner utility from the controversy surrounding missed calls, such utility is considerably outweighed by the social and economic harm that results from erroneous calls. That being said, incorrect calls are inevitable in sports—this new standard would simply make them less frequent. Thus, the emotional charge experienced from controversy would be properly balanced with the utility from an accurate and fluid contest.

ii. Super Bowl 50: An Example of How the De Novo Standard Would Lead to More Accurate Review.

On February 7, 2016, the Carolina Panthers and Denver Broncos faced off in Super Bowl 50—the world’s biggest sporting event. Over 110 million fans were watching live on television.¹⁷⁹ Billions of dollars were wa-

¹⁷⁹ Stephen Battaglio, *SuperBowl 50 Audience Slides 2% from Last Year with 111.9 Million Viewers*, L.A. TIMES, Feb. 8, 2016, <http://www.latimes.com/entertainment/>

gered on the outcome.¹⁸⁰ Midway through the first quarter, underdog Denver jumped out to a 3-0 lead.¹⁸¹ On the ensuing drive, Panthers quarterback Cam Newton drilled a pass over the middle to wide receiver Jericho Cotchery.¹⁸² Cotchery bobbled the ball initially, but caught it while he was falling to the ground, keeping his hand under the ball the entire time.¹⁸³ Carolina would have a first down at the 40-yard line after the 24-yard completion and were driving to even the score or take the lead.

Except for one crucial thing: the referees called the pass incomplete, ruling that the ball had touched the ground as the receiver fell. Cotchery was incensed, yelling to his coaches on the sideline, "I got it!" and imploring them to throw the challenge flag. Coach Ron Rivera obliged.¹⁸⁴

After a commercial break, television announcers Jim Nantz and Phil Simms called on NFL officiating expert Mike Carey, referee of Super Bowl XLII, for his opinion on the Carolina challenge. Carey responded decisively, "*This is a good challenge by Carolina. Receiver goes up, he's going to the ground so he must maintain control of the ball, which he does. If I was in the booth, I would reverse this to a catch.*" Nevertheless, head referee Clete Blakeman walked out onto the field a moment later and declared, "After reviewing the play, the ruling on the field stands as called, an incomplete pass." Nantz responded in disbelief, "I'm trying to look for what they saw here." Simms added, "His hand was definitely under the football." Nantz replied, "Had a hand under it there. Now he rolls over. Does it touch [the ground]? I didn't see it." Simms confirmed, "I didn't see it."¹⁸⁵

Simply put, the indisputable evidence standard required for reversing the call led to a gross injustice that changed the trajectory of America's biggest sporting event. Even though all experts agreed it was a good catch, the replay official believed he had less than the indisputable proof required for reversal. Instead of Carolina driving to take the lead, Denver now had the Panthers pinned back deep in their own end.¹⁸⁶ Two plays later, on third down and long, Denver linebacker Von Miller stripped Cam Newton

envelope/cotown/la-et-ct-super-bowl-ratings-20160208-story.html, {<https://perma.cc/9H6B-AN4H>}.

¹⁸⁰ David Purdum, *SportsBooks See Record Amount of Money Bet on SB 50*, ESPN (Feb. 8, 2016), http://espn.go.com/chalk/story/_/id/14738319/more-money-bet-super-bowl-50-nevada-other-super-bowl-sportsbooks-say, {<https://perma.cc/HD2Q-SQAF>}.

¹⁸¹ *Super Bowl 50* (CBS television broadcast Feb. 7, 2016).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

of the football at the 5-yard line.¹⁸⁷ Miller's teammate Malik Jackson recovered the ball in the end zone for a game-changing touchdown.¹⁸⁸ Denver, which came in as a heavy underdog, was shockingly up 10-0 and went on to secure the improbable upset. Lost in the shuffle was that the failure to reverse the incomplete pass call completely changed the complexion of America's biggest game.¹⁸⁹ Justice was denied. The announcers decried it for a few minutes but it will likely be forgotten by history.

This is but one of hundreds of examples of the ways in which asymmetric burdens of review in sports hinder the ability of referees to make accurate calls in accordance with the rules of the game. Under a *de novo* standard, the replay referee would have been able to review the play unburdened. If Mike Carey is any indication of what the replay referee would have found without such a burden—and it is hard to find a better indicator than a former Super Bowl referee—the play would have been reversed, Carolina would have had the momentum, and the outcome of the Super Bowl may have been vastly different. We will never know. Until the NFL reads this law review Article and reforms its rules, the asymmetric burdens of review will continue to ruin a fair chance at justice.

iii. How to Utilize the De Novo Standard While Mitigating Concerns About Delaying the Game.

Part (III)(1), *supra*, of this Article noted that despite the benefits of a more lenient standard of review in sports, its drawbacks might militate in favor of the current standards. Specifically, the current standards likely discourage coaches from frequently and frivolously challenging calls, reducing the delay imposed during a competition. This is beneficial for the players and the coaches, as their quick adjustments to situations are a reflection of skill and preparation. Finally, and perhaps most importantly, it could be argued that the current standards maintain to a significant extent the human element of sports, which is deeply rooted in tradition.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Interestingly, Panthers Coach Ron Rivera challenged another play around the 12-minute mark of the second quarter (which he won). Because his first challenge on the "incomplete pass" was found to "stand," the Panthers did not receive a third challenge, which they would have received had they been right on the first two. As such, Carolina was unable to challenge any call for the following 40 minutes of the game. We will never know how this influenced the game, but the announcers noted it immediately.

Each of these concerns can be assuaged on a structural level by maintaining the current “challenge” format of the instant replay review system. For example, the NFL and MLB limit the number of challenges that each team is granted. In the NFL, a team is allowed two challenges per game, with the option to be awarded a third if they prevail on their initial ones. The MLB grants a team one challenge per regular season game and two for playoff games, with the option to win an additional challenge as a reward for winning previous ones. Keeping these tight limits in place prevents coaches from frivolously challenging calls and unnecessarily delaying the game. As such, coaches and players will have to continue tirelessly preparing and practicing, unable to rely on constant delays to make crucial decisions. This would maintain the utility that fans garner from a fluid and fast-paced game. Limiting coaches to only a few challenges forces them to be cautious in their use, allowing the human element of the sport to dominate the vast majority of the game. But, when they do take the opportunity, they can be far more assured that accuracy and fairness will be served in the end.

Conversely, in the NBA and NHL, coaches are unable to challenge play calls. As such, the risk of frequent and frivolous review by a coach is eliminated, and instead falls into the hands of the league. In the NBA, a review is triggered when a referee is not reasonably certain that the call on the floor is correct. This same standard for *triggering* the review could be maintained, allowing the *de novo* standard to provide more accurate rulings of the plays that are reviewed. As such, the *only* thing that the new standard would change is the potential result of the review. There would be no effect on the number of reviews because the standard to trigger a review is maintained. Thus, the speed of the game, fan utility, and the human element of the sport would all be unaffected.

iv. A Final Note Concerning Questions of Law vs. Questions of Fact.

This Article has noted that the *de novo* standard is used to review questions of law in the legal process. Yet nearly all instant replay challenges would appear to concern questions of fact—a feature that on cursory blush seems to militate against this Article’s argument in favor of utilizing a *de novo* review standard in sports. As was explained in Section (II)(4)(a), *supra*, findings of fact are typically given significant deference in the litigation process because the fact finder was present during the original trial. Comparatively, the appellate court relies only on the trial documents provided. Such deference is provided not because the lower court made the decision first, but rather because it had superior information when making its decision. This rationale actually supports utilizing the *de novo* standard in

replay review because, as previously noted, the replay referee has far greater access to the facts than the on-field referee. The ability to consider multiple camera angles and utilize slow motion replay provides the replay reviewer with significantly better information than the on-field referee had when making his split second decision. Thus, because the replay reviewer has access to the superior information, he should be given the deference, not the on-field referee.

IV. CONCLUSION

For centuries, the law has recognized that initial decision-makers, whether trial judges or juries, might make errors in their determinations. Hence, we have developed appellate review systems that attempt to serve the needs of ensuring accuracy, fairness, and justice by righting previous wrongs.

The world of professional sports has similarly instituted instant replay review systems in order to seek the same objectives, but it unfortunately has imposed drastically asymmetric burdens of review that thwart the very purpose they aim to serve. By insisting on indisputable proof or clear and conclusive evidence in order to overturn calls made on the field, sports leagues like the NFL and MLB perpetuate continued inaccuracy and injustice. Instead, if they were to borrow from the world of law and utilize a *de novo* standard of review, there would be no biased presumption that a given call on the field should stand absent indisputable proof to the contrary. Adopting this standard would both further the cause of justice as well as reward players and teams by ensuring that the call ultimately made was the one most likely to be correct. Simply put, if a reviewer is more certain than not that a call made on the sports field is wrong, there is no compelling reason to let it stand.

This stands in stark contrast to our legal system, where society insists on higher thresholds of proof before taking away a person's freedom and where appellate reviewers are often not in as good a position to make factual determinations as a trial judge and jury. No such considerations apply to the realm of sports, where instant replay officials have access to superior information compared to on-field referees. The instant replay officials can use multiple camera angles and slow motion replays. Yet, despite this obvious difference between legal and sports reviews, the standards utilized in professional sports (indisputable proof) are far more draconian than those generally used in the law (most notably, *de novo* review). It is well past time to remedy this inequity. Only when the world of sports learns to borrow lessons from the world of law can we do so.