COMPARATIVE PROCEDURE ON A SUNDAY AFTERNOON: INSTANT REPLAY IN THE NFL AS A PROCESS OF APPELLATE REVIEW

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> "In the NFL, coaches' challenges, which trigger replays, contribute to the sense that a game consists of about seven minutes of action . . . encrusted with three hours of pageantry, hoopla, and instant-replay litigation."
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> —George Will[1]

INTRODUCTION

The use of sport as a metaphor for aspects of the legal process has a long history. Over a century ago Roscoe Pound decried the "sporting theory of justice" in his momentous speech to the American Bar Association.[2] More recently, Chief Justice Roberts famously likened the judicial role to that of a baseball umpire.[3] The instinct to draw parallels between law and sport is understandable. The litigation process, in particular, has adversaries, winners, and losers, and bears other resemblances to various games.

Not surprisingly, this extends to football. Lawyers,[4] judges,[5] and

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1. George Will, *The End of the Umpire? Foul!*, CHI. TRIB., June 19, 2008, at C27.

2. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. A.B.A. 395, 404 (1906), *reprinted in* 35 F.R.D. 273, 281 (1964).

3. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before S. Comm. on the Judiciary, 109th Cong. 55 (2005) (statement of John G. Roberts) [hereinafter Roberts Statement] ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire."). The metaphor predates Chief Justice Roberts. *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1033 (1975). For a critique, see Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 42-46 (1994) [hereinafter Oldfather, *The Hidden Ball*].

4. *See, e.g.*, Waugh v. Williams Cos., Inc. Long Term Disability Plan, 323 F. App'x 681, 684 n.2 (10th Cir. 2009) (noting claimant's contention "that the level of deference a court should give a plan administrator's decision is the same deference that a football official reviewing an instant replay in a booth should give to a call made by the on-the-field official").

5. *See, e.g.*, Finnsugar Bioproducts, Inc. v. Amalgamated Sugar Co., 244 F. Supp. 2d 890, 893 (N.D. Ill. 2002) ("Even under the more relaxed rules that govern pro football, however, the Court notes that Finnsugar would have exhausted its opportunities for further review of this issue

commentators have noticed and drawn upon the similarities between appellate review and instant replay review in the National Football League (NFL). One senses delight, for example, in Seventh Circuit Judge Terrence Evans' opinion for the court reversing a ruling of then-Chief Judge Richard Posner (who had been sitting as a district judge by designation) in *Bankcard America, Inc. v. Universal Bancard Systems, Inc.*[6] The opinion began:

> Football fans know the sickening feeling: your team scores a big touchdown but then a penalty flag is tossed, wiping out the play. Universal Bancard Systems, Inc. knows that feeling firsthand after seeing not one, but two big touchdowns called back. The referee who waved off the first—a $7.8 million verdict—and then the second—a $4.1 million jury verdict after a second trial—was the Honorable Richard A. Posner, the circuit's chief judge who in this case was wearing, by designation, the robe of a district judge. Like the instant replay official, we now review the decisions of our colleague—using the voluminous record rather than a television monitor and recognizing that our review in 1999 of a case that began in 1993 is a far cry from instant.[7]

Indeed, one state bar association president exhorted his colleagues to use replay review as a teachable moment, part of "our platform for discussing how the system of justice really works and its importance to our society, as well as the

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long ago."); United States v. Eckhoff, 23 M.J. 875, 881 (N.M. C.M.R. 1987) (Cassel, J., concurring) ("For while the decisions in the appellate process are similar to those made in deciding the application of rules in a professional football game (well-matched and well-trained teams with plenty of expert assistance and the type of action which can be played and considered in discrete periods with the availability of the instant video replay), the trial judge is more like the referee in a youth basketball game where the motion is continuous, the players of varying degrees of ability and training, and there is no way to examine and reexamine each call; there is no need for us to add to the already present needless and distracting heckling."), *judgment rev'd in part*, 27 M.J. 142 (C.M.A. 1988); Johnson v. Frazier, 787 A.2d 433, 436 (Pa. Super. Ct. 2001) ("Like an instant replay challenge in professional football, the appeal was made before the next play began; the challenge must be resolved before another play may be validly run. 'After further review,' we find the call on the field must be reversed."); Vaccaro v. Joyce, 593 N.Y.S.2d 913, 916 (Sup. Ct. 1991) ("[T]he problem, as frequently occurs in many sporting events, is whether primacy is to be given to correctness or to finality. A football official may rule that, in accordance with his interpretation of the rules as to when the ball is dead a touchdown has not been scored, and even though replays on the next day show that his call and his interpretation of the rules was clearly incorrect, once everybody has gone home the game is over and the result stands.").

6. 203 F.3d 477 (7th Cir. 2000).

7. *Id.* at 479 (footnote omitted); *see also* NFL Players Ass'n v. Pro-Football, Inc., 857 F. Supp. 71, 72 (D.D.C. 1994) ("The parties normally rely upon an arbitrator to act as a referee when disputes arise, but in this particular case, the Court is forced to don a black and white striped shirt and interpret the rules by which the parties have agreed to be bound."), *vacated in part on reh'g*, 79 F.3d 1215 (D.C. Cir. 1996).

important role lawyers and judges play."[8] He urged lawyers to use replay review, and the "indisputable visual evidence" standard that it incorporates,[9] "as an opportunity to explain how similar burden of proof standards exist in the law, that not all mistakes can be corrected, that the system has inherent limits, but that it is the best system yet devised."[10]

The analogy is, to a point, a good one. The NFL's replay review process does resemble appellate review in the courts. The underlying goal—correcting mistakes by the initial decisionmaker—overlaps with one of the core functions of appellate review.[11] The NFL's "indisputable visual evidence" standard is nothing less than a standard of review.[12] One can tease out other similarities between the two mechanisms at varying levels of generality and abstraction. The suggestion that replay review provides a good illustration of some of the basic features of appellate review makes sense.

Of course, just as metaphors and analogies serve to illuminate similarities between the two points of comparison involved,[13] they also serve to obscure.[14] By drawing our attention to similarities, they can lead us to overlook differences.[15] Moreover, reliance on a metaphor can lead to shifts in understanding of the underlying subject as the metaphor triggers associations with ideas previously regarded as unrelated.[16] To the extent that there are fundamental differences between the two processes under consideration here—and there are—it is important to understand the differences in order to use the analogy thoughtfully.

Such consideration is particularly appropriate given the increasing prevalence of video evidence.[17] Cameras are everywhere, not only mounted in squad cars and bank lobbies but also carried in the pockets and purses of millions of citizens.[18] Events that in the past could be reconstructed only through oral testimony are often recorded and preserved. Courts find themselves with the ability to quite literally watch replays. As they do, some judges will undoubtedly

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8. Joseph G. Bisceglia, *CSI, Judge Judy and Civic Education*, 95 ILL. B.J. 508, 508 (2007).

9. *See infra* Part II.A.3.

10. Bisceglia, *supra* note 8, at 509.

11. *See* Chad M. Oldfather, *Error Correction*, 85 IND. L.J. (forthcoming 2010) (on file with author) [hereinafter Oldfather, *Error Correction*].

12. Standards of review "function not to compel a particular disposition of a given case, but rather to fix the relationship between, and allocation of power among, the appellate and trial courts." Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 504 (2004) [hereinafter Oldfather, *Appellate Courts*].

13. *See* Oldfather, *The Hidden Ball*, *supra* note 3, at 22-23.

14. *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 10-13 (1980).

15. *See* Oldfather, *The Hidden Ball*, *supra* note 3, at 24-25.

16. *Id.*

17. *See, e.g.*, Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600 (2009) (noting the increased use of recording technology by the State and its citizens).

18. Sean Dodson, *A Cheap Camcorder in Every Pocket*, GUARDIAN, Sept. 4, 2008.

draw on the analogy between themselves and the instant replay official.

This Article seeks to lay the groundwork for the responsible use of this analogy by illumination of features of both processes through consideration of the similarities and differences between them. But that is not all. There is more to be gleaned here than the fruits of exploring an analogy. The Article is also a product of the same sort of impulse that underlies comparative inquiries focused on two legal systems. The purposes of comparative inquiry can be described in quite high-minded terms:

> The historical origins of the classifications known to any system, the relative character of its concepts, the political and social conditioning of its institutions, all these are really understood only when the observer places himself outside his own legal system, that is to say when he adopts the perspective of comparative law.[19]

We are mindful that the point of comparison is a game rather than another country's legal system. Yet it would not be an overstatement to suggest that the results of the replay review process can be as consequential to the parties involved as the resolution of many lawsuits. The NFL is big business.[20] Careers may be at stake, as may a team's playoff fortunes, which in turn may affect the team's financial health as well as the psychic health of its fans. As a result, there are benefits to this analysis. The inquiry was enjoyable to undertake (and will hopefully be enjoyable to read), but more than that, the comparison of appellate review to the use of instant replay can provide a fresh perspective on the appellate process. That comparison illustrates not only some of the more discrete components of the appellate process (such as standards of review), but also facilitates the exploration of broader themes such as the ways in which decision-making processes and institutions must accommodate a variety of competing interests and considerations and the limitations and difficulties of rule-based constraints on decisionmakers.

The remainder of this Article proceeds as follows: Part I provides a brief overview of the processes of replay review in the NFL and appellate review in

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19. RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 5 (3d ed. 1985).

> Objectives as varied as aiding law reform and policy development, providing a tool of research to reach a universal theory of law, giving a critical perspective to students and an aid to international law practice, facilitating international unification and harmonisation of laws, helping courts to fill gaps in the law and even working towards the furthering of world peace and tolerance have been attributed to comparative law.

Id.; Esin Örücü, *Developing Comparative Law*, *in* COMPARATIVE LAW: A HANDBOOK 44 (Esin Örücü & David Nelkin eds., 2007); *see also* PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 18-25 (3d ed. 2007) (identifying and discussing five functions of comparative law: (1) "as an academic discipline," (2) "as an aid to legislation and law reform," (3) "as a tool of construction," (4) "as a means of understanding legal rules," and (5) "as a contribution to the systematic unification and harmonisation of law").

20. *See* GEORGE H. SAGE, POWER AND IDEOLOGY IN AMERICAN SPORT 138-39, 154 (1990).

the legal system. Part II explores some of the particulars of the analogy, including both similarities—the reliance on adversarialism, a concern with error correction, and the use of standards of review—and differences—the immediate context in which review takes place, the scope of review, and the existence of a lawmaking function. Part III takes up some of the broader themes illustrated by the comparison including the role of institutional competence in a review mechanism, the effect of systemic considerations, and the difficulty of achieving perfect constraint through rules. The Article concludes by considering the perils of over-reliance on the analogy between the two processes.

I. AN OVERVIEW OF THE TWO PROCESSES

The review process in the NFL as well as appellate review in the American judicial system has developed over time. The current rules and procedures of each system, in some degree, can be traced to the processes that were originally used for review.

A. A Brief History of Instant Replay in the NFL

Ron Rivera was livid. After the Chicago Bears[21] held the Green Bay Packers to a single touchdown for fifty-nine-and-a-half minutes of the game, Rivera's team was a quarterback kneel-down away from victory after officials penalized Packers quarterback Don Majkowski for an illegal forward pass on fourth down.[22] Had Majkowski not crossed the line of scrimmage, his touchdown pass to Sterling Sharpe (and the ensuing extra point) would have given the Packers a one point lead with thirty-two seconds remaining.[23] However, instant replay official Bill Parkinson had the benefit of watching the play multiple times in slow motion.[24] What he saw was that line judge Jim Quirk made the incorrect call; Majkowski's foot did not cross the line of scrimmage.[25] After four minutes of review, Parkinson reversed the call and the Packers went on to win the game, 14-13.[26]

Though the call was correct, Rivera was upset with the use of the replay system. "I can't wait for them to get rid of instant replay. . . . They have definitely taken out human error and the human nature of football. It's out. We might as well just put robots in the football game and let them play."[27]

Rivera was not alone in his criticism of the NFL's instant replay system. The

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21. The reader will note that this Article is devoid of any references to the Minnesota Vikings. That is because the senior author has been around long enough to know that the Vikings will always disappoint in the end and need no help from botched officiating to do so. Of course, the junior author is a Chicago Cubs fan, and thus knows a little bit about such disappointment.

22. Fred Mitchell, *Picture Fuzzy to Bears*, CHI. TRIB., Nov. 6, 1989, at C1.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

NFL owners voted to adopt a limited form of instant replay in 1986 in an attempt to eliminate egregiously bad calls.[28] Under the original replay system, a designated replay official had the sole discretion to review each play on a monitor and to order non-judgment calls reversed if he found "indisputable" evidence that the on-field call was incorrect.[29] This format gave total control to a single official, as neither the teams nor the referees could call for a replay of a disputed call.

Although the system was utilized for six years, the NFL owners opted to cancel the replay option in March 1992 after complaints that the system was arbitrary and "cumbersome."[30] There was no limit on the number of plays that could be reviewed or the length of the reviews.[31] Furthermore, because the replay official relied exclusively on camera angles provided by the television broadcast of the game, network executives felt that the NFL was compromising the independence of the broadcast.[32] Most damning of all, several correct on-field calls were erroneously reversed by the replay official.[33]

Instant replay eventually returned after several controversial calls marred the 1998 NFL season. Some of the more embarrassing examples: during a Thanksgiving game between the Detroit Lions and the Pittsburgh Steelers, the officials incorrectly awarded the coin toss to the Lions (although it is unclear if replay could have helped); the Seattle Seahawks were denied a playoff spot after the referees awarded a "phantom touchdown" to New York Jets quarterback Vinny Testaverde; and the Green Bay Packers were eliminated from the playoffs when an official erroneously called San Francisco 49ers wide receiver Jerry Rice down by contact when he had, in fact, fumbled the ball.[34] With fans decrying the injustice of so many incorrect calls, the owners voted overwhelmingly to reinstate instant replay during the spring of 1999.[35]

The revised replay system that returned to the NFL in 1999 had some important distinctions from the 1986-1991 version. Most importantly, the plenary power of the replay official was largely devolved to coaches. Under the new system, a coach initiates a challenge by using a timeout; if he is vindicated,

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28. Michael Janofsky, *New N.F.L. Replay Rule Stirs Debate*, N.Y. TIMES, Mar. 13, 1986, at B14.

29. *Replay the Replay*, N.Y. TIMES, Sept. 25, 1986, at A30.

30. Aaron R. Baker, *Replaying Appellate Standards of Review: The NFL's "Indisputable Visual Evidence": A Deferential Standard of Review*, 16 TEX. ENT. & SPORTS L.J. 14, 14 (2007) (citation omitted).

31. *Id.*

32. Michael Goodwin, *Instant Replay Rule Troubles Networks*, N.Y. TIMES, Oct. 11, 1986, at A19.

33. Tim Green, *Replay's Back and There's Going to Be Trouble—Again*, USA TODAY, Sept. 10, 1999, at 13F.

34. Baker, *supra* note 30, at 14-15.

35. Thomas George, *N.F.L. Backs Limited Replay After Complaints of Bad Calls*, N.Y. TIMES, Mar. 18, 1999, at A1.

the challenging coach gets his timeout back.[36] Originally, the coach only had two challenges to use per game; the rule has since been revised to give a coach a third challenge if he is successful on his first two challenges.[37] NFL coaches must judiciously use their timeouts because a coach may not initiate a challenge if he does not have a timeout.[38]

The replay official in the upstairs booth was retained, but in a limited form. Instead of giving the booth official the power to review any call he thought was questionable, the owners decided to limit the replay monitor's discretion to the last two minutes of each half.[39] This system forces coaches to be invested in the system by punishing a coach who makes an erroneous challenge with the loss of a timeout. However, it also allows coaches to focus on strategy and not video monitors in the final two minutes of each half.

The other big change from the earlier version of instant replay was that owners instituted a time limit for reviews. Originally, the limit was ninety seconds, before being reduced to sixty seconds in 2006.[40] The NFL wanted to avoid the mistakes of the past replay system where the replay official could unilaterally cause long delays in the middle of a game. By placing a check on officials, the owners ensured that replay would not significantly interrupt the pace of the game.

In 2007, NFL owners voted to make instant replay a permanent fixture in the NFL.[41] The current rules allow officials to review the following non-judgment calls: if a runner broke the goal line plane; if a pass was completed or intercepted; if a player remained in bounds; if a player recovered a fumble in bounds; if an ineligible player touched a forward pass; if a quarterback's forward motion was a pass or a fumble (the "Tuck Rule"[42]); if a player crossed the line of scrimmage before throwing a pass; whether a pass was thrown forward or behind the line of scrimmage; if a player was ruled not down by defensive contact; forward progress (only with respect to a first down); if a kick was touched; if there were more than eleven players on the field; kick attempts where the ball is lower than the top of the uprights at the point it crosses the goal post; or if there was an illegal forward handoff.[43] In addition to judgment calls such as pass interference and holding, non-reviewable calls include: status of the clock; what the current down is; forward progress not related to a first down or touchdown; fumbles; or kick attempts where the apex of the football is above the

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36. NFL Rules, R. 15, § 9.

37. Damon Hack, *Clarett's Suit Against the N.F.L. Is Headed to the Court of Appeals*, N.Y. TIMES, Mar. 31, 2004, at D4.

38. NFL Rules, R. 15, § 9.

39. *Id.*

40. Joe Starkey, *Silent Count Crackdown*, PITT. TRIB.-REV., Aug. 5, 2006.

41. John Clayton, *Picture This: Instant Replay Here to Stay*, ESPN.COM, Mar. 28, 2007, http://sports.espn.go.com/nfl/columns/story?columnist=clayton_john&id=2815186.

42. Mark Maske, *Tuck Rule Hard to Grasp*, WASH. POST, Oct. 15, 2005, at E1.

43. NFL Rules, R. 15, § 9.

uprights when the ball reaches the cross bar.[44]

The NFL has thus restrained the scope and power of referees in the context of instant replay. Only a coach can initiate a challenge in the first twenty-eight minutes of a half. After that, a replay booth official has total discretion. Additionally, certain calls, specifically judgment calls, cannot be reviewed.[45] This is because judgment calls are inherently subjective, and thus the official reviewing the call on a replay monitor would ultimately substitute his judgment for that of the official who made the original call. The rationale for bringing back replay was to eliminate egregious mistakes, not subjective calls.

Finally, the NFL expects that officials viewing a replay monitor will extend great deference to the original call. The NFL Rulebook explicitly states that a call should only be reversed "when the Referee has *indisputable visual evidence* available to him."[46] Thus, the original call must be given great deference. This review standard arguably protects the institutional integrity of officiating by ensuring that animosity does not cultivate amongst crews, and that referees do not have to fear that any call they make could be reversed. The limit on the number of challenges also serves to protect referees from embarrassment.

B. A Thumbnail Sketch of the Appellate Process

A brief review of the typical appellate process in American courts reveals why the analogy to replay review seems fitting. An appeal, of course, arises out of an underlying lawsuit. Although lawsuits are not standardized and vary in their particulars from one jurisdiction to the next, among subject matters, and even from trial judge to trial judge, there are common features. As a case progresses, the parties will have made various assertions, denials, and defenses, many of which will result in rulings from the trial judge. The party on the losing side of any one of these rulings will often object to the judge's decision and want to have it reviewed.

Of course, not every ruling made by a trial judge can be reviewed, at least not immediately. There are preconditions that must typically be satisfied.[47] The claimed error must have been raised at the trial court.[48] As a general proposition,

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44. *Id.*

45. *Id.*

46. *Id.*

47. In one judge's formulation:

> For a reviewing court to determine that there is reversible error, three critical prerequisites must be implicated in the judicial error-correcting process. It is necessary that there be (a) specific acts or omissions by the trial court constituting legal error, (b) properly suggested as error to the trial court, and (c) if uncorrected on that level, then properly presented for review to the appellate court.

Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 457 n.1 (3d Cir. 1982) (Aldisert, J.), *judgment vacated*, 462 U.S. 821 (1983).

48. "[I]n general, attorneys must raise an issue in the trial court, and sometimes take specific steps indicated in common law and in codified rules such as the applicable rules of civil procedure

there must be a final judgment from the trial court before any of its rulings can be reviewed,[49] the party seeking to appeal must have standing, and an appeal must not be moot.[50] More broadly, "an appellate court can be activated only pursuant to a rather elaborate array of rules deriving from statutes, court-made doctrines, written rules of procedure, or some combination of these."[51]

There are exceptions. The justifications for the final judgment rule, which are largely based in considerations of efficiency,[52] do not justify delayed review in every situation. Sometimes it is more efficient, and more fair, to allow for an immediate appeal.[53] These are interlocutory appeals, and American jurisdictions vary greatly in the extent to which they are allowed.[54] In addition, parties are sometimes able to obtain review before a final judgment by way of the extraordinary writs or via procedures allowing for review at the discretion of the appeals court.[55] In operation, these requirements result in a system in which appeals take place at differing stages in a lawsuit's progression. The grant of a motion asserting that the plaintiff has failed to state a claim upon which relief can be granted can result in an appeal at the earliest stages of a lawsuit, while other cases might progress through trial before there is an appeal.

Still more restrictions apply to an appeal that has cleared all these hurdles. There are limitations on the extent of appellate review. The first, scope of review, relates to the breadth of the appellate court's inquiry. As a general matter, the appellate court may only consider things already in "the record" which consists of the information brought before the trial court.[56] There are limited exceptions to this,[57] but for the most part appellate courts are restricted to using the information presented in the trial court to resolve issues first raised in the trial court.[58] The second, standard of review, concerns the depth of the

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and of evidence, to make that issue eligible for consideration by the appeals court." DANIEL J. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 34 (2d ed. 2006).

49. 28 U.S.C. § 1291 (2006).

50. *See* Nat'l Treasury Employees Union v. United States, 101 F.3d 1423, 1427-28 (D.C. Cir. 1996).

51. MEADOR ET AL., *supra* note 48, at 33.

52. *See* DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 45-46 (1994) (listing the avoidance of piecemeal review, the possibility that the complaining party will ultimately prevail, and the desirability of not disrupting the trial judge in the management of the case as the justifications).

53. *Id.* at 49.

54. *Id.*

55. *Id.* at 51-52.

56. *Id.* at 55.

57. *Id.* at 55-56 (identifying those exceptions as consisting of facts of which the court may take judicial notice and "a fact not in the record that is conveyed by counsel during oral argument and not disputed by opposing counsel").

58. There are, not surprisingly, more exceptions to this. Appellate courts sometimes raise issues "sua sponte," and will also relax the requirement that issues have been raised to the trial court

appellate court's review, and may also be regarded as concerning the level of deference to which the trial court's ruling will be entitled. These vary depending upon the type of ruling being reviewed. As a general matter, trial court rulings on questions of law receive no deference, but trial court and jury determinations of fact are entitled to a great deal of deference.[59] Additionally, there are decisions that are committed to the discretion of the trial judge. This discretion is never absolute, and such decisions are reviewed for "abuse of discretion," a standard that varies from one context to another.[60]

An appeal can be regarded as involving an independent, derivative dispute.[61] The parties submit briefs, there is often an oral argument before the appellate court, and the court typically issues a written opinion justifying its decision. Depending on the court's resolution and the stage in the case at which the appeal arose, the appellate court's decision might bring an ultimate conclusion to the lawsuit, or might result in it being remanded to the trial court. If remanded, the case might resume where it was left off, effectively start all over again, or require the determination of new sets of issues.

II. ASSESSING THE ANALOGY

There is a reason that judges and commentators have drawn the connection between replay review and the appellate process—in a basic sense, the analogy works. Both processes involve review of a ruling made by an initial decisionmaker, and both place constraints on the ability of the second decisionmaker to reverse the decision of the first. Many of the features of the replay review process have direct counterparts in the processes of appellate courts. But there are, unsurprisingly, significant differences, too.

This Part examines some of the similarities and differences between the two processes. As the analysis will reveal, whether a feature of the two processes constitutes a similarity or a difference depends to a significant degree on the level of generality at which the assessment takes place.

A. Notable Similarities

Although obvious differences abound, the appellate review process conducted by American courts often overlaps the job of an NFL official viewing a replay of a previous play.

1. Adversarialism and the Preservation of Error.—The NFL replay system and the appellate process both arise out of an adversarial process. As the prevalence of the "law as sport" metaphor[62] attests, litigation and football each involve two parties engaged in a struggle in which there will be a winner and a

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in cases of "plain error." *Id.* at 56-57.

59. *Id.* at 59-64. There are also mixed questions, which arise when the question under consideration requires the application of a legal standard to a given set of facts. *Id.* at 64-65.

60. *Id.* at 65-68.

61. Oldfather, *Error Correction*, *supra* note 11.

62. *See supra* notes 2-10 and accompanying text.

loser.[63] This extends to the process of triggering review: one party must challenge the initial decision. Parties to a lawsuit must object, make a motion, or otherwise prompt a ruling from the trial court. After a party takes the steps necessary to preserve a claim of error, the party must then file an appeal at the appropriate time. The process in the NFL is somewhat less involved. Aside from the final two minutes in each half, an NFL coach must challenge an on-field call for a referee to engage in the instant replay review process.[64] This entails the coach tossing a red flag on the field and telling the crew chief what aspect of the prior play the coach seeks to challenge.[65]

Moreover, in both settings a challenge must be initiated within a designated time period or it will be lost. Litigants must raise pretrial contentions within prescribed time periods,[66] trial objections must be "timely,"[67] and appeals must be filed within a fixed period following a final judgment.[68] These requirements are a product of a number of considerations, including the desirability of drawing the attention of the trial judge and the opposing party to the issue (to allow for the possibility that an error can be corrected without the need for an appeal), as well as facilitating finality by closing off the possibility of review for issues that have not been raised in a timely manner.[69] Considerations of finality and

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63. Of course, even at this basic level the analogy breaks down. Football is generally a zero-sum game (one could imagine a scenario in which a spot in the playoffs turned on a team's overall point differential, such that a team might lose a game but still obtain a playoff spot for itself by minimizing the size of the loss, *see* NFL Tie Breaking Procedures, http://www.nfl.com/standings/tiebreakingprocedures (last visited Oct. 11, 2009), but this is the rare exception.) Litigation is less so. A lawsuit can settle on terms that represent a compromise, a jury might reach a compromise verdict, and so forth.

64. NFL Rules, R. 15, § 9.

65. Curiously, the rules do not expressly provide for any challenge mechanism. Nonetheless, whatever the source of the requirement, flag-tossing is the prescribed method. *See* Judy Battista, *He Who Hesitates Is Lost, Miami's Coach Acknowledges*, N.Y. TIMES, Sept. 9, 2006, at D6.

66. *See, e.g.*, FED. R. CIV. P. 12.

67. FED. R. EVID. 103(a)(1).

68. *E.g.*, FED. R. APP. P. 4(a)(1)(A).

69. One professor summarized as follows:

> There are several reasons for the preservation of error requirement. First, it gives the trial court the opportunity to resolve the issue and determine the prejudicial consequences of the objection, frequently obviating the need for appellate review. Second, a preserved objection gives the appellate court a complete record upon which to base its decision. Third, the preservation rule encourages competent and vigilant performance by the trial attorneys. Fourth, the rule recognizes the unfairness to the winning party at trial of reversing a judgment on the basis of arguments not addressed at trial. Fifth, it avoids sandbagging or concealment by trial counsel to withhold possible reversible errors until the appeal. Sixth, the preservation requirement promotes efficient judicial administration because it results in fewer new trials or remands for further proceedings. Seventh, the preservation requirement encourages finality and trust in litigation. Eighth, it prevents ad hoc decision making. Moreover, appellate courts

practicality likewise drive the process in the NFL. There a challenge must be initiated before the snap of the next play, and will be lost if it is not.[70] The effect is that the NFL's system is one in which all review is interlocutory. Once the game is over the result is final, and no subsequent determination that a call was erroneous will change that result. Thus, the remedial power of the reviewing official is limited to the result of the preceding play. This is to ensure that the rhythm of the game is not disrupted.

There is a lesson in the evolution of the NFL's system. In its original incarnation, instant replay used an essentially sua sponte process in which review was conducted entirely at the discretion of the replay official, with no input from the teams. This proved to be unsatisfactory, and the frustration that resulted is consistent with theories of procedural justice that suggest that opportunity for input is critical to the perceived legitimacy of such a process among potentially affected parties.[71] Indeed, some have raised concerns that replay officials have too much discretion in the final two minutes of a half.[72] Unless the replay assistant located in the coaches' booth or press box determines that a call merits a full review, the head coaches and on-field officials are powerless to initiate review.[73] Much consternation was caused when Kurt Warner's last second fumble in Super Bowl XLIII was not given a booth review.[74] The League's explanation was that Bob McGrath, the replay assistant, had additional time to review the play because of an unsportsmanlike conduct penalty and determined that no official review was needed.[75] The replay system in essence becomes sua sponte in the last two minutes of each half, and thus deprives head coaches of any power over the process. The same dynamic exists in the appellate process. One hears echoes of these critiques in those directed at sua sponte review by appellate courts,[76] as well as in lawyers' frustration with courts' failure more generally to

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are reluctant to vest original jurisdiction over unpreserved matters.

Derrick Augustus Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 U. KAN. L. REV. 947, 950 (1998) (footnotes omitted).

70. In a September 2006 game, then-Dolphins coach Nick Saban attempted to challenge a touchdown reception by Pittsburgh's Heath Miller. He threw the flag before the extra point attempt, but it was too late for the officials to see it, and accordingly Saban lost the ability to mount what would have been a successful challenge. *See* CBS Sportsline.com Wire Reports, *Batch Fills in for Big Ben, Leads Steelers Over Dolphins*, CBS SPORTS.COM, Sept. 7, 2006, http://www.cbssports.com/nfl/gamecenter/recap/NFL_20060907_MIA@PIT.

71. For a consideration of the connection between instant replay and procedural justice, see Jerald Greenberg, *Promote Procedural Justice to Enhance Acceptance of Work Outcomes*, *in* THE BLACKWELL HANDBOOK OF PRINCIPLES OF ORGANIZATIONAL BEHAVIOR 181, 190 (Edwin A. Locke ed., 2000).

72. Peter King, *MMQB Mail: Explaining the Warner Review; Defending Best Game Tag*, SI.COM, Feb. 3, 2009, http://sportsillustrated.cnn.com/2009/writers/peter_king/02/03/wrapup/.

73. NFL Rulebook, R. 15, § 9.

74. King, *supra* note 72.

75. *Id.*

76. *See, e.g.*, Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua*

be responsive to their arguments.[77]

Finally, both systems temper the contestants' adversarial impulses by placing some risk on the party seeking to challenge a ruling. The defeated party in a legal appeal must invest time and money and faces assorted other risks including the generation of an unfavorable precedent or the imposition of sanctions in the event of a frivolous appeal. The NFL coach who incorrectly believes the initial call was wrong loses a timeout and limits his ability to challenge additional calls.[78] Both systems thus provide incentives for the parties to police themselves and thereby increase the likelihood that appeals are meritorious.

2. A Primary Concern with Error Correction (Including Mechanisms Designed to Limit the Number of Appeals).—At least insofar as the point of comparison is review by an intermediate court, both processes are concerned primarily with the correction of errors by the initial decisionmaker. Indeed, considered from a historical perspective the basic architecture of the U.S. judiciary rests on the understanding that appellate courts serve no purpose other than policing for lower court errors.[79] Although the "simple minded formalism"[80] underlying that conception of the appellate role has long since gone out of fashion, many intermediate appellate courts still purport to regard themselves as engaged exclusively in the process of error correction.[81] What is more, many commentators have suggested that all intermediate courts ought to regard this role as their primary function.[82] Even when one accounts for appellate courts'

Sponte Decisions by Appellate Courts, 69 TENN. L. REV. 245 (2002).

77. *See, e.g.*, Mary Massaron Ross, *Reflections on Appellate Courts: An Appellate Advocate's Thoughts for Judges*, 8 J. APP. PRAC. & PROCESS 355, 362 (2006).

78. If the comparison seems absurd, understand that NFL coaches guard time outs like their children. See Dave Anderson, *Replay Instant Replay*, N.Y. TIMES, Mar. 11, 1997, at B11, which notes that Bill Parcells was opposed to reinstituting instant replay because the challenge option required a team to first use a time out. According to Parcells, "Time outs are precious. I don't see what one has to do with the other." *Id.*

79. For a more thorough discussion of this point, see Oldfather, *Error Correction*, *supra* note 11.

80. The phrase is Paul Carrington's. *See* Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 416 (1987).

81. *See, e.g.*, State v. Rodriguez, 738 N.W.2d 422, 432 (Minn. Ct. App. 2007) ("The task of extending existing law falls to the supreme court or to the legislature, but it does not fall to this court. . . . Our analysis is consistent with our role as an error-correcting court and describes what we believe to be the current state of the law." (citation & footnote omitted); *In re* Grand Jury Subpoena Duces Tecum Directed to Keeper of Records of My Sister's Place, No. 01CA55, 2002 WL 31341083, ¶ 22 (Ohio Ct. App. Oct. 9, 2002) ("By and large, courts of appeal in Ohio function in an error correction capacity. We leave the creation of public policy to the legislature and the Supreme Court.").

82. *See, e.g.*, Stephen B. Burbank, *Judicial Accountability to the Past, Present and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19, 21 (2005); Paul D. Carrington, *Justice on Appeal in Criminal Cases: A Twentieth Century Perspective*, 93 MARQ. L. REV. (forthcoming 2009) (on file with author).

law creation role, it seems clear that the overall institutional mission can be characterized as some version of attaining improved results, whether gauged in terms of the trial court's application of legal rules to a case or in terms of determining the most appropriate legal rule.[83]

The error correction mission of replay review is more apparent, and is quite clearly the predominant, if not the sole, rationale for the mechanism. The question facing an NFL referee viewing a replay of a challenged play is simply whether the initial call was correct. Because the rulings subject to review almost exclusively involve what are quite literally bright-line determinations, the question of what constitutes error is considerably less open to interpretation than is the case in the legal system.[84] Thus, making a ruling on whether a play stands should be simple: mere application of the relevant rule to the given situation, with the aid of slow motion replay and multiple camera angles. If this is inconclusive, "indisputable visual evidence" does not exist and the original call must stand. Nor must the replay official concern himself with how the ruling will affect future cases: an official who overturns an on-field call does not write an opinion, does not create precedent, and has no influence over the interpretation of the rules. Indeed, the NFL's director of officiating will occasionally admit when referees make incorrect calls.[85] In theory, and with respect to most calls, NFL officials are to operate as automatons. The NFL rulebook does not offer any room for compromising in that each official is expected to reach the proper conclusion according to the rules.

This is not to suggest that NFL officials are not forced to rely on their judgment. The process of officiating a game during live action constantly requires referees to use their judgment to make split second decisions. Additionally, certain penalties such as holding or pass interference are called differently from week to week, and from one officiating crew to the next, in part because of leeways inherent in the applicable rules and also because officials do not have the luxury of witnessing each play at a leisurely pace.[86] Although the league goes to great lengths to foster uniformity in the way these penalties are

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83. *See* Oldfather, *Error Correction*, *supra* note 11.

84. *Id.* This is not to suggest that there is no room for interpretation, or that the replay review system is infallible. Despite the bright lines on the field, camera angles provide a perspective on reality that is different from reality, and the interpretation of the resulting video introduces an opportunity for subjectivity to generate further distortions.

85. *See* Gary Mihoces, *NFL Admits Mistake in Steelers Game; Error Costly to Gamblers*, USATODAY.COM, Nov. 18, 2008, http://www.usatoday.com/sports/football/nfl/steelers/2008-11-17-score-mistake_N.htm; Associated Press, *NFL Admits Mistakes in Hawks Win Over Giants*, SEATTLETIMES.NWSOURCE.COM, Nov. 28, 2005, http://seattletimes.nwsource.com/html/sports/2002652274_webhawks28.html; Michael David Smith, *NFL Admits Mistakes on Terrell Owens, Bubba Franks Force-Out Catches*, NFL.FANHOUSE.COM, Oct. 17, 2007, http://nfl.fanhouse.com/2007/10/17/nfl-admits-mistakes-on-terrell-owens-bubba-franks-force-out-cat/.

86. The rules also include some grants of broad discretion to officials. For example, if non-players enter the field and interfere with play, "the Referee, after consulting with his crew . . . , shall enforce any such penalty or score as the interference warrants." Rule 17, § 1, art. 1.

called,[87] it acknowledges and accepts some inconsistency. That may be necessary. The use of replay to review such calls would undoubtedly generate *different* results, but not necessarily better results. Pass interference, for example, is to some degree in the eye of the beholder. As a result, the set of calls generated via the use of replay would, to a large degree, serve only to substitute one set of officials' standards for those of another. This effect would likely swamp any tendency toward greater accuracy in the aggregate,[88] thereby making the benefits of review not worth the costs.

The NFL's replay regime, then, offers a glimpse at a pure error correction system. The regime's mechanisms are focused on ensuring that review is available only in situations where it holds the promise of leading to a better result than the one reached on the field, and that when it is available a call will only be reversed if it is clear that reversal is the better outcome. NFL replay does not provide for review in situations where review would not improve upon the quality of calls, nor does exercise of the review mechanism lead to the creation or refinement of the rules involved.

This is not to suggest that there is a single, ideal-type of error correction review mechanism of which replay review is an exemplar. One can imagine many variants of the NFL's system that would still be best characterized as involving only error correction,[89] and in any event the functions of review are not mutually exclusive and the various features of a process of review may serve multiple ends. The point instead is simply to set up a contrast between a review mechanism with a clear focus on error correction and the more mixed process of appellate review.

An appellate regime devoted to error correction to the same extent as replay review would look radically different from the system we have. Review would be limited to rulings as to which the trial court lacks discretion, such as with respect to the admission of a witness' prior crimes involving falsehood or dishonesty under Federal Rule of Evidence 609(a)(2), or perhaps to the category of cases dealt with as involving "clear" or "plain" error. More generally, such a transformation would seemingly require a larger shift to a legal system patterned on a civil law model, in which legislatures generate detailed legal codes that courts apply on a case-by-case basis with no implications for future cases.[90]

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87. Telephone Interview with Derrick Crawford, Counsel for Policy and Litigation, NFL (May 11, 2007) [hereinafter Crawford Telephone Interview].

88. However much judgment informs pass interference calls, there are undoubtedly calls that are simply wrong, such as where there was no contact between the defender and the receiver. Therefore, the application of replay review to pass interference would result in *some* accuracy gains across the run of calls.

89. There is nothing inevitable about the particulars of the replay review system as currently structured. Many of its features could be modified—the types of calls subject to review, the mechanisms for challenging calls, the standard of review, and the like—without (necessarily) affecting its essential character as a system for correcting error.

90. The NFL instant replay process bears some similarities to civil law jurisdictions. The driving force behind civil law systems is a desire to limit the role of the judiciary. Charles H. Koch,

Of course, we do not live in such a world. Few legal rules share the concrete clarity of the sideline or the plane of the goal line. Instead, the appellate process often requires judges to engage in law declaration. Common law courts must determine whether the rules and principles embodied in past cases should be extended to present situations.[91] Courts engaged in statutory interpretation must grapple with ambiguous, inconsistent, and even absent language.[92] It is entirely routine and perfectly acceptable for two competent judges to reach opposite conclusions on a legal issue. Indeed, Congress is often not clear in drafting statutes and punts the job of interpretation to the courts. All of this is complicated further by the expectation that a court will issue a written opinion justifying its decision, and the fact that a court's decision in the case before it will serve as binding precedent in later cases. As a result, the court must engage in its analysis with an eye to the future.[93] Because of this, it is plausible to imagine a court reaching a result in the case before it that it believes to be wrong in the sense of being unjust given the facts of the specific case, but correct in the sense of being consistent with the best rule for the larger class of cases of which it is a part.[94]

There is another sense in which the appellate system's error correction mission is qualified, and it is one that is shared with replay review. Both the appellate review process and instant replay incorporate mechanisms for ensuring that only consequential errors are addressed. In the NFL, this mechanism is driven primarily by the incentives created for the teams. A coach could

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Jr., *The Advantages of the Civil Law Judicial Designs as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 150 (2004). Civil law thus differs from common law in that civil law countries are governed by a codified set of laws, rather than judicial interpretation of the law. Mary Garvey Alegro, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 778 (2005). Additionally, civil law countries generally do not adhere to stare decisis. *Id.* at 779. Likewise, stare decisis does not exist in the NFL because referees are not bound by previous rulings. In both systems the decisionmaker is expected to properly apply the code or rules—a previous ruling that is incorrect is viewed as a hindrance and thus irrelevant. *See* Catherine Valcke, *Quebec Civil Law and Canadian Federalism*, 21 YALE J. INT'L L. 67, 85 (1996).

The litigation process in civil law countries is largely driven by judges. Koch, *supra*, at 152. After pleadings, one judge is responsible for building the record, and a judicial officer prepares his own opinion to assist the court in reaching a decision. *Id.* at 153. Furthermore, the judiciary has total control over fact-gathering. *Id.* One substantial difference appears in the standard of review that governs appeals. In the NFL, of course, the highly deferential "indisputable visual evidence" standard applies. NFL Rules, R. 15, § 9. In contrast, because civil law judges rely on written records on appeal, they engage in de novo review. Koch, *supra*, at 156.

91. *See* Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 339-40 (2009) [hereinafter Oldfather, *De Novo*].

92. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

93. Oldfather, *De Novo*, *supra* note 91, at 339-40.

94. *See id.* at 344-50.

challenge the spot of the ball in the first quarter on a play where the effect of a successful challenge would be to transform second-and-five to second-and-three, but he would be foolish to do so.[95] He might lose the challenge, and regardless of the outcome would restrict his ability to challenge the more significant calls that might occur later in the game.[96] As noted above, the appellate process likewise creates incentives for parties to limit themselves to challenges of consequential rulings.[97] But these incentives do not operate as effectively in the legal context.[98] As a result, appellate review has incorporated the "harmless error doctrine."[99] Prior to the passage of the Judiciary Act of 1919, federal courts adhered to the rule that any error—regardless of how insignificant—required reversal for a new trial.[100] Now, the Federal Rules of Civil Procedure state that "the court must disregard all errors and defects that do not affect any party's substantial rights."[101]

3. Analysis Directed by a Standard of Review.—One of the more salient similarities between the appellate process and replay review is that in each the inquiry is guided by a standard of review. In law, the standard varies from one context to the next. One commentator has likened the scope of judicial review to that of a telescope, with legislatures adjusting the lens to change the level of judicial scrutiny.[102] Different standards of review apply depending on whether the legal issue is a question of law, a question of fact, or a matter of discretion.[103] Generally, questions of law are reviewed de novo, meaning the appellate court has complete discretion and does not need to defer to the lower court.[104] The commonly offered rationale for this standard of review sounds in institutional competence.[105] The assumption is that the appellate court is just as capable as the

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95. This would be so even if the coach had a running back like Leroy Hoard, who reportedly once told his coach, "if you need one yard, I'll get you three. If you need five yards, I'll get you three." Matt Meyers, *A Giant Duo*, CSTV.COM, Nov. 14, 2007, http://www.cstv.com/roadtripcentral/goingbig/2007/11/14/.

96. *See* Hack, *supra* note 37.

97. *See supra* text accompanying note 78.

98. This is so for a variety of reasons, including the underdeterminacy of legal standards, inconsistent lines of decisions from a single court, agency problems between clients and lawyers, and the lack of incentives against appeal faced by some parties (most notably indigent criminal defendants).

99. *See* Glen Weissenberger, *The Proper Interpretation of the Federal Rules of Evidence: Insights from Article VI*, 30 CARDOZO L. REV. 1615, 1633 n.94 (2009) (defining the harmless error doctrine).

100. *See* Oldfather, *Error Correction*, *supra* note 11.

101. FED. R. CIV. P. 61.

102. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 682 (2002).

103. Baker, *supra* note 30, at 15-16.

104. BLACK'S LAW DICTIONARY 852 (7th ed. 1999).

105. *See* Oldfather, *De Novo*, *supra* note 91, at 327-32.

trial court to decide legal matters.[106] Indeed, because appellate courts are more prestigious and larger bodies, they are, theoretically, more capable of answering questions of law.

On the other hand, appellate courts grant a tremendous amount of deference to lower court determinations of issues of fact. Here too, the arrangement's justification stems from an understanding regarding relative institutional competence—namely that the trial court is in a better position to handle factual matters than an appellate body.[107] A trial court judge hears all of the testimony, sees all of the witnesses, and deals mostly with factual questions.[108] And although the terminology can vary (clear error, clearly erroneous, substantial evidence, or arbitrary and capricious),[109] appellate courts will only reverse factual questions under extreme circumstances.

In contrast, the NFL has one overriding standard of review for challenged calls: The official must see "*indisputable visual evidence*" to overturn the original call.[110] This standard is highly deferential to the on-field official who made the original call. According the NFL spokesman Greg Aiello, "[u]nder the standard of the instant-replay rule, [the video evidence] has to be clear-cut," otherwise "you can't reverse the call."[111] The rationale for this standard is to prevent instant replay reversals from becoming more controversial than the original call.[112]

Observers in both contexts have suggested that the reviewers do not consistently conduct their review in line with the dictates of the applicable standard. To take just one example from the legal context, some have suggested that appellate courts, as a general matter, fail to show appropriate deference to

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106. Baker, *supra* note 30, at 15.

107. *See* Oldfather, *Appellate Courts*, *supra* note 12, at 444-66.

108. *See id.* at 444-49.

109. One school of thought is that these distinctions are merely semantics. *See* Morales v. Yeutter, 952 F.2d 954, 957 (7th Cir. 1991). As Judge Posner has put it elsewhere, "The only distinction the judicial intellect actually makes is between deferential and nondeferential review. . . . So what is involved in appellate review is, at bottom, simply confidence or lack thereof in another person's decision." RICHARD A. POSNER, HOW JUDGES THINK 113 (2008).

110. NFL Rules, R. 15, § 9.

111. Bart Hubbuch, *Jaguars Notebook*, FLA. TIMES-UNION, Dec. 10, 2002, at D9.

112. There are some who believe that the NFL would do well to adopt a less deferential standard of review on instant replay. *See* Jack Achiezer Guggenheim, *Blowing the Whistle on the NFL's New Instant Replay Rule: Indisputable Visual Evidence and a Recommended "Appellate" Model*, 24 VT. L. REV. 567, 578 (2000). The highly deferential "indisputable visual evidence" standard could be replaced with the "manifest weight of the evidence" standard or even de novo review. *Id.* Officials reviewing a replay—unlike appellate courts—have additional evidence at their disposal in the form of multiple camera angles with close up shots and slow motion. Appellate courts generally defer to the trial court on factual matters because the trial court has a more intimate connection with the evidence. *Id.* at 576. The opposite is true of an official viewing an instant replay.

jury determinations in civil cases.[113] Critics have likewise chastised NFL officials for not following the NFL's clear guidelines.[114] In fact, there is some evidence that NFL officials often apply a de novo standard of review to instant replay. For example, in a December 2008 game between the Pittsburgh Steelers and the Baltimore Ravens, Steelers wide receiver Santonio Holmes caught a pass with his feet inside the end zone.[115] However, the head lineman ruled that the ball did not cross the plane of the goal line.[116] Replays of the catch were inconclusive, with different angles seemingly showing different results.[117] Yet the call was reversed by referee Walt Coleman.[118] As *Sports Illustrated*'s Peter King remarked, "[t]his is the continuing problem with the replay system. I think officials need to realize what 'indisputable' means. It doesn't mean likely, or most likely. We still see calls like this, year after year. . . . I just wish the rule would be applied exactly the way it was intended."[119] In fact, instant replay had this same problem during its first go round.[120]

One might suggest that the league should discard the "indisputable visual evidence" standard.[121] After all, the rationale for de novo review by appellate judges is that they are in as good a position—if not better—to decide questions of law.[122] The same might be said of referees viewing a replay monitor. An on-field official has to make a decision in the blink of an eye with an orchestrated maelstrom of colliding bodies surrounding him. By contrast, a referee reviewing the play on a replay monitor can focus on the precise zone of action from multiple angles with the aid of slow motion and zoomed-in camera shots.

As we discuss below, however, institutional competence is not the only factor.[123] The NFL also has to worry about institutional integrity. If the NFL instituted a lower standard of review for challenged plays, more calls would likely be overturned. This could eventually impact the public perception of the competency of NFL officiating crews. Additionally, a lower threshold for overturning calls would make it more likely that NFL coaches would challenge borderline calls. This would result in longer games with more interruptions, which was the most significant problem with the original replay system.

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113. *See, e.g.*, Eric Schnapper, *Judges Against Juries-Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 353-55.

114. Posting of J. Red to East Coast Bias, http://www.east-coast-bias.com (Dec. 28, 2007, 11:18 EST).

115. The video can be found at http://www.youtube.com/watch?v=w7z4RXNwHKk.

116. Peter King, *Indisputable Evidence: Steelers Continue to Survive in Tough Games*, SI.COM, Dec. 16, 2008, http://sportsillustrated.cnn.com/2008/writers/peter_king/12/14/Week15/.

117. *Id.*

118. *Id.*

119. *Id.*

120. Eldon L. Ham, *Play it Again Sam—but in a Different Key*, CHI. DAILY L. BULL., Sept. 19, 1997, at 6.

121. And indeed some have. *See supra* note 112.

122. *See* Oldfather, *De Novo*, *supra* note 91, at 327-32.

123. *See infra* Part III.A-B.

B. Points of Contrast

Many of the points of contrast between replay review and the appellate process are too obvious to warrant sustained discussion. No matter the money at stake or the various collateral consequences to players, coaches, and fans, football, as played in the NFL, remains an athletic contest performed within a closed universe pursuant to a fixed set of rules. Rather than attempting to enumerate a comprehensive list of the differences that result from this distinction, this subsection focuses on contrasts that illuminate the nature of the review process.

1. The Architecture of Review.—There are substantial differences between the appellate process and replay review in terms of the context in which review takes place. An appeal, even an interlocutory appeal taken before the proceedings at the trial court have concluded,[124] involves going to an entirely separate tribunal from the one that made the initial decision.[125] More often than not the appellate court will be in a different geographical location than the trial court. With rare exceptions, the appeal takes place at some chronological remove as well, with the various components of the process typically parceled out over several months. It is, on the whole, a process that is clearly distinct from the larger lawsuit from which it arises. To some extent these features of the appellate process may be artifacts of now non-existent historical conditions stemming from various hurdles involving travel and communication.[126] But they serve other purposes as well. Physical separation from the initial decisionmaker serves to reduce any tendency for the reviewing court to be, in effect, too lenient, by avoiding reversal of a trial judge for the simple reason that doing so would make for an uncomfortable ride in a shared elevator. The multi-member nature of appellate courts and relatively relaxed pace of the appellate process, at least as it was traditionally conducted, allows for the sort of reflection and deliberation that is absent in the chaos of the trial process.[127] Oral argument and the court's written opinion provide the two windows through which the public can view the process.[128] These features result in what is generally thought to be a superior decision-making process and combine to foster the perception of legitimacy in the losing litigant. She gets to take her arguments to a higher authority, and in

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124. BLACK'S LAW DICTIONARY, *supra* note 104, at 94.

125. *Id.*

126. *See* Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1178-85 (2004).

127. That sort of reflection and deliberation may now characterize the appellate process as it relates to a small minority of cases. *See, e.g.*, William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 295-96 (1996).

128. These features are increasingly absent from the process. *See* Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 764-74 (2006) [hereinafter Oldfather, *Remedying Judicial Inactivism*].

the process of doing so she is afforded a cooling-off period, after which the news that the appeals court has also found in her opponent's favor may sting somewhat less than the original defeat.

All of this is arguably necessary given the nature of the inquiry. As Judge Posner has noted, it is remarkably difficult for an outsider to discern whether a court has done what it is supposed to do, and whether a given decision is the right decision, or even a good decision.[129] Process thus serves as an important proxy for decisional quality.

Replay review, in contrast, takes place immediately and occurs in what is effectively the same location. The reviewing official is a member of the officiating crew that made the call under review, and may even review a call that he himself made.[130] These features work in the context of replay review not only because some of them are necessary to any replay review system in a sporting contest,[131] but also because of the nature of the review process itself. Again, the types of decisions subject to review are limited to those involving what are often quite literally bright-line rulings.[132] Here, in contrast to the judicial context, it is often not merely possible to determine whether a given decision is the correct one, but inevitable following a viewing of the replay. What is more, the teams and the viewing public have the full ability to monitor the reviewing official's decisionmaking. Both the television viewing audience and the fans in the stadium generally have access to the same replays as the reviewing official. As a result, there is little risk that the reviewing official will succumb to any temptation to shade his decision to avoid embarrassing or offending a colleague.

Notably, replay review is not the only, or even the primary, mechanism through which the NFL ensures that officials follow the rules. Instead, the league uses video replay to assess the performance of every official on each play of every game.[133] The league provides the results of these assessments to officials within days after a game, and continually monitors for consistency across its

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> Many of the decisions that constitute the output of a court system cannot be shown to be either "good" or "bad," whether in terms of consequences or other criteria, so it is natural to ask whether there are grounds for confidence in the design of the institution and in the competence and integrity of the judges who operate it.

POSNER, *supra* note 109, at 3.

130. Richard Sandomir, *Referees Turn to Video Aid More Often*, N.Y. TIMES, Jan. 25, 2002, at D1 (noting that referee Walt Coleman reviewed and reversed his own fumble call in the infamous "Tuck Game" between the Raiders and Patriots).

131. One could easily imagine having the review process conducted by a distinct team of officials who never interact with the on-field officiating crew. But immediacy seems absolutely crucial for the simple reason that without it play would have to be suspended until the challenge was resolved. Such a regime seems unworkable in any sporting context where there are factors—like maintaining fans' interest—pushing in favor of reaching a resolution in a short period of time.

132. NFL Rules, R. 15, § 9.

133. Crawford Telephone Interview, *supra* note 87.

officiating crews.[134] In the law, by contrast, appellate review is the primary source of discipline on judges. Beyond that, the system relies on a cluster of structural and cultural mechanisms to keep judicial decisionmaking in check.[135]

2. Scope of Review.—As noted above, both processes illustrate the concept of scope of review in that the court or official reviewing the initial decision is permitted to cast its or his gaze only so broadly.[136] But the relationships between the limitations placed on the scope of the reviewer's inquiry and the raw materials that provide the basis for review are quite different. In the judicial appeals process the materials available to support review by the appeals court are regarded as a primary source of limitation on the court's power. In the NFL, in contrast, the materials that support review (i.e., the replays) generally place the reviewing official in a superior position relative to the official who made the original call.

The limitations on appellate courts are familiar. Because trial judges and juries are present in the trial courtroom when the evidence comes in, they are best positioned to assess the credibility of witnesses, the weight of a particular piece of evidence in the context of the entire case, and the like.[137] Appellate judges, conversely, confront trial testimony in the form of a transcript.[138] The record is "cold,"[139] and thought to provide less reliable clues to aid in answering the question before the court. This is perhaps compounded by the fact that the appellate court is reviewing the record of a secondary account (the trial) designed to determine what actually took place at some earlier time (the events giving rise to the litigation). Additionally, the necessary historical fact-finding often requires the divination of some actor's mental state, such as whether the person acted with intent, recklessly, or the like. In all, the proceedings at the trial level involve using somewhat unreliable inputs in an effort to determine the truth of what happened at some other place and time. The appellate process introduces another layer. The court must use further unreliable inputs to unpack what happened both at the trial level and at the place and time where the operative facts took place. These stacked layers of imprecise inputs stand as an obstacle to effective appellate performance and make a broad scope of review seem inappropriate.

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134. *Id.*

135. For a thorough, if somewhat dated, consideration of these mechanisms, see KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 19-51 (1960).

136. *See supra* Part II.B.1.

137. *See* Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 238 (1991); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 759 (1982) ("The most notable exception to full appellate review is deference to the trial court's determination of the facts. The trial court's direct contact with the witnesses places it in a superior position to perform this task.").

138. Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 293 (2000).

139. LESTER BERNHARDT ORFIELD, CRIMINAL APPEALS IN AMERICA 85 (1939) ("The cold printed record inevitably must give an incomplete and sometimes distorted picture of the case.").

The instant replay official stands in a different position from the appellate court in at least two respects. First, the replay official does not review secondary evidence of what took place. The opposing teams do not offer testimony and evidence about whether a receiver's foot was on the line for the officials to consider. Moreover, the focus of the replay official's consideration is not so much the on-field official's decision as it is the actual on-field conduct to which that decision is related. An appellate court would operate similarly if its focus was not on what took place in the trial courtroom, but rather on what took place at the time and in the place giving rise to the lawsuit. This difference undoubtedly stems from the second. The replay official not only has a "record" to review that is as good as what the on-field official had, he has a record that is often undeniably better. He has access to multiple angles, and the ability to watch it all in slow motion and high definition.[140] There are limitations—images captured by the stadium Jumbotron fall outside of the purview of instant replay[141]—and inequities—primetime NFL games have additional camera angles,[142] such that officials working less prestigious contests are put at a disadvantage. And the video evidence will not always be conclusive. But within the limited universe of calls that can be challenged, the replay official often has access to better information.

3. The Existence of a Lawmaking Function.—One of the primary functional differences between the review mechanisms in the NFL and in the law concerns the prospective effect of any given ruling. Because appellate courts must consider issues of law, and because existing legal materials are often ambiguous or incomplete, it often falls to courts to, in effect, create law. Despite popular rhetoric to the contrary, this is a non-controversial position.[143] Indeed, even the task of applying a clear legal rule to an established set of facts involves, in a very narrow sense, the creation of law.[144] This is a function of the idea that like cases should be treated alike and the notion of precedent that follows from it. Because like cases are to be treated alike, when a court in Case 1 has determined that

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140. Associated Press, *NFL Will Give Referees Same HD Look as Fans at Home*, ESPN.COM, Aug. 10, 2007, http://sports.espn.go.com/nfl/news/story?id=2968462.

141. Green, *supra* note 33.

142. Troy Aikman, *It's Time to Scrap Instant Replay Because the System Isn't Working*, SPORTING NEWS, Dec. 27, 2004, at 45; Richard Sandomir, *Let's Go to the Tape: N.F.L. Unveils a System*, N.Y. TIMES, May 27, 1999, at D4.

143. Consider, for example, Justice Scalia's opinion for the Court in *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002) ("This complete separation of the judiciary from the enterprise of 'representative government' might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system."). *See also id.* at 784 n.12 ("In fact, however, the judges of inferior courts *often* 'make law,' since the precedent of the highest court does not cover every situation, and not every case is reviewed.").

144. For the view that any application of law to fact should be accorded precedential value, see Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 221-23 (1999).

Result A is required when factors X, Y, and Z are present, a court in Case 2 begins from the presumption that Result A will likewise be required in that case if the same factors are present.[145] The court adjudicating Case 1 must consider the appropriateness of factors X, Y, and Z as triggers.[146] In turn, the court must imagine what subsequent cases will look like and consider whether committing to resolve those cases based on the existence or non-existence of the identified factors will lead to the appropriate set of results.[147]

NFL referees never face such encumbrances. To be sure, some of the rules of the game vest discretion in on-field officials (such as in determining whether a defender's conduct on a given play constituted pass interference) just as trial judges enjoy broad categories of discretion. But these rulings are immune from review, and there is rarely any doubt as to what the NFL rulemakers and the Competition Committee meant with respect to the rules governing those calls that are subject to review. Either the ball crossed the goal line or it did not. Any given call involves some novelty in the extreme sense that the rule has never before been applied in precisely the same situation. But accounting for such novelty adds nothing to the content of the rule—that precise situation will never arise again, and the scope and application of the rule are clear enough that accounting for a prior call via a system of precedent would add nothing to the content of the rule. There simply is no need for a system of precedent in a context like that presented by the NFL.

This is not to suggest that there is no need for something analogous to a lawmaking process in the NFL. There is, and such a process exists. NFL officials have no say as to the meaning of rules, and will be reprimanded for incorrect interpretations.[148] Similarly, the NFL Competition Committee will often release a "point of emphasis."[149] These edicts explicitly state which calls the NFL wants stressed for the upcoming season.[150] For instance, the Committee has told referees to emphasize illegal contact, and sure enough the number of pass interference calls has increased.[151] In essence, the NFL can achieve a desired policy result without changing the rulebook.

The difference between the two systems in terms of the lawmaking function has consequences. It is judges' role as lawmakers—or, perhaps more accurately,

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145. *Id.*

146. *Id.*

147. *See* Oldfather, *De Novo*, *supra* note 91.

148. *See, e.g.*, Seattle Times News Service, *Referee Ed Hochuli Gets Downgraded After Blown Call*, SEATTLE TIMES, Sept. 16, 2008, http://seattletimes.nwsource.com/html/seahawks/2008182066_ref16.html.

149. Len Pasquarelli, *Expect More Illegal Contact Penalties in 2004*, ESPN.COM, Mar. 27, 2004, http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli_len&id=1771047.

150. *Id.*

151. Kerry J. Byrne, *Golden Age of Passing*, COLDHARDFOOTBALLFACTS.COM, Dec. 3, 2008, http://www.coldhardfootballfacts.com/Articles/11_2564_Golden_age_of_passing.html; Aaron Schatz, *Decline in Offense is Leaving 2004 in N.F.L. Record Books*, N.Y. TIMES, Nov. 6, 2005, § 8, at 11.

the extent to which they should embrace or even acknowledge that role—that accounts for the politicization of judicial selection. Referees, in contrast, do not make the rules, and there are no competing schools of thought on how to interpret the NFL rulebook. It is, relatedly, much easier for the league (and observers) to conclude that an official got a call wrong, and it will often acknowledge as much. Not so in law. In part because of the nature of the rules involved, which require interpretation, it is difficult to reach a definitive conclusion that a court arrived at the wrong result. Imagine the U.S. Congress writing an apology to a litigant because the Supreme Court misinterpreted a statute.

III. BROAD THEMES

In addition to the specific comparisons undertaken in the preceding section, there are several broader themes pertaining to processes of appellate review (or, more generically, review of decisions by a secondary decisionmaker) that are usefully illustrated by consideration of the NFL replay review system and appellate review.

A. The Role of Institutional Competence

A key theme running through discussions of the appellate process is the significance of institutional competence. It is the appellate courts' perceived inability—relative to trial judges and juries—to assess witness credibility, evidentiary weight more generally, and the myriad factors that go into the exercise of trial court discretion that provide the primary justification for deferential review of trial-level fact finding.[152] At the same time, appellate courts' perceived competence advantage with respect to legal rulings forms a substantial part of the justification for their power to engage in plenary review of such questions.[153]

And so it is in the NFL. Replay review depends almost entirely on the belief that an official who has the benefit of looking at a replay will be in a better position to rule on the question under consideration than was the official who made the call in real time. Indeed, the "indisputable visual evidence" standard seeks to ensure that assumption holds true in the case of any reversal of a call: If there is not indisputable visual evidence, then the reviewing official does not enjoy a competency advantage (or at least not one of a sufficient magnitude). The appropriateness of this underlying assumption is easy to appreciate, as fans in stadiums and viewing games on TV do in large numbers each week of the season.

To this point the comparison concerning institutional competence, although apt, may seem somewhat pedestrian and not all that instructive. But there is perhaps something more to be learned from the analogy. Consider that the potential for replay review, and thus for the sort of competence advantage enjoyed by the replay official, has not existed during the entire history of the

152. *See* Oldfather, *Appellate Courts*, *supra* note 12, at 444-66.

153. *See* Oldfather, *De Novo*, *supra* note 91, at 327-32.

NFL. The possibility of near-instant replay review did not even exist until the introduction of videotape in the 1950s, and the possibility did not evolve into practicality until some time after that.[154] The specifics of the relevant time line are not so important as the fact that the existence of the league predated the possibility of replay review. But just as other aspects of the game and its rules have evolved to accommodate technological, strategic, and other advances, so did replay review arise in the wake of the competence advantage that video technology conferred.

Of course, video technology did not exist at the time our existing appellate structure and processes came into being. The point is not to suggest that appellate review ought to incorporate a use of video technology that is as transformative as replay review has been in the NFL. As we note below, the environment in which appellate review takes place and the sorts of determinations that appellate courts are called on to make are more complex than what is involved in replay review. As a result, it is not enough simply to suggest that what is good enough for the NFL (and now even Major League Baseball[155]) ought to be good enough for the legal system. Still, the NFL's embrace of a competence advantage provided by advances in video technology at least invites consideration of whether the technology might confer similar advantages on appellate courts that could be appropriately accounted for in the review process.

Video is increasingly pervasive in society, as more and more people

> gain the ability to record the people and events around them. Video also is increasingly pervasive in law, as more and more of the events recorded in public become the basis for civil and criminal litigation and come to be used as evidence in that litigation.[156]

As a result, many courts and commentators have started to grapple with the issues arising out of video's implications for appellate courts' relative institutional competence. For example, some American courts have referenced the "indisputable visual evidence" standard in the context of evaluating videotaped evidence.[157] In *Carmouche v. State*, the Texas Court of Criminal Appeals utilized videotaped police evidence to hold that the defendant did not consent to a police drug search.[158] The court noted "that the videotape from the patrol car's camera does not support the testimony of Ranger Williams."[159] The opinion emphasized that *Carmouche* presented "unique circumstances" that did

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154. Joe Starkey, *Instant Replay Born 40 Years Ago Today*, PITT. TRIB.-REV., Dec. 7, 2003, *available at* 2003 WLNR 13948466 (noting that instant replay was not utilized by television crews until 1963).

155. Jack Curry, *Baseball to Use Replay Review on Homers*, N.Y. TIMES, Aug. 27, 2008, at D3.

156. Wasserman, *supra* note 17, at 660.

157. Carmouche v. State, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000).

158. *Id.* at 331-32.

159. *Id.* at 331.

not merit the normal deference to the trial court's evidentiary findings.[160] Ultimately, the Texas Court of Criminal Appeals overturned the lower court's holding because "the videotape presents indisputable visual evidence."[161] In a later case, the Texas Court of Appeals declined to apply de novo review to videotape evidence, stating that it "must be considered with all the evidence before the trial court."[162]

The most high-profile case involving video evidence is the Supreme Court's 2007 decision in *Scott v. Harris*.[163] The case concerned whether a police officer involved in a high-speed chase acted unreasonably in ramming into the back of a fleeing motorist's car.[164] The Supreme Court reversed the court of appeals, and held that the officer did not violate the plaintiff's Fourth Amendment right against unreasonable seizure.[165] In reversing the appellate court, the Supreme Court relied on video evidence of the car chase.[166] Justice Scalia remarked that, "[t]he videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals."[167]

Although the trial record demonstrated a discrepancy between the statements of the officer and the statements of the respondent, the Court nonetheless overruled the lower courts and granted the officer's motion for summary judgment.[168] The majority refused to grant deference to the trial court's judgment on factual matters because "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[169] Justice Scalia held that the video footage of the incident provided indisputable visual evidence to dismiss the case.[170] "Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape."[171]

In his dissent, Justice Stevens chided the majority for arrogating to itself the fact-finding job traditionally reserved for juries.[172] Justice Stevens criticized the

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160. *Id.* at 332.

161. *Id.*

162. Peace v. State, No. 07-02-0347-CR, 2003 WL 22092707, at *2 (Tex. Ct. App. Sept. 9, 2003).

163. 550 U.S. 372 (2007).

164. *Id.* at 374.

165. *Id.* at 386.

166. *Id.* at 378-80. The video can be found at http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb.

167. *Scott*, 550 U.S. at 378.

168. *Id.* at 386.

169. *Id.* at 380.

170. *Id.* at 380-81.

171. *Id.*

172. *Id.* at 389-90 (Stevens, J., dissenting).

majority for applying a de novo standard of review to an evidentiary question, and for assuming that residents of Washington, D.C., could better determine the safety of driving on Georgia highways.[173] Given that the district court judge, three appellate court judges, and a Supreme Court Justice thought that the video did not provide a basis for summary judgment, Justice Stevens did not see a reason to remove the factual determination from jurors.[174]

The *Scott* case underscores the tensions that would result from a too-facile acceptance of the similarities between replay review and the appellate process. In *Scott*, the majority dismissed a lawsuit based on factual grounds—a task normally reserved for juries. Because the majority believed that "no reasonable jury" could have found otherwise, the Court prevented a jury from assessing the video.[175] Justice Breyer, in a concurring opinion, likewise emphasized the significance of the video footage in shaping his reaction to the case.[176]

In effect, and without expressly making the analogy, the Justices in the majority regarded themselves as occupying a position that is the functional equivalent of the replay-review official. Whether this was appropriate is open to debate. To be sure, the Justices were in the same position to view the video as a hypothetical jury, and consequently were equally competent to make findings of historical facts. But the analogy may extend no farther. For the Justices to be truly equivalent to the replay official, it would also have to be the case that they are better positioned to characterize what took place in terms of its reasonableness. As Dan Kahan and his colleagues have shown, viewers' assessment of what the video in *Scott* depicts varies along with their cultural and ideological backgrounds.[177]

There are certainly arguments to be made for the normative desirability of the Court's conclusion. "Reasonableness" as applied in this context undoubtedly has a legal component to it, such that the Justices might best be characterized as having supplanted the jury not so much with respect to the finding of fact as to the legal consequences of those facts. Or it may be that the Court's conclusion serves systemic ends such as the avoidance of inconsistent verdicts.[178]

The point is not so much to criticize or defend the specifics of *Scott* as to note that any such conclusions are contestable in a democracy (as opposed to the effectively autocratic world of the NFL), and with respect to inherently judgment-infused standards such as reasonableness (as contrasted with the literally bright lines of a football field). As Wasserman concludes, "[l]ike much else in the law, video is neither an unadorned good nor an unadorned bad; the reality is far more complex."[179] One can appreciate the allure to an appellate

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173. *Id.* at 389.

174. *Id.* at 395-96.

175. *Id.* at 380 (majority opinion).

176. *Id.* at 387 (Breyer, J., concurring).

177. *See* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 868-69 (2009).

178. *Id.* at 888.

179. Wasserman, *supra* note 17, at 661.

judge of viewing herself as performing a role analogous to that of the replay official. However, the analogy does not hold without significant qualification.

B. The Importance of Context

Effective review of prior decisions, even in a regime focused primarily or exclusively on error correction, is not entirely driven by institutional competence. To be sure, competence plays the largest role. If the second-order decisionmaker lacks the raw ability to make better decisions than the initial decisionmaker, no process of review is likely to be worthwhile. But effective review is a product of more than a simple competence advantage. The reviewing authority must likewise be subject to constraints designed to keep its exercise of authority within appropriate bounds. That is, there must be reason to believe that the second decisionmaker will implement its competence advantages in a responsible way.

Even when those conditions are satisfied, review will not be unconstrained. Accuracy is only one of the many ends the system must serve, many of which conflict with an unfettered quest for correctness. Appellate courts are fond of invoking the idea that litigants are not entitled to a perfect trial, but rather a fair one.[180] A similar dynamic holds on appeal. Finality, for example, is an end in its own right, and one that will often displace the quest for accuracy.[181] The legal system must accommodate a host of conflicting ends.

The contextual constraints on review in the judicial system and the NFL are quite distinct. As noted above, it is difficult to determine whether any given judicial decision is the "correct" decision, and often whether it is even a good decision. We instead rely to a great degree on proxies.[182] Oral argument provides some assurance that decisionmaking is appropriately responsive to the parties' contentions, and the requirement that courts provide a written opinion disciplines decisionmaking by acting as a form of informational regulation.[183] We require judges to recuse themselves in situations where there appears to be too great a possibility that they will be able to act without bias.[184] At a more general level, mechanisms of judicial selection operate to ensure that judges do not fall at the extremes in terms of their approach to the various sorts of issues they are likely to confront. At the same time, review in the judicial system is structured so as to place the reviewing court, at least in most instances, at some remove from the lower court. As noted above,[185] the appeals court is a separate

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180. This idea in the Supreme Court at least, appears to have originated in *Lutwak v. United States*, 344 U.S. 604, 619 (1953).

181. *Cf.* Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1194-95 (1979) (suggesting that the attainment of "authoritative finality," rather than accurate determinations of guilt, may be the primary goal of the criminal justice system).

182. *See* POSNER, *supra* note 109, at 3.

183. *See* Oldfather, *Remedying Judicial Inactivism*, *supra* note 128, at 764-67.

184. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009).

185. *See supra* Part II.B.1.

tribunal that is, as a general matter, distant in time and location from the initial decisionmaker. This serves to reduce the likelihood that the reviewing court will identify too strongly with the trial judge, or otherwise feel constrained (interpersonally or otherwise) from reversing the full range of decisions that should be reversed.[186] It also has some effects in terms of furthering the perception of systemic legitimacy more generally. Affording litigants the opportunity to appeal, while doing so in the context of a system that incorporates a "cooling off" period, likely results in greater litigant satisfaction than would be the case under alternative mechanisms.[187]

There is almost no reliance on proxies in the NFL. For the category of decisions that are subject to review, the identity of the correct decision is not subject to dispute. It would be difficult to imagine a more open process of review. Although the replay official goes under a hood to conduct his review, the teams and the spectators (both those at the game and those watching on television) have access to the same information and have the ability to assess the information independently. There is, accordingly, no need for other mechanisms to discipline the replay official's conduct of the review process. Note as well that these contextual constraints are powerful enough that there is no concern about the fact that the person conducting the review was part of a team of officials whose call is under review, and may even be in the position where he has to review his own call.[188]

Too much significance may be drawn from these contextual differences. After all, the geographic and chronological distance present in the appellate judicial process is at least as much a product of factors such as the need to allow parties time to prepare an appeal and the relative logistical convenience of having appellate courts convene at a central location as it is a reflection of some conscious effort to create space between decisionmakers at the various levels involved. In similar fashion, the instant replay process is undoubtedly driven by the need to have a review mechanism that can be implemented without interrupting the flow of the game or otherwise detracting from the game's entertainment value.

Consider the NFL's reluctance to part with the chain measurement system. Legendary broadcaster Pat Summerall has objected to its continuing use: "There must be a better way . . . . Because games are decided, careers are decided, on those measurements."[189] Nonetheless, although several laser-based systems have been developed by entrepreneurs to replace the antiquated chains, the NFL continues to use the old system for a variety of reasons.[190] Part of the rationale

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186. *See supra* Part II.B.1.

187. *See generally* Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871 (1997) (considering the effects of procedural mechanisms on litigant satisfaction).

188. *See, e.g.*, Sandomir, *supra* note 142.

189. John Branch, *In High-Tech Game, Football Sticks to an Old Measure of Success*, N.Y. TIMES, Jan. 1, 2009, at A1 [hereinafter Branch, *High-Tech Game*].

190. *Id.*

is tradition; the seven members of the crew are lovingly referred to as the "chain gang."[191] However, the most important reason was summed up by the NFL's vice-president for officiating: "When we measure, we make sure the players are clear so that TV can get a good shot of the actual measurement."[192] The drama of close measurements helps make football America's favorite spectator sport.[193]

The rationale for maintaining the chain gangs instead of adopting a more accurate computer system is similar to the reason the NFL limits the use of instant replay. If the NFL's sole objective were getting every single call correct, replay's usage would be unlimited. The NFL could order a mandatory thirty second pause after each play, and replay officials could meticulously scan multiple angles of the previous play in search of a missed call. However, this would slow the game to a crawl, and eliminate the drama that makes the NFL so unique.

Some commentators have even called for abolishing replay on the grounds that human error is an indispensable part of the game.[194] In fact, the 2008 season provided several examples where replay did not result in a reversal of an incorrect call.[195] Furthermore, replay has inherent limitations that occasionally result in blatantly incorrect calls standing. Last October, the Philadelphia Eagles were leading the Atlanta Falcons 20-14 with two-and-a-half minutes remaining.[196] The Falcons were out of timeouts, but the Eagles were punting. After a short punt, the Falcon's return man Adam Jennings ran at, but did not touch, the football.[197] However, the referee ruled that Jennings did touch the ball, and the Eagles recovered.[198] The call was undoubtedly incorrect, but because the clock was still outside of two minutes and the Falcons were out of timeouts, replay was powerless to right the wrong.[199]

Because the goal is not a perfectly officiated game, the NFL is willing to live

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191. John Branch, *The Orchestration of the Chain Gang*, N.Y. TIMES, Jan. 1, 2009, at 2009 WLNR 19349.

192. Branch, *High-Tech Game*, *supra* note 189.

193. *See* Bryan Curtis, *The National Pastime(s)*, N.Y. TIMES, Feb. 1, 2009, § WK, at 5 (noting that, according to a Harris Interactive Survey, forty-two percent of Americans say football is their favorite sport).

194. Posting of Howard Wasserman to Sports Law Blog, http://sports-law.blogspot.com/ (Sept. 10, 2007 10:00).

195. Peter King, *Eleven Opinions in NFL's Week 11*, SI.COM, Nov. 17, 2008, http://sportsillustrated.cnn.com/2008/writers/peter_king/11/16/week11/index.html; Peter King, *Where Do You Begin on One of the Most Dramatic NFL Sundays Ever?*, SI.COM, Sept. 15, 2008, http://sportsillustrated.cnn.com/2008/writers/peter_king/09/15/Week2/index.html (go to page three of the article).

196. Peter King, *Expect Replay Rule to be Tweaked in Wake of Eagles-Falcons Blown Call*, SI.COM, Oct. 29, 2008, http://sportsillustrated.cnn.com/2008/writers/peter_king/10/28/mail/index.html.

197. *Id.*

198. *Id.*

199. *Id.*

with a limited and flawed instant replay system. Similarly, the appellate review process does not always result in the proper decision—the Supreme Court can reverse a circuit court, or circuit splits can emerge. However, the major difference is that in the NFL it is much more plausible, if not entirely accurate, to suggest that the "right call" exists on every play.[200] In the appellate process, the "right decision" often does not exist because different judges come to different—and logical—conclusions. The two systems are similar in that neither produces perfect results. The difference is that the NFL accepts imperfection to maintain the pace of the game, while perfection is not attainable in the legal appeals process.

A final contextual point worth noting is that the existence of a review mechanism can affect the performance of the initial decisionmaker. Ideally, the effect is positive, in that the prospect of having a decision reversed following the exercise of review leads trial judges and referees to take greater care to ensure that the initial decision is correct. But at the same time, there is a risk that the prospect of review will engender hesitancy or an unwillingness to make decisions. Put differently, if the initial decisionmaker senses that his decision will inevitably be second-guessed he may not think it necessary to focus on reaching the best decision, or will err on the side of making the decision that is most readily undone should the second-level decisionmaker come out the other way.[201] Any review mechanism introduces this concern, and those responsible for institutional design must take care to guard against it lest it lead to a decline in the overall accuracy of the system.

C. The Difficulty of Achieving Perfect Constraint Through Rules

Both the legal system and the NFL rely on rules, though the two systems employ rules in dissimilar ways. In law, rules are typically a means to a readily identifiable end, and their relationship to that end is often apparent. In similar fashion, qualifications to those ends—and thus to the rules—tend to be equally apparent. Rules of procedure seek to balance the accurate resolution of disputes against concerns of efficiency and fairness. Substantive law aims to, for example, balance the need to take safety precautions against the cost and practicality of doing so. The result is that legal rules are inevitably both over- and under-inclusive.[202] This creates a tension because the application of a rule

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200. Some dispute this notion, because different referees will come to different conclusions, particularly on judgment calls. However, the NFL director of officiating grades each official to determine the number of mistakes made per play. *See* Judy Battista, *In N.F.L., Wrong Calls and Wrong Assumption*, N.Y. TIMES, Nov. 2, 2008, at SP3. Thus, the League believes that each whistle is either correct or incorrect.

201. There is a further danger that might arise if this effect is too pervasive. If the initial decisionmaker believes that all important decisions will be subject to review, the perceived quality of the initial decisionmaker's job—whether it be judge, referee, or some analogous position—will decrease, thereby making it more difficult to attract high-quality people to the position.

202. *E.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION

to a given factual situation appears to conflict with the ends the rules are designed to further. Indeed, it is no revelation that the legal system's rules place imperfect constraints on judges.[203] A certain amount of indeterminacy inheres in any system that attempts to govern something as complex and varied as human affairs. The dynamic is compounded by the fact that the mechanisms for policing courts' compliance with rules are themselves imperfect. Many commentators have suggested that, in most cases, a determined judge will be able to justify any result she seeks to reach.[204] Whatever the reality, the very notion of the rule of law invokes in most observers the sense, at least as an aspiration, that the decision-making process will often, if not always, involve a mechanical process of applying a clear rule to an established set of facts.

Consideration of the history of replay review demonstrates just how difficult this ideal is to achieve. Rule-governed decisionmaking in the NFL differs from that in the legal system in at least two fundamental respects. First, the rules do not serve other ends so much as they serve as ends in themselves. To be sure, the rules of games are designed to foster competitive balance and, at least in some cases, to make the game enjoyable for spectators. But it does not make sense to speak of the rules of football as being over- or under-inclusive in the way that legal rules are. The rules are assumed to be fixed, and no one is entitled to argue that, for example, a team should be awarded a first down when its running back fell just inches short but did so via a spectacularly entertaining run. Second, the calls subject to review almost uniformly involve bright-line determinations, and the "indisputable visual evidence" standard requires a high level of proof in order for a call to be reversed. The question for the reviewing official seems to be as susceptible to mechanical application as any such question can be—for example, "after viewing this replay can I conclude, to a level of certainty such that no person could question it, that the ball broke the plane of the end zone?" In all, the differences suggest that the process of refereeing an NFL game should be considerably more amenable to governance by rule than that of judging, and it seems beyond dispute that it is so. But there is another lesson here. Even in the NFL, rules do not provide a perfect constraint. Despite the seeming-clarity of the replay-review inquiry, and the fact that it is undertaken in a way that is completely open to public scrutiny, the process still leads to occasional results that nearly everyone agrees are wrong. Human institutions, it seems, are prone to mistakes.

OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 31-34 (1991).

203. *See* Oldfather, *De Novo*, *supra* note 91, at 320-24.

204.

> Subtle rules about presumptions and burden of proof, elaborate concepts of causation and consideration and the rest, have been devised in such a way that unless the appellate judge handling the case is a dullard, some doctrine is always at hand to achieve the ends of justice, as they appear to the appellate court.

Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 751 (1957).

CONCLUSION

Just as the suggestion that the judicial role is analogous to that of a baseball umpire has persisted,[205] the comparison of appellate review to the review of an NFL official's call seems likely to have lasting allure, particularly given the increasing use of video evidence in the legal setting. Perhaps the most salient lesson of this extended comparison of the two processes is that easy analogies can often mislead. On the surface, the analogy works, and this Article highlights the ways in which the process of replay review exemplifies certain components of a process of appellate review. Not only does it involve the use of a standard of review, but it also illustrates the significance of institutional competence to processes of review, the influence of contextual constraints, and the ways that adversarialism can be tempered, among other things. But an extended comparison of the two processes also demonstrates that there is more to the analogy than meets the eye. Institutional design is complex. Features of a review mechanism are products of, and have effects on, the larger system of which they are a part. "Indisputable visual evidence" works as a standard of review in the NFL because the calls in question turn on clear, verifiable determinations, and because the standard is amenable to the sort of quick application necessary in the midst of a game in which it is important to maintain the audience's interest. It might work in some legal contexts for certain types of questions. But any urge to transport the standard—or any aspect of replay review—to the legal context must be tempered by the realization that appellate review takes place in a different context and in a system that must balance a different set of ends.

205. *See* Roberts Statement, *supra* note 3.