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# KNICKS-HEAT AND THE APPROPRIATENESS OF SANCTIONS IN SPORT

ROBERT L. BARD\* & LEWIS KURLANTZICK\*\*

The National Basketball Association ("NBA") 1997 playoffs featured a decision by the league office that raises difficult jurisprudential issues and illustrates the complexity and limits of rules systems in ordering human activity.<sup>1</sup> That decision, which probably altered the outcome of the Eastern Conference semifinals, involved the one-game suspension of four members of the New York Knickerbockers.<sup>2</sup> This event forces attention to the question of the definition and operation of a desirable structure of disciplinary sanctions in the setting of sport. In particular, it points to the problematic character of suspension as a disciplinary response. An analysis of an optimal remedial system reveals parallels and dissimilarities between the dilemmas faced by the creators of an apt sport structure and policy choices about punishment confronted in the legal system, particularly in the criminal law. The goal should be a structure which is least damaging to the basic objective(s) of the activity. Yet the NBA and other professional sports leagues, in fashioning disciplinary vehicles, have displayed limited creativity in pursuit of that goal.

One pervasive point that reflection on the playoff incident highlights is the multiplicity of stakeholders with interests in the manner in which the league operates. These stakeholders include more than the obvious candidates—players, the union, owners, the league, broadcasters, and the audience. The media, for example, belong in this category as well. Indeed, to the extent that the league is concerned with the messages it sends to its audience, the press, whether as representative of the fans' views or its own, plays an important role in affecting league decisions about disciplinary rules and sanctions. The interests of these manifold parties, who possess differing amounts of power, both overlap and conflict. As a

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<sup>1</sup> On May 14, 1997, the New York Knickerbockers played against the Miami Heat in Miami in Game 5 of the 1997 Eastern Conference semifinals. See Learning Network, *Sports Almanac*, at <http://www.infoplease.com/ipsa/A0003786.html> (last visited Apr. 29, 2002) [hereinafter *Sports Almanac*].

<sup>2</sup> See Mike Wise, *N.B.A. Playoffs: 5 Knicks Barred for Mêlée; 3 to Miss Game 6*, N.Y. TIMES, May 16, 1997, at A1; see also *Ewing v. Stern*, No. 97-3578 (S.D.N.Y. May 16, 1997).

result, the question of how to weigh these different interests and where to place emphasis in fashioning and operating the league's disciplinary structure is a complicated one. Of particular consequence is the difference in perspective of the devoted fan of a specific team and the members of the national audience for the sport.<sup>3</sup> Disciplinary action by the league assumes that certain spectators care about public perception of misbehavior, and that assumption is undoubtedly correct. The extent of such concern and the definition of acceptable tradeoffs, however, vary greatly among subgroups in the spectator population. This difference in perspective affects the nature of these fans' interest in the sport, thereby affecting their views about the extent and character of player discipline. A prime question becomes: To what extent are these different views represented in the creation and operation of the disciplinary system?

Moreover, although the Commissioner presented the 1997 decision as a straightforward, uncontroversial application of an established rule, that characterization is disingenuous. In fact, the league faced a predicament which implicated the fundamental, basic objective of the competitive sporting enterprise, *i.e.*, the identification of the best team.<sup>4</sup>

### I. THE INCIDENT: THE FRACAS AND THE PENALTY

The incident which prompted the league decision occurred during the fourth quarter of Game 5 of the Eastern Conference semifinals between the Miami Heat and the New York Knickerbockers.<sup>5</sup> The Knicks entered the game with a 3-1 lead in the series.<sup>6</sup> With a little less than two minutes remaining in the game, the teams were lined up for a foul shot.<sup>7</sup> P.J. Brown of the Heat, offended by Knicks guard Charlie Ward's low box-out after the foul shot, picked Ward up and flipped him head-over-heels into the

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<sup>3</sup> The distinction here is between the devotee who appreciates the game and is dedicated to a team and its fortunes, and the more casual spectator, for example, who tunes in for the playoffs or the league finals. All things being equal, neither of these groups is in favor of ugliness on the court. However, for the dedicated fan, the cost of weakening his team via suspension of a player is great since he is interested in the outcome of a game or a series involving his team and an outcome determined on the merits. As a result, he is willing to tolerate more ugliness. The casual spectator cares less about suspensions since he is disposed to tune in to watch any game. As he is less focused on outcome, he is willing to tolerate less ugliness.

<sup>4</sup> See Wise, *supra* note 2, at A1 (suggesting that even though the Knicks still lead the series, the "penalties could help to determine the outcome of the series.").

<sup>5</sup> See *Sports Almanac*, *supra* note 1; see also Mike Wise, *N.B.A. Playoffs: Not for the Faint-Hearted; Knicks-Heat Turns Nasty*, N.Y. TIMES, May 14, 1997, at B17.

<sup>6</sup> See *Sports Almanac*, *supra* note 1.

<sup>7</sup> See *id.*

group of photographers under the basket.<sup>8</sup> Spurred by the sight of this altercation, several Knicks streamed on to the court from their bench.<sup>9</sup> None of those who left the bench threw a punch.<sup>10</sup> Instead, they tried to help break up the fracas between Ward, Brown, and Knicks forward John Wallace, who had joined the *mêlée* from his position on the court.<sup>11</sup>

In response, the league suspended the Knicks players who had left the bench—Patrick Ewing,<sup>12</sup> Allan Houston, Larry Johnson and John Starks—for one game.<sup>13</sup> The Commissioner invoked Rule 12-A, which stated: “During an altercation; all players not participating in the game must remain in the immediate vicinity of their bench. Violators will be suspended, without pay, for a minimum of one game and fined up to \$20,000.”<sup>14</sup> As a result of the

<sup>8</sup> *See id.*

<sup>9</sup> Ironically, at that point in the game the Knicks’ bench contained most of their best players because the game had already been lost. Indeed, the identity of players affected by the rule points to an element of fortuity in its operation. Grave consequences arise in a fortuitous fashion. Ewing, a key player rather than a scrub, for example, was essentially irreplaceable.

<sup>10</sup> *See Wise, supra* note 2, at A1.

<sup>11</sup> *See id.*

<sup>12</sup> *See id.* While Ewing did wander from the area of the Knicks’ bench, he did not approach the vicinity of the fight. *See id.*

<sup>13</sup> *See id.* Charlie Ward, a Knicks player involved in the original skirmish, was also suspended for one game.

<sup>14</sup> Official Rules of the National Basketball Association, Rule 12A § IX (NBA Properties, Inc. 2000), available at [http://www.nba.com/analysis/rules\\_index.html](http://www.nba.com/analysis/rules_index.html) (last visited Apr. 29, 2002) [hereinafter NBA Rules]. The rule requires that the suspension commence before the next game. *See id.* Because league rules dictate that each team must have at least eight players available for each game, the suspensions were staggered over the two remaining games in the series. *See id.* Ewing and Houston sat out game six; Johnson and Starks missed game seven. *See Wise, supra* note 2, at A1. Ward also served a one-game suspension in game six for fighting, and Miami’s Brown received a two-game suspension for the same reason. *See id.*

Other sports leagues have similar rules about the movement of players who are not then engaged as participants in the contest on the playing area. *See, e.g.,* National Hockey League Official Rules 2000-2001, Rule 72 (NHL Enterprises, L.P. 2000), available at <http://nhl.com/hockeyu/rulebook/index.html?clk=001> (last visited Apr. 29, 2002) [hereinafter NHL Rules]. The National Hockey League (NHL) enjoins players not to leave the bench “at any time during an altercation or for the purpose of starting an altercation.” *Id.* The first player to leave the bench receives an automatic ten game suspension without pay, and the next player to leave the bench receives a five-game suspension. *See id.* Also, the offending player is subject to an automatic fine in the amount equal to the maximum allowed under the collective bargaining agreement. *See id.* Notably, unlike the NBA arrangement, the NHL applies sanctions to the team as well as the player. *See id.* A team that has a player penalized for violation of the basic rule is fined \$10,000 for the first instance, and the fine is increased by \$5,000 for each subsequent occurrence over the next following three year period. *See id.* In addition, for all suspensions imposed on players, the team pays the League an amount equal to the pro-rata share of that player’s salary covered by the suspension. *See id.* A team is subject to a fine of \$100,000 if it reimburses the player the amount of the fine or loss of salary assessed for violation of the basic rule. *See id.*

The rules of baseball do not specifically punish players for leaving their positions or the team bench to join a fight. Although baseball umpires can eject players who engage in fights, that response is rarely invoked on a large scale. *See* Official Rules of Major League

suspension, the Knicks were significantly disadvantaged in games six and seven, and it is likely that the enforcement of this rule led to their loss of the series.<sup>15</sup>

## II. THE RULE AND THE PURPOSES OF SPORTING COMPETITION

Appreciation of the difficult and troubling character of the Commissioner's decision requires recognition of the place of the playoffs in the NBA's operation. The playoffs serve to identify and certify the league's best team; and, in a sense, the entire season's play points towards that end. The Commissioner's dilemma—and, more fundamentally, that of the designer of the disciplinary structure—follows from that understanding.

Ideal accounts of modern sport paradigmatically portray it as activity involving the quest for the highest level of performance.<sup>16</sup> If the exercise and development of physical skills and the achievement of mastery over one's body are among the intrinsic pleasures connected with sports, the challenge of a contest enhances these skills and heightens this sense of mastery. The athletic interaction of a competitive contest appears to mobilize energies beyond what is possible in noncompetitive situations. If we hope to achieve what the philosopher Paul Weiss refers to as "the excellence of the body,"<sup>17</sup> we need others as opponents.<sup>18</sup> One implication of this

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Baseball § 3.17 (Major League Baseball Properties, Inc. 1998), *available at* [http://www.mlb.com/NASApp/mlb/mlb/baseball\\_basics/mlb\\_basics\\_foreword.jsp](http://www.mlb.com/NASApp/mlb/mlb/baseball_basics/mlb_basics_foreword.jsp) (last visited Sept. 24, 2001) (noting that "[p]layers and substitutes of both teams shall confine themselves to their team's benches unless actually participating in the play. . . . For violation umpire may, after warning, remove the offender from the field.").

<sup>15</sup> The Knicks ultimately lost the series four games to three. Meanwhile, the National Basketball Players Association ("NBPA"), along with Ewing, Houston, Johnson and Starks, went to court and unsuccessfully sought a judicial order to prevent imposition of the discipline by the NBA. In denying the NBPA's request for a preliminary injunction and an order to compel arbitration, the court rejected the union's creative contentions that: (1) the bench rule violated the collective bargaining agreement's (CBA) anti-collusion provision (Art. XIV, § 1) because it was a term of employment that had never been bargained over; (2) the CBA requires individualized case-by-case determinations of discipline by the Commissioner and thus does not permit an arrangement featuring the promulgation of rules which call for automatic suspension; and (3) the merit of these two objections about violation of the CBA was to be determined by arbitration. The court concluded that under the language of the CBA (Art. XXXI, § 8(a)), disputes about player discipline for on-court misconduct are to be resolved by the Commissioner and not by either of the arbitrators to whom the CBA accords authority to resolve other disputes. *See Ewing v. Stern*, No. 97-3578 (S.D.N.Y. May 16, 1997).

<sup>16</sup> *See, e.g.,* Robert Simon, *Good Competition and Drug-Enhanced Performance*, 11 J. PHIL. SPORT 6, 10-11 (1985).

<sup>17</sup> PAUL WEISS, *SPORT: A PHILOSOPHIC INQUIRY* (Carbondale, S. Ill. Univ. Press 1979) (1969).

<sup>18</sup> *See* Robert Butcher & Angela Schneider, *Fair Play as Respect for the Game*, 25 J. PHIL. SPORT 1, 14-16 (1998) (postulating that sports' structure is such that skills cannot be tested or demonstrated in isolation, and that one's sporting skills are measured in competition against others seeking to do the same. The interests of both athletes and the game lie in

paradigm is that if the fastest runners, swimmers, or players are barred from competition for some irrelevant reason, the victory or record achieved is devalued.<sup>19</sup> To many people, for example, the gold medals won at the boycotted 1980 and 1984 Olympic Games were tarnished by the absence of some of the strongest challengers,<sup>20</sup> illustrating that easy victory has little value.<sup>21</sup> Neither a genuine follower of sports nor any athletic participant in a championship contest who values his own performance and the process for determining a victor looks with favor upon the needless disqualification of a critical member of the opposing team in an important game. Accordingly, a particular sport's rule structure should be framed to minimize these disqualifications.<sup>22</sup>

The focus of the dedicated fan is on an outcome consistent with skill. He wants to see his fully manned team exhibit its talent. He has limited concern about the "image" of the product and actions taken in service to that image or to preserve the entertainment value of an athlete participating in a contest.<sup>23</sup> Thus, he holds, to a considerable extent, this position about disqualifications derived from the philosophy of sport.

### III. CATEGORIZATION OF OFFENSES: THE OBJECTIVES OF RULES

Critical thought about an apt system of sanctions requires recognition that the rules of an athletic contest, and the penalties assessed for their violation, are instituted to attain a number of different objectives. Determination of the appropriate penalty may

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excellent competitions, and in the best possible competitions evenly matched competitors push each other to the limits of their ability.).

<sup>19</sup> See EDWIN J. DELATTRE, *Some Reflections on Success and Failure in Competitive Athletics*, in *PHILOSOPHIC INQUIRY IN SPORT* 271, 275-76 (William J. Morgan & Klaus V. Meier eds., 1988).

It matters whom we play against and whether they are worthy of us, whether they can press us to call up our final resources. Satisfaction in victory is warranted only when we have played well against a worthy opponent. Otherwise victory is no achievement, and pride in it is false.

*Id.*

<sup>20</sup> See Wayne Drehs, *For Those Affected, Boycott Still Lingers*, ESPN.COM, available at <http://www.espn.go.com/oly/summer00/s/boycott/mainbar.html> (last visited Feb. 8, 2002).

<sup>21</sup> See ALLEN GUTTMANN, *A WHOLE NEW BALL GAME: AN INTERPRETATION OF AMERICAN SPORTS 1-7* (1988); see also Butcher & Schneider, *supra* note 18, at 16 (noting that winning may be tainted if teams are unevenly matched).

<sup>22</sup> See Butcher & Schneider, *supra* note 18, at 15 (stating that ideally, "[the] outcome of the contest should be determined by sporting skill or ability, not extraneous factors such as egregious luck or errors in officiating"). Athletes who respect the game wish to play as well as possible against a worthy opponent, who in turn is playing as well as possible. See *id.* These athletes view winning in a positive light only if it results from a particular process, *i.e.* the well-played, well-matched game. See *id.*

<sup>23</sup> See *supra* note 3. The fan's interest is in seeing an honest effort by both teams to do their best to win a contest in which the outcome is unknown beforehand.

depend on the category within which the particular rule governing the course of play fits. "Rectificatory" rules look to one form of corrective justice.<sup>24</sup> These rules aim to attain the proper outcome, the result that might have been obtained in the absence of the foul. An example is the rule that awards two free throws to a player fouled in the act of shooting.<sup>25</sup> The free throws provide the fouled player with an opportunity to replicate the situation which would have resulted had he been able to take an unobstructed shot from the field. Rules prohibiting contact by a defensive player with an offensive player, backed by either awarding the offensive team the ball out of bounds or foul shots to the player fouled, are similarly motivated.<sup>26</sup> These regulative precepts perform two key restorative functions. First, penalties create vehicles that enable the continuation of a game that has been interrupted by a violation; they address the problem of temporary dislocations in the mutual test. Second, compensations are offered to negate, or minimize, any gain secured through rule breaking.<sup>27</sup> Thus, a determination to discourage "bully ball" involves a corresponding commitment to disallow the bullying player to keep the benefit of his objectionable behavior.

Another set of rules is designed to provide game officials with authority to control the game, to deal with the kinds of behavior that pose abnormal risk of injury or that are likely to inflame volatile tempers. Thus, referees may assess technical fouls for a wide range of disruptive (or potentially disruptive) behavior by players, coaches, and trainers, including physical contact with or cursing at

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<sup>24</sup> See ARISTOTLE, NICOMACHEAN ETHICS, available at <http://nothingistick.org/library/aristotle/nicomachean> (last visited May 31, 2001) (explaining that rectificatory justice seeks to repair injustice resulting in an inequality). In this view, "the judge tries to equalize [inequality]; for in the case also in which one has received and the other has inflicted a wound, or one has slain and the other has been slain, the suffering and the action have been unequally distributed; but the judge tries to equalize by means of the penalty, taking away from the gain of the assailant." *Id.*

<sup>25</sup> See NBA Rules, *supra* note 14 at Rule 12B § V(a)(6); see also *id.* at pt. I., *Guides for Administration and Application of the Rules* (listing the purposes of rules: primary purpose of penalties is to compensate the player who is placed at a disadvantage by the opponent's illegal act).

<sup>26</sup> See NBA Rules, *supra* note 14, at Rule 12B § I. Rules designed to level the playing field, such as those which place limits on performance-enhancing equipment, are related in their goal to produce a game result determined on the merits. See, e.g., Rule 2 § II(d) (noting that the use of unnatural equipment designed to increase height or reach, or to gain similar advantages, is banned).

<sup>27</sup> See Cesar R. Torres, *What Counts As Part of a Game? A Look at Skills*, 27 J. PHIL. SPORT 81, 83 (2000). See generally ROBERT L. SIMON, FAIR PLAY: SPORTS, VALUES, AND SOCIETY 48-49, 208 n.19 (1991) (stating that a penalty is fair compensation for rule breaking); GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 89 (1996) ("Corrective justice seemingly requires two things: the 'corrective' component of compensating the victim for his loss, and the 'justice' of returning the parties to the equality that prevailed prior to the accident or harmful incident.").



an official, presence of a coach on the court without permission of an official, delay of game, taunting, elbowing, and fighting.<sup>28</sup> In the case of a player ejected during the course of a game—due to the commission of two technical fouls, for example—the team which may have been “victimized” by his objectionable behavior receives the benefit of his departure. That correspondence contrasts with the case of a suspension during the regular season where the benefit goes to the next team to be played by the offender’s squad. In the playoffs the victimized team will likely, though not necessarily, receive the benefit of the suspension, as it is likely that the same two teams will play in the next game. Inevitably, players’ passions will be aroused at times, but referees are vested with authority to impose quick and certain sanctions for misconduct during the game.

An additional group of rules is rooted in a concern neither about influencing outcome nor securing control of the contest, but rather about protection of the aesthetics or reputation of the game. Thus, several rules addressed to the appearance and behavior of players, coaches, and club personnel are justified in terms of the image of professional basketball.<sup>29</sup> Of course, any particular rule may be designed to serve more than one of these purposes simultaneously.<sup>30</sup> In like manner, suspension itself has a dual character as a sanction. On the one hand, it effects a financial penalty in the form of loss of salary for the period of the suspension. On the other hand, it produces an impact on the team’s chances of winning during that suspension period. Both designers and administrators of an apt system of sanctions need to be conscious of

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<sup>28</sup> See NBA Rules, *supra* note 14, at Rule 12A § VII. See generally NHL Rules, *supra* note 14, at Rule 41 (“Abuse of Officials and other Misconduct”). The tort law regime plays a partial back-up, and alternative, role in this context. Thus, if a *mêlée* results in a player injury, for example, that player may bring a civil action to gain compensation for his harm, whether or not the defendant has been disciplined by the team or league. Indeed, if the disturbance is severe, invocation of the criminal law may be triggered. See, e.g., PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 934-55 (2d ed. 1998).

<sup>29</sup> See NBA Rules, *supra* note 14, at Rule 3 § IV(d); *id.* at pt. II, *Basic Principles, Player/Team Conduct and Dress*. See generally PAUL C. WEILER, *LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS* 15-16 (2000) (suggesting that suspension should be more severe when misconduct occurs during a public game, as opposed to a private practice or meeting). After all, the sports league is out to market its commercial product by pleasing customers.

<sup>30</sup> Thus, the rule violated by the Knicks players could be seen to be grounded in both the need to keep control of the contest and the desire to avoid an ugly scene while communicating to fans a serious commitment to a no-fighting regime, thereby protecting the reputation of the league’s product. Similarly, the rule defining and sanctioning flagrant fouls serves corrective, control, and aesthetic purposes. See NBA Rules, *supra* note 14, at pt. II., *Basic Principles, Fouls: Flagrant - Unsportsmanlike*. Additionally, it has a protective objective, as it seeks to shield players from unnecessary violence and injury. Mixed motives are common, and it may sometimes be difficult to know which motive is dominant.

how much of each motive is operating in a particular situation. Moreover, in specific circumstances the rules' objectives may conflict, and the multiple stakeholders' views about resolution of these conflicts may well diverge.<sup>31</sup>

#### IV. RULES, REGULAR SEASON, AND PLAYOFFS

Rule 12 calls for suspension as the disciplinary response to violation of the norm. Suspensions, though, are troublesome because they always have a potential impact on the quality of play and, therefore, are outcome-affecting. Indeed, this impact is significantly heightened in the playoffs as the consequences of the application of Rule 12 are dramatically different in the course of the regular season than in the course of the playoffs.<sup>32</sup> Recognition of this difference in impact might have grounded an alternative response by the league in the Knicks-Heat case. By failing to confine the Rule 12 automatic suspension to regular season play, and rejecting the option of postponing the suspension until the following season, the league, at least implicitly, rejected an interpretation that Rule 12 is not applicable during the postseason.

The beneficiary of the one game suspension during the season is the next opponent of the disciplined player's team. The identity of that team is a matter of chance—whichever of the league's twenty-eight members happens to be next on the schedule. Moreover, the suspension affects one game of an eighty-two game schedule in an arrangement where the team's record over the course of that entire season determines its standing and playoff position. On the other hand, in the playoffs the remedial effect is far more severe. The beneficiary of the suspension is the known opponent in a short series. And the manpower depletion is not for one game out of eighty-two, but rather for one game in a four-of-seven series in which the loser is eliminated from further play.<sup>33</sup> The potential for the ruling to affect the outcome of a game (and series) is very high, a consequence which, by adding a fortuitous element to the process, runs counter to the purpose(s) of competition.

The impact of this kind of ruling, then, is focused on a small

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<sup>31</sup> See *supra* note 3 and accompanying text.

<sup>32</sup> That difference in impact is so great that one might question whether it even makes sense to talk of the same rule being applied in the two cases. Recognition of the difference in consequences at least raises doubts about whether the draftsmen of Rule 12 had the Knicks situation in mind when the rule was formulated. One question we might ask is: Are *mêlées* more likely in the playoffs so as to justify the more costly penalty?

<sup>33</sup> In other words, the sanction is served in the course of a critical playoff series when the team and its fans most need the unruly players' services. See WEILER, *supra* note 29, at 13.

group that feels it most intensely. That group, which can claim serious injury, comprises not only the players of the affected teams but also the devotees of both teams and especially the fans of the team with depleted manpower. The players and fans of the winning team are damaged in that they will be subject to the objection of others that "on a level playing field we would have won." The quality of the game is affected by this sanction, and the winner is denatured.<sup>34</sup> Thus, the benefits of a rigid rule—the service of deterrence,<sup>35</sup> the relief of referees and executives from the need to make individualized judgments about the motivation of players who leave the bench, and avoidance of suspicion of ad hominem administration—are bought at a much lower cost during the regular season than during the playoffs.<sup>36</sup>

Also, different sports have different sensitivities to the loss of a player. In baseball, for example, the impact is not severe, as even the best player on a team only comes to bat four or five times in a

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<sup>34</sup> Weiler suggests:

I believe it would be in the best interests of baseball (and other sports) to have all player suspensions served during the regular season rather than the playoffs . . . . This would ensure that the punishment was actually borne by the player who was guilty of misconduct, rather than by his team and its fans. Baseball fans watching the 1996 Orioles-Yankees games [the series during which Roberto Alomar spat in an umpire's face] were better off when they knew that each club had its best talent out on the field, as the Yankees won this American League playoff series on their way to the World Series title.

*Id.* at 11-12.

<sup>35</sup> The failure of deterrence, of course, often produces unwanted effects. Punishment, after all, "is only an unfortunate consequence of the fact that the threats, which are the operative elements in the system, are partially ineffective . . ." Stanley I. Benn, *Punishment*, in 7 THE ENCYCLOPEDIA OF PHILOSOPHY 29, 32 (Paul Edwards ed., 1967). In that respect, deterrence is an inherently limited instrument. Thus, in the criminal law an offender is incarcerated with not only an attendant loss of individual liberty and social administrative expense but also the possibility, if not probability, that he will emerge from the experience less likely to avoid anti-social activity. See generally Henrik Lando, THE OPTIMAL STANDARD OF PROOF IN CRIMINAL LAW WHEN BOTH FAIRNESS AND DETERRENCE MATTER 8 (2000) (noting that after an individual has acted, the deterrent effect is lost such that costly sanctions may no longer be optimal).

We are not suggesting that the actual practice of imprisonment, with its loss of liberty and forfeiture of civil rights, is comparable to the suspension of an athlete who winds up watching his teammates on television back at the hotel. Also, needless to say, less is at stake in the selling of a sports product than in managing society, and the criminal law's directives are addressed to a large audience while sports leagues are concerned with the behavior of a small group. However, some insight about sanctions systems can be gained by comparison of the two regimes. See A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LIT. 45, 45 n.3 (2000); see also SANFORD H. KADISH, THE CRIMINAL LAW AND INDUSTRIAL DISCIPLINE AS SANCTIONING SYSTEMS: SOME COMPARATIVE OBSERVATIONS IN LABOR ARBITRATION: PERSPECTIVES AND PROBLEMS 125 (Mark L. Kahn ed., 1964).

<sup>36</sup> Ironically, the criminal law, the rule-backed-by-sanction system that serves as a model for the league's approach, intentionally includes built-in mechanisms to minimize or avoid rigidity within the system. For example, the criminal process provides the prosecutor with discretion to pursue a case or not, and the court with discretion in the sentencing of a criminal defendant.

typical game. In basketball, on the other hand, the impact is far graver. The team roster consists of only twelve players, and in the playoffs the coach is likely to play only two-thirds of them on a regular basis. Indeed, among the four major sports, the impact of player suspension is most acute in basketball.

Admittedly, though, adoption of this suggestion comes at a cost. Thus, in the NBA, the existing sanction has induced team care in instructing players and monitoring their behavior, and has made the players extremely sensitive about remaining on the bench when there is an altercation on the court. The alternative sanction being recommended may not be so effective.

## V. THE CHOICE OF APPROPRIATE SANCTIONS

The implications of our analysis for the establishment, elaboration, and administration of rules by a sports league are several.<sup>37</sup> First, all disciplinary rules, particularly those involving player suspension, should be examined with respect to their use in the playoffs. Second, the league should look to refashion these rules in a way that eliminates or minimizes side effects that affect the quality of play with attendant harm to players and fans. Thus, to the extent possible, responses which are outcome-affecting should be avoided.<sup>38</sup>

We are not challenging the desirability of the primary norm about players staying on the bench. The league presumably is out to nip a *mêlée* in the bud and is therefore serious about deterrence

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<sup>37</sup> Our concern is with the overall design of the system, and with the availability and character of sanctions. Of course, in any particular case an available sanction may be misapplied or mistakenly invoked. The creation of safeguards against such misapplication has largely been the product of collective bargaining negotiations between players' unions and leagues. Curbs on arbitrary employer action are particularly consequential in the setting of professional sports because the employment effect of a commissioner's ruling, due to its industry-wide character, is more sweeping than an act of management discipline in a more conventional industry. A commissioner suspension amounts to a ban on hiring by all employers in the industry. See Lewis Kurlantzick, *John Rocker and Employee Discipline for Speech*, 16 LAB. LAW. 439-40 (2001).

<sup>38</sup> An analogous suggestion was offered by *Sports Illustrated* contributor Ian Thomsen in response to the NBA's sanction of the Minnesota Timberwolves for violating the league's salary cap rules. See Ian Thomsen, *NBA's To-Do List: Helpful Hints on Ways to Improve the Game*, SPORTS ILLUSTRATED, Feb. 19, 2001, at 37. The team had entered into a secret contract with Joe Smith, one of its players. See *id.* The Commissioner fined the team \$3.5 million and stripped it of four first-round draft choices. See *id.* He also suspended the team's owner for the remainder of the season, and the team's vice-president took a "leave of absence" as part of the settlement. See *id.*

Thomsen suggested that the NBA "punish owners for their sins. When the Timberwolves violate salary-cap rules by signing Joe Smith under the table, fine the hell out of their front office but don't take it out on their supporters by docking the team four future first-round draft picks." *Id.* Of course, the magazine's recommendation raises the question of whether it is possible to punish owners without punishing fans. For example, can owners be fined without restricting their ability to compete?

and about sending a message that fighting is regarded as a grave matter.<sup>39</sup> But the task then is to imaginatively conceive kinds of penalties that serve the end of deterrence<sup>40</sup> but also minimize the impact on core values of the sport. Suspensions are troublesome because they always have a potential impact on the quality of play.

In speaking about, and focusing on, sanctions, we do not mean to imply that these are the only, or even the most effective, tools for bringing behavior in compliance with the accepted social norm. Clearly, the acculturation of players, and in particular their education by coaches and other associates, has great ability to influence their behavior. Indeed, as a general matter, people who have been acculturated with strong preferences for desired behavior will require fewer incentives to comply. Conversely, people who have significant incentives to comply will require less acculturation of their preferences in order to effect desired behavior.<sup>41</sup>

In fashioning its disciplinary scheme, a useful analytical and prescriptive starting point for the league would be to ask whether suspension is ever an apt sanction. Other sanctions and combinations of sanctions are possible. An obvious alternative to suspension is monetary sanctions.<sup>42</sup> For example, a significant fine, perhaps a percentage of an offending player's salary, could be imposed. A financial penalty might also be assessed against the team. Monetary sanctions have some clear advantages as they avoid the negative, outcome-affecting characteristics of suspension, and they are easy and inexpensive to administer.<sup>43</sup> Determination of the

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<sup>39</sup> See *supra* note 14 and accompanying text. Rule 12's exclusive concern with deterrence differentiates it from other rules which govern the way the game is played. Thus, the prohibitions on double-dribbling and walking are examples of rules that are protective of the way the game is played. Presumably, Rule 12 is designed to get the attention of both the player and the team, with the indirect effect that the team will pressure the player to control his conduct.

<sup>40</sup> See *supra* note 30 and accompanying text. Though deterrence is a prime objective, league action in the Knicks-Heat situation is likely designed to serve other goals as well.

<sup>41</sup> See KENNETH DAU SCHMIDT, *Preference Shaping By the Law*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 84-85 (Peter Newman ed., 1998).

<sup>42</sup> See WEILER, *supra* note 29, at 12-13. Suspension, of course, may carry significant financial consequences if the player is suspended without pay. It is noteworthy that the financial impact will vary markedly if the suspension occurs during the regular season or the playoffs. Not only would a policy of regular-season suspensions minimize the harm inflicted on innocent teammates and fans, it would also increase the financial penalty imposed on guilty players. Players are paid a salary for regular-season play, and playoff awards and bonuses now represent only a tiny fraction of the total earnings of marquee players. Clearly, the most effective (as well as most equitable) deterrent for players' misconduct is one that is directly targeted at the guilty player's own pockets, rather than at his team's big-game performance.

<sup>43</sup> See generally A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984). This preference for fine over suspension, due to their relative costs, has a parallel in the conventional economic analysis of sanctions in the criminal law. The usual economic view is that, all things being equal, the use of fines is prefera-

ble to non-monetary sanctions such as imprisonment. The reason is that the costs of administration of a fine are minimal as compared with the social costs of incarceration. Those costs include not only the direct claims on goods and services from operation of the prison system, but also the lost value of prisoners' time (and the possible contribution of imprisonment to an increased incidence of recidivism). And, unlike monetary sanctions, imprisonment produces disutility to prisoners that is not balanced in any automatic way by additions to the utility of others. (It is possible that victims, and perhaps individuals generally, obtain some utility from seeing that injurers are punished, thereby lowering the social cost of imprisonment. The incapacitation benefit—incapacitating the potential criminal saves the cost of catching and punishing him and the net damage done by the crime—also offsets the punishment cost.)

In contrast to this depletion of social resources by imprisonment, fines do not significantly diminish resources but instead transfer command over resources from violators to the state. See DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 225 (2000). Accordingly, it would not be optimal to use non-monetary sanctions unless the less costly monetary sanctions could not adequately deter people. But see C.Y. Cyrus Chu & Neville Jiang, *Are Fines More Efficient Than Imprisonment?*, 51 J. PUB. ECON. 391 (1993) (suggesting that a mix of jail and fines may be a more efficient deterrent when potential criminals of different wealth face spectrum of crime possibilities).

Of course, in practice, fine collection generates some costs such as the cost of identifying and confiscating the criminal's assets if he resists paying the fine. See Steven D. Levitt, *Incentive Compatibility Constraints as an Explanation for the Use of Prison Sentences Instead of Fines*, 17 INT'L. REV. L. & ECON. 179, 181 (1997) (stating that fine collection is difficult when there is private information about agent's wealth or when wealth consists of human capital). Additionally, solvency limitations cause the cost of collecting fines to rise with the fine's size. See, e.g., Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1208 (1985). However, neither insolvency nor difficulty of collection are significant concerns of the NBA, where the authority has access to offenders' wealth and an offender's paycheck can be simply debited.

Economic analysis of optimal sanctions in the criminal law must also include consideration of the cost of law enforcement and particularly the cost of detection. Indeed, the general problem is to select a set of sanctions and the probability of apprehension that will maximize social welfare. The overall question is how resources should be allocated to enforcement in order to minimize the social costs of crime, including enforcement costs. However, in the NBA setting, the costs of enforcement, and the cost of detection in particular, are insignificant, at least with respect to on-court violations. For example, in a situation such as that of the Knicks players, there is little question about the probability of detection of misconduct. Behavior occurs in a public arena, and it is almost always videotaped in some fashion. Accordingly, enforcement costs are not a major consideration in thinking about the appropriate design and use of sanctions in the NBA. (This situation also largely eliminates the issue of the appropriate manipulation of certainty with respect to the probability of detection to increase deterrent effects.) See generally Alon Harel & Uzi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Detering Crime*, 1 AM. L. & ECON. REV. 276 (1999) (reporting that findings of cognitive psychology suggest combination of certainty regarding size of sanction and uncertainty regarding probability of detection and conviction is optimal in providing maximum deterrence at minimum cost).

Similarly, economic analysis of enforcement policy indicates that, in response to concerns about overdeterrence and underdeterrence, optimal sanctions should vary with the difficulty of apprehension of offenders. See Lucian A. Bebchuk & Louis Kaplow, *Optimal Sanctions and Differences in Individuals' Likelihood of Avoiding Detection*, 13 INT'L. REV. L. & ECON. 217 (1993). But again, in the NBA setting, there is no reason to expect any significant variation in the probability of detection of offenders or in players' expectations about the likelihood of apprehension.

An empirical puzzle in criminal punishment is why, in fact, jail time is used so much more often than fines, given that fines would seem to be much less socially costly. One reason proffered is that fines may not be used because they are "unfair," as the rich can pay more easily, or ineffective, as the poor are unable to pay them. See EDWARD L. GLASER, *Economic Approach To Crime And Punishment*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 1, 5 (Peter Newman ed., 1998); see also Posner, *supra* note 43, at 1208

levels of fines,<sup>44</sup> moreover, should sensibly take account of the

(noting solvency limitation and asserting that imprisonment is a harm, which when imposed, is greater than depriving a defendant of his wealth. Imprisonment "imposes disutility on people who cannot be made miserable enough by having their liquid wealth confiscated."); FRIEDMAN, *supra* note 43, at 225-26 (stating the solution to the empirical puzzle); Polinsky & Shavell, *supra* note 43, at 90-91 (noting that for harmful acts labeled criminal, the magnitude of desirable monetary penalties would be high and often greater than prospective criminal's assets). See generally ISAAC EHRLICH, *Criminal Justice*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 553, 555-57 (Peter Newman ed., 1998). None of these concerns about unfairness and ineffectiveness would seem to have any application to a contemporary professional sports league and its well-paid athletes. Similarly, the objective of incapacitation (rather than deterrence) served by imprisonment is not a purpose sought by the NBA out of its concern for compliance with the type of rule violated by the Knicks players.

When viewed from the perspective of preference-shaping, the practice of using jail time becomes more comprehensible. From that standpoint, fines and imprisonment are not interchangeable tools. Imprisonment is regarded as a much more effective, though more costly, method of influencing preferences than condemnation and levying of a fine. Writing a check most likely does not have the same impact on a person's perspective on life or serve to communicate the same abhorrence of the offender's conduct to the rest of the population as does removal from society. See DAU-SCHMIDT, *supra* note 41, at 87. Similarly, in the sports league setting a suspension may well produce more impact on both players and team management, as it deprives the player of the opportunity to play and affects the on-court competitive status and off-court financial results of the team. However, it is a highly costly tool; and a key question is when, if ever, those costs are worth incurring.

<sup>44</sup> In the economic analysis of optimal law enforcement the seminal work is that of Gary Becker. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). Becker's conceptual apparatus provided the underlying structure for subsequent work on the economics of crime and punishment. Becker's formulation is that if individuals are risk neutral, then an efficient system of law enforcement is one in which the fine is as large as possible, indeed equal to the wealth of the individuals whose behavior is being controlled. This arrangement permits the probability of detection to be very low in order to save enforcement costs. The implication is that the optimal fine is maximal because it is a costless transfer, whereas the probability of detection and conviction is costly. In other words, to the extent that deterrent effect is a function of the size of the fine and the probability of apprehension, the level of fine can be set high with a low probability of detection in order to reduce enforcement costs. The basic idea is that the system can economize on enforcement resources by reducing the probability of apprehension while increasing sanctions, thereby maintaining the same deterrent effect at reduced cost. Fines are essentially transfer payments and therefore socially costless (in narrow efficiency terms) relative to the production of arrests and convictions. See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 77-78 (2d ed. 1989); JEREMY BENTHAM, THE THEORY OF LEGISLATION 208 (Uppendra Baxi ed., 1975) ("Pecuniary punishments are highly economical, since all the evil felt by him who pays turns into an advantage for him who receives.").

An impressive body of literature has grown to test and modify Becker's original formulation. Much of the recent work in the field has tried to show why his result may not hold. See, e.g., Nuno Garoupa, *The Theory of Optimal Law Enforcement*, 11 J. ECON. SURV. 267 (1997). Furthermore, Becker's basic approach has not escaped more fundamental criticism. See, e.g., Thomas Gibbons, *The Utility of Economic Analysis of Crime*, 2 INT'L REV. L. & ECON. 173 (1982) (the capacity of Becker's model to provide useful aid in understanding crime and responses to punishment is questionable; the model has not produced any significant contribution to criminological theory and furnishes an inadequate basis for penal policy). As previously noted, however, detection and enforcement costs are not a significant expense in the administration of a disciplinary scheme in the NBA, particularly with respect to violations, like those of the Knicks players, which occur on the court.

The fact that governments, in fact, do not impose more severe penalties in order to conserve resources dedicated to policing costs presents an empirical puzzle for economic analysts. The explanations offered as to why punishment does not look like Becker's predictions have limited relevance for our inquiry. See, e.g., GLASER, *supra* note 43, at 5. One

wealth and income of the audience addressed.<sup>45</sup> One practical

explanation notes that institutional rules are designed to limit the trouble caused by governmental actors who maximize their own, occasionally perverse interests, while working within the constitutional rules. Thus, for example, limits on penalties are needed to limit the ability of police officers to use penalties to extract bribes from innocent people. The bribery problem occurs when the police and the courts use the criminal justice system to control the innocent. Unlimited penalties, then, give the police and the courts power with which to extort bribes or punish their enemies. See generally Polinsky & Shavell, *supra* note 43, at 90-93 (noting that optimal enforcement policy changes if public enforcers' behavior is self-interested). See also FRIEDMAN, *supra* note 43, at 239-41 (noting that enforcement apparatus is rational if posit self-interested actors and that rent-seeking is a cost of a system of efficient punishments); Ingolf Dittmann, *The Optimal Use of Fines and Imprisonment if Governments Don't Maximize Welfare* (Jun. 2001) (unpublished manuscript, on file with the authors) (concluding that proposition that fines should be used whenever feasible need not hold in presence of agency conflicts). While athletes and their unions may (necessarily) have concern about disciplinary processes and outcomes operated and produced by management and its representatives, it is doubtful that fear about this type of overreaching by the commissioner is a major source of anxiety. See *supra* note 33 and accompanying text.

Another explanation for the existence of limited penalties points to the potential of juries or judges to undo legislative rules designed to enforce minimum penalties. See Louis L. Wilde, *Criminal Choice, Nonmonetary Sanctions, and Marginal Deterrence: A Normative Analysis*, 12 INT'L REV. L. & ECON. 333, 339 (1992) (discussing the degree to which a precommitment to a given sanctions policy is possibly problematic; judges and juries have significant control over sanctions and it is difficult to bind them to prespecified sanctions policies). This disjunction between the law as enacted and as administered, which is a function of current American institutional arrangements, is an unlikely phenomenon in the world of professional athletics given the constitutional structure of sports leagues and the authority and role of the commissioner in particular. More generally, unlike the populist institution of the jury, there is no reason to think that the officials responsible for conceiving and administering a league disciplinary scheme are unable or unwilling to think centrally in deterrence terms. See Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237, 250 (2000) (noting that experiments suggest people do not attempt to promote optimal deterrence, and that optimal deterrence policies conflict with people's moral intuitions, so that efforts to move enforcement policy in this direction may be perceived as unfair and wrong and therefore resisted); see also A. Mitchell Polinsky & Steven Shavell, *The Fairness of Sanctions: Some Implications for Optimal Enforcement Policy*, 2 AM. L. & ECON. REV. 223 (2000) (inquiry introduces notions of fairness such as that sanctions should not be disproportionate to the gravity of the act committed; result is that the standard model of public enforcement produces an optimal probability and magnitude of sanctions that are different than the conventional deterrence ideal).

Another problem with fines is that if the state punishes offenders by imposing fines payable to itself, the state has an incentive to overextract penalties in order to fill its own treasury. Again, while the same incentive may theoretically affect the behavior of league officials and therefore provide some rationale for union (and constitutional) efforts to place limits on the permissible level of fines, it is doubtful that this is a significant source of practical concern to players. Moreover, all NBA fines are presently donated to charity and thus do not remain in the League's coffers. See National Basketball Association – National Basketball Players' Association Collective Bargaining Agreement, art. VI § 3, available at <http://www.nbpa.com/cba/cba.html> (Jan. 20, 1999) [hereinafter NBA CBA].

Finally, the larger the penalty the larger the cost from mistaken punishment of innocent people. See Polinsky & Shavell, *supra* note 35, at 53 (noting that if sanctions are sometimes imposed by mistake it is better to use fines to the maximum extent possible before employing the more costly imprisonment sanction). The weight of this factor in the league setting is a function of one's judgment about the likelihood and incidence of such mistakes by disciplinary officials. In a situation such as the Knicks-Miami game, where the behavior occurs on the court and is broadcast, the chance of an erroneous factual determination is quite small.

<sup>45</sup> FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE THREAT OF CRIME CONTROL* 176-77 (1973):



translation of this principle is the desirability of a scheme which varies the fine with the offender's income in pursuit of a proportionate impact across different economic strata.<sup>46</sup> An example would be an arrangement which exacted as a penalty a percentage of the offender's income rather than a uniform, flat dollar amount.<sup>47</sup>

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<sup>46</sup> Bentham long ago offered the prescription that pecuniary punishments be graduated with regard to the wealth of the offender. BENTHAM, *supra* note 44, at 217 ("Pecuniary punishments should always be regulated by the fortune of the offender. The relative amount of the fine should be fixed, not its absolute amount; for such an offence, such a part of the offender's fortune . . ."). See also Posner, *supra* note 43, at 1215.

The notion that achievement of the same deterrent effect requires a threat to different people of different exactions, and more particularly the threat of a higher dollar exaction for a wealthier person than a poorer one, is rooted, in part, in the principle of the marginal utility of income. That principle rests on the proposition that a dollar has less "value" for a person with a million dollars of income than for a person with only a thousand dollars of income. To take the same number of dollars from each is not to impose the same amount of hurt on them; and to fine wealthier defendants more for the same offense is to make sure that the defendant "feels the pain." In making assumptions about the reactions to money that men have in common, the principle assumes that people's appetite for money declines as the amount of money they have increases. The technical expression of that assumption is that in general the relation between utility and money for an individual is such that a curve for the utility of his money will have a declining slope. For a thoughtful examination of the marginal utility principle which recognizes its intuitive force but which is highly critical of its pivotal assumptions, see Harry Kalven, Jr. & Walter Blum, *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 472-79 (1952). See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 39-42 (1970). If one posits that an objective of fines is to inflict a measured amount of "pain" for preference-shaping purposes, i.e., to punish people with deviant preferences for the purpose of modifying those preferences and setting an example for others that such preferences are not to be indulged, then graduating those fines in proportion to a person's wealth makes eminent sense in light of the common assumption of the declining marginal utility of wealth. See DAU-SCHMIDT, *supra* note 41, at 87-88. See generally Friedman, *supra* note 43, at 232-34 (discussing whether the rich should pay higher fines).

<sup>47</sup> [T]he significance of a fine threat is inversely proportional to financial means, for the threat of a \$10 fine would seem more severe to a man with only \$100 than to a man with \$1,000. The threat of small fines would thus seem more important to less wealthy members of an audience, while the threat of very large fines would have more influence on those with the means to pay them than on those without.

BENTHAM, *supra* note 44, at 217.

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In fact, a combination of union and fan attitudes may provide a partial explanation for recourse to suspension in the sports setting. For a fine to be an effective deterrent, it may need to be set at a level that would not be tolerated by the players' union. At the same time, a fine within the range acceptable to the union might not be viewed by spectators as a sufficient response, *i.e.*, one that convinces the fans that the league believes in the value of the precept—no fighting. Accordingly, suspension may be seen as both a convenient and visible sanction in this situation, with the result that the league authority winds up adopting a step which, for many reasons and paradoxically, it would prefer to avoid.

In the same vein as creative consideration of monetary sanctions, suspensions of offending players might be ordered to be served the following season.<sup>48</sup> Alternatively, or in addition, a team's placement in the draft might be lowered.<sup>49</sup> Further, an offense could result in an award of points to the opposition or reduc-

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an individual is such that a curve for the utility of his money will have a declining slope. For a thoughtful examination of the marginal utility principle which recognizes its intuitive force but which is highly critical of its pivotal assumptions, see Harry Kalven, Jr. & Walter Blum, *The Uneasy Case for Progressive Taxation*, 19 U. Chi. L. Rev. 417, 472-79 (1952). See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 39-42 (1970). If one posits that an objective of fines is to inflict a measured amount of "pain" for preference-shaping purposes, *i.e.*, to punish people with deviant preferences for the purpose of modifying those preferences and setting an example for others that such preferences are not to be indulged, then graduating those fines in proportion to a person's wealth makes eminent sense in light of the common assumption of the declining marginal utility of wealth. See Dau-Schmidt, *supra* note 41, at 87-88. See generally Friedman, *supra* note 43, at 232-34 (should the rich pay higher fines?).

Suggestive in this respect is the flexible Scandinavian system of monetary fines known as the "day-fine" system, an approach which takes account of both the criminal's income and the seriousness of the crime. The underlying idea is that the amount of a fine ought to be settled in accordance with the per diem income of the accused. The typical fine structure in the United States provides a fixed fine per offense, independent of the offender's wealth, with statutorily-prescribed maxima. In contrast, Sweden and other European countries assess a monetary penalty for a particular crime which is not a fixed sum but is a variable figure adjusted to the wealth and income of the offender. Under the day-fine scheme, the prosecutor determines the offender's daily income and recommends that he pay, if guilty, that daily income times a certain number of days. For a trivial crime, such as a traffic offense, the punishment may be 5 or 10 days. For a serious crime, the number of days may rise to the maximum of 120. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 555, 558-59 (Scott Foresman ed., 3d ed. 1988). The workings of the system are detailed in several sources. See, *e.g.* H. Thornstedt, *The Day-Fine System in Sweden*, 1975 CRIM. L. REV. 307. A condition to the effective operation of this kind of system is the ability of prosecutors and courts to obtain reliable information about the offender's finances. See *id.* at 310; see also Gary M. Friedman, Comment, *The West German Day-Fine System: A Possibility for the United States*, 50 U. CHI. L. REV. 281, 294-96 (1983) (analyzing possible application of system in the United States). However, that need would not be a significant obstacle to the implementation of a comparable scheme in professional basketball as the amount of a player's compensation from his team, at least, is readily available to the NBA.

<sup>48</sup> See Weiler, *supra* note 34, and *supra* note 42.

<sup>49</sup> See generally Sports Violence Arbitration Act of 1983, H.R. 4495, 98th Cong. § 5(c)(2) (1983) (suggesting the use of disciplinary sanctions which may be imposed on professional sports club, including loss of a draft choice).

tion of the number of timeouts available to a team or easier access to foul shots by to the opponent<sup>50</sup> (by affecting when the offending team enters penalty status in a quarter, for example). The key points, though, are recognition of the differential impact of rules in the regular season and in the playoffs with respect to central sporting values and the need to use imagination in formulating remedies which serve worthwhile ends at minimum cost to these values.<sup>51</sup>

Complications arise, however, from the fact that in any individual situation, the objectives sought by the rules may conflict. In particular, the need to protect the league's image may lead to action which will compromise competition-connected values at the core of an athletic contest in order to secure the league's sources of revenue. Suspension represents a clear, unambiguous outcome well-suited to defend the league against the charge of indifference to "unacceptable" behavior by parts of its audience.<sup>52</sup> But while that crude response is acceptable to league owners,<sup>53</sup> it runs counter to the preferences of fans and risks serious damage to the sport.<sup>54</sup> Unfortunately, there is no easy, neat solution for this dilemma; action that is effective for the purposes of public relations may conflict with the proposition that the outcome of an athletic contest be a function of skill and effort.<sup>55</sup>

### CONCLUSION

The suspension of the Knicks players and its effect on the outcome of the playoff series brings home the need to re-examine

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<sup>50</sup> Basketball's methods appear crude even as compared with other sports. Consider tennis, for example, where unreasonable delay or racquet abuse by a player may result in loss of a point.

<sup>51</sup> It would not be irrational for the NBA to conclude that Rule 12, as presently understood, should be applied in the playoffs. But, at a minimum, such a conclusion would reflect a belief that *mêlées* are more likely (or their reputational impact greater) in the playoffs and therefore a more costly penalty is justified then. Whatever the ultimate conclusion, the important point is that the NBA should face squarely the issue of the Rule's status in the playoffs.

<sup>52</sup> Basketball may be an unusual type of enterprise as compared to other forms of entertainment in that different segments of its audience will react differently to incidents. Also, for some spectators, the sport competes with other forms of entertainment while other spectators are diehard basketball fans.

<sup>53</sup> The crude device employed in response to public relations concerns stands in marked contrast to the great attention to subtleties in the definition of the rules governing how the game is to be played and refereed, rules designed to serve the interests of fairness and efficiency. Subtlety is sacrificed to gain attention.

<sup>54</sup> The league has latitude to disregard the preferences of diehard fans because it knows that these fans will not exit in favor of a different sport or form of entertainment.

<sup>55</sup> If the rationale for action is public relations—and that is undeniably a legitimate league interest—it is difficult to imagine a standard against which to measure action and therefore to second-guess the Commissioner's judgment.

league sanctions in light of the basic purposes of the enterprise and, in particular, to recognize the differential impact of penalties during the regular season and the playoffs. The tension is between the pursuit of deterrent effectiveness and the desire not to have the chosen remedy affect the ability of any team to play at its best. Articulation of a perfect or optimal design is, of course, not possible, and an acceptable plan may vary among different sports. However, a desirable structure should meet identifiable criteria. A system sensitive to the objectives of sport would aspire to serve the competition-centered interests of the athletes, fans, and the activity itself and would seek, to the extent possible, to avoid remedies which are likely to affect the outcome of the contest. In particular, suspension, it should be recognized, is a poor remedy at any time—one disruptive of central values—and its defects are dramatically heightened in the playoff setting. It should be treated as a last resort and should be utilized only when the league has demonstrated the exhaustion of other less damaging possible responses.