Fair Play
REVISTA DE FILOSOFÍA, ÉTICA Y DERECHO DEL DEPORTE
www.upf.edu/revistafairplay

The Strategic Foul and Contract Law: Efficient Breach in Sports?

Miroslav Imbrišević
Heythrop College/University of London

Citar este artículo como: Miroslav Imbrišević (2018): The Strategic Foul and Contract Law: Efficient Breach in Sports?, *Fair Play. Revista de Filosofía, Ética y Derecho del Deporte*, vol. 12, p.69-99

FECHA DE RECEPCIÓN: 5 de Mayo de 2018
FECHA DE ACEPTAPCIÓN: 21 de Junio 2018

The Strategic Foul and Contract Law: Efficient Breach in Sports?

Miroslav Imbrišević

Heythrop College/University of London

Abstract

The debate about the Strategic Foul has been rumbling on for several decades and it has predominantly been fought on moral grounds. The defenders claim that the rules of a game must be supplemented by the 'ethos' of the game, by its conventions or informal rules. Critics of the Strategic Foul argue that to break the rules deliberately, in order to gain an advantage, is morally wrong, spoils the game, or is a form of cheating. Rather than entering the moral maze I will argue that the Strategic Foul rests on a conceptual mistake. I will contrast the Strategic Foul with the idea of Efficient Breach in the economic approach to law in order to bring out some of the salient features. While doing so I will attempt some cross-fertilisation between jurisprudential insights and philosophical reflection on game rules. Finally, I will re-cast Searle's distinction between constitutive and regulative rules in order to bring out the conceptual mistake more clearly.

Key Words: strategic foul, efficient breach, contract law, pacta sunt servanda, constitutive rules

Resumen

El debate sobre las faltas estratégicas ha si recurrente durante varias décadas y se ha discutido predominantemente por motivos morales. Los defensores afirman que las reglas de un juego deben ser complementadas por el "ethos" del juego, por sus convenciones o reglas informales. Los críticos de las faltas estratégicas argumentan que romper las reglas deliberadamente, con el fin de obtener una ventaja, es moralmente incorrecto, arruina el juego o es una forma de hacer trampa. En lugar de entrar en el laberinto moral, argumentaré que la falta estratégica se basa en un error conceptual. Voy a contrastar las faltas estratégicas con la idea de la violación eficiente en el Análisis Económico del Derecho con el fin de poner de manifiesto algunas de las características más destacadas. Iniciaré además una cruzada contra las ideas de la teorías del Derecho y la reflexión filosófica sobre las reglas del juego. Por último, reformularé la distinción de Searle entre normas constitutivas y normas regulativas con el fin de poner de manifiesto con mayor claridad el error conceptual.

Palabras Clave: faltas estratégicas, incumplimiento eficiente, derecho de contratos, pacta sunt servanda, normas constitutivas

1. Introduction[1]

Some fouls are accidental rather than deliberate. They may be due to bad judgement, clumsiness, a wet pitch, fatigue, poor preparation, etc. Among the deliberate fouls we need to distinguish those which happen 'in the heat of battle' (due to anger, loss of self-control,

1 I presented elements of this paper at the 'Philosophy at Play' conference in Cheltenham, at the 'Joint Session' in Edinburgh and at the '7th Philosophy of Sport' conference in Brno/Czech Republic – all in 2017, and I am grateful to the participants for their input. For detailed comments I wish to thank: Patrick Riordan, Tobias Schaffner, Stephen McLeod, Sarah Pawlett Jackson, Peter Czerne, Alfred Archer and Mihail Evans. And thanks to Prof. Christoph Engel for sending me two of his papers.

asserting yourself, revenge for a previous foul, etc.) from those with a strategic intent. Heat-of-the-battle fouls rarely leave you with an advantage, you are more likely to be in a worse position, after being penalised, than before the foul. However, in the latter type of deliberate foul the player aims to retain an advantage even after the imposition of the penalty.

I must confess that I find the moral argument against the Strategic Foul (also known as the 'professional foul' or the 'tactical foul') convincing. In a Strategic Foul (SF from hereon) an athlete breaks the rules of a game deliberately and openly in order to gain an advantage; and they accept the penalty for the infraction willingly. However, the advantage gained is unearned, because if was achieved through rule-breaking rather than through out-playing the opposition – unless you consider (some) rule-breaking to be a form of out-playing the opposition. There are many more moral problems with the justifications given for strategic fouling, but this is a subject for another paper.

In the following I would like to suggest that viewing the SF as part of the game rests on a conceptual error, not just on a moral error. I will include the commonly occurring SFs in this essay, rather than just those few which find favour with philosophers of sport. Although I have stated that I don't wish to enter the moral maze, the reader will notice that I occasionally stray.

I will proceed as follows. I begin with discussing Robert Simon's notion of compensation as a response to strategic fouling. This is followed by comparing the idea of 'efficient breach' (in the law and economics movement) to strategic fouling. In both realms an agent is breaking a promise: to fulfil the obligations in a contract; to abide by the rules of the game. I continue with a section on 'Rights and Options'. There is a tension between one side claiming that they have the option to prevent their opponents from doing X (by breaking a rule) and the other side claiming they have a right to do X (because it is in accord with the rules). The next section deals with the distinction between constitutive and regulative rules when applied to games. I suggest that Searle's terminology has led to confusion in the literature and propose the terms 'playing rules' and 'penalty rules' instead. Only the playing rules determine the options of the players. The penalty rules do not provide (more/other) options within a game: e.g. committing a foul. I end by arguing that penalty rules are not playing rules, and treating them as such does not make them into playing rules.

2. Compensation for breach

The foremost defender of the SF is probably Robert Simon. Other supporters of the SF are: Suits (2005), D'Agostino (1981), Vossen (2014), Russell (2017) and Flynn (2017). Although Simon wishes to restrict its use to certain sports and situations, coaches and players are not so discriminating. Russell (2017: 10) writes:

> let's face it, strategic fouling is embraced in a wide range of circumstances beyond what Simon et al. contemplate, including when it is unclear or even unlikely that there is no other strategy that would give a contestant a reasonable opportunity to use their constitutive skills to win.

Practitioners might use Simon's account to justify their actions, because, as we will see, there is an element of vagueness in his criteria for the 'good' foul.[2] Simon (2005: 91) provides a justification for the 'judicious' use of the SF, and such a justification can easily be applied to many other situations. Few athletes will feel that their judgement is not 'judicious'. This insight about human psychology has been acknowledged a long time ago by Descartes in his *Discourse on the Method* (1637). I will overtly focus on Simon, but, at the same time, I am also addressing those who make use of the SF on the playing field.

Simon (2005: 88; and more recently in Simon *et al*. 2015) claims that sometimes the SF is the right move in a game:

> I have tried to defend a theory of penalties that distinguishes punishments for prohibited behavior from prices for the exercise of strategic options and have argued that in some cases, such as fouling late in a basketball game to stop the clock and force the team in the lead to make foul shots, the penalties for strategic fouls are prices for allowable strategic choices rather than sanctions of moves not allowed in the game.

What Simon has in mind would better fit the distinction between a 'penalty' (his *punishment*) and a 'tax/licencing fee' (his *price of action*). Simon explains (2005: 93): 'the penalty for the foul must reasonably be regarded as the price of action rather than punishment for it; that is, the penalty must provide reasonable compensation for the offended team.'[3]

---

[2] This is recognised by Russell (2017: 28).

[3] The legal scholar Robert Cooter makes a similar distinction in an influential paper from 1984. Cooter suggests that sometimes the law imposes prices and sometimes sanctions, for example when it comes to remedies for breach of contract. I don't know whether Simon has been influenced by Cooter, but he hasn't adopted Cooter's theoretical underpinning for the distinction. The weakness of Cooter's approach is to focus primarily on the instrumental aspect (what pricing information is available to lawmakers) of the law rather than on its normative function (guidance).

I take Simon's claim to be that whenever the sanction is a punishment the foul is real, or serious; but whenever the sanction is compensation, then the foul is not a 'real' foul (a trivial foul?), because such a move is 'allowed'. This distinction allows us to view the SF as morally acceptable, presumably because the idea of compensation (for rule-violations) is morally acceptable – or, rather, compensation is required, is a duty, in certain contexts. For example, if I knock over your excellent bottle of wine, before we can drink it, I should provide a new bottle of the same wine or, if it isn't available, one which is just as good.

But note that in my wine example my action was accidental and I wasn't violating any rules. However, by convention I feel obliged to replace the bottle. By contrast, the SF is deliberate and it violates a rule; furthermore, the game rules stipulate a penalty for the violation.

In Simon's account there is also some confusion in linking a price for action with the notion of compensation. The former is a tax or fee for something which is on offer, something which is allowed (like hunting, fishing, driving, drinking alcohol, smoking tobacco, bringing goods above a certain value into the country, etc.). However, compensation is paid as a response to wrong-doing: e.g. polluting rivers, wrongful arrests or intentional torts – and these are not on offer. These are prohibited acts (see Russell, 2014: 308).

Several theorists (Suits, Simon, Moore) take the view that strategic fouling is an option within games which comes with a price attached. I would like to suggest that this view is conceptually mistaken. The rules of a game are similar to the statutes of criminal law. Note that the rules of football, rugby and cricket are called 'laws' in the English language (but not in other languages, e.g. in German). Breaking the rules or breaking the law is not offered to the player/citizen as an additional option, for example: *you can obey the rules/law and there will be no penalties, OR you can break the rules/law and you will be penalised*. Only the former is an option, but not the latter. When the criminal law presents its threats, they don't come in the form of a choice. Although to the would-be rule breaker it may appear as a choice, perhaps because a wily coach said so – but the rule maker does not present it as a choice. It is a command: *Don't break rule X!*

There is only one option, one thing, which the law wants me to do (or not), and that is to obey.[4] I submit that the same applies to the rules of a game. This is well understood by Pearson, but Suits, Moore and Simon believe that sometimes breaking the rules is an option. Moore (2017: 101) writes: 'Thus, the constitutive rule gives players a choice: they may either follow the rule or break it and be penalized.' And this view of rules is a conceptual mistake.

The coach may tell you that the SF is an option – but it contravenes the rules of the game – thus it cannot be an option. The fact that the game is stopped and one side is penalised confirms this.

Let us look at the relevant passage by Simon *et al*. (2015: 67):

> in addition to penalties for crimes, the law also sometimes requires payment or fees for actions that are permissible, such as obtaining a hunting license. Thus, it would be absurd to regard the fee the state charges for issuing a driver's license as a penalty or punishment for driving; rather, it is more like the price of having one's driving legally sanctioned. Similarly, not all penalties in sport are punishments or sanctions for prohibited acts; instead, some may be the price to be paid for exercising a strategic option.

Note that Simon offers two analogies for penalties in sports: criminal law and regulatory law. The criminal law sanctions wrong-doing, just like some punishments for fouls in sport; regulatory law simply imposes a fee for permissible activities, just like Simon's 'price of action'.[5] But it is surprising that a 'price of action' (for a SF) should feature under penalties. It would make more sense to reclassify it as a tax or fee (for a license, privilege or immunity, etc.) – something he hints at in the above passage. After all, Simon thinks that the SF is an allowable move, whereas it is generally agreed that the actions which trigger penalties are not.

Migotti provides an illuminating discussion of these distinctions in law (2015: 390):

> penalties are not prices (…): Prices are paid for things on offer, with a promise of entitlement to what is paid for, and can be paid at any time relative to what is on offer,

---

[4] Hart (1997: 27) agrees that a criminal statute is not a conditional proposal; see also Rawls (1999: 276f.). For a wider discussion see Chapter 5 of my PhD thesis (London 2014). In contrast, the threats of the gunwoman come in the form of a conditional proposal: *Either give me your money or I will shoot you*. See also Migotti (2017: 389).

[5] Eylon and Horowitz (2017: 8) similarly distinguish prohibitions and prices: 'actions that are forbidden and actions that are legitimate but at a cost'.

while penalties are paid in consequence of violations of orders, and can only be paid retrospectively.

Thus Simon is blurring the distinction between a fee and a penalty.

His use of the word 'compensation' is more apt, because it implies that someone has been wronged or harmed. But compensation is not a price of action, it is a 'price' for violating a rule. Migotti points out that treating a penalty as a price for action doesn't make it so.[6] Migotti (2017: 380) explains: 'when someone is made to pay a sum of money as a penalty, this does not *entitle* him to his transgression, but is a kind of *reprimand* to him *for* it'.

Compensation aims to restore the victim, but it doesn't cancel out the wrong – unless there is an apology and the apology is accepted. For this reason players usually apologise to the victims of their accidental fouls (and heat-of-the-battle fouls), even after being penalised by the referee.[7] Thus, philosophical supporters of the SF are mistaken when they treat the penalty for the foul as a price which entitles them to the action.

4. Law and Economics

Viewing the law (particularly contract law) as a pricing system, where breaking the law (or breaking a contract) is an option, is a feature of the 'economic approach to law' (EAL from hereon). An important exponent if this movement is Richard A. Posner (1975), but we can find a precursor for this view in Oliver Wendell Holmes. He writes (1897: 5): 'The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else.' Holmes' claim was that the law is indifferent about breach, and his aim was to keep morality out of the law.

The EAL is very popular with legal theorists in the US. One could see the incorporation of the SF into games as an 'economic approach' to the rules of a game, because in such instances rule-breaking is included into the parameters of playing the game.

The best analogy to strategic fouling is probably the notion of *efficient breach* (EB from hereon) in contract law. Daphna Lewinsohn-Zamir explains (2012: 5):

> In a nutshell, the doctrine of efficient breach holds that a promisor may breacha contract whenever breach is more efficient than performance, i.e., the promisor's profits

[6] See also Hart (1997: 39).

[7] See also Klass (2014: 368).

> from the breach exceed the losses to the promisee. Thus, if after contracting with A for the sale of an asset, the seller finds a second buyer (B) willing to pay a higher price, the seller may breach the contract with A, transfer the asset to B, and compensate A for her losses. The criterion for compensation is expectation damages, which aim to put the promisee in as good a position as she would have been in had the contract been performed. According to this criterion, the injured party is awarded her expected profits from the contract (…). The breach is considered to be efficient because the asset is transferred to the person who values it more, while minimizing transaction costs. The seller does not have to bargain with A for a release from her obligation, but may directly contract with B.

My focus is on *deliberate* (or *opportunistic*) breach of contract, i.e. when contracting with a third party promises to be more profitable. I exclude taking advantage of the other side's vulnerable position from my notion of opportunistic breach. We need to distinguished deliberate breach from *involuntary* breach of contract: e.g. impossibility, mistake, or when it turns out that the cost of performance has unexpectedly risen and strict performance would result in a substantial loss (i.e. threatening the viability of the business) for the promisor. EB theory has advanced since its early developments in the 70s and 80s. Gregory Klass (2017: 105; also 2014) distinguishes between the simple (early) theory and a more sophisticated doctrine of EB: 'Later iterations acknowledge the theory's assumptions, which include sophisticated parties, competitive markets, cheap adjudication and high costs of negotiating a release.' For the purposes of this essay (to compare and contrast the salient features between the SF and EB) the simple theory will do. Note that the rise of the use of the SF runs parallel to the rise in popularity of the EAL movement: i.e. from the early 70s. And, interestingly, the most fervent supporters of either doctrine reside in North America. Fortunately, there are some pockets of resistance, as we shall see.

It appears that EB makes everyone happy, because they either get what they want or they get compensated. We can observe a similar move by Simon with regard to the SF. Reasons are given which stress the benefits for both sides, for the game and for the audience. Rather than admitting that breaking the rules is done simply to win a game[8] or because a more attractive opportunity to contract with someone else presents itself (i.e. an expectation of

[8] But see Flynn (2017) and Simon's update of *Fair Play* in 2015.

greater profits), apologists of these practices employ the façade of 'greater benefits': *It makes for more interesting and exciting games!* or *EB increases economic welfare for all!*

Note that the promisee[9] originally wanted the goods rather than compensation: 'One does not buy a right to damages, one buys a horse.'[10] Even if the promisee is a sophisticated participant in the market of a common law system, i.e. they are aware of the possibility of EB, they might still not be indifferent about the remedy. Thus, the notion of 'efficient allocation of assets' favours the party who breaks the contract. Their interests are privileged in the notion of EB. Thus, the adjective 'efficient' (in contrast to Suits' use of 'efficient') could be read as: *facilitating greater convenience or greater profit for the breaching party (and for the new recipient of the goods)*. Although proponents of the EAL would argue that EB maximises the value of the assets in question, and thus it is a good thing. For the promisee compensation is merely an approximation, a substitute for that which was originally agreed in the contract.

Thomas Riehm (2015: 181) writes that the true value which the promisee places on performance can only be ascertained through negotiations with the promisor. Contrarily, some thinkers tried 'reinterpreting the promise so that paying money counts as performance rather than breach' – see Katz (2012: 779, 785). Shavell (2006) claims that because most contracts are incomplete, both parties have (hypothetically) agreed to breach under certain circumstances.

The problem is compounded if the object of the contract is a unique good (e.g. land or works of art). Note that normally the breaching party is awarded expectation damages only and does not have to disgorge the additional profits to the non-breaching party. But if the object of the contract is a unique good this might happen. Thus the rationale of the common law seems to be that the inconvenience to the promisee to replace non-unique goods (via the

---

[9] The idea of 'contract as promise' is championed by Charles Fried (1981) and is widely accepted. For the purposes of this essay I will also accept it. For a different view ('contract is consent') see Randy Barnett (2012). If any of my readers are allergic to the word 'promise', they are free to replace it by 'agreement', or even 'consent'. I don't think much hangs on it. Randy Barnett's claim that 'contract is consent' rather than promise seems sensible to me, and keep in mind that courts accept that you consent to assume a risk (of sustaining injuries) when you enter a game.

[10] Sir Frederick Pollock, in an epistolary exchange with O.W. Holmes (as quoted in Buckland 1944: 247).

market) does not warrant either strict performance nor disgorgement of additional profits from breach.

The routine awarding of compensation for EB in common law systems assumes that the promisee is indifferent between the remedies of strict performance and compensation.[11] Randy Barnett (2010: 61f.) points out that we don't know that this is the case. We could know, however, if we gave 'the promisee the option of freely choosing damages or specific performance.' And this is what German contract law envisions.[12] Christoph Engel (1994: 145f.) states that, particularly in the context of German law, the promisee is not indifferent, because choosing compensation would often result in losses which would be unrecoverable in law.

Because compensation is the default remedy for EB in common law systems, and the excess profits from opportunistic breach may be kept, it encourages this practice. This equally explains the attraction of the SF – here, the rule-breaker is better off – they can keep the 'excess profits' from strategic fouling.

O'Sullivan (2004: 334) writes: 'The "performance interest" tends not to be accorded sufficient weight in the English remedial system, which generally assumes that a plaintiff is neutral as between damages (assessed by reference to market value) and performance itself.' Recent empirical work, however, has shown that the indifference thesis is wrong, particularly when we are dealing with opportunistic breach.[13]

According to the EB doctrine, we give the promisor the option to either perform or to breach. But when she does decide to breach, she knows, i.e. can confidently plan her future, that compensation is the remedy. In contrast, the promisee's future planning would be derailed by breach. Furthermore, in common law systems, the promisee is not given the option to choose between strict performance and compensation. It appears that the rule

---

[11] See Eisenberg (2005: 999).

[12] See BGB § 241; also Markesinis *et al*. (2006: 399).

[13] See for example Wilkinson-Ryan (2010), Lewinsohn-Zamir (2013), Bigoni *et al*. (2017) and Engel/Freund (2017).

breaker has been dealt the better cards.[14] Under the continental system this imbalance is less pronounced.

If the promise in a contract is simply a disjunctive commitment to either perform of pay, then the value of contracting (or promising) is diminished. The promisee cannot rely on performance. But the original purpose of contracts was presumably to guarantee reliance (to a reasonably high degree) on what was promised; and continental systems of law seem still to adhere to this principle. I suspect the reason for this is that the principle *pacta sunt servanda* has had a stronger hold on the Europeans than on the Anglo-Americans.

Let us look at EB from the viewpoint of a continental lawyer. It appears that the economic aim of efficiency (i.e. increasing the value of a good in a market/maximizing resources) is applied to the legal realm. It is used to justify the breaking of a venerable moral and legal principle: *pacta sunt servanda*. The legal (and moral) norm of fidelity to past agreements is trumped by the economic aim of efficiency.[15] Zimmermann (1990: 542f.) states that the principle stems from canon law rather than from Roman law (see also Hyland, 1994). But the notion of the 'sanctity of contracts' is much older (see Wehberg, 1959).

For the US-trained lawyer things look differently. Hyland (1994: 429) writes:

> The American law of contract, for example, starts from the proposition that it is the role of the law – and not of morality – to decide which promises should be legally enforceable. There is no general rule in the common law, either in the form of the *pacta* maxim or in any other form, that all promises or all agreements are binding.

Thus for the US-trained lawyer honouring a contract is merely a legal obligation, and not at the same time a moral obligation.

Hyland (1994: 430) asks: 'Why did the *pacta* maxim arise and triumph in the civil law [i.e. in continental systems] while remaining foreign to the common law tradition?' His answer is that there is a particularly intimate relationship between the Latin language and continental European culture. I believe Hyland is slightly off the mark here; it is simply that the Europeans were influenced by the Catholic church and by canon law.

---

[14] See also Shiffrin (2009: 1564).

[15] See also Shiffrin (2007).

We need to distinguish the legal obligation (to the promisee) from the divine or canonical obligation: breaking a promise (in the sight of God) is to fall into sin. Hyland (1994: 426) himself points out that for Augustine (just as for Pufendorf) 'breaking a promise is equivalent to deceit.' Thus, breaking a contractual promise is failing a moral obligation, not a just a legal obligation. For this reason, something Hyland acknowledges, continental systems offer strict performance as a remedy. There is another aspect to this. For the canonist, forcing the promisor (in a court of law) to honour their obligations through strict performance, prevents the promisor from falling into sin (see Thier, 2015: 334f.).

The tension between fidelity to past agreements and efficiency, which the Europeans feel more keenly than their cousins over the pond, however, might dissipate if we look at matters in a different light. Gregory Klass argues that the nature of promising in contracts differs from promises to friends and family. It is a *thin form of sociability* (2017: 101): 'a promise to perform or pay would be inappropriate, and even harmful, among friends or other intimates. But not everyone is, or should be, my friend. Human sociability is multilayered, and valuable relationships take many forms.' I take Klass to endorse breach (and pay) as appropriate in a contractual relationship, but not in an intimate relationship.

The idea that promising exhibits a different nature, depending on the recipient, deserves more space than I can give it here. I will, however make some general remarks. I believe Joseph Raz (1982: 931) is right in claiming that the closer the relationship, the less the need for invoking promises. Contracts often involve strangers, and thus the parties to a contract cannot rely on a prior relationship to cement their trust. But the lack of familiarity between the parties does not mean that their promises are somehow less binding. Raz (2014:61) explains: 'Promises, being commitments to others, facilitate co-operation, the forging of relations that presuppose dependence, trust and joint actions, and more.'

It may be a thin form of sociability, particularly in the context of one-off consumer contracts, but most consumers will not be amused when faced with breach of contract. Furthermore, contracting parties may develop a relationship over time. Bellia (2002:35) states: 'The law of contract enables these persons not only to pursue their own reasonable objectives, but to create possibilities for relationships of lesser trust to ripen into relationships of greater trust.' Then, a handshake may suffice to come to an agreement. This would not be a

thin form of sociability – and presumably a promise to 'perform or pay' would then not be appropriate. Also recall the formula: 'My word is my bond.' This is bound up with the honour of the promisor – admittedly, another old-fashioned value.

Let us also remember that contracts used to have a religious import because these obligations were considered to be undertaken in the sight of God. Hans Wehberg (1959: 775) writes: 'The gods [of different peoples and religions] were, so to speak, the guarantors of the contract and they threatened to intervene against the party guilty of a breach of contract. So it came to be that the making of a contract was bound up in solemn religious formulas'.

I suspect that with the secularisation of society and the rise or capitalism the notion of the 'sanctity of contracts', even in its metaphorical sense, has lost ground. Nevertheless, the state (via its legal system) became and still is the guarantor or contracts, whereas promises between intimates are left out of the purview of the law. I will come back to these issues soon.

Do players have an obligation to obey the rules of the game? They certainly have – not a legal obligation – but an institutional obligation to abide by the rules, because they either explicitly or implicitly, by joining the game, agreed (promised) to do so. Is it also a moral obligation? It is often said that playing a game is not a moral endeavour: *It's just a game, it's not life!* Although, morality may show its face in how you play the game: do you stop playing once you notice that an opposing player is down with a serious injury?

It may be true that the actions we perform within a game (e.g. scoring a goal, defending, dribbling etc.) do not have a moral character, but it is widely accepted that fidelity to past agreements is a moral obligation. Pearson (1988: 184; also Fraleigh, 1982: 41) likens the agreement (usually an implicit promise) among players and spectators – to abide by the rules of the game – to a contract. Furthermore, breaking a promise (for opportunistic reasons), whether in contracting or in playing sports, is an abuse of trust.

Supporters of the SF might not sign up to the moral-obligation-view; they might only accept that there is an institutional obligation to follow the rules of the game. And the institutional obligation is defeasible: the prospect of losing a game might be a reason which is strong enough to loosen the ties of this obligation. This would then mirror the debate about EB. The opponents maintain that there are legal *and* moral obligations to honour contractual

obligations, but the supporters of EB only subcribe to legal obligations, and these are defeasible.

It is puzzling that, according to the EB doctrine, one can sell the same item twice over. First you bind yourself to do X (e.g. hand over certain goods to the promisee in exchange for payment), but subsequently you decide to bind yourself again (to hand over said goods) to another promisee. This is reminiscent of the bigamist. But note that the second (and any subsequent) 'marriage' is without legal effect. It is odd that in EB the second (or the ultimate) sale is supposed to have legal effect, rather than the first one.

Finsinger and Simon (1987: 265) write that efficiently working competitive markets allocate goods in such a way as to maximise productivity. But the question is: Does breach of the original contract and the subsequent sale of these goods via a second contract always lead to a more productive use of resources? EB doctrine assumes that (Dagan 2004: 273) 'the promisor is generally in a better position to exploit opportunities to redirect the promissory resource.' However, Finsinger and Simon, doubt that this is always the case. Dagan (2004: 274) shares these doubts:

> there are also numerous instances in which the promisee in fact has access to the market, and this access is not inferior to that of the promisor. At times this access may even be superior. [FN] A common example of such a case is where the promisor is a producer and the promisee a wholesaler or a retailer, such that it is at least questionable as to whether the promisor, rather than the promisee, is the best finder of efficient reallocations.

The orginal buyer, if in possession of commercial acumen, might have achieved the same or a greater productivity of resources than that which might result from the second contract. Furthermore, the seller cannot ascertain what further losses the promisee, apart from lost profits, might incur as a result of the breach. The promisee may also have entered into contracts for delivery of other goods and/or services which are necessary for the whole of the commercial enterprise to succeed (e.g. packing material, crates, machinery).[16] The resulting losses may negate the notion of efficiency. This could also result when the matter comes to court, which would increase transaction costs and thus diminish efficiency even more.[17]

---

[16] See Engel (1994: 145).

[17] Klass (2017: 95) points out that courts sometimes get confused about what 'efficient breach' means and as a result sanction inefficient breach as in *US ex rel. O'Donnell v. Countrywide Home Loans*.

The problem with the doctrine of EB is that it privileges the viewpoint of the breaching party, although they suffer from an informational deficit.[18] The breaching party, in most instances, will lack certainty that efficiency will result from breach. The promisor (and the supporter of the EAL) will only be able to judge *post factum* whether the breach was efficient or not. There is a similar uncertainty in the use of the SF. The foul may not come off as planned: resulting in an injury to either or both players and/or resulting in a more severe penalty. Because Simon (2005: 91f.) is aware of the epistemic problem, he endorses the 'judicious' use of SFs. But who has enough *nous* to make such a judgement?

Christoph Engel (1994: 147) stresses that it is important to separate the point in time when the contract came about from the agreed date of performance. He explains that the efficiency of EB is viewed *ex post*, i.e. after the promisor discovers a change of market conditions, whereas German contract law insists on viewing matters *ex ante*, i.e. from the point in time when the contract was made. The *ex post* view privileges the promisor, but why should the promisor enjoy such a privilege? Let us keep in mind that contracts are normally bilateral (or multilateral) agreements, however, the doctrine of EB will allow a unilateral deviation from the contract: breach. Similarly, the SF constitutes a unilateral deviation from the (explicit or implicit) agreement to abide by the rules of the game.

It is well established that legal norms can sometimes be superseded by other norms, e.g. by the notion of equity. But it is questionable whether the idea of economic efficiency (which, in EB, privileges one of the contracting parties) should trump legal obligations. This would assume a narrow view of the purpose of contract law as: maximising value. The breaching party relies, of course, on other parties being faithful to the contracts they enter into. Thus, the promisor is free-riding on the co-operative scheme.

Joseph Raz takes a different view: (1982: 938):

> when enforcement remedies are appropriate, they are justified by the goals of preventing harm to the contracting parties and protecting the practice of undertaking voluntary obligations from erosion. The enforcement of promises is justified as a means, not as an end.

On the Razian view the enforcement of promises does not serve the end of efficiency, but rather the end of protecting the practice of contracting as well as protecting against (ibid.)

---

[18] See Klass (2014: 369).

'harms resulting from its abuse.' The doctrine of efficient breach is, in my view, an erosion of the practice of undertaking voluntary obligations. Seanna Shiffrin (2007: 743) raises similar concerns: 'If contract is more forgiving of transgressions, as I have suggested, this may exert a subtle influence to treat promises less seriously.'

This *reliable* system of exchange, which is based on the practice of voluntarily undertaking obligations, represents the wide view of the purpose of contract law.[19] The free-rider claims that EB leads to better results (for all?), but at the same time she relies on all others (including the third party who replaces the original promisee) to adopt the wide view – and not to make exceptions (i.e. to breach) for themselves. By the same token, isn't the SFer a free-rider who is making an exception for herself?[20]

Avery Katz (2012: 792) presents another objection' to EB: 'a legal regime in which commitment is respected and valorized will better promote virtuous moral character, civic solidarity, and a flourishing community. We may call this the aretaic argument against efficient breach.' One could also ask: Does the use of strategic fouling damage the athlete's moral character?

I submit that proponents of the SF see it as something akin to the notion EB in contract law – in both realms breaking the rules is seen as an option. The legal scholar W. David Slawson (1996: 122) writes: 'People ought not to be liable for punitive damages merely for breaching a contract. They have done nothing wrong if they pay full compensation.' The idiosyncratic use of the legal term 'compensation' by Simon suggests that the SF is simply an option one can exercise during a game, provided one is prepared to 'pay the price'.

Apologists for the SF claim that the victim of the SF is fairly compensated, presumably because the penalty for such a foul fulfils its restorative function. I am assuming that the function of a penalty in games is to restore the fortunes of the victim to the state of play prior to the foul. But there is an important difference in the 'compensation' for the SF compared to EB. Whereas in the contract example the compensation comes – ideally – close to restoring

---

[19] Shiffrin (2007) and Murphy (2014) also stress the importance of the wide view.

[20] At least on those occasion when a particular SF is employed for the first time or as long as it hasn't been adopted by all athletes.

the promisee (at least as far as expectation damages are concerned)[21], in the SF the other side is only partially restored, because after paying the 'compensation' the offending side retains an advantage. This advantage is not compensated for. This means that the side who suffered the foul is not fully restored to the *status quo ante*. Just like in EB the strategic rule-breaker's viewpoint is privileged in the SF. But here the idea of fair compensation is a myth. It is puzzling that Simon (2005: 93) and others (Flynn 2017: 351) believe that, for the SFs which they endorse, the offending side does provide reasonable compensation to their opponents.

The compensation for EB can be an adequate remedy when we are dealing with goods which are freely available on the market, i.e. I can buy replacements for the oranges I was originally promised and thus keep my customers happy. Matters are more complicated when it comes to strategic fouling. What makes the SF attractive, and distinct from a non-SF, is that the penalty routinely undercompensates the party who suffered the foul. If this were not the case, the SF would lose its attraction. Wright and Hirotsu (2015: 167) report that after the imposition of a red card for a SF 'no statistically significant change in goal-scoring rate was found for a team playing with 10 men when analysing the 1999–2000 EPL season (this was also found by Ridder *et al* for the Netherlands League).' These findings might mean that in football the penalty of exclusion undercompensates the victim side.

As a consequence the victim of strategic fouling might either be denied (a well earned) victory or the final score might not reflect their true ability, i.e. they appear to be worse than they really are.

5. Rights and options

Simon (2005: 93) views the compensation for a SF as a 'price of action'. Taking such a position in Sport ignores that the victim of the SF had a right to perform a prior action, say, attempting to score a goal – but they were prevented from doing so. Steiner (1977: 767) states: 'A right denotes a range of actions that its possessor may perform. It further implies a duty, on the part of persons other than its possessor, not to act in such a way as to interfere with or prevent those actions.' Applied to games, this means that others may not interfere with my right to perform, whenever they would act contrary to the rules of the game (see also Hohfeld, 1913, on claim rights).

---

21 See Barnett (2010: 30f.). Lewinsohn-Zamir (2012: 23) points out that courts undercompensate promisees.

The apologists for the SF want to make us believe that the option to use the SF is normatively on a par with any action by the non-fouling side, which is in accord with the constitutive rules of a game. Thus, there is a tension between one side having a right and the other side – allegedly – having the option to do something which would interfere with this right. And this option can be bought by paying 'compensation' later. Flynn (2017: 351) states that the SF is: 'consistent with justice, since it compensates the competitor who has been 'illegally'" deprived.' Flynn recognises that the competitor has been deprived of a licit action, but he simply passes over this injustice because the victim is compensated. Furthermore, he ignores that the 'compensation' for a SF usually falls short of restoring the victim.

However, there is something more significant at issue here than the notion of fair compensation. Friedrich Georg Jünger (1953: 99) recognises what that is: intentionally interfering with the ability to display or exercise one's skill.[22] We can say that a central function of the rules of a game is to facilitate the display of skill.[23]

Fraleigh (2003: 271) recognises that the display of skill is central to a game. However, his rejection of the SF rests on weighing the importance of constitutive skills against restorative skills. Fraleigh fails to state clearly that they are normatively not on a par; more precisely, restorative skill are not normatively neutral – they only come into being through a rule-violation. For this reason restorative skills are not desirable in a game – their use is to be minimised rather than promoted. Highlighting this point would allow Fraleigh to deflate Simon's riposte (2015: 69): 'not all exercises of restorative skills are routine or require less skill than constitutive skills require'.

In sports every player has the (institutional) right to attempt to perform certain moves, which are in accordance with the rules of the game. The rules are supposed to protect this

---

[22] Jünger writes: 'Regeln sind nicht nur die positiven Bestimmungen, die den Anfang, den Fortgang und das Ende des Spiels sichern, sondern auch die negativen, die ein spielwidriges Verhalten nicht zulassen. Dazu gehört, daß die Geschicklichkeit eines Mitspielers nicht vorsätzlich verletzt wird.' My translation: 'Rules are not only positive determinations which secure the beginning, continuation and end of the game, but also negative determinations which don't permit rule violations. Part of this is that the ability to display one's skill may not be intentionally interfered with by other players.' In spectator sports we could say that it is the display of skills which is being curbed, but whenever there are no spectators present, apart from fellow competitors, the German word 'Geschicklichkeit' should be rendered as 'competence in performance'. I have to thank Patrick Riordan on this point of translation.

[23] See also Suits (1988: 1).

display of skill, rather than offering its violation as an option. Apologists of the SF are ignoring this principle.

What is the purpose of the rules of the game? Is it merely to facilitate that one side may be victorious – or to allow for a draw? This would be the narrow view. The wider view is that game rules protect the display of skill, provide a fair measure of performance, and safe-guard the game as an institution. The SFer takes the narrow view (to facilitate a result in their favour) and this type of rule-breaking is eroding central elements of the game and perhaps the game itself.

Patrick Riordan (1996: 16f.) points out that there are two aspects to fouling. The foul doesn't just violate the rules of the game, thus creating a situation of unfair competition, but it also results in there being a (direct) victim – the fouled player. Riordan explains (1996: 16): 'He suffers the harm resulting from his fall, but also the deprivation of the opportunity to score, with his chances of excelling as a footballer, attaining recognition from his peers, and glory and adulation from his fans.' Note that it may not always be possible to identify a *direct* victim of a SF, e.g. in cases of handball. But then it is the whole team which is put in a worse position.

If I am the direct victim of a SF my primary right to perform (e.g. an attempt to score a goal) has been taken away from me and replaced with the right to compensation. The SFer feels empowered to convert what is a duty to refrain from breaking the rules into a liberty to perform a SF. Such a rule-breaker attempts to convert my claim right (not to be fouled) into a liberty to strategically foul – *post factum*, via the acceptance of the sanction specified for the foul.

We may ask: does a SFer have the authority to convert the duty to refrain from fouling (deliberately) into a liberty to do just that? A player does not have such authority – and it cannot be bought by paying 'compensation'. Not even the referee possesses such authority. But note that the referee might have the authority not to penalise a foul (by invoking the advantage rule in football). But such a 'conversion' is within the rules of the game. It is theoretically conceivable that the gamewright or the governing body of a sport could institute a rule which stipulates that under certain circumstances a player might be permitted to do

something which is normally against the rules. But in these circumstances it doesn't constitute a rule violation any more.

The right to 'compensation' flows from an act which violates the rules of the game and apologists for the SF would claim that it is 'tactically correct' (Suits 2005: 52) to do so. Thus, the question arises: what is the normative status of exercising the 'option' to commit a SF? Doubtless, it is not a right, since it contravenes the rules of the game, and specifically, it violates the rights of the opponent to perform licit acts. Supporters of the SF have not much to say on this issue except to suggest that it is part of the 'ethos' of the game. And by 'ethos' they invariably mean a convention or a common/habitual practice, rather than the 'moral character' of the game. But what people habitually do (e.g. park their cars in restricted areas) is not necessarily right or 'a right'. Migotti explains (2015: 381): 'what you pay when you pay your $30 for parking in a No Parking zone is not the price of parking, but the price of violating a prohibition against parking.'

The rights of individuals or groups in the real world may clash of course, but I suspect that the rights within games, irrespective of the agonistic attitude of the players, are *wholly* compossible, i.e. compatible with the rights of other players (see Steiner, 1977, on compossible rights).

Although compensation is the default remedy for breach of contract in the Anglo-American realm, it is not the best remedy. Pearce & Halson (2008: 75) write: 'The most obvious means of vindicating the claimant's right to performance of the contract is to order the defendant to perform.' But the function of compensation is equally to vindicate the rights of the promisee, it isn't replacing the right, as Daniel Friedmann (1989) has argued. He writes that it is a mistake to convert 'the remedy into a kind of indulgence that the wrongdoer is unilaterally always entitled to purchase.' I submit that this also holds for the SF.

Because of the nature of strategic fouling strict performance, as a remedy, is not possible – the opportunity has gone. In tennis we can re-play a point, but in team sports something like this would be impractical. One could of course 'rewind' the game to the position of each player just before the SF occurred, via video replay, to allow for something close to 'strict performance'. But this would be time-consuming and it would not re-create the particular flow of the game as well as the energy and enthusiasm of the players prior to the foul. The

rule-violater has ‘relieved’ me of the possibility of strict performance (e.g. attempting a shot at goal).

So far I have, for the sake of argument, accepted Simon’s notion of compensation as a response to rule-violations. He and other supporters of the SF pattern their justification on the legal notion of compensation, which regulates the wrongs of breach (contract law) and tort (tort law).

But compensation as the analogon between law and games is ill-conceived when applied to strategic fouling. A deliberate personal foul is structurally similar to an intentional tort. The penalty for a foul doesn’t compensate the direct victim for the harm they suffered – think of a player who is taken off the field on a stretcher. The penalty does not aim to compensate them for their pain, bruises, broken bones and other injuries; it doesn’t aim to make that player whole again. Instead, the penalty aims to give to all of the team what was taken from them. It is a re-allocation of advantages (profits). Riordan (1996: 17) writes: ‘The attacking forward who had been brought down receives nothing in the redistribution: the blows to his body and his ego impose their own marks but he receives no compensation.’

I have argued above that the re-allocation of advantages in response to a SF is usually inadequate. Neither the victim nor the team is fully restored. In order to bring about such a restoration we need to look at another branch of the law of obligations: the law of restitution. Here, the aim is to allow for recovery when someone profits from a wrong (rather than compensating for a loss). Virgo (2015: 4) explains: ‘where the defendant has obtained a benefit at the claimant’s expense, justice demands that this should be restored to the claimant. This is known as “corrective justice”.’

The court orders the wrong-doer to give up their gains to the wronged party. This is more apt as an analogon. The sanctions for strategic fouling usually fail to re-allocate fully all of the advantages resulting from the foul. This means that players who use the SF subvert the restorative function of penalties.

Simon approves of one particular SF: the practice of stopping-the-clock at the end of a basketball game. But even practitioners recognise that the restorative function of penalties can be undermined. Terry Holland, a former basketball coach, stated in 2010:

> The current situation that allows the defensive team to foul (intentionally) and limit the offensive team to a maximum of 2 points on that possession is not fair now that the team gaining possession after the free throws has the option of trying for 3 points on their possession. An intentional foul should not give the team fouling a 3-2 advantage for the respective possession.[24]

What is (morally) objectionable about the SF (and EB) is that one side profits from their wrong-doing. If we accept this precept not just in law but also in games, then the SF cannot be justified in the way Simon tries to justify it.

My aim is not to reform the rules of games – it is to show that using strategic fouling is a conceptual (and a moral) error. My plea, not to employ the SF might, fall on deaf ears though. In that case the penalties for strategic fouling need adapting, as has happened in response to stopping-the-clock in basketball (2016). There, the residual advantage for the fouler (gaining possession of the ball) has been taken away, rather than giving to the victim (e.g. more free-throws) – and this is what the law of restitution would require. This solution may not always work as elegantly as in this example, but it is a start.[25]

6. Rules and games

Some remarks about terminology are now necessary. Many theorists of games have adopted the terms 'constitutive' and 'regulative' rules from John Searle, who used them with reference to how language works (but one can trace these terms back to Kant). It might be helpful to quote Searle (1969: 33f.) at length:

> we might say that regulative rules regulate antecedently or independently existing forms of behaviour; for example, many rules of etiquette regulate inter-personal relationships which exist independently of the rules. But constitutive rules do not merely regulate, they create or define new forms of behaviour. The rules of football or chess, for example, do not merely regulate playing football or chess, but as it were they create the very possibility of playing such games. The activities of playing football or chess [34] are constituted by acting in accordance with (at least a large subset of) the appropriate rules. [FN] Regulative rules regulate a pre-existing activity, an activity whose existence is logically independent of the rules. Constitutive rules constitute (and also regulate) an activity the existence of which is logically dependent on the rules.

What is confusing to the reader is that constitutive rules, apart from creating new forms of behaviour, also regulate. But then there is a separate class of rules, i.e. regulative rules, which

---

[24] As quoted in Ray Glier (2010). Note that the NBA changed the rules in 2016 to reduce – but not to eradicate – the practice of stopping-the-clock.

[25] I elaborate on these issues in a forthcoming paper: 'Compensation, Restitution and the Strategic Foul'.

also regulate. Two questions arise: how can constitutive rules serve both functions, and why do we need two classes of rules which overlap?

Wray Vamplew (2007: 844) states that constitutive rules have a prescriptive and proscriptive function; similarly Torres (2000: 83). Klaus Meier (1985: 69) suggests that regulative rules are a subset, an extension, of constitutive rules. Stemmer (2008: 229) claims that there are no constitutive rules, only regulative rules. Those of Searle's rules which exhibit the form *X* counts as *Y* in context *C* are, strictly speaking, not 'rules', rather, such prescriptions merely establish a standard. We could illustrate Stemmer's view with the following example: a will in English law requires two witnesses (among other things). If this standard is met we have a valid will. Stemmer argues that to establish a standard is not to establish a rule.

Searle (1969: 33) admits that there is a lack of clarity in his presentation: 'I am fairly confident about the distinction, but do not find it easy to clarify.'[26] This lack of clarity has lead to confusion in the literature. Carlson and Gleaves (2011) have shown that there are many different interpretations of the constitutive/regulative-dichotomy among theorists of games. It is also interesting to note that Suits, unlike subsequent writers, makes do with constitutive rules only; he never refers to regulative rules. This might be because he was influenced by Aurel Kolnai (1965), who relies on constitutive rules only,[27] or Suits might have recognised that Searle's dichotomy is problematic. It is likely that Suits (and Kolnai) take the constitutive rules also to be regulating,[28] and thus there is no need to posit a separate class of regulative rules. Be that as it may, writers who rely on Suits but refer to Searle's constitutive/regulative dichotomy may, as a result, misinterpret *The Grasshopper*.

In order to avoid the confusion around these terms it might be useful to introduce terms which are much clearer and easier to grasp. I propose to distinguish 'playing rules' from 'penalty rules'. There are other (auxiliary) rules of course, e.g. eligibility rules, competition

---

[26] See for example Joseph Raz' (1999: 110f.) criticism of Searle; also Christopher Cherry (1973); Fred D'Agostino (1981: 12f.); William J. Morgan (1987: 2) and Graham McFee (2004).

[27] Suits cites very little literature in *The Grasshopper* but he does discuss Aurel Kolnai's paper 'Games and Aims'.

[28] Similarly Morgan (1987: 5).

rules, regulatory rules, etc., but they are not central to my argument – for an overview see Vamplew (2007).

The playing rules explain and determine how the game is to be played (e.g. a football team cannot field more than 11 players). They tell us what we can do and what we cannot do. My way of putting it explains how constitutive rules could create new forms of behaviour and at the same time 'regulate' it. Searle should have said that constitutive rules set up the game but at the same time they 'constrain' (rather than 'regulate') the behaviour *ex negativo*: e.g. you cannot field more than 11 players, etc. And Searle's regulative rules are simply penalty invoking rules.

The penalty rules explain what is to be done if certain playing rules are broken (e.g. a foul within the penalty area results in a penalty kick).[29] The penalty rules are parasitic on the playing rules – they are not free-standing. I suspect that the lack of clarity about the constitutive/regulative-dichotomy has not helped in discussing the issue of strategic fouling. I hope that introducing my own distinction allows us to see more clearly what is wrong with the SF.

My re-conceptualisation of game rules is nicely mirrored in Hart's (1997: 38f.) account of the criminal law: 'the characteristic technique of the criminal law is to designate by rules certain types of behaviour as standards for the guidance either of the members of society as a whole or of special classes within it'. Hart explains that 'the rules requiring the courts to impose the sanctions in the event of disobedience (…) make provision for the breakdown or failure of the primary purpose of the system. They may indeed be indispensable but they are ancillary.'

We need to keep in mind that only the playing rules determine the options of the players. The penalty rules do not provide (more/other) options within a game: e.g. committing a foul. The penalty rules only specify what is to be done if the playing rules have been broken. For example, rule 12 of the 'Laws of Football' deals with 'Fouls and Misconduct' only – it is not a playing rule.[30] So the (conceptual) mistake in a SF is to incorporate the penalty rules into

---

[29] Jünger (1953: 99) adopts a similar classification. Meier (1985: 70) writes that the constitutive rules incorporate a subset of penalty rules.

[30] See also the competition rules of World Taekwondo: 'Article 14 Prohibited acts and penalties'.

the playing rules. Russell (1999: 37) calls such a practice an 'anti-game', i.e. you are not playing *by* the rules but rather *with* the rules. Such a widening of options through the inclusion of rule-breaking is something we can observe in the doctrine of EB: breaking a contract is just another option when being bound by a contract. The practice of strategic fouling rests on a conceptual mistake. The rules of games – normally – do not give players the option to break any rules as part of playing the game.

There is a German card game which does permit 'cheating' and 'rule-breaking' ('Schummellieschen'). The game is based on two related skills: to cheat without being detected, and for the other players to expose the attempt to cheat. Thus the 'rule-breaking' is incorporated into the overriding rules of the game, which govern the subordinate rules (of cheating). Cheating here is a genuine option.

An anonymous reviewers brought the following to my attention. Is kicking the ball out intentionally in football, when under pressure in front of your own goal, a strategic foul? I agree that it is a strategic move, but, by definition, it is not a (strategic) foul. The resulting throw-in or corner-kick is not a penalty (FIFA, Law 15): 'A throw-in is a method of restarting play.' The same goes for a corner-kick (FIFA, Law 17). If you cause the ball to go out of play, whether accidentally or deliberately the rules stipulate that the ball belongs to the other team. There may be some structural similarity between such an action and a SF, but the important difference is this: The strategic fouler incorporates the penalty rules into the playing rules to give herself more options, i.e. options which violate the rules; the player who kicks the ball out deliberately is using the playing rules (in traditional parlance 'constitutive rules') strategically. The latter athlete is playing *by* the rules.

Another reviewer suggested that players (and philosophical supporters of the SF) might work with a different conceptual framework. I think the framework is the same, but they wrongly believe that the penalty rules can be incorporated into the playing rules, i.e. that they can be treated as if they were playing rules.

There is another – illuminating – way of describing the SF by contrasting game rules with moral rules in life. Kolnai (1965: 121) writes:

> A game is defined by its constitutive rules (together with the equally arbitrary agonistic aims of the partners, i.e., the theme proper of the game); moral rules, however relevant they are to the conduct of life, do not define life, which can be carried on with more or less

> success and enjoyment in occasional or systematic defiance of some or many moral rules; what they define is the person's moral status in life, which has no analogue in [sic] game. The concern of "being moral" or "being good", no doubt intimately conjoined with many standard and focal purposes in life, itself constitutes one such paramount purpose whose service demands a great deal of thematic attention, thought, strategy and effort; whereas to abide by the rules of the game is not a thematic part of the game but merely a self-evident presupposition of playing it. The rules form an immutable set of data on which, but not for which, all planning and thought-effort in the game has to work.

Suits (2005: 46) had the same insight: 'In morals obedience to rules makes the action right, but in games it makes the action.' Thus, we can say that the person employing a SF views the (penalty) rules of the game as belonging to the thematic part of the game which they wish to pursue. And this is a misconception.

It may be better to avoid the term 'compensation' altogether, because it suggests to the player/coach that you may break the rules as long as you are willing to pay 'the price' for your violation. Instead, it might be better to talk of penalties which aim to 'restore' the other side. This makes it clearer that the other side was wronged and that rule violations are not options within a game which can be 'bought'.

6. Conclusion

Utilising the SF rests on a moral error, because the fouler retains an unearned advantage after the imposition of the penalty. But it also rests on a conceptual error: the penalty rules should not be incorporated into the playing rules – they cannot be treated as if they were playing rules. Breaking the rules is not an additional option which the game (and its rules) provide. It is only wily coaches who claim that this is so. And some philosophers of sport then felt the need to provide justifications for what athletes do.

The notion of EB equally rests on a moral error. The breaching party is free-riding on the co-operative scheme. If there is the equivalent of a conceptual mistake in EB, perhaps it is this: the breaching party (and theorists of EB) assume that the purpose of contract law is to maximise value/resources and therefore contracts may be broken in order to promote 'efficiency'. As a result, EB is seen as an option – within contract law – provided you are willing and able to pay the price. This narrow view of contract law is self-serving. It ignores that the institution of contract is a co-operative scheme which relies on contractors honouring

what they agreed to do in the contract. Adopting the wide view keeps the co-operative scheme going – it makes it run more smoothly (perhaps even more efficiently?).

The wider view in sport is that game rules protect the display of skill, provide a fair measure of performance, and safeguard the game as an institution. The SFer takes the narrow view: rules exist so that one side may be victorious and some rules may be broken for the same end. This type of rule-breaking is eroding central elements of the game and perhaps the game itself.

There are circumstances, of course, when breach of contract is acceptable: e.g. when somebody goes out of business. In other circumstances, e.g. a collapsing market for a particular good, we could (re-)negotiate – keep in mind that both sides might be looking for repeat business, rather than a one-off transaction. We also make such exceptions (due to change of circumstances) when somebody binds themselves through a simple promise. If I promised to help you move your books to your new house, and my grandmother dies on that day, no reasonable person would insist that I keep my promise.[31] Note that when we accept reasons for breach they are normally not opportunistic. Take the West Ham striker, Paolo Di Canio, for example. During a Premier League match in 2000, while receiving a cross into the penalty box, Di Canio caught the ball with both hands and thus stopped play. Di Canio had seen the goalkeeper Paul Gerrard collapse outside the penalty box and refused to take advantage of the unguarded net. Di Canio broke the rules (handball) but not for opportunistic reasons.

In everyday life the villain often thrives, because breaking the rules can be part of how they conduct the 'game of life'. However, in games things are different. Kolnai (1965: 121) explains: 'to abide by the rules of the game is not a thematic part of the game but merely a self-evident presupposition of playing it.' Following the rules of a game is the condition of the possibility of playing that game.[32] And we are inculcated with this idea when we learn to play games as children, whereas the strategic fouler (the 'professional' player) has discarded this notion.

---

[31] I will of course try to make it up to you.

[32] Searle (1969: 33f.) seems to have understood this when he claims that some rules don't just regulate antecedently existing behaviour, rather, 'they create or define new forms of behaviour'.

We create a new world, located in a special place: the playing field. Playing a game is a rule-based world constitution, created by players through following the rules. Deliberately breaking the rules means to destroy some of that world. Rules don't just penalise wrong-doing, they also create a barrier against conduct (contrary to the rules) – when this is done deliberately. Penalty rules are not playing rules, and treating them as such does not make them into playing rules. To play a game by including strategic rule-breaking into your game plan is to misconstrue what a game is and how it works.

Bibliography

Barnett, R., (2012). 'Contract Is Not Promise; Contract Is Consent', *Suffolk University Law Review*, Vol. 45:3, pp. 647-666.

Barnett, R.E., (2010). *The Oxford Introductions to U.S. Law: Contracts*, Oxford: OUP.

Bellia, A. J., (2002). 'Promises, Trust, and Contract Law', *The American Journal of Jurisprudence*, Vol. 47, pp. 25-40.

BGB – *German Civil Code* (Bürgerliches Gesetzbuch), [Online] available: http://www.gesetze-im-internet.de/bgb/ [22/07/2018].

Bigoni, M., Bortolotti, S., Parisi, F. and Porat, A., (2017). 'Unbundling Efficient Breach: An Experiment', *Journal of Empirical Legal Studies*, Vol. 14:3, pp. 527–547.

Buckland, W.W, (1944). 'The Nature of Contractual Obligation', *The Cambridge Law Journal*, pp. 247-251.

Cherry, C., (1973). 'Regulative Rules and Constitutive Rules', *The Philosophical Quarterly*, Vol. 23:93, pp. 301-315.

Cooter, R., (1984). 'Prices and Sanctions', *Columbia Law Review*, Vol. 84, pp. 1523-1560.

D'Agostino, F., (1981). 'The Ethos of Games', *Journal of the Philosophy of Sport*, Vol. 8:1, pp. 7-18.

Dagan, H., (2004). *The Law and Ethics of Restitution*, Cambridge: CUP.

Descartes, R., (1998 [1637]. *Discourse on Method and Meditations on First Philosophy*, 4th ed., Indianapolis/IN: Hackett Publishing Company.

Eisenberg, M.A., (2005). 'Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law', *California Law Review*, Vol. 93:4, pp. 975-1050.

Engel, Ch., (1994). ' "Effizienter Vertragsbruch" - Eine juristische Antwort', *Homo Oeconomicus*, Vol. 11, pp. 143-150.

Engel, Ch. and Freund, L., (2017). 'Behaviorally Efficient Remedies: An Experiment', *Preprints of the Max Planck Institute for Research on Collective Goods*, Bonn.

Eylon, Y. and Horowitz, A, (2017). 'Games, Rules, and Practices', *Sport, Ethics and Philosophy*, pp. 1-14.

Finsinger, J. and Simon, J., (1987). 'Vertragstreue und Vertragsbruch: Eine juristische und ökonomische Analyse', *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, Vol. 2, pp. 262-274.

Flynn, E., (2017). 'Strategic fouls: a new defense', *Journal of the Philosophy ofSport*, Vol. 44:3, pp. 342-358.

Fraleigh, W.P., (1982). 'Why the Good Foul is Not Good', *Journal of Physical Education, Recreation & Dance*, Vol. 53:1, pp. 41-42.

Fraleigh, W.P., (2003). 'Intentional Rules Violations – One More Time', *Journal of the Philosophy of Sport*, Vol. 30:2, pp. 166-176.

Fried, C., (1981). *Contract as Promise: A Theory of Contractual Obligation*, Cambridge/MA: Harvard University Press.

Friedmann, D., (1989). 'The Efficient Breach Fallacy', *The Journal of Legal Studies*, Vol. 18:1, pp. 1-24.

Glier, R., (2010). 'Does the Ending Need Rewriting?', [Online] available: http://www.nytimes.com/2010/03/24/sports/ncaabasketball/24fouls.html [22/7/2018].

Hart, H.L.A., (1997. *The Concept of Law*, 2nd ed., Oxford: OUP.

Hohfeld, W. N., (1913). 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *The Yale Law Journal*, Vol. 23:1, pp. 16-59.

Holmes, O.W., (1897). 'The Path of the Law', The Boston Law School Magazine, Vol. 1, pp. 1-17.

Hyland, R., (1994). 'Pacta Sunt Servanda: A Meditation', *Virginia Journal of International Law*, pp. 405-433.

Imbrišević, M., (2014). *Carlos Nino's Consensual Theory of Punishment*, unpublished PhD thesis, University of London, [Online] available: http://publications.heythrop.ac.uk/2369/1/Imbrisevic%2C%20M%2C%20Final%20Thesis.pdf [22/7/2018].

Jünger, F.G., (1953). *Die Spiele: Ein Schlüssel zu ihrer Bedeutung*, Frankfurt a. Main: Vittorio Klostermann.

Katz, A., (2012), 'Virtue Ethics And Efficient Breach', *Suffolk University Law Review*, 45, pp. 777- 798.

Klass, G., (2014). 'Efficient Breach', in Klass, G., Letsas, G. and Saprai, P. (eds.), *Philosophical Foundations of Contract Law*, Oxford: OUP, pp. 362-387.

Klass, G., (2017). 'The Rules of the Game and the Morality of Efficient Breach', *Yale Journal of Law & the Humanities*, Vol. 29:1, pp. 71-111.

Kolnai, A., (1965). 'Games and Aims', *Proceedings of the Aristotelian Society*, Vol. 66, pp. 103-128.

Lewinsohn-Zamir, D., (2012). 'The Questionable Efficiency of the Efficient Breach Doctrine', *Journal of Institutional and Theoretical Economics*, Vol. 168:1, pp. 5-26.

Lewinsohn-Zamir, D., (2013). 'Can't Buy Me Love. Monetary Versus In-Kind Remedies', *University of Illinois Law Review*, No. 1, pp. 151-194.

Markesinis, B.S., Unberath, H., Johnston, A., (2006). *The German Law of Contract:A Comparative Treatise*, 2nd ed., Oxford: Hart Publishing.

McFee, G., (2004. *Sport, Rules and Values*, London: Routledge.

Meier, K. V., (1985). 'Restless Sport', *Journal of the Philosophy of Sport*, Vol. 12, pp. 64-77.

Migotti, M., (2015. 'Paying a Price, Facing a Fine, Counting the Cost: The Differences that Make the Difference', *Ratio Juris*, Vol. 28:3, pp. 372–391.

Moore, E., (2017). ‘Formalism and strategic fouls’, *Journal of the Philosophy of Sport*, Vol. 44: 1, pp. 95-107.

Morgan, W.J., (1987) ‘The Logical Incompatibility Thesis and Rules: A Reconsideration of Formalism as an Account of Games’, *Journal of the Philosophy of Sport*, Vol. 14:1, pp. 1-20.

Murphy, L., (2014). ‘The Practice of Promise and Contract’, in Klass, G., Letsas, G. and Saprai, P. (eds.), *Philosophical Foundations of Contract Law*, Oxford: OUP, pp. 151-170.

O’Sullivan, J., (2004). ‘Reflections on the role of restitutionary damages to protect contractual expectations’, in Johnston, D. and Zimmermann, R., *Unjustified Enrichment: Key Issues in Comparative Perspective*, Cambridge: CUP, pp. 327-347.

Pearce, D. and Halson, R., (2008). ‘Damages for Breach of Contract: Compensation, Restitution and Vindication’, *Oxford Journal of Legal Studies*, Vol. 28:1, pp. 73-98.

Pearson, K.M., (1995). ‘Deception, Sportsmanship, and Ethics’, in *Philosophic Inquiry in Sport*, ed. by Morgan, W.J. and Meier, K.V., 2nd edition, Champain/IL: Human Kinetics, pp. 183-184.

Posner, R.A., (1975). ‘The Economic Approach to Law’, *Texas Law Review*, Vol. 53, pp. 757-782.

Rawls, J., (1999). *A Theory of Justice*, revised edition, Cambridge/MA: Belknap Press.

Raz, J., (1982). ‘Promises in Morality and Law’, *Harvard Law Review*, Vol. 95:4, pp. 916-938.

Raz, J., (1999). *Practical Reasons and Norms*, Oxford: OUP.

Raz, J., (2014). ‘Is There a Reason to Keep a Promise?’, in Klass, G., Letsas, G. and Saprai, P. (eds.), *Philosophical Foundations of Contract Law*, Oxford: OUP, pp. 58-77.

Riehm, T., (2015). *Der Grundsatz der Naturalerfüllung*, Tübingen: Mohr Siebeck.

Riordan, P., (1996). *A Politics of the Common Good*, Dublin: Institute of Public Administration.

Russell, J.S., (1999). ‘Are Rules All an Umpire Has to Work With?’, *Journal of the Philosophy of Sport*, Vol. 26:1, pp. 27-49.

Russell, J.S., (2014). ‘Is There a Normatively Distinctive Concept of Cheating in Sport (or anywhere else)?’, *Journal of the Philosophy of Sport*, Vol. 41:3, pp. 303-323.

Russell, J.S., (2017). ‘Strategic fouling and sport as play’, *Sport, Ethics and Philosophy*, pp. 26-39.

Searle, J., (1969), *Speech Acts: An Essay in the Philosophy of Language*, Cambridge: Cambridge University Press.

Shavell, S., (2006) ‘Is Breach of Contract Immoral’, *Emory Law Journal*, Vol. 56:2, pp. 439-460.

Shiffrin, S.V., (2007). ‘The Divergence of Contract and Promise’, *Harvard Law Review* Vol. 120, pp. 709-753.

Shiffrin, S.V., (2009). 'Could Breach of Contract Be Immoral?', *Michigan Law Review*, Vol. 107:8, pp. 1551-1568.

Simon, R.L., (2005). 'The Ethics of Strategic Fouling: A Reply to Fraleigh', *Journal of the Philosophy of Sport*, Vol. 32:1, pp. 87-95.

Simon, R.L., Torres, C.R. and Hager, P.F., (2015). *Fair Play: The Ethics of Sport*. 4th ed., Boulder/CO: Westview Press.

Slawson, W.D., (1996). *Binding Promises: The Late 20th-Century Reformation of Contract Law*. Princeton: Princeton University Press.

Steiner, H., (1977). 'The Structure of a Set of Compossible Rights', *The Journal of Philosophy*, Vol. 74:12, pp. 767-775.

Stemmer, P., (2008). *Normativität: Eine ontologische Untersuchung*, Berlin: Walter de Gruyter.

Suits, B., (2005). *The Grasshopper: Games, Life and Utopia*. Peterborough/Canada: Broadview Press.

Suits, B., (1988). 'Tricky Triad: Games, Play, and Sport', *Journal of the Philosophy of Sport*, Vol. XV, pp. 1-9.

Thier, A., (2015). 'Von der gehaltenen und der gebrochenen fides: Zur fides in den Vertragsrechtskonzeptionen der Kanonistik seit dem 12. Jahrhundert', *Das Mittelalter*, Vol. 20:2, pp. 327–343.

Torres, C.R., (2000). 'What Counts As Part of a Game? A Look at Skills', *Journal of the Philosophy of Sport*, Vol. 27:1, pp. 81-92.

Vamplew, W., (2007) 'Playing with the rules: Influences on the development of regulation in sport', *The International Journal of the History of Sport*, Vol. 24:7, pp. 843-871.

Virgo, G., (2015). *The Principles of the Law of Restitution*, 3rd ed., Oxford: OUP.

Vossen D. P., (2014). 'A Grasshopperian Analysis of the Strategic Foul', *Journal of the Philosophy of Sport*, Vol. 41:3, pp. 325-346.

Wehberg, H., (1959). 'Pacta Sunt Servanda', *The American Journal of International Law*, Vol. 53:4, pp. 775-786.

Wilkinson-Ryan, T. and Hoffman, D.A., (2010). 'Breach is for Suckers, *Vanderbilt Law Review*, Vol. 63, pp. 1001-1045.

World Taekwondo, (2018). 'Competition Rules and Interpretation', [Online] available: http://www.worldtaekwondo.org/wp-content/uploads/2018/06/Revision-WT-Competition-Rules-Interpretation-Hammamet-040520181.pdf [22/7/2018]

Wright, M. and Hirotsu, N., (2015). 'The Professional Foul in Football: Tactics and Deterrents', in Wright, M. (ed.), *Operational Research Applied to Sports*, Basingstoke: Palgrave Macmillan, pp. 165-180.

Zimmermann, R., (1990). *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Cape Town: Juta & Co.