

Fair Play

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

Paying to Break the Rules: Compensation, Restitution and the Strategic Foul

Miroslav Imbrišević

(formerly of Heythrop College/University of London)

Citar este artículo como: Miroslav Imbrišević (2020):Paying to Break the Rules:
Compensation, Restitution and the Strategic Foul, *Fair Play. Revista de Filosofía, Ética y
Derecho del Deporte*, vol. 18, p. 44-72.

FECHA DE RECEPCIÓN: 24 de Agosto de 2020
FECHA DE ACEPTACIÓN: 17 de Septiembre de 2020

Paying to Break the Rules: Compensation, Restitution and the Strategic Foul

Miroslav Imbrišević

Abstract

Some philosophers of sport have suggested that strategic fouling is acceptable if you pay full compensation. In this paper I will argue that the idea of ‘compensation’ is conceptually inadequate to deal with strategic fouling. Compensation is a legal remedy designed to make the victim of a wrong whole again, i.e. make good the loss or harm they have suffered. But compensation as the analogon between law and games is ill-conceived when applied to strategic fouling. I will suggest another analogon from the law of obligations – restitution – which is more apt to deal with strategic fouling and which shows more clearly why the ‘compensation’ prescribed by the rules often fails to restore the fouled side.

Keywords: Strategic Foul, Compensation, Restitution, Robert Simon.

1. Introduction¹

My interest in the philosophy of sport and particularly the strategic foul came about by accident. In the summer of 2014 I was watching the World Cup in Brazil on TV. Day by day I was getting more annoyed by players who openly and intentionally fouled their opponents. I asked myself: why are you getting annoyed? After all, the ruler-breakers were punished and this would make the world of football whole again. But it was clear to me that these penalties for strategic fouling didn’t do their job.

In a team sport like football many fouls are accidental rather than deliberate. They may be due to bad judgement, clumsiness, a wet pitch, fatigue, poor preparation, etc.² Among the deliberate fouls we need to distinguish those which happen ‘in the heat of battle’ (due to anger, loss of self-control, asserting yourself, revenge for a previous foul, etc.) from those

¹ I presented parts of this paper at the *1st International Conference of Ethics, Bioethics and Sport* in Zagreb and Varaždin/Croatia and at Heythrop College/London in 2018. I wish to thank Patrick Riordan, Paul Gaffney and Jim Parry for valuable feedback. Thanks are also due to various reviewers of various journals.

² See Kosiewicz (2011: 36) for a wider list of reasons for accidental fouls.

with a strategic intent. Heat-of-the-battle fouls rarely leave you with an advantage, you are more likely to end up in a worse position than before. Whereas in strategic fouling the player aims to retain an advantage even after the imposition of the penalty. For this reason the rule-breaker violates the rule openly and takes the penalty willingly. Here, the restorative effect of the sanction often fails, because the gamewrights of our most popular games designed the penalties to deal with ‘regular’ (i.e. non-strategic) fouls.

For the strategic rule-breaker openly fouling and accepting a penalty is the better ‘deal’, better than, for example, allowing the opposition to have a good opportunity to score. The strategy does not always pay off, i.e. the advantage may not materialise due to the contingencies of the game. But a rule was nevertheless violated with a view to getting such an advantage.³ These fouls are known as ‘strategic fouls’ (SF from hereon), but are also called ‘professional’ or ‘tactical’ fouls.

Philosophical supporters of the SF don’t approve of all instances of the practice. Robert Simon’s (2015: 69) favourite example for a ‘good’ SF is stopping-the-clock at the end of a basketball game. By fouling a player off the ball the victim side has a chance to make 2 points via free-throws. However, they may not convert the free-throws because the fouler targets the weakest free-thrower on the team. Afterwards, the fouling side gets possession of the ball and now has a chance to score 3 points via a field goal. At worst, the fouling side acquires a 3-2 advantage, at best it would be a 3-0 advantage.⁴

Here is an example for a ‘bad’ SF from football: A striker is facing only one defender in front of the goal and is subsequently brought down by the defender. This is a wide-spread practice in the professional game, but so far philosophers of sport have not given it their blessing.

2. The ‘Good’ Foul

³ At the end of a tight basketball game SFs are common, but the leading side might convert the free-throws after a foul and play hard defense, thus staying in the lead. Luck, ability or lack thereof may also play a role. See also Moore (2017: 103).

⁴ Both Robert Simon and Bernard Suits (2005, 51f.; also Imbrišević 2019a) approve of some fouls in ice hockey, which trigger the foulers temporary dismissal. But neither of them elaborate on this. Simon (2005: 90) praises the thrill for the viewer of one team being a player down and trying to prevent the other side from scoring (the penalty-kill-mode), as well as the specific skills required by both teams.

The target of my paper is Robert Simon's (2015: 67) claim that a SF may be morally acceptable if you pay 'fair' compensation ('reasonable' or 'equitable' are other adjectives Simon uses). It must be regarded as a 'price of action rather than punishment for it', and presumably this would be a 'fair' price. The penalty for Simon's favourite example (stopping-the-clock in basketball⁵) could be viewed as aiming to compensate the victim side, but it doesn't fully restore them. And this is not very well understood in the literature. Simon's claim is repeated in the update (4th ed.) of his book *Fair Play* (2015), and here Simon has two collaborators, who presumably agree with Simon. In a recent paper Erin Flynn (2017: 351) follows Simon in this respect. Using the term 'fair compensation' suggests that giving to the victim will restore them. It hides (or distracts us from) the gains to the fouling side which accrue even after the imposition of a penalty.

I wish to suggest that the idea of 'compensation' is conceptually inadequate to deal with strategic fouling, once you subscribe – like Simon does – to the idea that the rules provide fair compensation. Rather than asking: *Has the victim been (fully) compensated – as prescribed by the rules?*, we should ask: *Has the victim been restored?* One important function of game rules is to *restore* – but also to deter – the victim through the imposition of penalties. Full compensation often leads to restoration of the victim of wrong-doing (e.g. in contract or tort), but in strategic fouling we encounter a misalignment between these two notions.

This problem has been recognised by José Luis Pérez Triviño. He (2012: 72) argues that there is an 'axiological gap' between a norm (a game rule) and the sanctions for its violation (in a particular context, i.e. the SF): 'the case is regulated, but the solution should have been different because some important aspect has not been accorded the attention that it deserved.' The reason for this lack of attention is, of course, that the gamewright did not envision the practice of strategic fouling. Pérez Triviño's account stresses the intent of the rule-giver (the gamewright). Generally, governing bodies are trying to curb strategic fouling and this appears to support Pérez Triviño's analysis.

⁵ Just like Simon I refer to the NBA rules prior to the 2016 changes, unless stated otherwise.

Compensation is a legal remedy designed to make the victim of a wrong whole again, i.e. make good the loss or harm they have suffered.⁶ But compensation as the analogon between law and games is ill-conceived when applied by supporters of strategic fouling. I will suggest another analogon from the law of obligations – restitution – which is more apt to deal with strategic fouling and which shows more clearly why the ‘compensation’ prescribed by the rules often fails to restore the fouled side.

My argument is not just aimed at the specific types of strategic fouling which some philosophers support, but applies to all instances of the practice that we observe on the playing field. 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.’

I will talk about basketball, which is the favourite example for enthusiasts of strategic fouling, and about football (also known as ‘soccer’ in some remote parts of the world), which is the game I know best. But what I have to say about the SF will equally apply to other sports where strategic fouling is a feature.

3. Schools of Thought

There are three main schools of thought in the philosophy of sport: Formalism, Conventionalism and Broad Internalism. Formalism stresses the importance of the formal rules of the game. The (constitutive) rules of a game circumscribe which moves are allowed and which moves violate the rules. If you cheat or break the rules intentionally, you no longer play the game. You are playing a different game, and you therefore did not win the game.

Conventionalists claim that apart from the formal rules we need to consider the informal rules which guide players. Some forms of strategic fouling are widely accepted among players, they are part of the ‘ethos’ of the game. Ethos theorists or ‘conventionalists’ claim that there is a convention/agreement among players to employ strategic fouling (e.g. stopping-the-clock in basketball).

⁶ This is not always possible, for instance when acts of negligence result in loss of limbs, paralysis or death. Then compensation is a recognition of their loss as well as an attempt to help them or their next of kin to adapt to the loss.

We can see how Formalism and Conventionalism shape a particular view about rule-violations. Robert Simon (2015: 31) writes: ‘narrow versions of both pure formalism and conventionalism lack the intellectual resources to deal with the important ethical issues that arise in sport.’ He aims to provide such intellectual resources.

Simon counts himself among the Broad Internalists. Let’s see how this theory of sport accommodates strategic fouling. Internalists claim that sport contains its own values, rather than simply reflecting the values in wider society (Externalism). The values of a sport can (Simon 2000: 2) ‘run counter to the values dominant in culture’ and could even subvert these external values. For Simon sport has ‘a kind of internal ethic’. His contention is that the formal rules presuppose certain principles to provide a (Simon 2015: 32) ‘comprehensive, coherent, and morally acceptable’ account of sport – in analogy to Ronald Dworkin’s (1997) legal principles. These principles help us (Simon 2015: 35) ‘find the best overall interpretation of sporting practices within given social-cultural contexts.’

Simon writes (2005: 7): ‘Broad internalism, then, is the view that in addition to the constitutive rules of sports, there are underlying principles that may be embedded in overall theories or accounts of sport as a practice.’ And it is these principles which help us to adjudicate difficult (or controversial) cases. It would provide us with the best interpretation and explanation of the central features of a sport.

We need to distinguish Simon’s underlying principles from those principles which are explicitly stated by governing bodies. These often appeal to certain values for their particular sports. This is usually couched in general or vague terms. The FIFA Code of Ethics 2019 (Preamble, p. 6) mentions for example: ‘integrity and reputation’; ‘the core value of fair play’. There is nothing particularly ‘internalist’ about such values. Since there are always competing values (value pluralism) at work when it comes to justifying a case (e.g. stopping-the-clock: ‘enhance the challenge’ versus ‘adherence to the rules’), these general terms are not decisive. It depends on which value you consider to be relevant/more important. Of course there may be some overlap between explicitly stated values and Simon’s underlying principles. But the latter will be more difficult to discern. There is another factor which is often overlooked: ‘transcendental rules’ (more on this below).⁷

⁷ See Imbrišević (2020).

One of Simon's underlying principles appears to be this: An action is acceptable (right?) if it can 'be made universal without destroying the game itself'; and he states that players condone strategic fouling even if it works against them (2015: 66). If players expect their opponents to use SFs in appropriate situations and judge this to be morally acceptable (contrary to external morality), then the principles of equality and justice, internal to the sport, (Simon: 2015: 62) 'are not affected'.⁸

All of this is quite vague; we have some rough version of Kant's Categorical Imperative, and the principles of equality and justice internal to sport. In the following I will take issue with Simon's account of strategic fouling, because, contrary to Simon, equality and justice – internal to sport – are affected.

4. Prices and Punishments

Before espousing the blessings of strategic fouling, philosophical supporters of the practice must first establish that not all game rules are categorical prohibitions; some rules may be broken in particular contexts. Supporters of the SF make the following move: some rules are prohibited outright, others are disjunctive. The latter may be broken, if you pay the 'price' which is attached to rule-breaking.⁹ Then the action is allegedly permissible¹⁰. Of course we will not find any evidence for this distinction in the rule-books, they appear to prohibit all rule-breaking. But some sports philosophers came up with a solution to this problem: let's look at what athletes actually do. We find that they routinely break some rules. The 'ethos' of the game (D'Agostino 1984) makes some forms of strategic fouling 'acceptable', although they are 'impermissible'. Eylon (2020: 241) writes that a certain type of SF 'in a particular sport is justifiable if there is an agreement or a convention according to which it is legitimate.' Simon would presumably claim that this is a 'narrow version' of Conventionalism, but which he incorporates and improves in his Broad Internalism: consequently, he provides the best interpretation of the practice, using the underlying principles of the game.

⁸ Another internalist, John S. Russell (2007), disputes Simon's separation thesis (of external and internal moral principles). But this need not detain us here.

⁹ Some sports philosophers (e.g. Morgan 1987) distinguish constitutive rules from regulative rules, and only the latter may be broken. Suits' position is more complex – see Imbrišević 2019a).

¹⁰ In the sense that this type of rule-breaking is part of the game.

Simon (2005: 88; and more recently Simon *et al.* 2015) writes:

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.

When are penalties prices and when are they punishments? Simon *et al* (2015: 67) provide the following explanation:

Although it is sometimes difficult to tell whether a penalty should be regarded as a sanction or a price, the notion of a *fair price* might help us distinguish the two. The intuitive idea here is that if a pricing penalty is fair in sports, then it should provide equitable compensation to the opposing player or team. The penalty for intentional fouling in basketball is probably best regarded as a price rather than a sanction if the foul shots awarded are fair compensation for the violation. Sports authorities can more clearly distinguish sanctions from prices by making the penalty for prohibited acts more severe than mere fair compensation would require.

A penalty can be considered a price for action if it provides fair compensation (I will say more on this below). If the penalty is more severe than fair compensation would require, then it is likely to be a punishment. This implies that any penalties which ‘fairly’ compensate could be classed as prices for action – and open to violation.

So if gamewrights and governing bodies wanted to eradicate strategic fouling they would only have to communicate to athletes more clearly that all penalties are punishments, by introducing harsh penalties (which overcompensate) for all violations. But this is nonsense, because gamewrights try to match the severity of the offence with the severity of the penalty. We also find such a gradation in the criminal law. I have doubts about Simon’s idea that some penalties exceed fair compensation. If a penalty seems to be overcompensating the fouled side (e.g. in a well-designed game such a football), it is very likely that the excess ‘punishment’ functions as a deterrent (the red card).

People may treat the fine for illegally parking in a space for the disabled as a ‘price’ for violating a rule. But they can only treat it as a price because they can afford it. If the sanction were 20 years of hard labour or the death penalty they wouldn’t treat it as a price. The ‘affordability criterion’ allows them to treat the rule (*parking for the disabled only!*) as disjunctive (you follow it or you break it). But note that the law doesn’t present its demands

in this way; breaking the law is not an option offered to citizens. Similarly, breaking game rules is never offered as an option by rule-books, by match officials or by governing bodies.

Here, Simon's interpretative approach doesn't just favour the viewpoint of the athlete (what do athletes do), it favours the viewpoint of the rule-breaker. This way of looking at rules, from the viewpoint of the 'bad man' (as predictions of what might happen if I don't comply), goes back to the legal realism of the American jurist Oliver Wendell Holmes. But why take the rule-breaker's perspective? I will say more on Holmes presently.

Loland (2002: 8) highlights some problems with this in sport:

Is any kind of rule violation acceptable as long as it is commonly accepted among the participants? There is no doubt that the development of a violent ethos would be problematic for most sports. Moreover, if the ethos of a sport tolerates a high number of rule violations, its rule system may lose clear meaning and no longer serve as a conceptual framework for a practice at all. Finally, competitions between groups of competitors each of whose ethos has radically different content become very hard if not impossible.

Simon's distinction between prices and punishments could open the flood gates to strategic fouling, but Simon *et al* (2015: 70) add some constraints on when the SF is permissible: A. the teams are roughly equal in constitutive skills; B. the fouling side has no alternative strategy, using constitutive skills only, which would give it a reasonable chance to win; C. 'the foul must not take away a major¹¹ advantage earned by the use of constitutive skills'.

I will not discuss the virtues of these constraints here.¹² What interests me is the notion that you can view the sanctions for rule-violations as prices. We also find this idea in the 'law and economy' movement in the US, starting in the 70s of the last century. According to this doctrine, the law sometimes imposes prices and sometimes sanctions, for example when it comes to remedies for breach of contract (see also Robert Cooter's seminal paper from 1984). But there are earlier influential iterations of the idea that rule-breaking is permissible, if you compensate the other side.¹³

Oliver Wendell Holmes, writes in 1897:

¹¹ So it's ok to take away a minor advantage? What happened to fairness?

¹² For criticism see Imbrišević (2019b).

¹³ See Imbrišević (2018).

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. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.

Holmes' view is that there is nothing wrong with breaking the rules (in the context of torts and contracts), as long as you pay compensation.¹⁴ His aim was to keep morality out of the law. I suspect that here lies the intellectual root of Simon's contention that rule-breaking in sport can be acceptable. Eylon and Horowitz (2018: 248) similarly distinguish prohibitions and prices; see also Berman (2011: 1347).

We need to ask: how much, if any, normative force does the practice-view of rule-breaking have in sport? Cesar Torres, one of Simon's co-authors of *Fair Play* (2018: 7f.) appears sceptical:

the acceptability of a practice depends on the soundness of the supporting arguments rather than only on how extensive the practice has become in the sport community. Otherwise, the members of a sport community risk capitulating to the ethos and surrendering their critical capacity to understand, value, and appreciate sport. An ethos is clearly not beyond moral scrutiny.

Some people treat the fine for illegal parking as a 'price' for violating a rule, but treating it in this way doesn't make it so. Here the practice-view does not override the normativity of the parking rules. My contention is that Simon's distinction between prices and punishments relies on a misunderstanding of the function of game rules. Breaking a game rule is not an option which is on offer. In order to avoid this conclusion Simon *et al.* (2015: 67) liken rule breaking for strategic fouling to paying a fee to obtain a license:

in addition to penalties for crimes, the law also sometimes requires payment of fees for actions that are permissible¹⁵, 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

¹⁴ Continental lawyers value the maxim *pacta sunt servanda* very highly, because they are influenced by canon law. In common law there is no general rule that the maxim is binding or 'that all promises and all agreements are binding' (Hyland 1994: 429). See Imbrišević (2018) for a detailed discussion. Interestingly, we also find such a cultural difference among philosophers of sport. Most supporters of the SF reside in North America, and hardly any in Europe.

¹⁵ Here Simon uses 'permissible' in the sense that it doesn't contravene any rules.

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 (i.e. no rules are broken), just like Simon's 'price of action'. But the latter analogy breaks down.

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, 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.¹⁶ 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 (the 'bad-man view') doesn't make it so.¹⁷ He (2015: 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'.

I conclude that Simon's attempt to distinguish two types of sanctions is not successful. Penalties only differ in severity, but their prohibitive force is the same.

5. Compensation

There is a non-legal sense of the word 'compensation' which means 'exchange': I am compensated for my labor. But we are not dealing with a rule-violation in that context, so this is not what Simon has in mind.

Taking our cue from a venerable source (*Bouvier's Law Dictionary*, 1856), we can define 'compensation' as: 'Something to be done for or paid to a person of equal value with something of which he has been deprived by the acts or negligence' of another. In *Black's Law Dictionary* (1968) we find the following definition of compensation: 'Indemnification; payment of damages; making amends; making whole; giving an equivalent or substitute of equal value; that which is necessary to restore an injured party to his former position'.

¹⁶ See Hart (1997: 39); for a detailed discussion see Imbrišević (2018).

¹⁷ See also Hart (1997: 39).

Compensation aims to restore someone who has suffered a loss or harm to their former position. In contract law the default remedy for breach of contract is compensation.¹⁸ The injured party receives in compensation the equivalent of the ‘benefits of the bargain’.

Similarly in tort law: if I give my friend a push, who is dithering on the 10 metre diving board, and she consequently breaks her arm, I will have to compensate her for her losses. This might be the hospital costs, loss of earnings and any other expenses she might incur as a result of my action. Robert Nozick (1974: 57) writes: ‘Something fully compensates a person for a loss if and only if it makes him no worse off than he would otherwise have been’.

Note that compensation in both areas of law is not the perfect remedy: In many instances I would rather that the contract be honoured, i.e. I would prefer performance to breach. And although my friend’s arm has mended, there are many things which compensation will not make good, e.g. while her arm was healing she was not able to play with her children in the way she used to. However, we can say that in both of these contexts (tort and contract) compensation normally comes close to making the victim whole again.

Are people indifferent between being wronged and being paid full compensation? Recent empirical work has shown that in contract law the indifference thesis is wrong, particularly when we are dealing with opportunistic breach.¹⁹ Market compensation for breach of contract might fit the bill – if people are presented with a choice (performance or compensation) before breach, but in other contexts (tort) this may not be the case. Nozick (1974: 66) pointed out that offering compensation before breaking someone’s arm is not an attractive offer. Now imagine offering a free kick or a penalty kick to a striker in exchange for fouling her when she is in an advantageous position. I suspect she would not be indifferent about being fouled and being ‘compensated’ afterwards. Players would most likely prefer the chance to display their footballing skills, rather than using their restorative skills²⁰, as well as avoiding pain and

¹⁸ This is so in common law systems, but continental legal systems offer strict performance or compensation as a choice. See Imbrišević (2018).

¹⁹ See for example Wilkinson-Ryan (2010), Lewinsohn-Zamir (2013), Bigoni *et al.* (2017) and Engel/Freund (2017).

²⁰ Cesar Torres (2000) introduced the terms ‘constitutive skills’ and ‘restorative skills’. The former skills are promoted by and in accord with the (constitutive) rules of the game; the latter skills only come into being as a result of a foul: e.g. a free-throw in basketball or a free kick in football.

bruises (including bruises to their ego). Note that some athletes agree to throw a game (or a fight), but this is usually done for financial gain and is a form of cheating.

Paying compensation after breach of contract or after a tort, does not return you to moral equality with the promisee or the victim.²¹ After all, you did break a contract or you did act negligently. All you have done is to make good the losses to the promisee/victim. The same holds for strategic fouling – you broke an undertaking not to violate the rules.

One could object here (following Eylon and Horowitz' account) that the real rules are those which are observed by practitioners, rather than those which we find in the rule book. But this objection fails in the context of strategic fouling, because the rule-breaker wants (e.g. stopping-the-clock) or accepts (e.g. cynical fouls in football) that the foul be called and the penalty be imposed. When you 'stop the clock', you are not ignoring the rules, on the contrary, you want the rules to be enforced. For this reason it is wrong to call such rule-breaking a 'convention' (more on this below). Supporters of the SF in basketball rely on the rule-book – as a means – to achieve their end.

In sports, only an apology (if accepted) might return you to moral equality with the victim. Such an apology makes most sense in accidental fouls, and sometimes also in heat-of-the-battle fouls. Players also apologise if they benefit from a fluke (e.g. in darts or tennis). But an apology would not make much sense when you purport to 'buy' the option to commit a foul by 'paying' compensation afterwards.

The agonistic character of the game is at the same time a recognition of my opponent as a person. When we clash on the playing field, we are equals in competition²². The strategic fouler however is using me as an object rather than an equal, and as someone who can be paid off later for using me in this way.²³ She ends my endeavour to compete by bringing me

²¹ See Gaus (1991: 62f.). In the US many theorists of contract law divorce the moral obligation to honour agreements from the practice of contracting. 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.'

²² The word 'competition' (Latin: *com petere*) means to make for, to strive, to seek – together with another.

²³ Nozick (1974: 71) writes: 'a system permitting boundary crossing, provided compensation is paid, embodies the use of persons as means; knowing they are being so used, and that their plans and expectations are liable to being thwarted arbitrarily, is a cost to people'. See also Gaus (1991: 69f.).

down – I have no say in it – she takes my agency away from me.²⁴ And this is not compensable. Dellatre (1975: 136) writes: ‘When a person violates the rules which govern competition, he treats his opponents as means merely to his end of victory.’ The SFer destroys not only our equality in competition, but also our moral equality. Here, Simon’s version of Kant’s Categorical Imperative falters.

The penalties for fouls in games have, among other things, a restorative function. With respect to the aim of restoring the victim of a wrong by paying compensation, Simon’s thesis appears plausible at first glance. But whereas in contract law and in tort law compensation might be adequate or reasonable as a means of making a person whole again, as a response to a SF it usually is not. It is only ‘half’ of the remedy (the other half being restitution).

The penalties for non-SFs give the victim only the *opportunity* for restoration, rather than actually restoring them to the *status quo ante*. This is just or fair in the context of accidental fouls (there will occasionally be hard cases of course). The contingency of the accident matches the contingency of the opportunity for restoration. This (underlying fairness) is probably also the case for heat-of-the-battle penalties, but this need not detain us here.

The ‘compensation’ awarded for SFs sometimes has the potential to restore the victim (e.g. a penalty kick in football), but sometimes it clearly doesn’t. In NBA basketball pre-2016, the penalty for stopping-the-clock did not have sufficient restorative power. Here, the fouling side acquired a 3-2 advantage. The victim side was limited to 2 penalty points but the fouling side had a chance to gain three points on possession (more on this below).

Consider the Uruguay player Luis Suarez, who in the dying minutes against Ghana in the 2010 World Cup, used his hand to swat away the ball on the goal line. Suarez prevented Ghana from winning the game and thus from proceeding to the semi-finals. Ghana failed to convert the subsequent penalty kick. Uruguay profited from wrong-doing – they retained an advantage (not losing the game and thus continuing in the competition). If Ghana had converted the penalty, they would have been fully restored and there wouldn’t be a residual advantage for the fouler. But not having converted the penalty means that the attempt to

²⁴ See O’Neil (1989: 113).

compensate them (in order to achieve restoration) did not result in restoration. Having the potential to restore the fouled side is not the same as actually restoring them.

In a SF the element of contingency which is central to accidental fouls is missing and for this reason the penalty (which only offers an opportunity) for restoration does not match the offence – I suspect that this is Pérez Triviño’s original insight. The penalty was designed for non-SFs.

In a ‘successfully’ executed SF the other side is only partially restored, because after paying ‘compensation’ the offending side retains an advantage. This advantage is not compensated for, and it is the result of the foul. The victim side is burdened with a wrongful loss and the fouling side acquires a wrongful gain. Here, the idea of ‘fair compensation’ hides this fact. 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. However, Simon (2005: 93; Simon *et al.* 2015: 61ff.) believes that, for the SFs which he endorses, the offending side does provide reasonable compensation to their opponents – he must believe that paying compensation equals restoring the victim; what else could ‘fair compensation’ mean? But perhaps Simon is equivocating between the legal meaning of compensation and the everyday meaning (exchange). However, as I have pointed out, the latter meaning does not rely on a rule-violation.

In the context of non-strategic fouling a penalty may achieve the aim of restoring the victim, or may come close to restoring the victim. For example: the pitch is wet, you slide into another player – and the referee awards a free kick against you.

One could claim that the victims of strategic fouling are routinely undercompensated and that all we need to do is to adjust the ‘compensation’ for SFs (via the rules). But this is what supporters of the SF would deny. For them, the compensation provided by the rules is ‘reasonable’, it is a ‘fair’ price for action. Anyway, harsher penalties which merely give the fouled side an opportunity for restoration (e.g. 4 free-throws, or a second penalty kick if they missed the first one) are not the right solution for strategic fouling, as I will argue below. They may communicate to athletes that the penalty is not a ‘price’ rather than a punishment, but they will often not achieve restoration. What good is the chance to take a second penalty for Ghana, if they miss both? Uruguay denied them certain victory which would have been

achieved through constitutive skills. Failing to convert in this situation (using non-constitutive skills, which have the potential to restore them) does not retrospectively justify the foul, and it does not mean that Ghana deserved to go out.

Similarly, you could argue²⁵ that at the end of a tight basketball game, rather than holding on to the ball for the last seconds, the team in the lead needs ‘to earn it at the foul line’. But forcing the victim side to resort to restorative skills disadvantages them in the following way: they could have increased their lead through constitutive skills, or they could have run out the clock – also through constitutive skills. Holding on to the ball is a constitutive skill – and taking the ball off your opponent is also a constitutive skill. Thus, the team in the lead has been deprived of using their constitutive skills, and the fouling side lacks the constitutive skills to take the ball away from them – hence the foul.²⁶

I don’t think you have to ‘earn it at the foul line’ if you are in the lead and if you are skilled enough to defend. The pressure of the clock ticking away doesn’t give your opponent the right to unilaterally change the test by breaking the rules. Furthermore, the exercise of constitutive skills and restorative skills is not normatively neutral (or on a par) – one relies on rule-breaking, the other doesn’t.²⁷

Running down the clock, in my view, would only be problematic in martial arts. You are supposed to fight your opponent, rather than run away. At a recent Tae-Kwon-Do competition in Muju, I observed several fighters who were in the lead and who deliberately left the fighting area in the last round of the bout. Their lead was comfortable enough to allow them to incur penalty points for stepping out of the fighting area. However, when you run down the clock in basketball (or football) you are still engaging your opponent. Rather than saying to the team in the lead: ‘you have to earn it at the foul line’, we should be saying to the trailing

²⁵ Thank you to Paul Gaffney.

²⁶ See also Russell (2017: 4): ‘under normal circumstances, the winning team’s advantage both in having possession of the ball and being ahead by two points has been earned through due execution of game skills, in particular, successful execution of constitutive skills plus successful execution of restorative skills where contestants were illegally prevented from exercising constitutive skills and were entitled to compensation.’ Recently, Eylon (2020) put forward a solution to this problem: the restorative skills which ensue from a SF are actually ‘constitutive’ skills. H.L.A. Hart (1959/1960: 5) has a name for this move (defining a problem out of existence): ‘definitional stop’.

²⁷ Some fans do not like running down the clock. But why should their attitude towards a particular style of play determine the test? The attitude of these fans does not exert any normative power in such instances.

team: ‘come and get it – if you can.’ There is a standing challenge by the team in possession to engage in constitutive play.

In a SF the restorative function fails precisely because the rule-violator is subverting the intent of the penalty (restoring the victims of non-SFs).²⁸ It is not a failure or weakness of the game rules as such, but rather an exploitation – or misapplication – of game rules. The rules of a game are not designed to offer the option of profiting from wrong-doing through deliberate fouling. Gamewrights, normally, don’t devise games and their rules so that strategic fouling is simply another option in a game, just like kicking or heading the ball. It is likely that when the rules of popular games were codified (mostly in the 19th century) there was no need to be explicit about such rule-violations. This doesn’t mean such rule-breaking didn’t occur, but it was rare. When football was the preserve of gentlemen, committing a deliberate foul was bad form. Here is a voice from 1891, discussing the novel idea of the penalty kick in football (McIntosh 1979: 80):

It is a standing insult to sportsmen to have to play under a rule which assumes that players intend to trip, hack, and push their opponents and to behave like cads of the most unscrupulous kind. I say that the lines marking the penalty area are a disgrace to the playing field of a public school.²⁹

Players understood that deliberate rule-breaking in order to gain an advantage would undermine the game. We could call this a ‘transcendental rule’ – or a generally accepted presupposition of playing a game.³⁰ For Dolores Miller (1981: 192) this would be part of the ‘meta-institutional concepts’ of a game. Aurel Kolnai (1965: 121) is equally aware of this. He 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.’ I suspect that growing commercial pressures have eroded the force of this presupposition.

The penalty for a foul has several functions. Apart from affirming that rule-breaking is wrong and vindicating the conduct of the victim (the right to attempt to do *X*), it also aims to

²⁸ Particular rules do change over time (one hopes, always for the better). Ideally the intent of the gamewright (to facilitate a great game) and the intent of subsequent governing bodies would coincide.

²⁹ Note that in Britain a ‘public school’ is actually a private school, and that’s where you would find young ‘gentlemen’.

³⁰ For more on transcendental rules see Imbrišević (2020).

restore the victim; but, in addition, it functions as a deterrent.³¹ However, the aim of deterrence is equally undermined in the practice of strategic fouling – because the rule-breaker retains an advantage. This may explain the proliferation of strategic fouling, e.g. in football.

The strategic fouler is also imposing a risk of injury on the direct victim of the foul which goes beyond those risks which the game and its rules circumscribe – and to which players (implicitly) acquiesce. We accept or perhaps tolerate injuries which result from accidental fouls and from heat-of-the-battle fouls. But the strategic rule-breaker is not just acting *extra regulas* but also *ultra vires* when they impose additional risks of injury on other players (and on themselves) – although they would presumably claim that the ‘ethos’ of the game gives them these powers. The size of their pay package and the knowledge that the best medical treatment is available to players might reinforce their belief that they may impose such risks on others. And lastly, there will be great pressure from the coaching staff to employ strategic fouling, regardless of the risk of injury.

The harm in a SF is twofold: it treats me/my team as an object, we are not moral equals anymore, it takes away my right to perform a licit action (e.g. my attempt to score) or to hold on to my lead. Secondly, a SF disadvantages me/my team materially, because it often results in an advantage for the fouling side.

6. Restitution rather than Compensation

Restitution is a gain-based remedy. Graham Virgo (2015: 3) explains: ‘The law of restitution is concerned with the award of a generic group of remedies which arise by

operation of law and which have one common function, namely to deprive the defendant of a gain rather than to compensate the claimant for loss suffered.’

One could gain by mistake: the government could gain from citizens who are overpaying their taxes; an insurance company may pay out on life insurance (although the policy had not been maintained). But one could also gain from a wrong, for example, by committing a tort, by breaking a fiduciary duty or by breaking a contract. And this is the area I will focus on here. Both compensation and restitution aim to make the victim of a wrong whole again, but

³¹ If you convert a penalty, the victim side is restored. The additional red card for the offender functions as a deterrent. It should not be seen as ‘overcompensating’ the fouled side.

they go about it in different ways. In the former we give to the victim (making good a loss), in the latter we take something away from the wrong-doer (restoring a gain³²), which was generated at the expense of another. It is important that the law recognises these distinct types of remedy, for after compensating a victim the wrong-doer may still realise a gain. The law of restitution attempts to remove this wrongful gain.³³

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. But 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 would like to adapt an English case for illustrative purposes [*Lipkin Gorman v Karpnale Ltd*]. Mr. Cass, a partner in a law firm, took £ 220 000 from his law firm's account and gambled with it at the *Playboy Club* in London. He lost £ 154 000. But imagine that he had doubled his money. He could have returned £ 220 000 to his firm and thus would have fully compensated them. If compensation is our main concern we lose sight of his wrongful gain: £ 220 000 in winnings. The law of restitution requires that we strip him of his winnings. In this example the wrong-doer gains even though the victim has been fully compensated. Here, we strip the wrong-doer of gains because of an ancient principle of justice: nobody should profit from wrong-doing.

³² Commonly restitution means 'giving back' to the wronged party, but sometimes restitution can mean 'giving up' a gain, when it was received from a third party (see Birks, 1985: 12).

³³ Note that the efficient breach doctrine advocates compensating the promisee but ignoring any gains which result from breaking a contract. In this respect the SF resembles efficient breach in contract law; see Imbrišević (2018).

Although a more systematic account of the law of restitution (in England) is a recent development³⁴, the idea that you should not profit from wrong-doing is an ancient one. In the Digest, a collection of Roman law during the reign of Justinian, we read (Watson 1998, D 50.17.206): ‘By the law of nature it is fair that no one become richer by the loss and injury of another.’³⁵ And Aristotle’s notion of corrective justice (i.e. returning parties after an unjust transaction to the *status quo ante*) would prevent a wrong-doer from retaining an advantage or profiting from a wrong.³⁶

There is a striking difference, when it comes to restoring a victim, between torts and SFs. We can distinguish two scenarios in tort law: a) one can return all of the wrongful gains and thus fully restore the claimant; b) one can return the wrongful gains of which the claimant was deprived, but the wrong-doer might still retain additional wrongful gains which resulted from the tort – a surplus of wrongful gains. In non-SFs we are dealing (ideally) with scenario a); in SFs we have a variation of scenario b).

Even if we compensate the victim as envisioned by the rules, as long as the rule-breaker retains an advantage, the victim is not fully restored. The wrongful gains of the rule-breaker disadvantage the victim because they do not return the parties to the *status quo ante* – this is the aim of restoration. Supporters of the SF believe that their justification is based on scenario a); they assume that the ‘compensation’ which the penalties provide equals a restoration of the victim. But in reality the strategic foul rests on a variation of scenario b). The rule-breaker gives the victim a chance of (partial) restoration, i.e. compensates, the victim (through the penalty – designed for non-SFs), but often retains a surplus of wrongful gains. In order to restore the victim, the rule-breaking would have to give up all wrongful gains.

Simon’s use of the term ‘fair compensation’ hides (or distracts us from) the gains by the fouling side which accrue even after the imposition of a penalty (i.e. Simon’s ‘compensation’). These gains (e.g. getting possession of the ball in basketball, after forcing

³⁴ See Birks (1985); in other common law systems there has also been a growing interest in the subject of restitution.

³⁵ The original, attributed to Pomponius, reads: ‘Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletioem.’

³⁶ See Bk. V of the Nichomachean Ethics.

the victim to make two free throws) constitute a worsening of the situation for the fouled side – they have not been restored. Simon’s choice of perspective does not capture what goes on in a SF. We shouldn’t merely look at what to give to the victim (as specified by the rules) but also at the residual gains of the fouler, and the idea of ‘restitution’ helps us to shift the perspective. A nice example for such a shift in perspective is the 2016 rule change in the NBA (in order to curb instances of stopping-the-clock), where the fouling side loses possession of the ball. The law of restitution helps us to understand why Simon’s account is defective: as long as the fouler retains an advantage the compensation cannot be adequate – it does not restore the victim.

As I indicated before, this problem has been recognised by the ancients. The Roman jurist Ulpian says that when you have wrongly taken something, you need to restore not just the thing but also all of its fruits (Watson 1998, D 50.16.73). Simon mistakenly believes that the fouler returns all of ‘what was wrongly taken’ (via the penalties specified in the rules), but doesn’t see that the fouler retains the fruits of her wrong-doing.

Consider self-yellow-carding in football tournaments. Recently, Sergio Ramos (Real Madrid) fouled Kasper Dolberg (Ajax) in the 89th minute of a Champions League match, with Real 2-1 up. The referee issued a yellow card (and a free kick, i.e. the sanction/penalty), making it the third booking for Ramos in the competition. This would have resulted in a suspension for the following home game in Madrid, but it insures that there is no risk of suspension in the later stages of the competition for Ramos, because the slate is wiped clean for the quarter-finals (i.e. the strategic advantage). In this case the penalty may actually fully compensate the fouled player/side for the particular foul in this particular match – Ramos committed an unnecessary foul, by bringing down Dolberg in midfield. This was apparently a ‘dumb’ foul with respect to the game at hand, but it is at the same time a SF. Here, unusually, the advantage occurs at a later stage in the competition. But the governing body wasn’t asleep. By imposing a two-match ban, the UEFA Ethics Committee clearly aimed to remove the wrongful gain from Real Madrid – a restitutionary move.

Simon’s mistake is to think that compensation through penalties (which are usually designed for non-SFs, because they only provide an *opportunity* for restoration) will always restore the

victim of a SF, but the *raison d'être* for the SF is just that: it (often) doesn't restore the fouled side, because the rule-breaker retains an advantage.

7. The Value of Primary Rights

There is another aspect to violating the rights of others (in tort law), which I haven't considered yet. If *A* violates the property rights of *B*, knowing that the profits from the violation will substantially exceed the compensation which a court will award, this might still leave *B* in a worse situation. Think of a cement plant polluting the adjacent properties. The court does not know how highly *B* values her property rights – it could well be that *B* values them much higher than the compensatory damages which the court would award. What does this mean for Simon's account of compensation in the context of strategic fouling? My primary right to perform a licit action in the game has been taken away by the fouler and replaced by the secondary/remedial right to compensation. But I may value a shot at goal, after having outplayed the last defender, much higher than being awarded a free kick or a penalty kick. Simon's account ignores how highly we might value primary rights in games. He assumes that we are indifferent between performance or pay. Furthermore, his compensation account of strategic fouling not only endorses rule-breaking but it also privileges the viewpoint of the fouler. The 'payment' of compensation legitimises retrospectively what the rule-breaker has done – and the victim of the SF (apparently) has no more cause to complain.

I submit that the primary rights of players cannot be treated as something that can be 'bought', because the playing field is not a market – in spite of the commercial interests associated with professional sports. The fouled player has no say in the 'transaction' – unlike in contracting where one could agree or decline to trade – her primary right is simply taken away and replaced with an inferior remedial right. In a real trade I could put a value on my primary right – in strategic fouling I cannot.

7. Some objections

A) By considering restitution rather than compensation, am I asking the referees to discern intent? Would this not cause more problems? Whether a foul is intentional or not is a general problem in sport, but consider that the penalty kick in football has been in existence for more than 100 years. What is important is that the rules aim to restore the fouled side to the *status*

quo ante, be it for an accidental or a strategic foul. In Football, fouling a player accidentally who is in good position to score will result in a red card and possibly a penalty shot. If the foul were accidental (due to a wet pitch), then the red carding might appear to be unjust to the perpetrator, but the penalty shot could – rightly – restore the fouled side. However, if you chop a lone striker in front of a goal, it is obvious that this is a SF. Most often we can grasp the intent from the particular situation in a game: fouling a player (off the ball) in the dying seconds of a basketball game – and this is now reflected in the NBA rules. Similarly, the UEFA Ethics Committee knew what Ramos was doing and acted accordingly.

B) If a defender deliberately kicks the ball out, when under pressure, is this not also a SF, requiring restitution? In a one-on-one battle close to the goal, you may want to kick the ball out. The important difference compared to a SF is that you are not fouling your opponent. You are using the rules strategically. You are in a desperate situation and you decide to trade in the possibility of conceding a shot at goal for a corner kick or a throw-in. Also note that the corner kick/throw-in is not a penalty/punishment. You haven't done anything wrong. This is simply a mechanism to restart the game after the ball has gone out of play. Now the opposing team gets possession of the ball, because one side failed to keep the ball in play. The corner kick/throw-in could be considered a 'price' you are willing to pay, but it isn't based on wrong-doing. This rule encourages the constitutive skill of keeping the ball in play; failing to do so is a failure of skill. But you can also use this rule if you are skillful. Both sides routinely use their opponents' bodies to deflect the ball out of bounds and thus gain possession of the ball.

C) One could try to rescue Simon's account by arguing that the penalties for a foul (including a SF) give the victim an opportunity for restoration. Thus, compensation and restoration would align. If the victim side fail to convert, by missing a free-throw or penalty kick, it is their own fault (see Simon, 2015: 67f.). The problem with this defense is that the fouler deliberately (rather than accidentally) changes the course of the game by breaking the rules. Because of this, as I have argued above, there is an imbalance, a mismatch, between the rule violation (deliberate) and the penalty (designed for accidental fouls). Although the penalty kick was originally introduced in response to strategic fouling, it is only potentially restorative, rather than actually restorative.

One commentator pointed to an important difference between law and sports. A judge in cases of tort or breach of contract aims to restore the plaintiff, rather than giving them *a chance* to be restored – as is normally the case in sports (through free kicks/free-throws).³⁷ Rule makers have usually – but not always – opted against direct restoration (e.g. awarding a goal by the referee in response to handball on the goal line), instead the rules give the victim a chance to nullify the effects of the foul by putting them in an advantageous position. The original advantage, prior to the foul, based on constitutive skills, is now replaced with an advantage (e.g. a penalty shot), based on restorative skills. Does this approach by gamewrights support Simon’s account of strategic fouling (i.e. it is fair compensation)? There are several reasons why the answer is: ‘No’.

Gamewrights of old took the ‘transcendental rule’ for granted. They assumed that most fouls will be accidental (or perhaps ‘in the heat of battle’) fouls. Direct restoration by the referee would have been unfair. In such situations it is far less certain how the foul impeded the course of play, whereas in strategic fouling it is fairly obvious what the fouler is trying to prevent. There is also some rough equivalence (and fairness) in responding to something that happened *accidentally* by giving the victim *a chance* to reverse what happened to them. The contingency of an accidental foul is matched by the contingency of converting a free-throw or a penalty kick. Today governing bodies are reluctant to institute direct restoration, because of human error (notwithstanding VAR) and because of the acting abilities of players, and perhaps because of a long tradition of providing only the chance of restoration for fouls. As a result, the fairness in giving the victim side the chance of restoration for accidental (or heat of battle) fouls does not carry forward to SFs.

However, in football we have a precedent for direct restoration. In the early 1880 the FA introduced a law (Miller 1998: 14) which gave umpires the power to award a goal for a handball which, in their opinion, had ‘prevented a goal being scored’ (a Ghana-type situation). This was in response to the rise in professional fouls (as players started to get payed). At the beginning the referees freely made use of their powers of direct restoration, but (Miller 1998: 15) ‘as the decade progressed, hostility to this rule, and to referees, increased. It

³⁷ This is not quite right. The compensation for breach of contract is often undercompensating the promisee. In continental systems the law also offers strict performance as a remedy – and this can be fully restorative.

was a brave referee who exercises his discretion, particularly against the home side, and few did.³⁸ Keep in mind that at the time the fans were often gathered close to the touch-line.

D) Simon contends that breaking the rules (i.e. strategic fouling) in sports is not always wrong. If Simon were right, then the maxim that you should not profit from wrong-doing would lose its force in these circumstances. And I would have to admit that Simon's account is plausible. But I would contend that the principle of fair play, internal to games, implies and incorporates the principle that you should not profit from wrong-doing (originally a principle external to sport). This is another way to interpret the underlying principles of a sport (i.e. Broad Internalism).

When we feel justified in breaking a rule outside of the context of games, it is usually because we have ascertained that the rule (a law) is unjust. Thus our course of action may be civil disobedience. And sometimes the application of a rule (*Don't cross on red!*) might be defective, for example when I notice that the traffic lights are faulty. I will then proceed to cross the road on red, when it is safe to do so.

In contrast, the SFer does not consider the rules to be unjust or faulty. She breaks the rules and derives her justification for doing so from the belief that it will benefit her team. The claim: *Everyone is doing it!* is not a justification, it is merely an intermediate step towards the justification that it is in my self-interest. Fraleigh (1982: 42) writes: 'Although such intentional violations, of which the "good" foul in basketball is used as *one* illustration, are "good" in terms of the rational self interest of the violator, they are not good in terms of the good sports contest.'

There is an odd tension in Simon's account which I cannot pursue further, except for some brief remarks. There are conventions which govern the 'good' SF, and this makes the rule-violation permissible. The penalties prescribed for said rule violations allegedly provide 'fair' compensation. We don't have to abide by certain rules, but – strangely – we have to abide by the penalties prescribed for breaking them; these provide 'fair' compensation.

I agree that sometimes rules may be broken in sport, but this should not be to the benefit of one side only. When Paulo Di Canio³⁹ caught the ball with his hands, interrupting the game

³⁸ I suspect this rule was superseded by the introduction of the penalty kick in 1891.

³⁹ See here: <https://www.youtube.com/watch?v=YKrGjuSFw9g>

so that the opposite goalkeeper could get medical attention, his reasons for doing so had sufficient normative power to warrant violating the rules. His action benefited the opposing team, but it also reinforced the spirit of the game: there is no joy or honour in taking advantage of an injured player and slotting the ball into an empty net.

My contention is that breaking game rules is wrong when you use the violation to gain an advantage, when you try to make the rule-violation part of your game plan. The fact that such rule-violations are wide-spread doesn't provide any normative justification (e.g. illegal parking or fiddling your taxes). Simon agrees that some SFs can be part of the 'ethos' of a game, because there is a convention among players to use it. If there were such a convention, then this could provide some normative force. But it is not a true convention. We need to consider the genealogy of the so-called 'convention' of stopping-the-clock. This particular practice was introduced by a wily coach and only became wide-spread because other competitors didn't want to be disadvantaged, rather than everyone whole-heartedly agreeing/consenting that employing this particular SF was a great idea. Competitors are forced to use it.

Furthermore, conventions either create a rule where there is none (e.g. holding the door for people behind you – a rule of etiquette), or they replace an existing rule (e.g. in emails a rule of punctuation is broken. After the salutation: *Dear John*, you continue with a capital letter). None of this is the case in stopping-the-clock. The practice actually relies on the enforcement of the rule and the prescribed penalties (just like in the self-yellow-carding by Ramos).

Gamewrights don't devise games so that rule-breaking is just another option in the game, like kicking the ball.⁴⁰ This is a transcendental rule of games; it is a condition of the possibility of playing a game.

8. Conclusion

If the sanction for some SFs should be read as a 'fair price' rather than a 'punishment', as Simon claims, then such SFs would be permissible. But the 'compensation' for SFs cannot be said to be fair – it is a myth. If the sanction were actually restorative (as later happened in the Ramos case), rather than potentially restorative, the action might be permissible (would we still need a convention?). But then there would be no incentive to use the SF. However, if you

⁴⁰ This is well understood by Pearson (1973) and Imbrišević (2018).

dispute the distinction between prices and punishments, as I do, strategic fouling falls at the first hurdle; it is impermissible.

Another problem with strategic fouling, which Simon doesn't consider, is that it takes away my agency as a player and replaces a primary right with a remedial right. The game ceases to be a mutual quest.

The whole point of a SF is to target those rule violations which give you an advantage, after 'compensating' the victim. What is (morally) objectionable about the SF is that one side profits from 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. Even if you don't follow me in equating all SFs (including those based on so-called 'conventions') with wrong-doing, the fairness and equity of the respective 'compensation', which Simon invokes, is a myth.

Simon's *apologia* for strategic fouling – wrongly – suggests that: a) some rules are disjunctive, rather than prohibitive (i.e. rule-breaking is an option which can be bought by 'paying' compensation); b) compensation (always) equals restoration; c) the victim is indifferent when it comes to exchanging primary rights for remedial rights; d) the proportionality and fairness between offence (accidental) and penalty (opportunity to nullify the disadvantage) in non-SFs carries forward to SFs.

My plea to use restorative powers, rather than giving to the victim and making penalties harsher, doesn't solve the problem of course. Once such a rule-change occurs, in order to curb strategic fouling, the athlete or coach who is looking for an edge will then target other rules which will yield an advantage when winning seems out of reach. What we have seen over the last decades is that sports governing bodies are playing catch-up with wily coaches and athletes. No matter how well a game is designed, the imagination of the gamewright will always be outstripped by the ingenuity of athletes and coaches to find other opportunities for strategic fouling. The (professional) player of today has no qualms about rule-breaking in order to win – they ignore what I have called a 'transcendental rule'. Only if we abide by this rule will the SF wither away.

Bibliography

- Aristotle, (2002). *The Nicomachean Ethics*, transl. by Rowe, C., Oxford: OUP.
- Berman, M.N., (2011). “Let ‘em Play”: A Study in the Jurisprudence of Sport, *The Georgetown Law Journal*, Vol. 99, pp. 1325-1369.
- 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.
- Birks, P., (1985). *An Introduction to the Law of Restitution*, Oxford: Clarendon Press.
- Black, H.C., (1968). *Black’s Law Dictionary*, St. Paul/Minn: West Publishing Co.
- Bouvier, J., (1856). *Bouvier's Dictionary of Law*, Vol. I & II, 6th ed., Philadelphia: Childs & Peterson, [Online] available: <http://ecclesia.org/truth/bouviers.html> [11/05/2020]
- 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.
- Dellatre, E.J., (1975). “Some Reflections on Success and Failure in Competitive Athletics”, *Journal of the Philosophy of Sport*, Vol. 2:1, pp. 133-139.
- Dworkin, R., (1997). *Taking Rights Seriously*. London: Duckworth.
- 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., (2018). “Games, Rules, and Practices”, *Sport, Ethics and Philosophy*, Vol. 12:3, pp. 241-254.
- Eylon, Y., (2020). “Conventional Fouls - A Note on Strategic Fouls”, *Sport, Ethics and Philosophy*, Vol. 14:2, pp. 241-246.
- FIFA Code of Ethics (2019). [Online] available: <https://resources.fifa.com/image/upload/fifa-code-of-ethics-2019.pdf?cloudid=fmhdml5mqynrljmmsut> [20/9/2020].
- Flynn, E., (2017). “Strategic fouls: a new defense”, *Journal of the Philosophy of Sport*, Vol. 44:3, pp. 342-358.
- Gaus, G.F., (1991). “Does Compensation Restore Equality?”, *Nomos*, Vol. 33, pp. 45-81.
- Hart, H.L.A., (1959/1960). “Prolegomenon to the Principles of Punishment”, *Proceedings of the Aristotelian Society*, Suppl. Vol. LX, pp. 1-26.
- Hart, H.L.A., (1997). *The Concept of Law*, 2nd ed., Oxford: OUP.
- Holmes, O.W., (1897). “The Path of the Law”, *Harvard Law Review*, Vol. 110:5, pp. 991-1009
- Hyland, R., (1994). “Pacta Sunt Servanda: A Meditation”, *Virginia Journal of International Law*, pp. 405-433.
- Imbrišević, M., (2018). “The Strategic Foul and Contract Law: Efficient Breach in Sports?”, *Fair Play*, Vol. 12, pp. 68-99.

- Imbrišević, M., (2019a). "Suits on Strategic Fouling", *Sport, Ethics and Philosophy*, Vol. 13:3-4, pp. 307-317.
- Imbrišević, M., (2019b). "Robert Simon and the Morality of Strategic Fouling", *Synthesis Philosophica*, Vol. 34: 2, pp. 359-377. [Online] available: https://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=338045 [20/9/2020]
- Imbrišević, M., (2020). "Why Break the Rules – in Life and in Sport?" *Idrottsforum*. [Online] available: <https://idrottsforum.org/imbrisevic200617/> [20/9/2020].
- Kolnai, A., (1965). "Games and Aims", *Proceedings of the Aristotelian Society*, Vol. 66, pp. 103-128.
- Kosiewicz, J., (2011). "Foul Play in Sport as a Phenomenon Inconsistent with the Rules, yet Acceptable and Desirable", *Physical Culture and Sport. Studies and Research*, Vol. 52:1, pp. 33-43.
- Lewinsohn-Zamir, D., (2013). "Can't Buy Me Love. Monetary Versus In-Kind Remedies", *University of Illinois Law Review*, No. 1, pp. 151-194.
- Loland, S., (2002). *Fair Play in Sport: A Moral Norm System*, London: Routledge.
- McIntosh, P.C., (1979). *Fair Play: Ethics in Sport and Education*, London: Heinemann.
- 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.
- Miller, C., (1998). *He Always Puts it to the Right: A Concise History of the Penalty Kick*, London: Victor Gollancz.
- Miller, D., (1981). "Constitutive Rules and Essential Rules", *Philosophical Studies*, Vol. 39:2, pp. 183-197.
- 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.
- Nozick, R., (1974). *Anarchy, State, and Utopia*, Oxford: Blackwell Publishers.
- O'Neil, O., (1989). *Constructions of Reason: Explorations of Kant's Practical Philosophy*, Cambridge: CUP.
- Pearson, K.M., (1973). "Deception, Sportsmanship, and Ethics", *Quest*, Vol. 19:1, pp. 115-118.
- Pérez Triviño, J.L., (2012). "Strategic Intentional Fouls, Spoiling The Game and Gamesmanship", *Sport, Ethics and Philosophy*, Vol. 6:1, pp. 67-77.
- Riordan, P., (1996). *A Politics of the Common Good*, Dublin: Institute of Public Administration.
- Russell, J.S., (2007). "Broad Internalism and the Moral Foundations of Sport", in *Ethics in Sport*, ed. by Morgan, W.J, Champaign, IL: Human Kinetics.
- Russell, J.S., (2017). "Strategic fouling and sport as play", *Sport, Ethics and Philosophy*, Vol. 11:1, pp. 26-39.

Simon, R.L., (2000). “Internalism and Internal Values in Sport”, *Journal of the Philosophy of Sport*, Vol. 27:1, pp. 1-16.

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.

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.

Torres, C. R. (2018): “What counts as part of a game? Reconsidering skills”, *Journal of the Philosophy of Sport*, Vol. 45:1, pp. 1–21.

Watson, A. (tr.), (1998). *The Digest of Justinian*, Vol. 4, Philadelphia: University of Pennsylvania Press.

Wilkinson-Ryan, T. and Hoffman, D.A., (2010). “Breach is for Suckers”, *Vanderbilt Law Review*, Vol. 63, pp. 1001-1045.

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

Cases:

Lipkin Gorman v Karpnale Ltd [1988] UKHL 12