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NFL Justice

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The Honorable J. Michael Eakin†

It began with the referees' strike of 2018. You recall—after the Eagles won the Super Bowl and hell froze over? The NFL, recognizing the Eagles' victory meant there was an immediate need to restore public confidence in the league's integrity, decided the answer was to hire full-time referees. This appeared not only the cheapest solution, but a move that would be roundly applauded by the TV commentators who believed they thought of it in the first place.

Thus, the lawyers, accountants, and such who heretofore served as part-time referees and umpires and linesmen were told they would become full-time, on pain of losing their stripes. They resisted the

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> The emu's a bird quite large and stately,
> whose market potential was valued so greatly
> that a decade ago, it was thought to be
> the boom crop of the 21st century.
>
> Our appellant decided she ought to invest
> in two breeding emus, but their conjugal nest
> produced no chicks, so she tried to regain
> her purchase money, but alas in vain.
>
> Appellant then filed a contract suit,
> but the verdict gave her claim the boot;
> thus she was left with no resort
> but this appeal to the Superior Court.

Liddle v. Scholze, 768 A.2d 1183, 1184 (Pa. Super. Ct. 2001).

mandate. Positions hardened, and the refs became obstinate. The summer of their discontent eventually turned into the autumn of their displacement. When they decided to strike on the eve of the new season, even the threat of Commissioner Berman to "air traffic controller" them was ignored. They laughed, too young to remember Reagan. When they persisted, Berman told them they could go "back back back" to their real jobs; he fired them and brought in replacements.

But the new referees did not solve the problem. Coaches complained, players whined, and fans suspected foul play and fixed games. Too many of the calls made by the new employees, beholden to the league and not unionized unto themselves, coincided with the result that seemed to maximize the television ratings. Placing of corporate advertising on their shirts did little to assuage the skepticism.

The "instant replay" system, which used to allow the on-field ref to review the decisions of his own crew, or himself, was no help. This review only allowed TV commentators to claim bias, as it exposed every mistaken ruling and called into question the integrity (and IQ) of the new refs. Senator Specter began to grumble and senatorial hearings were threatened. The league's owners, ever reluctant to concede there was even a problem, but not wishing to arouse anti-trust sentiments, looked for a compromise. Then a plan was suggested by one congressman who had made, or at least heard, a speech on judicial independence, and remembered there were platitudes of justice attributed to such a concept. When instant replay was called an "independent review" during the hearings, his memory was triggered. He suggested that instead of reinventing the football, the league could reach out to an established, credible, autonomous system that deals with appeals all the time—which is how appellate judges came to be in "the booth upstairs."

Judges, not elevated because of their physical prowess, could not be running all over the field, despite the observation that many were "all over the place" much of the time. However, if they could not get on-field refs who got it right, what better solution than putting appellate judges upstairs in the booth and letting them rule on replay appeals. Crowd noise and the occasional tossed bottle, factors that might sway an on-field judgment, were a non-factor in the appellate setting, where the deciding judge/ref was isolated by distance (and Plexiglas). Similarly, any "home field advantage," like being a hometown attorney before the hometown judge, would play no part

in a game decided by a non-local judge strictly on the merits of the issue placed before him or her.[1]

Judges were used to sitting up high—enjoyed it, truth be told—and the replay booth seemed a natural. Likewise, being called upon to second-guess others was a normal and frankly enjoyable part of the job. There may be a new "statute" or two for them to learn, but the application of their experience to the new process did not appear strained. In addition, appellate judges had "flexible" schedules, making them not averse to a "full-time" designation even though they only showed up on weekends.

The league agreed, particularly as judges tended to work cheap, particularly when compared to the players and coaches. Trappings and titles seemed more important than cash; once those were worked out, any obligation to the league owners did not seem to be a factor. While the first incarnation of white and black striped robes was short-lived, overall the system was an immediate success, or at least "immediate" in appellate terms.

Why did this concept work? Well, in many ways, a football game is much like a case or a trial. A football game is resolved in an adversarial system, just like a lawsuit. Both contests are normally preceded by a period of exchanges between the two sides. This might be written, as a lawyer putting forth a position in letters, or the teams doing so in blogs or media interviews. There are also verbal exchanges, though talking serious smack in the legal arena normally proves counterproductive to settlement.

The football game itself could be thought of in terms of a civil trial. Despite the violence inherent in football, it would not work to treat it as a criminal case; the game does not have a disproportionate burden of proof on either side, outside perhaps Philadelphia, and it does not seek punishment in the name of the people, outside perhaps Oakland. No one was looking to put anyone in jail, as the players generally do a fine job of accomplishing that on their own. However, the contest could be seen as civil, with each party striving for some advantage more pecuniary than retributive.

The similarities do not end there. Trial preparation and game preparation are comparable. Like a civil case, a football match has significant pre-game discovery—maybe a little too much discovery at times. *See In re Belichick.* However, the same notion's there—reviewing game films of the other team, discussing a game plan,

1. On the other hand, a hometown attorney is a presumptive three-point favorite.

knowing which parties and weaknesses to exploit, discussing options, and so on.

Then there are pleadings and motions. "Motion," in football, can refer to a penalty for "illegal motion" (originally called "backfield in motion," presumptively retitled to distinguish the '60s song by Mel and Tim). It can also refer to "man in motion," a subterfuge, designed to cause uncertainty in the other camp. Legal motions too can be used as either subterfuge, or as a request for penalty or sanction. Judges, like linebackers, see "motion" and think, "Uh oh, something *else* I have to deal with." As for "pleadings," they happen in football all the time: "He's holdin' me" or "That guy's offsides," whine whine whine. This is largely indistinguishable from legal pleadings.

But we are speaking of NFL appellate judges, not trials. The purpose of a legal appeal is correction of error, and perhaps avoiding idiosyncratic results, with an opinion to display the reasoned application of the law, and on some occasions the pursuit of justice. This seemed not a bad plan for football review. The league wanted to correct mistakes, and do so observably, even proudly. With announcement of the result of the appeal or review, the ref was instructed to give reasons, much like an opinion. It might be merely that the review confirms the ruling on the field (a per curiam affirmance), or if reversal is in order, a brief statement of the appellate ref's reasoning.

Judges could not accomplish this without rules, so a committee was formed to promulgate the NFL Appellate Rules. These rulemakers first considered the basic question, "What is appealable?" Unlike the legal system, a football game can not go on until there is a "final order" or score. Making the teams wait until the game was over, when the issue arose in the first quarter, did not appear to be workable, so interlocutory appeals were permitted.

The next question was standing: Who may appeal? Fans, like citizens, can not be permitted to appeal simply because they have a rooting interest and maybe a few dollars riding on the result—someone would appeal every play. Players could not appeal; they are always complaining about something and never admit doing anything wrong. When was the last time one of them said, "You're right, I was holding." Again, chaotic results and system overload would soon follow.

It was decided to designate the head coach as the party with standing to appeal. After all, the players are important, but the game's caption was not "Manning vs. Brady"—it was "the Colts vs. the Pats." The named party to the case being the team, an appeal could be lodged by its representative, the head coach. The idea that

an owner had the right to appeal, advanced by the Cowboys' Jerry Jones, was rejected, the other owners believing he was already on TV more often than *Seinfeld* reruns.

Filing would be accomplished by throwing a red flag, to the attention of the on-field ref. The appeal, however, must be timely filed. Appreciating that "timeliness," in the sense of the game clock, varies during different stages of a game, the time for appeal could not be set as a fixed number of seconds or minutes. It was decided the appeal had to be filed before the next play began; after that, the appellate ref was deprived of jurisdiction. An exception, a type of "mailbox rule," was established, where the red flag was thrown but not seen by a ref before the start of the next play—this inevitably led to another set of challenges, but the rule still stands.

A timely appeal resulted in an automatic stay of the proceedings. No bond was required per se, but to ensure the bona fides of the appeal, a price of one time-out was placed in limbo, and assessed, should the appealing party not prevail. To discourage litigious parties, a limit of two appeals per suit, or game, was established.

Briefing was waived—some suggest this was an acknowledgment that coaches might not be able to write well, but it was strictly a matter of expedience. However, the appealing party was required to give the ref a "clear statement of the error or omission alleged to have been made" by ruling on the field. Oral argument was limited to yelling at the sidelines ref fortunate enough to be stationed near the offended coach. Colorful adjectives applied to the referees were discouraged, but unlike legal pleadings, where describing the judge in less than reverential terms will be fatal to one's cause, their use was deemed part of the game and accepted without penalty.

Then there was the question of jurisdiction—since not every issue is subject to appeal, one must determine whether the issue raised allows the appellate referee to exercise jurisdiction in the first place. The on-field referee was permitted to question jurisdiction *sua sponte* because many offenses, particularly those involving discretion of the ref (judgment calls), were not appealable. These include:

1. Holding.
2. Offside/encroachment/false starts.
3. Pass interference.
4. Personal fouls/fighting.
5. Illegal blocks.
6. Illegal formations.
7. Face mask.

8. Taunting/excessive celebration.
9. Roughing the passer or kicker.[2]

What issues then may be appealed? These may be divided into three general categories: possession (or lack thereof), location (involving sideline, goal line, or forward progress), and other (such as twelve men on the field, "down by contact," etc.). While the notion of "penalties" may hearken to criminal matters,[3] the context remains civil.

Upon timely appeal, review by the appellate referee followed. What about the appellate ref's scope and standard of review, you ask? The scope was defined by the Rules as all the video that could be reviewed in the ninety seconds after review was begun. Television, like a stenographer (a very well-paid stenographer) with multiple recorders, provided a prompt record of the proceedings in most cases. However, like any record, if it does not contain the evidence, the evidence is not reviewable on appeal.

The standard of review is also set forth in the Rules: the reviewing court must affirm absent "indisputable video evidence" contrary to the ruling on the field. There is also a harmless error clause, for an alleged error is not reviewable unless it can have a direct, competitive effect on the game.

Remedies available to the appellate ref are to reverse or affirm. To the delight of the on-field refs, there is no remand, or "do-over." These remedies are self-explanatory; reversals undo the enumerated mistake, while affirmations reiterate the correctness of the on-field decision, or at least the absence of sufficient reason to change it. Once the ruling is announced, no further review is allowed, the appellate ref being a court of last resort. Coaches unhappy with the result may express themselves to the legislative branch (the NFL's Rules Committee). As in court, this might help the next guy, but it does little for the immediate cause.

Then there was the matter of an appellate time frame. Though the judges might have preferred it, months of deep thought could not be allowed. A successful appeal could not result in replaying today's game with last year's roster, so a limited appellate review period was established. Similar to notions of "deemed denied," the absence of a finding of error within a fixed period precluded reversal of the on-field call.

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2. The tendency of the judges to describe the penalty as "Borking" has diminished.
3. It has been noted the typical criminal accusation may evoke defenses in these same three categories: Possession (typically, "I never had it, plus I gave it back" or "they weren't *my* drugs"), location (aka alibi, "I wasn't there" or "some other dude did it"), and "other" (including the classic, "Go ahead, copper, you got nothin' on me!").

One wrinkle concerns the last two minutes of a game. During this period of heightened importance and attention, the appellate ref becomes a certiorari court. Coaches lose the right to file an appeal, though their countenance may convey a clear desire for further review. However, this is strictly a matter for the appellate ref; the ref may reach out and take the issue, should it be deemed of significance, or the ref may decide to do nothing. Again, decisions about whether to take the case are as unreviewable as the decision on the case itself. The anecdotal suggestion of a propensity to review more plays involving teams playing in the Ninth Circuit's region has not been supported.

Mention should also be made of the NFL equivalent of legal scholars and law review types, namely the commentators in the telecast business "calling the game," and the "experts in the studio." Their knowledge exceeding any practical application, they must fill the hours of the game, pregame, and postgame, with Madden-esque profundity and insight, as in, "If they keep turning the ball over, their chances of winning aren't good." While many announcers have played the game, few have ever agreed with a referee, and none have actually been referees. They nevertheless are happy to discuss the work of others, second-guess rulings and penalties, and can talk theory all day. Their contributions as experts are not a bad thing, though it must be remembered that it is not *the* thing, except when speaking to each other.

Some appellate referees have become known as "strict constructionists." These refs reflect an "original intent" philosophy of the rules, though even these will concede that face masks, not considered by the leather-helmeted founding fathers, are indeed part of the modern game. Others are perceived as adherents of a "living document" point of view, believing that in today's pass-oriented game, holding should be more of a relative term than it once was. This dichotomy led to a suggestion that the league adopt appellate panels of three judges, lest any game be decided based on an idiosyncratic philosophy. This has not yet found favor, though the occasional non-assigned appellate ref has been known to phone in a dissent to his colleague's decision. Empowering such dissent did not seem to advance the expectations of finality, much less the desire to get the game played in less than six hours, and as such it has not found favor.

In the end, the incorporation of appellate judicial concepts worked. The decisions made, if not more "right" are certainly more consistent, more likely to reflect the precedent of similar decisions made in the past. Teams in small TV markets report less fear of the opponent

getting preferential treatment, and the league's desire for parity among franchises has been advanced. There remains the inherent need of the public to complain when rulings do not favor their side, but this is human nature. In truth, the fans of all teams appear equally unhappy.

And this last stage, demonstrating judicial impartiality just as in the legal arena, is always the best indicator that the system works.