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# Response Essay: Temporal Variance, Hockey, and the Wartime Constitution

Dawinder S. Sidhu

*University of New Mexico - Main Campus*

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# Response Essay: Temporal Variance, Hockey, and the Wartime Constitution

DAWINDER S. SIDHU\*

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## INTRODUCTION

In “*Let ‘Em Play’*”: *A Study in the Jurisprudence of Sport*,<sup>1</sup> Professor Mitchell Berman offers a thoughtful and engaging defense of the concept of temporal variance, the notion that “some rules of some sports should be enforced less strictly toward the end of close matches.”<sup>2</sup> In support of his position, Professor Berman draws on various professional sports, including tennis, basketball, and baseball. Largely absent as a source of information or subject of the overall discussion is hockey, a sport with which Professor Berman acknowledges he is less familiar.<sup>3</sup>

As it happens, I am a dedicated fan of hockey<sup>4</sup> and, coincidentally, this sport seems to expose problems with temporal variance. Also, the idea that rules in sports should be enforced less strictly at certain moments of matches is not unlike the recurring and contemporary contention that the Constitution should not be strictly observed in times of war.<sup>5</sup> As it happens, I am also a professor of constitutional law with expertise<sup>6</sup> and experience<sup>7</sup> on the judicial enforcement of the Constitution in the post-9/11 context. The purpose of this response is to address my concerns with temporal variance, which stem from my appreciation for the enforcement of rules in hockey and for the role of the courts in wartime settings. These concerns

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\* Assistant Professor of Law, University of New Mexico School of Law. © 2011, Dawinder S. Sidhu. My thanks to Paul Stewart for sharing with me his insights and experiences for purposes of this essay, and to the staff of *The Georgetown Law Journal* for their helpful comments and assistance.

<sup>1</sup> Mitchell N. Berman, “*Let ‘Em Play’*”: *A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325 (2011).

<sup>2</sup> *Id.* at 1327.

<sup>3</sup> *See id.* at 1352 n.78. Throughout this essay, references to “hockey” should be interpreted to mean “professional ice hockey.”

<sup>4</sup> For example, my family and I have had season tickets for almost two decades to two professional hockey teams, and I generally watch, on average, over one hundred games per season on television.

<sup>5</sup> *See, e.g.*, Richard A. Posner, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 6 (2006).

<sup>6</sup> My representative articles in this area include Dawinder S. Sidhu, *Shadowing the Flag: Extending the Habeas Writ Beyond Guantánamo*, 20 WM. & MARY BILL RTS. J. (forthcoming 2011), Dawinder S. Sidhu, *First Korematsu and Now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court’s Disregard for Claims of Discrimination*, 58 BUFF. L. REV. 419 (2010), and DAWINDER S. SIDHU & NEHA SINGH GOHIL, CIVIL RIGHTS IN WARTIME: THE POST-9/11 SIKH EXPERIENCE (2009).

<sup>7</sup> For example, I have been lead counsel for *amici* in *Padilla v. Yoo*, No. 09-16478 (9th Cir. filed July 9, 2009), *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

may counsel the reader to reconsider the merits of temporal variance as a preferred or justifiable practice in sports or law.

At the outset it is necessary to state that my intention here is to enrich and extend the conversation that Professor Berman has provoked, not to suggest that the conversation should not have been started at all.<sup>8</sup> Whereas Professor Berman argues in favor of temporal variance, my reservations emphasize the value of the “rule of law” perspective that generally does not recognize time alone as a valid basis to relax rules or laws.<sup>9</sup> I hope that this response will encourage others to think about which bookend is more convincing or whether the appropriate answer lies somewhere in the middle. Professor Berman advances his article as an attempt to prove that “sporting systems . . . comprise a worthy object of legal–theoretical study.”<sup>10</sup> It is in this same spirit—of trying to understand the relationship between rules in sports and the law, and to determine thereby and ultimately how the latter can be improved—that I write this response.

### I. TEMPORAL VARIANCE AND HOCKEY

The National Hockey League (“NHL”) is the premier professional ice hockey league in the world. It consists of thirty teams situated throughout Canada and the United States. The rules of the sport generally contain what may be termed “power-conferring rules” or the “rules of the road,” such as off-sides and how to line up for a face-off, the abridgement of which generally do not lead to manpower disadvantages,<sup>11</sup> and “duty-imposing rules,” such as hooking or slashing, which conversely are punished by a manpower disadvantage or “penalty” for the offending squad.<sup>12</sup> This essay is concerned primarily with penalties. Calling penalties is generally the responsibility of “referees,” and two referees are assigned to each NHL game.<sup>13</sup>

The prevailing view among fans, according to Professor Berman, is that rules in sport should be enforced less strictly during the last moments of a close contest, or the playoffs.<sup>14</sup> Fan support for temporal variance does not, however, convert temporal variance into a proper normative option. Put differently, if officials indulge the expectation of fans that referees should “let ‘em play,” this does not determine whether officials should cater to that expectation. There are several reasons why one may be skeptical of temporal variance as an initial proposition.

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<sup>8</sup> Professor Berman notes that a goal of “*Let ‘Em Play*” is “to help spur the growth of the jurisprudence of sport, or of the philosophy of sports and law, as fields worthy of more concerted theoretical attention.” Berman, *supra* note 1, at 1330. I hope this response helps demonstrate that he has succeeded on this front.

<sup>9</sup> *See id.* at 1327 (contrasting “temporal variance” with the “view, which possibly resonates with a common understanding of what it means to follow ‘the rule of law,’ [in which] rules of sports should be enforced with resolute temporal invariance”).

<sup>10</sup> *Id.* at 1331.

<sup>11</sup> *See, e.g.*, NAT’L HOCKEY LEAGUE, OFFICIAL RULES 2010–2011, at 111–12 (2010) [hereinafter NHL RULES], available at [http://www.nhl.com/league/ext/rules/2010-2011\\_Rulebook.pdf](http://www.nhl.com/league/ext/rules/2010-2011_Rulebook.pdf) (explaining face-off rules).

<sup>12</sup> *See id.* 80, 86–87 (explaining hooking and slashing rules).

<sup>13</sup> *See id.* 48, 52 (explaining referees’ responsibilities).

<sup>14</sup> *See* Berman, *supra* note 1, at 1327–28. There have been hockey sportswriters who favor “temporal variance.” *See, e.g.*, Jim Kelley, *Cup Finals a Game of ‘Survivor,’* ESPN (June 2, 2004, 3:32 PM), [http://sports.espn.go.com/nhl/playoffs2004/columns/story?columnist=kelly\\_jim&id=1814399](http://sports.espn.go.com/nhl/playoffs2004/columns/story?columnist=kelly_jim&id=1814399) (“The rules are different in the playoffs. It’s something everyone in the game knows and lives by. It’s also known with drop-dead certainty that what’s a penalty in the early part of the game is often overlooked in the later stages . . .”); *see also* Tyler Hunt, *Where’s the Call? NHL Referees in the Spotlight This Post-season,* DIGITAL J. (May 18, 2011), <http://digitaljournal.com/blog/11702> (“Most hockey fans will tell you there is nothing like old-time hockey where the referees put the whistles away and let the players decide the outcome of the game, and come playoff time this is a philosophy that almost becomes an unwritten rule that the officials abide by.”).

The first relates to consistency. The consistent application of rules enables individuals, in the sports arena and in broader social spaces, to bring their conduct within the bounds that supervisory agents establish and patrol.<sup>15</sup> In other words, appropriate behavioral conformance is predicated on clarity and reliability in enforcement.<sup>16</sup> Temporal variance impairs consistency at both the macro and micro levels.

At the macro dimension, a study of the 2008 NHL playoffs found that referees called an average of 8.09 minor penalties in the first period, 8.18 in the second, and 5.60 in the third.<sup>18</sup> In raw numbers, the study found that 273 minor penalties were called in the first period, 275 in the second, and 185 in the third.<sup>19</sup> While this study suggests that NHL officials have adhered to temporal variance and that rules are applied less strictly towards the ends of hockey games, further statistical inquiries reveal that only certain NHL referees follow this approach. For example, a separate study ascertained that two pairs of officials called only 15% and 16% of their games' penalties in the third period, in line with temporal variance.<sup>20</sup> Three other pairs of officials, however, made 31%, 32%, and 35% of their penalty calls in the third period, which is suggestive of temporal invariance.<sup>21</sup> Through the broad lens of multiple NHL games, it appears consistency in temporal variance is lacking.<sup>22</sup>

Temporal variance also threatens consistency at the micro level of individual games. As Paul Stewart, a former referee who officiated over 1,000 games in the NHL and who is currently the head of officiating for a major collegiate hockey association, told me, over the course of a game referees work to establish a standard of what will and will not lead to a penalty call. Temporal variance, however, changes the bar during a game and thereby erodes the consistency and predictability of the standard governing player conduct.<sup>23</sup> Stewart likens the impropriety of

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<sup>15</sup> As Justice Robert H. Jackson noted, “[c]onsistency and stability . . . are ends desirable in themselves, for only thereby can the law be predictable to those who must shape their conduct by it.” *Williams v. North Carolina*, 317 U.S. 287, 323 (1942) (Jackson, J., dissenting); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (“[The] erection and enforcement of a system of rules . . . enabl[es its subjects] to govern their affairs . . . in an orderly, predictable manner.”).

<sup>16</sup> *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984) (state action forbidding conduct shall be exercised so as to “reduce[] the danger of caprice . . . in the administration of the laws” and to “enable[] individuals to conform their conduct to the requirements of law.”).

<sup>18</sup> *See James Mirtle, When the Whistles Go Away: An Embarrassing Look at NHL Officiating*, JAMES MIRTLE: HOCKEY JOURNALIST’S BLOG (May 7, 2008, 6:08 AM), <http://mirtle.blogspot.com/2008/05/when-whistles-go-away-embarrassing-look.html>. A “minor penalty” is assessed for common infractions, such as holding, hooking, and roughing, for which the player called serves two minutes. *See NHL RULES, supra* note 11, at 26–27 (defining “minor penalties”); *see also id.* at 134–35 tbl.2 (listing infractions that qualify for a minor penalty).

<sup>19</sup> *See Mirtle, supra* note 18.

<sup>20</sup> *See Daniel Tolensky, Consistency Now*, HOCKEY BUZZ (Apr. 27, 2008, 2:13 AM), [http://www.hockeybuzz.com/blog.php?post\\_id=15033](http://www.hockeybuzz.com/blog.php?post_id=15033).

<sup>21</sup> *See id.*

<sup>22</sup> One may argue that consistency can be found based on which pair of NHL referees are officiating a given match. While this view may be initially appealing, in general terms a credible system of rules cannot be said to exist where enforcement depends on which officer is on his or her beat, or which official is working a given game. That is to say, predictable consistent-inconsistency is suboptimal, particularly in the NHL where there is no meta-entity, such as a Supreme Court, regularly ensuring that individual decisions, such as by lower courts, can be harmonized moving forward.

<sup>23</sup> Telephone Interview with Paul Stewart, Director of Officiating, ECAC Hockey League (Sept. 14, 2011). Prior to heading the officiating of one of the NCAA Division I hockey leagues, Stewart served as an NHL referee from 1986 to 2003, officiating over 1,000 games in the process. *See Meet Paul Stewart*, OFFICIATING BY STEWART,

temporal variance in hockey to a situation in which a judge painstakingly sets forth rules during the course of a trial only to modify those same rules at the last minute. Consistency is lost, as is the practical ability of individuals to shape their actions in conformance with the rules, thus damaging the credibility of the system itself.<sup>24</sup>

Similarly, Professor Berman's support of temporal variance includes the notion that calling a penalty late in a close match may be overcompensatory in that it bestows on the non-offending team a significant competitive advantage where there is a relatively limited and diminishing opportunity for the offending team to overcome or counteract that advantage in the remaining time.<sup>25</sup>

To relax rules for a possibly offending team towards the end of a game is itself a particular advantage not given to the other team, and exposes officials' active involvement, through non-enforcement, in assisting one team make best use of the last moments.<sup>26</sup> The impartiality and neutrality of referees may reasonably be called into question as a result.

Relatedly, however understandable fans' expectation may be with respect to temporal variance, this does not make the expectation any less extraneous to the rules that officials are duty bound to enforce. This expectation, in other words, is not embedded in the rules that NHL officials are obligated and trained to apply to player conduct. As Stewart observed, NHL officials are required to apply the rules as they exist and temporal variance is simply outside of those rules.

Further, non-enforcement comes at a significant cost: the integrity of the game. For example, Dan Marouelli, who served as a referee in the NHL for almost three decades, suggested that non-enforcement of rules in the championship-determinant game of the 2011 season—when temporal variance would seem logically to be at its height—undermined the legitimacy of the game's outcome and of the sport.<sup>27</sup> Fans, who may be the most ardent advocates of temporal variance, may be concerned solely with the outcome of the single match they are viewing. There

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<http://officiatingbystewart.com/stewart.html> (last visited Oct. 30, 2011). Other references to Stewart are based on this interview.

<sup>24</sup> Judge Learned Hand, in typical eloquent fashion, stated that to suspend the law "is of itself an irreparable injury, which no judge has the right to ignore." *Cunard S.S. Co. v. Mellon*, 284 F. 890, 898 (S.D.N.Y. 1922). The purposes of a law, he wrote, "should not be thwarted" by judges' preferences for other purposes. *Id.* Judge Hand succinctly concluded that "[n]o reparation is possible, if it is." *Id.*; see Edwin M. Borchard, *Government Liability in Tort*, 34 *YALE L. J.* 129, 130 (1924) (characterizing Judge Hand's opinion in this case as articulating the principle that "consistency in the law is necessary to give it prestige").

<sup>25</sup> See Berman, *supra* note 1, at 1336 ("[I]nsofar as penalties are designed to serve a compensatory or restitutionary function, we have reason not to impose them when they would work substantial overcompensation."); *id.* ("[T]he competitive impact of an event occurring during a close contest is inversely proportional to the distance remaining to the contest's completion."); *id.* at 1346 ("[E]vents have greater impact on the outcome of a game—good things contribute more to victory, and bad things are more costly—when they occur later in close contests.").

<sup>26</sup> I use the word "active" advisedly to convey the officials' affirmative injection of a competitive advantage through non-enforcement. Moreover, that a vast majority of games are decided within the context of referees' "normal" officiating in the earlier moments of a game brings into question the rationality of the "let 'em play" attitude. That is, referees' traditional enforcement of rules in the first and second periods have a material impact on the outcome of games. Accordingly it seems strange to insist, only in the last moments of a match, that referees enable players to determine the outcome of a close match. "Let 'em play" would make greater sense if it was a time-invariant expectation.

<sup>27</sup> Tim Wharnsby, *Bruins Win Stanley Cup*, CBC SPORTS (June 15, 2011 10:45 PM), <http://www.cbc.ca/sports/hockey/stanleycup/story/2011/06/15/sp-bruins-canucks-game7.html>. After identifying three specific infractions that were not enforced, Marouelli noted, "[i]t affects the integrity of our sport when these types of fouls aren't called." *Id.*; see also Mirtle, *supra* note 18 ("Too often referees are disappearing late in games, so much so that it's affecting the integrity of games.").

is, however, as Stewart reminded me, a lot more at stake in the enforcement of rules than who wins or loses a particular match. The legitimacy of those matches and, in the aggregate, the legitimacy of the league hang in the balance.

In addition, Professor Berman argues that non-enforcement may be justified where the “rule in question does not implicate the core athletic virtues and excellences of the sport in question”<sup>28</sup> because “[w]e want the outcome of athletic contests to depend (insofar as possible) upon the competitors’ relative excellence in executing the particular athletic virtues that the sport is centrally designed to showcase and reward.”<sup>29</sup> In most sports, this means that more contact may be tolerated if the contact does not interfere with the athletic qualities that the sport prizes.<sup>30</sup> In hockey, however, physicality is integral to certain players’ skill sets. Physical players, for example, are lionized for their ability to deliver thunderous body checks.<sup>31</sup> Whereas in other sports temporal variance would admit incidental contact unrelated to the core athletic virtues, in hockey temporal variance would seem to permit even more aggressive physical contact, thus giving an undue competitive advantage to the more physically inclined. In other words, temporal variance may particularly skew the athletic qualities that exist in hockey.

This may have already happened. As Marouelli observed in the context of non-enforcement during the final game of the 2011 finals, “usually the team that was most disciplined w[as] the one[] to win the [Stanley] Cup.”<sup>32</sup> By implication, the more physically dominant and brazen team—relieved from the strictures of traditional rules and allowed thereby to maximize this dominance and supplant brawn as a principal competitive advantage—won the Cup.<sup>33</sup> Finally, non-enforcement limits the deterrent effect of rules and thus emboldens players to act outside of regulated standards of professional, sportsmanlike conduct.<sup>35</sup> In one of the most controversial incidents from this past season, Zdeno Chara, the Boston Bruins’ captain and the tallest player ever to play in the league,<sup>36</sup> drove Montreal Canadiens’ forward Max Pacioretty into a partition

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<sup>28</sup> Berman, *supra* note 1, at 1358.

<sup>29</sup> *Id.* at 1348–49 (emphasis removed).

<sup>30</sup> *See, e.g., id.* at 1327 (“[M]ost fans of professional basketball would affirm that contact that would constitute a foul through most of the game is frequently not called during the critical last few possessions of a close contest.”); *id.* at 1335 (applying this view to a hypothetical example in basketball).

<sup>31</sup> *See, e.g.,* Liantamr, *Scott Stevens Greatest Hits!*, YOUTUBE (May 21, 2006),

<http://www.youtube.com/watch?v=7U7jUbKQYdw> (clip of highlight reel shown on an undated edition of ESPN’s SportsCenter).

<sup>32</sup> *See* Wharnsby, *supra* note 27.

<sup>33</sup> *See* Iain MacIntyre, *Playoff Success Leads to Short Summer Recess for the Canucks*, CANADA.COM (Aug. 30, 2011), <http://www.canada.com/sports/Playoff+success+leads+short+summer+recess+Canucks/5326905/story.html> (“[T]he Boston Bruins won [the Stanley Cup] going away by bullying the [Vancouver] Canucks . . .”). Apparently acknowledging this strategy, the Bruins themselves posted a video entitled “Bullying the Bullies” on their performance in a playoff series leading up to the finals. *See Bullying the Bullies*, BOSTONBRUINSTV (May 4, 2011), <http://video.bruins.nhl.com/videocenter/console?id=113098>.

<sup>35</sup> To his credit, Professor Berman had a limited focus in his article and admits to not fully considering the deterrent effect of non-enforcement of rules in sports. *See* Berman, *supra* note 1, at 1351 n.76 (“I have not addressed changes in the deterrent value of a penalty, though I acknowledge that such changes might be at least partially confounding.”). He seems to concede, nonetheless, that non-enforcement is not appropriate where “the penalty would weaken the rule’s deterrent force to an unusually great degree.” *Id.* at 1341 n.50. A concern that results from this essay’s discussion of the NHL is that the league already has proven unable to enforce its rules when the cost of non-enforcement would be significant. Accordingly, it does not seem to be in a position to gauge the circumstances in which non-enforcement would be optimal, if at all.

<sup>36</sup> *Here’s Looking (Up) at You, Kid: The Sports World’s Tallest Competitors*, ESPN (Apr. 6, 2010, 4:00 PM), [http://espn.go.com/blog/sportscenter/post/\\_/id/42232/heres-looking-up-at-you-kid-the-sports-worlds-tallest-competitors](http://espn.go.com/blog/sportscenter/post/_/id/42232/heres-looking-up-at-you-kid-the-sports-worlds-tallest-competitors).

separating the two players' benches.<sup>37</sup> Though Pacioretty suffered a severe concussion and broken neck,<sup>38</sup> and though he missed the rest of the season and playoffs as a direct result of the injuries sustained from the hit,<sup>39</sup> the NHL did not issue any supplementary discipline against Chara.<sup>40</sup> As a *New York Times* columnist noted, for those who watched a motionless Pacioretty lay on the ice and “wonder[ed] if Pacioretty was still alive after this particular hit,” the decision to not suspend Chara “was not acceptable.”<sup>41</sup> Indeed, Michael Farber of *Sports Illustrated* charged that this decision demonstrated the NHL had lost its “moral compass,”<sup>42</sup> while Andrew Cohen suggested in *The Atlantic* that the league’s excessive non-enforcement has drastically expanded the limits of acceptable conduct to the point that it will lead to the on-ice loss of an NHL player’s life.<sup>43</sup>

In short, the “let ‘em play” attitude has serious consequences, including endangering the well-being of the sport and the players within it, and undermining the hallmarks of an orderly system of rules, such as consistency, predictability, evenhandedness, and legitimacy.

## II. TEMPORAL VARIANCE AND THE WARTIME CONSTITUTION

The concept that certain temporal contexts call for different, specifically more relaxed, enforcement of rules is not foreign to legal theory. In particular, wartime moments are generally accompanied by arguments that the Constitution should not restrict the conduct of the wartime executive as it would in times of relative peace.

The Supreme Court has repeatedly rejected claims that judges should enforce a lighter version of the Constitution, reaffirming the rightful place of the Constitution as a limitation on the actions of the wartime executive.<sup>44</sup> In wake of the Civil War, for example, the Court stated

<sup>37</sup> See Fel0096, *Zdeno Chara Hits Max Pacioretty (March 8 2011)*, YOUTUBE (Mar. 8, 2011), <http://www.youtube.com/watch?v=mx2AxYxgqRA> (clip from RDS’s coverage of the March 8, 2011 game between the Boston Bruins and the Montreal Canadiens).

<sup>38</sup> Kevin Mio, *Fractured Vertebra for Pacioretty*, HOCKEY INSIDE/OUT (Mar. 9, 2011, 12:19 PM), <http://www.hockeyinsideout.com/news/fractured-vertebra-for-pacioretty>.

<sup>39</sup> See Dave Stubbs, *Montreal Canadiens’ Max Pacioretty Anxious to Get Back into Game Action*, MONTREAL GAZETTE (Sept. 14, 2011), <http://www.montrealgazette.com/news/Montreal+Canadiens+Pacioretty+anxious+back+into+game+action/5403793/story.html#ixzz1aKoxtsAQ>.

<sup>40</sup> See Jeff Z. Klein & Ken Belson, *N.H.L. Faces New Scrutiny for Hockey Violence*, N.Y. TIMES (Mar. 10, 2011), <http://www.nytimes.com/2011/03/11/sports/hockey/11hits.html>. The importance of supplementary discipline in the entire system of rules in the NHL is made clear by former longtime NHL official Kerry Fraser. He writes of the 2011 playoffs that the “inconsistency with which supplementary discipline was applied . . . creat[ed] confusion for players, officials and the hockey world in general as to what was deemed acceptable. This general confusion adversely affected the overall standard of enforcement applied by the referees throughout the playoffs.” Kerry Fraser, *Ready for a New Season with Shanahan on Board*, TSN (Oct. 10, 2011, 9:11 PM), <http://www.tsn.ca/nhl/story/?id=377834>. “The end result of all this,” Fraser observes, “was that players were being unnecessarily subjected to injury; often serious in nature.” *Id.*

<sup>41</sup> Lynn Zinser, *The N.H.L. Shrugs*, N.Y. TIMES (Mar. 11, 2011), <http://www.nytimes.com/2011/03/12/sports/12leading.html>.

<sup>42</sup> Michael Farber, *NHL Loses Its Moral Compass in the Chara–Pacioretty Incident*, SPORTS ILLUSTRATED (Mar. 10, 2011, 2:48 PM), [http://sportsillustrated.cnn.com/2011/writers/michael\\_farber/03/09/max.pacioretty.zdeno.chara.hit/index.html#ixzz1aKtHlkuU](http://sportsillustrated.cnn.com/2011/writers/michael_farber/03/09/max.pacioretty.zdeno.chara.hit/index.html#ixzz1aKtHlkuU).

<sup>43</sup> Andrew Cohen, *Woe, Canada: The NHL’s Slide into Big Trouble*, THE ATLANTIC (Mar. 11, 2011, 2:40 PM), <http://www.theatlantic.com/entertainment/archive/2011/03/woe-canada-the-nhls-slide-into-big-trouble/72309/>.

that “[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”<sup>45</sup> Similarly, in the aftermath of 9/11, the Court stated that a time of war is not “a blank check” for the executive.<sup>46</sup>

The defects of an opposite, hands-off judicial approach to the wartime executive are not dissimilar to those which attend temporal variance in hockey.<sup>47</sup> The wartime executive unrestrained by judicial review is effectively free and undeterred to engage in problematic behavior, much like a hockey player set loose by officials.<sup>48</sup> The Court’s active participation in this process, that is its affirmative decision to not check the wartime executive, undermines the credibility of the judicial institution—a harm that extends long past the expiration of the expedient circumstances ostensibly justifying the excessive deference.<sup>49</sup>

This is not to say that context does not matter, nor is it to say that rules should be applied blindly without regard to the climate within which those rules are applied. A rigid approach in which all cars traveling over fifty-five miles per hour are ticketed for speeding, for example, likely would be intolerable. This is to suggest, by contrast, that any argument that rules should not be enforced at the end of close sporting matches, or that the law is silent in times of war, present real difficulties. Those difficulties should be honestly appraised before we adopt—in the academic arena, the hockey rink, or courts—the view that time alone trumps rules or the rule of law.

#### CONCLUDING THOUGHTS

I would like to thank Professor Berman for penning the article giving rise to this response and for catalyzing renewed and robust interest in the interplay of professional sports and the rule of law. I have attempted, in good faith, to examine his article and to suggest additional

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<sup>44</sup> See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) (“Security subsists, too, in fidelity to freedom’s first principles.”); *id.* at 798 (“The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (“It is during our most challenging and uncertain moments . . . that we must preserve our commitment at home to the principles for which we fight abroad.”); *id.* at 535 (rejecting “the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts” in a state of war); *United States v. Robel*, 389 U.S. 258, 264 (1967) (“It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”); *Ex parte Quirin*, 317 U.S. 1, 6 (1942) (affirming “the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty”); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934) (“[E]ven the war power does not remove constitutional limitations safeguarding essential liberties”). *But see* *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (upholding the internment of individuals of Japanese ancestry on the West Coast in deference to the government’s claims of military necessity).

<sup>45</sup> *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866).

<sup>46</sup> *Hamdi*, 542 U.S. at 536 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

<sup>47</sup> Cf. Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 42 SETON HALL L. REV. (forthcoming Dec. 2011), available at <http://ssrn.com/abstract=1838402> (suggesting that four judges on the D.C. Circuit are effectively fighting the Supreme Court’s decision granting habeas rights to detainees held in Guantanamo, in contrast to their colleagues’ rulings on the bench).

<sup>48</sup> See, e.g., *Korematsu*, 323 U.S. at 223–24.

<sup>49</sup> See *id.* at 245–46 (Jackson, J., dissenting) (“[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.”).



considerations that may give readers pause as to the benefits of temporal variance in sports or as a principle to be replicated in our system of laws.