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What the Knicks Debacle of '97 Can Teach Students About the Nature of Rules

Robert A. Hillman

I have been a fan of the New York Knicks basketball team for more than thirty years. In fact, you can call me the Spike Lee of law professors.¹ So it was with a great deal of consternation that I saw my team self-destruct in the fifth game of the playoff series with the Miami Heat, which the Knicks were leading three games to one. Several of the Knicks left the bench to join an altercation after P. J. Brown of the Heat, infuriated by Knick Charlie Ward's low box out² after a free throw, picked Ward up, turned him upside down, and threw him to the floor. Apparently none of the Knicks who left the bench threw a punch. Instead, they attempted to help break up the fight between Ward, Brown, and Knick John Wallace, who had joined the fray from the court. Nevertheless, the players who left the bench—Patrick Ewing, Allan Houston, Larry Johnson, and John Starks—were each suspended by the NBA for one game. Ewing and Houston served their suspensions in game six, and Johnson and Starks in game seven.³ Miami won games five through seven and won the series, four games to three. The NBA's harshest playoff penalty in history⁴ was imposed pursuant to an NBA rule that states: "During an altercation, all players not

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1. Spike Lee, the movie director, attends all the Knicks' games. His boisterous cheering often has the unfortunate effect of inspiring the opposition, such as Reggie Miller of the Indiana Pacers, to play better and defeat the Knicks.
2. A box out is a block with a player's body that prevents the opposing player from getting a rebound. A rebound is— Wait a minute. I'm going to assume *some* knowledge on the part of the reader.
3. The NBA ordered the players to serve their suspensions in successive games so that the Knicks would have nine players eligible for each game. See NBA Rule No. 12-A § IX(c). (The rules are in NBA Operations Dep't, Official Rules of the National Basketball Association 1996-97.) Ward also served a one-game suspension in game six for fighting. Miami's Brown served a two-game suspension for the same reason.
4. Judge Refuses to Stop Suspensions; Knicks Must Sit (last modified May 16, 1997) <<http://www.sportserver.com/newsroom/ap/bkb/1997/nba/nyk/feat/archive/051697/nyk33238.html>>.

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participating in the game must remain in the immediate vicinity of their bench. Violators will be suspended, without pay, for a minimum of one game and fined up to \$20,000.”⁵

The Knicks were severely undermanned in games six and seven as a result of the suspensions, and there can be little doubt that enforcement of the rule cost them the series. (I told you I was a Knicks fan.) Rather than dwell on my misery and rather than stubbornly argue that the Knicks were treated unfairly on the merits, I want to turn my energies to a perhaps more constructive goal. It strikes me that the NBA rule and its application to this incident shed some light on the problem of administering legal rules in a society, and that a law teacher can use the example to teach the nature of rules.⁶ (No kidding.) What can students learn?⁷

Point 1: Whether a legal system promulgates a rule or a standard can change the result of a case.

A working definition of *rule* and *standard* is elusive because each takes many different forms with different attributes. Moreover, in reality our laws are not often starkly rule-like or standard-like, but take on characteristics of both.⁸ For the purposes of a class discussion, however, the teacher could present the

5. NBA Rule No. 12-A § IX(c). The rule also requires the suspension to commence before the next game. *Id.* The four suspended Knicks sought a temporary restraining order against the NBA to block the suspensions. The NBA Players Association supported the request, arguing that the NBA imposed the rule unilaterally on the players. U.S. District Judge Jed S. Rakoff refused to grant the order, ruling that Commissioner David Stern had sole and final authority to discipline players for their conduct on the court. See *Judge Refuses to Stop Suspensions; Knicks Must Sit*, *supra* note 4.
6. I am not insensitive to the concern that using a basketball incident for pedagogical purposes may appeal mainly to male students. But I question the factual basis for the concern. The NBA has a wide following among women, with female fans now constituting 38 percent of the television audience and 40 percent of the fans in attendance at NBA games. Electronic Letter from Jeffrey A. Mishkin, executive vice president & chief legal officer, National Basketball Association, July 17, 1997 (on file with author). At any rate, I suspect the benefit of supplying some examples from current events in the world of sports exceeds the cost, so long as the instructor is careful to supply nonsports examples too.
7. The premise of this analysis is that the NBA, or any large-scale organization, is governed by a system of rules and principles that is a microcosm of our legal system. There are obvious problems with this, however. The bottom line for the NBA—as a business—is to maximize profits. The ultimate goal of our legal system is to maximize the welfare of those it governs, but welfare should be viewed more expansively than simply increasing monetary wealth. For example, welfare may be increased by a legal system that is perceived to be fair and certain. Still, an organization such as the NBA will also strive for fairness and predictability because these values will increase profits in the long term. Anyway, I feel like writing about the Knicks.
 The use of examples in legal analysis from the world of sports is, of course, not novel. For example, quite a few legal analysts became interested in baseball’s George-Brett-pine-tar incident. See, e.g., Jared Tobin Finkelstein, Commentary, *In re Brett: The Sticky Problem of Statutory Construction*, 52 *Fordham L. Rev.* 430 (1983); Donald J. Rapson, A “Home Run” Application of Established Principles of Statutory Construction: U.C.C. Analogies, 5 *Cardozo L. Rev.* 441 (1984); Joseph Lukinsky, *Law in Education: A Reminiscence with Some Footnotes to Robert Cover’s Nomos and Narrative*, 96 *Yale L.J.* 1836, 1855 (1987) (“The arguments [concerning the pine tar incident] constituted perhaps the most widespread *popular* legal debate in American history.”).
8. I can’t resist a plug. See Robert A. Hillman, *The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law* 168–70 (Dordrecht, 1997).

following helpful definitions recently set forth in a perceptive law review article. Rules determine in advance what the parties subject to them can and cannot do. The task of the entity applying the rule, whether it is a court, administrative agency, or organization, is to determine only whether the facts place the actors within the rule. Standards, on the other hand, allow the decision-maker more leeway to determine permissible conduct as well as to evaluate the facts.⁹

The NBA legislation on players remaining in the vicinity of the bench is a rule. It requires the NBA to determine only whether a player has left the bench area during a fight. If so, the rule applies and the player must be suspended. But the NBA could have adopted a standard to govern the problem. The standard could have said, for example, that a player on the bench must at all times act in a sportsmanlike manner during an altercation on the court or be subject to disciplinary action, including suspension.

The NBA can justify in several ways its creation of a rule to govern the problem of players leaving the bench area during a fight. First, the rule requires the NBA to treat all incidents alike, thereby eliminating any actual or apparent bias or arbitrariness.¹⁰ For example, consistent application of the rule avoids the issue of whether the NBA suspended a player in one incident and not a player in another because the latter incident involved a team in a more profitable market or involved a more popular player. By enacting a rule that precludes consideration of the problem on a case-by-case basis, the NBA also sends a powerful and clear message to the players that the NBA will not countenance leaving the bench area under any circumstances.¹¹ Players are put on notice that they must control their conduct or suffer the consequences in a situation (fighting) where law and order especially may be called for.¹² Further, application of a rule decreases the cost of and time for deciding a controversy.¹³ The NBA was able to act quickly and decisively in part because the rule left little room for deliberation and discretion on the part of the NBA inner circle.¹⁴ An advantageous byproduct of the application of rules is that

9. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557, 560 (1992).

10. See Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 *Harv. L. Rev.* 22, 62 (1992).

11. See *id.* at 62–63. David Stern, the commissioner of the NBA, commented on the NBA's response to the Knicks incident: "I think it is our job to set rules." Further, "I think when we look back at this we'll say . . . that people won't go out on the court. . . . We need people to understand and teams to understand and coaches to provide for it." Commissioner Stern Says Suspending Knicks Was the Right Move (last modified May 18, 1997) <<http://www.sportserver.com/newsroom/ap/bkb/1997/nba/nyk/feat/archive/051897/nyk47877.html>>.

12. Responding to the argument that the Knicks who left the bench were peacemakers, Stern said: "That question misses the point. . . . You can't have a permissive situation where you say to people: 'Oh just come on out' and then we'll decide peacemaker or participant." Commissioner Stern Says Suspending Knicks Was the Right Move, *supra* note 11.

13. See Sullivan, *supra* note 10, at 63.

14. At the hearing for a temporary restraining order, NBA lawyer Howard Ganz argued that professional baseball's handling of Roberto Alomar's spitting on an umpire (Alomar was allowed to participate in the playoffs and served his suspension at the beginning of the following season) showed "baseball's inability to take control of it and deal with it immediately to preserve . . . the integrity of the game." Judge Refuses to Stop Suspensions; Knicks Must Sit, *supra* note 4.

players will generally pay closer attention to all of the governing norms and the public will accept outcomes more readily if the norms are clear and predictable.¹⁵

The principal problems with the use of rules are also illustrated by the Knicks misadventure. Strict application of the rule against leaving the bench precluded the NBA from appraising the circumstances of the Knicks conduct and considering the equities.¹⁶ The NBA rule did not allow for consideration of the particular provocation that led to the melee, how far the players strayed from the bench,¹⁷ what they did when they left the bench, or whether the penalty of suspension in the context was too severe. By precluding an examination of mitigating circumstances, application of rules can appear harsh and arbitrary and lead to disrespect for "the law" by both the players and fans. Application of the NBA rule also precluded a cost-benefit analysis of whether to suspend the players: decisive action possibly diminished the potential for embarrassing players' riots in the future and increased respect for the NBA in attempting to deal firmly with such problems. But what about the possible costs to the NBA of appearing arbitrary and unfair to many fans, and of losing the likely increased revenue that would have been generated and the augmented popularity of professional basketball that might have resulted had the Knicks won the Miami series and faced their archrivals, the Chicago Bulls?

Actually, I suspect that the NBA decision-makers did engage in such a cost-benefit analysis. But having adopted a rule that prescribed a result in this situation, the NBA had to add an additional cost to the equation of refusing to suspend the Knick players, namely the cost of undermining its own rule. Such a decision would have negated all the benefits of creating a rule in the first place and then some (because the NBA would have looked foolish in ignoring its own rule), including certainty, respect for law, and influence on conduct. Such costs in the NBA's eyes probably overwhelmed the perceived benefits of allowing the wandering Knicks to continue in the series.

Probably because I am a Knicks addict, I believe the NBA's decision to suspend the Knicks was unfortunate because it precluded competition from determining the result of the playoffs in a situation where the provocation was quite stark and the players' actions relatively restrained.¹⁸ (What does the class think?) Reluctantly, however, I must agree that the NBA rule clearly applied in the circumstances (except perhaps as to Ewing, as I discuss later) and that the NBA was correct in applying it. Thus the NBA's mistake, in my view, was in adopting a rule rather than a standard in the first place, which boxed it in.¹⁹

15. See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in the Law and in Life* 139 (New York, 1991).

16. See Sullivan, *supra* note 10, at 66.

17. Patrick Ewing wandered only a few feet off the bench and did not join the fracas. Mike Wise, *5 Knicks Barred for Melee; 3 to Miss Game 6*, N.Y. Times, May 16, 1997, at A1.

18. More from David Stern: "We would certainly like to have it decided only on matters related to the court." Commissioner Stern Says Suspending Knicks Was the Right Move, *supra* note 11. I assume Stern meant the *basketball* court.

19. No, I don't mean a box out. See *supra* note 2. Interestingly, the NBA has discretion as to whether to suspend players for virtually all other misconduct. See NBA Rule No. 12-A §§ VII(c), IX(b) (for fighting or unsportsmanlike conduct, a "suspension may be imposed . . . by the Commissioner at his sole discretion.").

But it is important to repeat to the class that adopting a rule was a mistake only if one believes as I do that the cost of the Knick resolution and other likely suboptimal decisions under the rule exceeds the benefit of having the rule in the first place. At any rate, it is safe to say that the NBA's determination to adopt a rule and not a standard—to opt for certainty over flexibility—had a significant, if not determinative, effect on the NBA's response to the Knicks' outburst.

Point 2: Rules are relatively determinate.

This point follows from the first (or perhaps it is an element of the first). If I am right that the NBA followed its rule in large part because it believed it had no other choice, then the Knicks episode illustrates to the class that rules matter. This deflects one of the basic criticisms of rules in a legal system: that they are highly manipulable and indeterminate.²⁰ The class discussion can now move to this issue.

Rules are sometimes criticized on the basis of their abundance. The decision-maker can apply a rule or, if it does not like that result, it can find another rule that prescribes the opposite result (a counterrule).²¹ There is surely some truth to this criticism. In contract law, for example, courts may not cite the inadequacy of consideration to bar enforcement of an exchange because of the "subjectivity of value."²² Nevertheless, courts will not enforce unconscionable exchanges, which in practice leads courts to the question of adequacy of consideration.²³

The rule-counterrule criticism is overdone, however, because it ignores the distinction between a counterrule and an *exception* to a rule that applies only in limited (and, for the most part, identifiable) circumstances. For example, courts cannot apply the unconscionability doctrine arbitrarily. The exchange must be extraordinarily one-sided and generally demonstrate formation problems as well.²⁴ But this is not the place to elaborate on this point because there is no counterrule to the NBA rule against leaving the bench area. Many legal rules also lack such a partner. Rules that regulate conduct to protect the person and property of others, such as those criminalizing thievery or creating liability for intentional misconduct, come to mind.

Somewhat related to the first criticism of rules is the point that general equity and fairness are always in a decision-maker's arsenal to allow for an end run²⁵ around a rule. For example, suppose that, after slamming Ward to the

20. See, e.g., Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *Yale L.J.* 997, 1006–07 (1985).

21. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685, 1700 (1976).

22. See Morton J. Horwitz, *The Transformation of American Law, 1780–1860*, at 181 (Cambridge, Mass., 1977); see also Hillman, *supra* note 8, at 197–200.

23. See Mark Kelman, *A Guide to Critical Legal Studies* 19 (Cambridge, Mass., 1987).

24. See Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 *U. Pa. L. Rev.* 485 (1967).

25. Pardon the football expression. I couldn't think of one from basketball. (Backdoor cut? Shake and bake?)

floor, Brown had pulled out a knife hidden under his baggy shorts and was about to plunge it into Ward's heart.²⁶ Although the rule against leaving the bench area literally would have applied even in this situation, I doubt that the NBA would have suspended the Knicks if they had left the bench to save Ward.²⁷ The simple response to this point, however, is that an incident such as a player's knife wielding did not occur. Alas, the instant occasion for invoking the rule appeared well within its purpose despite the attempt at distinctions by the Knick players. The NBA properly believed that the application of equity would have been perceived as wrongly circumventing an apposite rule.

Critics of rules also believe that a rule's language inevitably will be opaque or ambiguous, thereby allowing for "interpretations" that circumvent the rule. Again there is more than a grain of truth here. The NBA rule itself illustrates the point. Exactly where is the "immediate vicinity of the bench"? What constitutes an *altercation*? In this instance, the language of the rule was clear enough so that it is difficult to mount an argument for the Knicks under the actual circumstances. Interestingly, from what has been reported, it appears that no player, nor the Knicks' management, nor lawyers for the players' union appealing in court the NBA's decision to suspend the players made an argument based on these imprecisions in the language.²⁸ They did not do so because they believed a reasonable interpreter would conclude that the language of the rule taken as a whole clearly applied to the situation. Most rules in our legal system also can be picked apart in the abstract but still seem to apply coherently in most situations.

Now for a final and perhaps more controversial proposition to present to the class.

Point 3: In hard cases, the adjudicator should focus on reaching a fair result and discount a forward-looking instrumental analysis.

I have argued that rules matter and that they are generally determinate. Still, I acknowledge that there will always be hard cases in which reasonable minds can differ on such questions as whether the rule applies, what the rule means, and whether equity should override the rule. Try as I might, I have difficulty placing most of the Knicks who left the bench within one of these

26. Brown seemed that angry and his pants that baggy. After I wrote this essay (I swear), my wife showed me the *New Yorker* containing Ronald Dworkin's brief comments on the Knicks fiasco. Asking Around, *New Yorker*, June 2, 1997, at 35. Dworkin also imagined a knife-wielding assailant subdued by Ewing, who, Dworkin supposed, would then be treated more mercifully by the NBA. I am tempted to say that great minds think alike, but I am uncertain of Dworkin's reputation.
27. For an illustration of this point, see *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889) ("[A]ll laws . . . may be controlled in their operation and effect by general, fundamental maxims of the common law. . . . These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.").
28. Knicks coach Jeff Van Gundy said: "By the letter of the rule they're correct, it's the correct interpretation." Knicks Place Blame on Heat's Brown for Melee (last updated May 15, 1997) <<http://www.sportserver.com/newsroom/ap/bkb/1997/nba/nyk/feat/archive/051597/nyk23771.html>>.

categories. Let's suppose, however, that the controversy involved only Ewing and that, as reported, he strayed only a small distance from the "bench area" to observe the donnybrook. In other words, Ewing's conduct was at most a borderline infraction.

In this instance the NBA, as adjudicator, should still start with the rule and engage in a cost-benefit policy analysis such as that described above. But when the rule's purpose, such as maintaining law and order, does not clearly extend to the incident at issue, the benefit of applying the rule becomes much more problematic. In addition, without a rule to guide the way, the shortcomings of a cost-benefit analysis are also starkly exposed. Neither the NBA nor second-guessers like me can know with any degree of certainty whether the net benefit to the league (if any) of a decision to suspend Ewing would exceed the net benefit to the league (if any) of allowing an exception. This is because the decision-maker lacks a coherent method for determining what factors should be included in the decision-making process—for example, should Ewing's long-standing dedication to the Knicks and to the league be considered? The decision-maker also lacks an objective scale for weighing the various factors deemed pertinent to the decision, such as the value of consistency and applying the letter of the law on the one hand, and the benefit of allowing the Knicks to challenge Miami with full strength (O.K., with Ewing) on the other.²⁹ Even with the benefit of hindsight, and even if the NBA continues to thrive, whether the NBA's decision on the actual facts was optimal remains and will remain in doubt. After all, we cannot know whether the NBA would be doing even better had it reached a different conclusion.

If the rule does not clearly reach the case, and if cost-benefit analysis is ultimately indeterminate, how should the NBA decide a hard case? I believe the NBA should aim to reach a result that is fair to the players and teams involved. Issues such as the degree of provocation, the distance a player strayed from the bench, his role in the melee, and the cruelty of a suspension to the player and his team, displace the NBA's bottom line as the principal determinants. Of course, this quest for fairness is itself often unpredictable and subjective and, if abused, could compromise the effectiveness of rules.³⁰ But the NBA should rarely resort to this methodology because its rules will usually clearly govern. And when the NBA does focus on fairness, in many instances it will get it right. In addition, attempting to be fair enhances important values such as respect for the legal system and acceptance of results. Seeking a fair result therefore may even be more important than the ultimate

29. See Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 Mich. L. Rev. 2075, 2092–93 (1993); Girardeau A. Spann, *Pure Politics,* 88 Mich. L. Rev. 1971, 1989 (1990).

30. I have in mind something like the principle of "individualized justice" that allows prosecutors and judges to enjoy respectively some discretion in the decision to prosecute or in the severity of a sentence: "Individualized treatment of offenders, based upon the circumstances of the particular case, has long been recognized in sentencing, and it is argued that such individualized treatment is equally appropriate at the charging stage so as to relieve deserving defendants of even the stigma of prosecution." 2 Wayne R. LaFare & Jerold H. Israel, *Criminal Procedure*, § 13.2, at 162 (St. Paul, 1984).

decision (unless, of course, you are Patrick Ewing, or a member or a fan of the opposing teams).

The Knicks incident was different from those faced by courts in that the NBA was both the law maker and the law applier. I would reach the same conclusion about the limits of cost-benefit analysis and the importance of fairness with even greater enthusiasm when a court of law confronts a case in which applicable rules appear to apply not at all or only marginally. The drawbacks to judicial policy making are well rehearsed. In addition to the argument made above concerning the lack of a principled strategy for selecting and weighing pertinent criteria, these limitations include the lack of resources and time to evaluate the ramifications of decisions, the danger of overgeneralization about the role and responsibility of various social actors and groups, and the hazard of incorrectly appraising community standards.³¹ For these reasons a court in a hard case is better off attempting to achieve a fair result, with all the pitfalls that entails.

* * * * *

The Knicks incident, presented in class, should acquaint or remind students of the many issues involving the use of rules in a legal system. Of course, nothing I have said here will resolve the rules-standards debate or bring back the Knicks for another shot at Miami.

31. See, e.g., Arthur A. Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. Pitt. L. Rev. 349, 356–58 (1970); Alan Schwartz, *Comments on Professor Harrison's Paper*, 1988 Ann. Surv. Am. L. 115, 120.