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ESSAY

ASIDE THE *ASIDE*: THE *TRUE* PRECEDENT OF BASEBALL IN LAW

LAW, THE RESIDUE OF LUCK—OR, WHO'S *NOT* ON FIRST?

ELDON L. HAM

The Infield Fly Rule¹ evolved to counter a baseball aberration and level the playing field,² thus evoking many similarities to law, especially the ever-evolving common law. In baseball, as in free market economics and in law, the chip-on-the-shoulder, tobacco-spittin' object of competition is to win, yet the Infield Fly and other rules are seemingly contrived *against* winning—depending, at least, upon one's perspective. Ergo, is win-but-don't-win baseball a hopeless oxymoron, a mere fictional game—an “exhibition” as Justice Oliver Wendell Holmes, Jr. put it³—where white rabbits and mad hatters abound? No, that would be Congress, of course, and yet that is precisely the point of the *common* law.⁴

THE EVOLUTION OF LAW AND LUCK

The common law is a function of need, a Darwinian evolution of logic and principle that rises like *Erie v. Tompkins*⁵ from the rubbish of human design, sort of a “lucky” Keynes-like [John Maynard, not “L.”] solution that invents and reinvents itself, validating one of the great baseball tenets so duly observed by one of the game's genuine thinkers, Branch Rickey: “Luck is the residue of design.”⁶ In one fell swoop, Rickey, who had already inspired both

1. See Endnote 1 for the entire official text of the Infield Fly Rule.

2. Pundigrions (*i.e.*, “puns”—for non-pundits) are an essential element to American baseball and culture, and therefore law. (If language influences culture, can law not be far behind?)

3. See *Fed. Base Ball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208 (1922).

4. “No man's life, liberty or property is safe while Congress is in session.” *Read My Lips*, <http://www.geocities.com/scattershotbyrb/comingsoon/readmylips.html> (quoting Will Rogers).

5. Citation omitted, mostly because hardly anyone has read *Erie* since law school, and anyone who hasn't would not likely start now.

6. Baseball Almanac: The “Official” Baseball History Site, *Baseball Quotes: From and About*,

the baseball farm system and racial integration in the major leagues, had also stumbled upon the true “precedent” of not just baseball the game, but of baseball the metaphor: Make your own breaks.

Baseball is a throwback to the American heritage experience, a frontier moxie that spurred immigrants to Plymouth Rock, Ellis Island and beyond. Baseball is about diving headfirst into third base in a cloud of dust and reckless determination only to be tagged out by a deranged third baseman,⁷ or as one anonymous eight-year-old put it, “I feel closest to God . . . after I’m rounding second base after I hit a double.”⁸ It is what happens next that counts, of course. Law, as is life, is about dusting off, licking wounds and diving in again, for often such relentless trying is the only means to produce the desired result, later sometimes dismissed as “lucky” by myopic hindsight to avoid the true caldron of luck: effort.⁹ Next time the catcher may be expecting the headfirst charge and could therefore be unduly distracted; maybe the jumpy catcher will throw to third when he should not; or perhaps the third baseman will choke, freeze or miss the tag. In other words, by exploding for third once, the base-runner has changed the playing field and influenced the future by causing all fielders to think too much, especially third basemen.

PRECEDENT FOR THE *ASIDE* AS PRECEDENT

Indeed, it was Rickey-esq luck that cast the first grand spotlight on *Aside: The Common Law Origins of the Infield Fly Rule*,¹⁰ the inspiration of youthful author William Stevens published by the *University of Pennsylvania Law Review* in 1975 with no by-line. It was also lucky that Fifth Circuit Judge John R. Brown¹¹ chose to ferret out the author’s identity so he could be properly quoted in the written opinion for *Kessler v. Pennsylvania National*

<http://www.baseball-almanac.com/quotes/quobr.shtml> (last visited Apr. 11, 2003).

7. This is a non-oxymoron; in other words, a classic redundancy: Those who play third base may necessarily be logic-challenged; otherwise they would likely play first base, or at least anywhere but third. Ergo, who’s not on first would, first and foremost, be, well, third basemen, although dizzy catchers would not be far behind—to wit: one of the greatest of all time, Yogi Berra, who, parenthetically, may have actually invented the modern day oxymoron with his brand of deep observations, some soaked in irony, one of the most appropriate being, “I really didn’t say everything I said,” which he did say, at least once, as reported by *The Sporting News* on March 17, 1986.

8. See David Heller, *The Children of God*, PSYCHOLOGY TODAY, Dec. 1985, at 22, 27.

9. The efforts of Clarence Darrow, William Kunstler, and Johnny Cochran, among many others, come to mind.

10. William Stevens, *Aside: The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975).

11. See Robert M. Jarvis & Phyllis Coleman, *The Uncommon Origins of the ‘Common Law Origins of the Infield Fly Rule,’* 19 ENT. & SPORTS LAW. 17, 19 (2002).

Mutual Insurance Co.,¹² thus duly setting “precedent” for the *Aside* as precedent. But it was *not* luck that motivated Stevens the author to write the piece in the first place; it was inspiration and motivation, the “design” part of the luck-design truism of baseball, life and law.

Still, even the original *Aside* was hardly the genesis of baseball writing in American law. That genre is at least as old as 1902’s *Philadelphia Ball Club v. Lajoie*,¹³ which temporarily blocked Ty Cobb rival Napoleon Lajoie from switching leagues to jump start a rebellious new baseball consortium, the American League,¹⁴ which he eventually did anyway after finding another court in another state to spring him loose, thus perfecting the not-so-subtle art of forum shopping. In supporting its resistance to baseball free agency, the *Lajoie* (pronounced “la-zhwah”) court may have first coined the term “star” as it relates to ascending key players, making this awkward but prescient observation about the defendant, a .339 lifetime hitter soon to become the first second baseman in the Hall of Fame: “He may not be the sun in the baseball firmament, but he is certainly a bright particular star.”¹⁵ In other words, his services were sufficiently unique to warrant injunctive relief. Baseball as precedent in law received a boost from *American League Baseball Club of Chicago v. Chase*,¹⁶ a 1914 opinion by a lower court judge in upstate New York who preempted and possibly inspired the 1922 baseball antitrust exemption when he wrote, “Baseball is an amusement, a sport, a game . . . [that] is not a commodity . . . subject to the regulation of Congress on the theory that it is interstate commerce.”¹⁷ The court refused to interfere with Chase’s right to earn a livelihood, but in so doing it set in motion a chain of events that led Chase and destiny directly to the Chicago Black Sox of 1919.¹⁸

Baseball’s most infamous opinion, the Supreme Court’s 1922 *Federal Baseball Club of Baltimore v. National League*,¹⁹ took baseball as precedent to uncharted heights in finding baseball not to be a business in interstate

12. 531 F.2d 248, 249 n.3 (5th Cir. 1976).

13. 51 A. 973 (1902).

14. *Id.*

15. *Id.* at 974.

16. 149 N.Y.S. 6 (N.Y. Sup. Ct. 1914).

17. *Id.* at 17.

18. Although the *Chase* court found Chase himself to be “a special, unique, and extraordinary baseball player,” baseball historian Harold Seymour was less kind and notably more accurate, labeling him a “malignant genius.” Chase, as it happens, was the indicted intermediary between the 1919 White Sox players and the gamblers who brought down the World Series. For these and certain other references to law and history, the author is grateful to PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW: CASES, MATERIALS AND PROBLEMS* (2d ed. 1998).

19. 259 U.S. 200 (1922). In finding baseball not a business in interstate commerce, the Holmes opinion was way “off base” and, therefore, *not* on first—or any other base.

commerce and thus exempting it from burgeoning federal antitrust laws.²⁰ Notwithstanding its broad shadow cast over history, the opinion is a remarkably short piece authored by Oliver Wendell Holmes, Jr., but no doubt influenced by Justice William Howard Taft, the former president and baseball fanatic who invented both the seventh inning stretch and the symbolic act of presidents tossing each season's ceremonial first pitch. The socio-legal genre of baseball precedent as a fabric of law was boosted again in *Flood v. Kuhn*²¹ only three years before the *Aside* publication. The 1972 *Flood* opinion refused to overturn *Federal Baseball* and features over 700 astonishing words of editorial ranting in the text with still more in the footnotes, all at the hand of Justice Blackmun, which begins, "It is a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's Elysian Fields June 19, 1846 . . ." ²² Blackmun not only proceeded to affirm baseball's enigmatic antitrust exemption, then precisely fifty years old, but he saw fit to name every single one of his favorite baseball icons, all eighty-eight of them from Ruth and Cobb to Paige, Gehrig, Grove, Greenberg, Three-Finger Brown, and a three-for-one triumvirate of American baseball poetry: Tinker to Evers to Chance.²³

BASEBALL AS LAW

Baseball in law may be a genre of sorts, but baseball *as* law, well, *that* is precedent. Consider the Holmes opinion in the *Federal Baseball* antitrust exemption, which at 846 words²⁴ was barely longer than Blackmun's self-indulgent baseball diatribe, yet its irrational "baseball is not a business in interstate commerce"²⁵ conclusion may have influenced more baseball history than any other decision short of the Kenesaw Landis all-white edict.²⁶ Even so, the antitrust exemption outlasted baseball segregation, the latter ending soon after the death of Landis in 1944 when Branch Rickey exorcised the ghost of Landis with the signing of Jack Roosevelt Robinson the following year (not 1947 as commonly believed, which was when Jackie Robinson finally made it to the majors).²⁷

20. *Id.*

21. 407 U.S. 258 (1972).

22. *Id.* at 260-61.

23. *Id.* at 260-64.

24. Give or take.

25. 259 U.S. at 208-09.

26. WEILER & ROBERTS, *supra* note 18, at 73.

27. Nineteen hundred and forty-five was also the year that debuted the Abbott and Costello classic play on words and baseball, "Who's on First?" It was also the last time the Chicago Cubs

Therein may lie the residue legacy of the national pastime, for baseball is not just a footnote to history,²⁸ baseball *is* history. It is law, it is anarchy, it *is* America. Jackie Robinson was not even the first black player in the major leagues—that distinction belongs to Moses Fleetwood Walker who caught for the Toledo Blue Stockings on May 1, 1884²⁹—but he was the most significant, integrating the major leagues in an era when segregation was not just practiced nationwide, it was the expected norm. Yes, baseball has an ugly legacy of racism reflecting periods of a pervasive national epidemic of segregation. Significantly, though, major league baseball became integrated seven full years *before* 1954's landmark *Brown v. Board of Education* and a remarkable seventeen years ahead of Lyndon Johnson's 1964 civil rights legislation. *That* is precedent.³⁰

Moreover, only baseball could muster the supreme [court] power to defeat the impregnable Sherman Act antitrust laws of 1890, described by Justice Marshall as the “Magna Carta of free enterprise,”³¹ thus singularly consummating a feat of such bold-faced anarchy that not even Rockefeller's Standard Oil, Carnegie's steel, IBM, or Bill Gates' Microsoft could match it. With that, baseball's influence on history became legendary. Although baseball did not invent indentured servitude, it certainly perfected it with the almighty reserve clause that captured players and lined owner pockets for decades before an arbitrator took the time to actually read the clause in 1976, discovering to everyone's amazement, perhaps including his own, that the reserve clause did not last into perpetuity but, by its own words, was simply a one-time renewal option, freeing ballplayers and energizing the Major League Baseball Players Association.³² Still further, baseball the private enterprise (pastime?) has been judicially deemed a state actor for purposes of certain

were in the World Series which, of course, they lost to the Tigers in seven games—not so much because of the Tigers' superstar Hank Greenberg, but possibly due to the infamous Billy Goat Curse, a hex imposed by Billy Goat Tavern owner Billy Sianis when he was denied entry to Wrigley Field with his four-hoofed date, a rather smelly but decidedly vindictive goat.

28. A metaphorical, and possibly irresponsible fictional footnote, which, by definition, neither requires nor even has a footnote, as opposed to a real footnote, which must be actually footnoted. This may be akin to the Roger Maris home run asterisk, which never really existed, but later was removed (?) anyway.

29. BURT SOLOMON, *THE BASEBALL TIMELINE* (1997). Many references to baseball history in this text are attributed to the foregoing, a remarkable, inspired volume owed a debt of gratitude by many.

30. Well before *Brown v. Board of Education*, 347 U.S. 483 (1954), Jewish national hero Hank Greenberg integrated baseball in a much different but highly significant manner. Indeed, in 1947, Jackie Robinson paid tribute to Greenberg, referring to the star Jewish slugger as his own idol.

31. See *Flood v. Kuhn*, 497 U.S. 258, 291 (Marshall, J., dissenting).

32. See generally WEILER & ROBERTS, *supra* note 18, at 241-44 (citing Messersmith and McNally Grievances, 66 Labor Arbitration 101 (1976)).

constitutional limitations as it was, for example, in *Ludtke v. Kuhn*,³³ a female reporter's sex discrimination case that found baseball sufficiently entwined with the publicly-financed Yankee Stadium.³⁴

Moreover, the Holmes *Federal Baseball* opinion of 1922 threw its own curveball, turning the tables and actually citing the practice of law as precedent for baseball: "To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such [interstate] commerce because the lawyer or lecturer goes to another State."³⁵

THE LAMENT OF PRESIDENTS AND CONGRESS

If that is not enough, consider the lament of Presidents, such as Dwight Eisenhower who, as the five-star general of the Allied D-Day forces had stormed the blood-stained sands of history at Normandy, once reflected:

When I was a small boy in Kansas, a friend of mine and I went fishing and as we sat there in the warmth of the summer afternoon on a river bank, we talked about what we wanted to do when we grew up. I told him that I wanted to be a real major league baseball player, a genuine professional like Honus Wagner. My friend said that he'd like to be President of the United States. Neither of us got our wish.³⁶

William Howard Taft was himself a semi-professional pitcher until he was yanked from a game in 1882, tossing his last pitch until, as President, he threw the first major league pitch of the 1910 season. Attending the 1962 All-Star Game, a forty-five year-old John F. Kennedy remarked to Stan Musial, who was forty-two at the time, "A couple of years ago they told me I was too young to be President and you (Stan Musial) were too old to be playing baseball. But we fooled them."³⁷ On playing with the old-timers in 1983, President Ronald Reagan most aptly summed up baseball: "This is really more fun than being President."³⁸

Baseball's most famous brush with Congress came at the hands of curmudgeon Casey Stengel, who hopelessly confused Senator Kefauver's antitrust committee with a charming but endlessly confounding wit that

33. 461 F. Supp. 86 (S.D.N.Y. 1978).

34. *Id.*

35. 259 U.S. at 209.

36. PAUL DICKSON, *BASEBALL'S GREATEST QUOTATIONS* 126 (1991).

37. Baseball Almanac: The "Official" Baseball History Site, *All-Star Games: Midsummer Classic*, <http://www.baseball-almanac.com/asgbox/yr1962as.shtml> (last visited Apr. 11, 2003).

38. DICKSON, *supra* note 36, at 347.

inspired perhaps the most memorable quip of the next witness, Mickey Mantle, who succinctly added, “My views are about the same as Casey’s.”³⁹ A master of baseball truths, Stengel also got it right in law, poignantly condemning age discrimination when he retired as Yankees manager in 1960, saying “I’ll never make the mistake of being 70 again.”⁴⁰ Stengel consistently maintained age in perspective, such as answering a reporter’s question in 1965 on what he thought about his future. “How the hell should I know? Most people my age are dead.”⁴¹

Perhaps the residue of truth is law, and therefore the essence of the common law is change, for truth is dynamic, responsive and shrouded with simplicity. The quintessence of simple truths is found prominently in the sentimental ballparks of history. When Casey Stengel commented on his own candid “Stengelese” by noting he could actually make a living telling the truth, he not only was speaking the gospel, he reduced it to the simple fundamentals—and then he practiced it. “They brought me up with the Brooklyn Dodgers, which at the time was in Brooklyn.”⁴²

Luck being the “residue of design,” it is not really luck in the commonly applied sense. But from the residue of truth clearly comes law, and the necessary residue of law is culture, if not civilization itself. Truth itself may indeed “live a tortured life,” as Clarence Darrow and others have noted,⁴³ but who would argue it is not a worthy ideal? Darrow may have struck even closer to home, closer to the real truth, with another classic observation: “Laws should be like clothes. They should be made to fit the people they are meant to serve.”⁴⁴ Such may be the most compelling essence of the common law as obviated by the Infield Fly Rule. Improvement, like invention, is born of necessity and implemented by change. In this sense baseball is an allegory of life and law, for in its pure simplistic form, the essence of baseball is keenly observable. Sometimes the strike zone must be lowered, occasionally history mandates the raising or lowering of the pitcher’s mound, and circumstances

39. BaseballLibrary.com: The Stories Behind the Stats, *Casey Stengel*, http://www.pubdim.net/baseballlibrary/ballplayers/S/Stengel_Casey.stm (last visited Apr. 11, 2003).

40. Baseball Almanac: The “Official” Baseball History Site, *Baseball Quotes: From and About*, <http://www.baseball-almanac.com/quotes/quosteng.shtml> (last visited Apr. 11, 2003).

41. Baseball World, *Casey Stengel Quotes*, <http://www.geocities.com/Colosseum/Park/1138/quotes/quotesstengel.html> (last visited Apr. 14, 2003).

42. BaseballHumor.com, *Baseball Quotes, Bloopers, Misquotes and Sayings*, <http://www.baseballhumor.com/quotes/index.html> (last visited Apr. 14, 2003).

43. Originally from a Yiddish proverb, “The truth never dies but lives a wretched life.” ROBERT I. FITZHENRY, *THE HARPER BOOK OF QUOTATIONS* 448 (3d ed. 1993).

44. Creative Quotations, *Creative Quotations from Clarence Darrow*, <http://www.creativequotations.com/one/89a.htm> (last visited Apr. 21, 2003).

always dictate the necessary evolution of baseball, like dealing with Astro Turf or obstructions hanging from indoor stadiums.

Such change is not only desired, it is profoundly rewarded, an observation at least as old as civilization. "You are remembered for the rules you break," said General MacArthur,⁴⁵ perhaps echoing the words of Shakespeare's "Wrest once the law to your authority: To do a great right, do a little wrong."⁴⁶ This, of course, is not only the substance of Thoreau's *Civil Disobedience*, it is the *corpus* of America from the founding fathers to Martin Luther King, Jr., including such disparate miscreants as Abbie Hoffman, Albert Einstein, Franklin Roosevelt, John Kennedy, and Mark Twain. The long list of America's rascals should also include William Stevens, the wet-behind-the-ears lawyer-author responsible for the original *Aside* dissecting the Infield Fly Rule, one of the most noted law review articles ever published, partly because it does not take itself too seriously, but mostly because others do, especially those who recognize how profoundly serious, yet superbly simple, how quintessential American the *Aside* and baseball, really are:

It is the same game that Moonlight Graham played in 1905. It is a living part of history, like calico dresses, stone crockery, and threshing crews eating at outdoor tables. It continually reminds us of what was, like an Indian-head penny in a handful of new coins.

Shoeless Joe by W. P. Kinsella⁴⁷

Baseball, America, and law—a trio of truths self-evident, reminiscent of a little anarchy practiced by we, the people, at a time long past and in places so close to home.

45. FITZHENRY, *supra* note 43, at 245.

46. THOMAS S. KANE, *THE NEW OXFORD GUIDE TO WRITING* 23 (1988).

47. DICKSON, *supra* note 36, at 224.

Endnote 1:

An INFIELD FLY is a fair fly ball (not including a line drive nor [sic] an attempted bunt) which can be caught by an infielder with ordinary effort, when first and second, or first, second and third bases are occupied, before two are out. The pitcher, catcher and any outfielder who stations himself in the infield on the play shall be considered infielders for the purpose of this rule.

When it seems apparent that a batted ball will be an Infield Fly, the umpire shall immediately declare “Infield Fly” for the benefit of the runners. If the ball is near the baselines, the umpire shall declare “Infield Fly, if Fair.”

The ball is alive and runners may advance at the risk of the ball being caught, or retouch and advance after the ball is touched, the same as on any fly ball. If the hit becomes a foul ball, it is treated the same as any foul.

If a declared Infield Fly is allowed to fall untouched to the ground, and bounces foul before passing first or third base, it is a foul ball. If a declared Infield Fly falls untouched to the ground outside the baseline, and bounces fair before passing first or third base, it is an Infield Fly.

On the infield fly rule the umpire is to rule whether the ball could ordinarily have been handled by an infielder—not by some arbitrary limitation such as the grass, or the base lines. The umpire must rule also that a ball is an infield fly, even if handled by an outfielder, if, in the umpire’s judgment, the ball could have been as easily handled by an infielder. The infield fly is in no sense to be considered an appeal play. The umpire’s judgment must govern, and the decision should be made immediately.

When an infield fly rule is called, runners may advance at their own risk. If on an infield fly rule, the infielder intentionally drops a fair ball, the ball remains in play despite the provisions of Rule 6.05 (L). The infield fly rule takes precedence.

—Excerpted from Official Baseball Rules, *Definitions, Rule 2.00*, recodified, amended and adopted by Professional Baseball Official Playing Rules Committee at New York City, December 21, 1949, as amended. The italicized portion of the Rule text denotes the “Notes/Case Book/Comments” section incorporated directly into the Official Rules in December 1977.

