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## In re Brett: The Sticky Problem of Statutory Construction

Jared Tobin Finkelstein

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## COMMENTARY

### *In re Brett: The Sticky Problem of Statutory Construction*

*George Brett's pine tar almost let the plague of modern life, lawyers, into the sole redeeming facet of modern life, baseball.\**

*Knowin' all about baseball is just about as profitable as bein' a good whittler.\*\**

#### INTRODUCTION

On July 24, 1983,<sup>1</sup> at Yankee Stadium<sup>2</sup> in the Bronx,<sup>3</sup> New York,<sup>4</sup> with two outs in the top of the ninth inning and one man on base, Kansas City<sup>5</sup> Royal Third Baseman George Brett<sup>6</sup> hit a Goose Gosage<sup>7</sup> pitch into the seats in right field for an apparent home run. New York Yankees manager Alfred M. Martin<sup>8</sup> ran onto the field and informed the home-plate umpire that the pine tar on Brett's bat extended beyond the permissible eighteen-inch limit of the Official Baseball Rules (Rules).<sup>9</sup> According to the Rules, Martin argued, the batter should be called out for use of an illegal bat, and the home run disallowed. The umpires conferred, measured the pine tar and upheld Martin's protest. The game was over, the Yankees winning 4-3.<sup>10</sup>

The Royals filed a protest with Lee MacPhail, President of the American League of Professional Baseball Clubs, contending that the

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\* Will, *Such, Such Were the Joys*, Newsweek, Jan. 2, 1984, at 72.

\*\* F. Hubbard, *Saying*, in J. Bartlett, *Familiar Quotations* 895 (14th ed. 1968).

1. July 24, 1983 occurred on a Sunday. 1983 Julian Calendar 7 (Hallmark ed.).

2. The stadium, which opened in 1923, is affectionately known as the "House that Ruth Built" for the hero of the 1920's, George Herman "Babe" Ruth. 2 D. Voigt, *American Baseball* 157 (1970).

3. The borough is "[n]amed for Jonas Bronck, a Dane who settled the region in 1639." 4 *Encyclopedia Americana* 599 (1968 ed.).

4. "A city that never sleeps." *Hear* F. Ebb & J. Kander, *Theme from New York*, New York (F. Sinatra ed. 1980) (Reprise Records no. RPS49233).

5. A city where "[e]v'rythin's up to date . . ." R. Rogers & O. Hammerstein 2nd, *Oklahoma!* 6 (1956).

6. Born May 15, 1953. Throws right, bats left. 1983 Topps Baseball Card no. 600.

7. Given name is Richard or "Rich," as is his financial status. Born July 5, 1951. Throws right, bats infrequently. 1983 New York Yankees Yearbook 70, 76; 1983 Topps Baseball Card no. 240. Signed a contract with the San Diego Padres and now may occasionally bat right.

8. Also known as Billy Martin. Born Alfred Manuel Pesano, on May 16, 1928. *The Baseball Encyclopedia* 1171 (1969).

9. Off. Baseball R. 1.10(b), 6.06(a), (d) (Sporting News 1983); Am. League Reg. 4.23 (Rules 1.10(b), and 6.06(d) were amended for the 1984 season, see *infra* note 16).

10. N.Y. Times, July 25, 1983, at A1, col. 2. *But see infra* Conclusion.

umpire's decision was not supported by the Rules. They maintained that the home run should be reinstated and the game continued, the Royals leading 5-4 with two outs in the top of the ninth inning.<sup>11</sup> MacPhail upheld the protest,<sup>12</sup> thus overruling a decision made on the playing field for the first time in his ten-year tenure as League President.<sup>13</sup> In deciding the case, he looked beyond the text of the Rules and relied instead upon the intent of the Rules' drafters, principles of equity, and previous decisions involving pine tar.<sup>14</sup> This Commentary discusses whether the League President's decision was consistent with generally accepted rules of statutory interpretation.<sup>15</sup> While this factual situation will never reoccur, due to a change in the rules,<sup>16</sup> the decision itself is of interest because it may affect the game far beyond the facts<sup>17</sup> of this particular controversy.<sup>18</sup>

11. *Id.* at C5, col. 3.

12. Decision Regarding the Protest of the Game of Sunday, July 24, 1983 Kansas City at New York 1 (Press Release, American League, July 28, 1983) [hereinafter cited as *Brett Decision*].

13. Boswell, *Justice is Done with a Sticky Wicket*, Wash. Post, July 29, 1983, at C6, col. 1.

14. *Brett Decision*, *supra* note 12, at 1-2.

15. This Commentary, however, is not in response to Roy Cohn's fantasy that "major sports be governed by rules of law, by rules and regulations with a common sense basis . . ." Village Voice, Jan. 3, 1984, at 115, col. 6. Mr. Cohn represented the Yankees in the pine tar controversy. *Id.* Rather, this Commentary is in response to some feeling from within.

16. The Official Playing Rules Committee amended Rule 1.10 "so as to provide *only* for the removal of a bat that is not properly treated in accordance with" the pine tar provision. Minutes of the Official Playing Rules Committee, at 2 (Meeting of Winter 1983-1984) (emphasis in original). New Rule 1.10 also contains a note specifically relating to the limit on the remedy for a pine tar infraction. *Id.* at 3. Further, the definition of an illegally batted ball was deleted from Rule 2.00. *Id.* The first part of the definition, relating to balls hit by batters with one or both feet outside of the batters box, was incorporated in Rule 6.06(a), which previously referred to the entire definition in Rule 2.00, *id.*, and the portion referring to Rule 1.10 was omitted, *id.*

This Commentary does not address the merits of the new Rules; however, the author does support the application of the Rules to future incidents involving excess pine tar. This Commentary is limited to an examination of the League President's decision as it relates to the Rules then in effect.

17. Facts lead to trivia, and baseball is filled with facts. For example, since the inception of the Most Valuable Player Award, nine men have won the triple crown (leading the league in batting average, home runs, and runs batted in). Four of these winners did not win the Most Valuable Player Award. Can you name them? See *infra* note 78 (answer).

18. To the extent Mr. MacPhail's decision reflects a reduced acceptance of the sanctity of an umpire's ruling and the use of "clever ploys and gambits," baseball is undermined. See *infra* pt. V.

### I. TEXTUAL ANALYSIS OF RULES 1.10(b), 6.06(a) AND 6.06(d)

In every case involving statutory construction,<sup>19</sup> the relevant language must initially be analyzed.<sup>20</sup> Several rules and regulations are applicable to the pine tar situation.<sup>21</sup> Specifically, Rules 1.10(b),<sup>22</sup> 6.06(a)<sup>23</sup> and 6.06(d)<sup>24</sup> of the Official Rules of Baseball and Regulation 4.23 of the American League Regulations<sup>25</sup> must be considered.

An examination of the rules reveals two possible theories for calling a player out for use of excessive pine tar. The first involves a triad<sup>26</sup> of rules consisting of Rules 6.06(a), 2.00 and 1.10. Rule 6.06(a) states that a player is out when "[h]e hits an illegally batted ball."<sup>27</sup> An illegally batted ball is defined by Rule 2.00 as "one hit with a bat which does not conform to Rule 1.10."<sup>28</sup> Rule 1.10 provides in relevant part that:

The bat handle, for not more than 18 inches from the end, may be covered or treated with any material (including pine tar) to improve the grip. Any such material, including pine tar, which extends past the 18 inch limitation, in the umpire's judgment, shall cause the bat to be removed from the game. No such material shall improve the reaction or distance factor of the bat.<sup>29</sup>

19. A threshold question which may be summarily resolved in the affirmative is whether a baseball rule is a statute. Courts differ in their resolution of similar issues, apparently in response to the nature of the rule involved and the action requested to be taken in regard to it. *Compare* *Fund for Constitutional Government v. National Archives*, 656 F.2d 856, 867 (D.C. Cir. 1981) (Federal Rule of Civil Procedure is statute) *with* *Founding Church of Scientology v. Bell*, 603 F.2d 945, 951-52 (D.C. Cir. 1979) (Federal Rule of Civil Procedure not a statute). Because of the nature of the Rules at issue here, see *infra* notes 42-43 and accompanying text, a court of law would certainly hold these rules to be a statute for the limited purpose of construing them.

20. See *Cannon v. University of Chicago*, 441 U.S. 677, 689 (1979); *FTC v. Bunte Bros.*, 312 U.S. 349, 350 (1941); *Alabama Power Co. v. Costle*, 636 F.2d 323, 379 (D.C. Cir. 1979).

21. Nevertheless, many rules and regulations do not apply to the pine tar incident. See, e.g., *Wolfe v. Shelley*, 76 Eng. Rep. 206 (1579-1581) (Rule in Shelley's Case); "Can You Top Joey Adams" Contest Official Rules, N.Y. Post, Dec. 23, 1983, at 46, col. 6.

22. Off. Baseball R. 1.10(b) (Sporting News 1983) (amended 1984).

23. *Id.* R. 6.06(a) (amended 1984).

24. *Id.* R. 6.06(d).

25. Am. League Reg. 4.23.

26. As used in this Commentary, "triad" means a group of three. This should not be confused with other meanings of the word triad such as a favorite form of gnomic literature, a trivalent atom, a set of three vectors or a chord of three notes or tones. See Webster's International Dictionary 2705 (2d ed. 1957).

27. Off. Baseball R. 6.06(a) (Sporting News 1983) (amended 1984).

28. *Id.* R. 2.00 (amended 1984).

29. *Id.* R. 1.10 (amended 1984).

Together, these three rules imply that a batter should be called out for use of excessive pine tar. Thus, as Mr. MacPhail stated, the umpire's decision was "technically defensible."<sup>30</sup>

The second theory by which a player may be called out involves applying Rule 6.06(d), which concerns the use of "doctored" bats.<sup>31</sup> A violation of this provision results in the batter being called out, ejected from the game, and the imposition of "additional penalties as determined by the League President."<sup>32</sup> League Regulation 4.23, however, specifically addresses the question of whether excessive pine tar constitutes "doctoring" of a bat.<sup>33</sup> The regulation states that the use of pine tar in itself will not be considered to be "doctoring the bat."<sup>34</sup> The regulation apparently takes a pine tar violation out of the coverage of Rule 6.06(d), which penalizes players for using bats that are "doctored." Application of Rule 6.06(a), however, would still result in the batter being called out. This inconsistency in the rules should be settled using various aids to construction.<sup>35</sup> The first step should be to use intrinsic evidence.

## II. INTRINSIC RULES OF INTERPRETATION

### A. Rule 6.06(d) and Regulation 4.23

Rule 6.06(d) and Regulation 4.23 present a common problem of interpretation. The drafters of Regulation 4.23 excluded pine tar infractions from only two of the three possible penalties for doctored bats provided by Rule 6.06(d)—suspension and ejection from a game.<sup>36</sup> By failing to exclude the third penalty of calling the batter out, a question is raised whether the drafters intended to retain that provision as a possible penalty for excessive pine tar use.

The rule of interpretation, *expressio unius est exclusio alterius*, states that when specific examples are enumerated, those situations not enumerated are not implied, especially when they are noted elsewhere in the rules.<sup>37</sup> Thus, by specifically removing two of the three

30. *Brett* Decision, *supra* note 12, at 1.

31. Off. Baseball R. 6.06(d) (Sporting News 1983). "Doctored" bats are those "which have been altered or tampered with in such a way to improve the distance factor or cause an unusual reaction on the baseball." *Brett* Decision, *supra* note 12, at 2 (emphasis omitted).

32. *Id.* The additional penalty is usually suspension of the player for a number of games.

33. Am. League Reg. 4.23.

34. *Id.*

35. For other construction aids, *see, but do not use* 42 U.S.C. § 5305(a)(2) (Supp. V 1981) (construction aid for public works including neighborhood facilities); *see also* Cal. Civ. Code § 1793.2 (West Supp. 1983) (Lemon-Aid; defective car law).

36. Am. League Reg. 4.23.

37. *TVA v. Hill*, 437 U.S. 153, 188 (1978); *E. Crawford*, Construction of Statutes § 195, at 334-37 (1940); *see Fedorenko v. United States*, 449 U.S. 490, 512-13

possible penalties that may be levied when a player uses a bat that is "doctored" with pine tar, the Regulation apparently retains the remedy of calling the player out for such an offense. This analysis seems to indicate that Mr. Brett properly was called out, contrary to the League President's decision. The analysis is not complete, however, until the alternative method of analyzing the pine tar controversy is similarly examined.

B. *Rules 1.10(b), 2.00 and 6.06(a)*

Application of Rules 1.10(b), 2.00 and 6.06(a) would apparently result in the player being called out for the use of excessive pine tar. A conflict among these rules, however, does exist. Although reading the rules simultaneously implies that a batter should be called out when he uses too much pine tar, Rule 1.10(b) merely seems to provide that the illegal bat should be removed from the game. This conflict was recognized by Mr. MacPhail who stated that "[i]f it was intended that [a pine-tar] infraction should fall under the penalty of the batter's being declared out, it does not seem logical that the rule should specifically specify that the bat should be removed from the game."<sup>38</sup>

The accepted maxim of construction is that the more specific rule will apply when there is a conflict between two rules.<sup>39</sup> Assuming that removal of the bat from the game and calling the player out are considered conflicting remedies, Rule 1.10(b), which specifically provides that a bat with excessive pine tar should be removed from the game, would be applicable in the instant situation. The two remedies, however, may be read consistently as they may apply to different factual situations. Removal of the bat is applicable if the batter has not hit the ball. Calling the player out, on the other hand, is applicable if he has. The two rules may therefore both be valid despite the inclusion of the specific remedy in Rule 1.10(b).

Reinforcing this result is the principle of construction which states that rules should be read so as to give effect to all parts of the statute.<sup>40</sup> If the remedy provided in Rule 1.10(b) is read as being an additional

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(1981); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892, 895 (1982) (Supreme Court revived this maxim of construction) [hereinafter cited as *Clear Statements*]. *But see* Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 873-74 (1930) (criticism of use of maxim as "direct contradiction to the habits of speech of most persons").

38. *Brett Decision*, *supra* note 12, at 1.

39. *Busic v. United States*, 446 U.S. 398, 406 (1980); *see Hill v. Morgan Power Apparatus Corp.*, 259 F. Supp. 609, 611 (E.D. Ark.), *aff'd*, 368 F.2d 230 (8th Cir. 1966).

40. *See Noble v. Marshall*, 650 F.2d 1058, 1061 (9th Cir. 1981); *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 870 (D.C. Cir. 1979).

remedy for a pine tar violation rather than as being in conflict with the remedy provided in Rules 6.06(a) and 2.00, all parts of the Rules are given effect. Both theories, however, lead to the conclusion that Mr. Brett should have been called out for the use of too much pine tar.

### C. Rule of Lenity

An additional consideration which must be addressed when analyzing both theories is the rule of lenity. The rule provides that penal statutes are to be strictly construed against the government<sup>41</sup>—in this case the umpires. Thus, any ambiguity in the rule must be decided in favor of the alleged violator—in this case the batter. The baseball rules, while not rules of law or equity,<sup>42</sup> are akin to penal statutes. The rules specify offenses and corresponding punishments.<sup>43</sup> Thus, although the two theories may be harmonized in favor of calling the batter out, the rule of lenity precludes the issue from being definitively resolved. Extrinsic aids to interpretation therefore must be utilized to resolve the conflict between the two sets of rules.

## III. EXTRINSIC EVIDENCE

To determine the scope of a statute, courts examine legislative history and other extrinsic evidence. This section applies such analysis to the pine tar rule.<sup>44</sup>

### A. Spirit versus Letter of the Law

Mr. MacPhail stated that the umpire's decision was within the letter of the Rules, but "not in accord with the intent or spirit of the rules."<sup>45</sup> He noted that Rule 6.06(a), which refers to Rule 1.10, was intended to relate only to "doctored bats." He added that bats with excess pine tar should not be placed in this category.<sup>46</sup> Courts invoke such a rationale, known as equitable interpretation,<sup>47</sup> to remove an act from the scope

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41. See *Adamo Wrecking Co. v. United States*, 434 U.S. 278, 285 (1978); *United States v. Bass*, 404 U.S. 336, 348 (1971); *United States v. Patterson*, 664 F.2d 1346, 1348 (9th Cir. 1982).

42. Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. Pa. L. Rev. 1474, 1474 (1975).

43. See *Taylor v. United States*, 44 U.S. (3 How.) 197, 210 (1845); E. Crawford, *supra* note 37, § 73, at 105 (1940).

44. See *supra* note 19.

45. *Brett Decision*, *supra* note 12, at 1.

46. *Id.* at 2. Judge Jacob Fuchsberg, recently retired from the New York Court of Appeals, agreed with Mr. MacPhail's ruling. Judge Fuchsberg, however, only referred to Rule 1.10 and not Rule 6.06(a), and based his opinion solely upon the effect of pine tar on hitting the ball. N.Y. Daily News, Aug. 2, 1983, at 29, col. 1.

47. See R. Dickerson, *The Interpretation and Application of Statutes* ch. 11, at 214 (1975); *Clear Statements*, *supra* note 37, at 896; cf. Berkow, *The Eternal Pine-*

of a statute.<sup>48</sup> Equitable interpretation may be traced to the writings of Hobbes, who<sup>49</sup> stated that the “[i]ntention of the Legislator is always supposed to be Equity.”<sup>50</sup> Aristotle referred to the doctrine as “epieikeia.”<sup>51</sup> Under “epieikeia,” a judge faced with a difficult case should put himself in the place of the legislator and do what the legislator would have done had he or she known of the present facts. In other words, a judge is obliged to legislate equitably.<sup>52</sup> Recently, however, the Supreme Court has moved away from equitable interpretation and from determining “what statutory words *ought* to mean.”<sup>53</sup> Rather, the Court has established that the “law *is* what literal words proclaim it to be.”<sup>54</sup> Thus, the League President’s reliance upon equitable interpretation is not consistent with present Supreme Court philosophy.

### B. Legislative Purpose

A rule’s purpose is often the touchstone of statutory construction.<sup>55</sup> “Purpose” is a broader concept than legislative intent.<sup>56</sup> A legislature’s “purpose” is the ultimate purpose that the legislature intends the statute to accomplish or help to accomplish. Intent, on the other hand, refers to the immediate goal of the statute.<sup>57</sup> The legislative history of the Rules, therefore, must be examined to determine legislative purpose and intent, thus aiding in the resolution of the conflict between the two sets of Rules.

*Tar Case*, N.Y. Times, Aug. 9, 1983, at B9, col. 1 (Professor Halivni of the Jewish Theological Seminary, when discussing the pine tar incident, was reminded of the Talmudic lesson that it is anti-moral to use technical grounds to perpetrate chicanery.).

48. *Muniz v. Hoffman*, 422 U.S. 454, 469 (1975); see *Bingler v. Johnson*, 394 U.S. 741, 751-52 (1969).

49. Played first base. B. Abbott & L. Costello, *Who’s on First*, on Hey Aaa-bott (1978 ed.) (Murray Hill Records no. 899981).

50. T. Hobbes, *Leviathan* 326 (C.B. MacPherson ed. 1968).

51. Aristotle, *Nicomachean Ethics* bk. 5, ch. 10, at 141-42 & n.69 (M. Ostwald trans. 1962); Marcin, *Epieikeia; Equitable Lawmaking in the Construction of Statutes*, 10 Conn. L. Rev. 377, 382-84 (1978).

52. Marcin, *supra* note 51, at 393.

53. *Clear Statements*, *supra* note 37, at 896 (emphasis in original).

54. *Id.* An indication whether the Court will continue this trend may be discerned by examining the decision in *Washington Post Co. v. United States Dep’t of State*, 685 F.2d 698 (D.C. Cir. 1982), *cert. granted*, 104 S. Ct. 65 (1983), which involves the literal construction of a statute in apparent contravention of legislative intent and Congress’ power under the statement and account clause of the Constitution, U.S. Const. art. I, § 9, cl. 7.

55. R. Dickerson, *supra* note 47, at 87.

56. *Id.* at 88.

57. *Id.*

The legislative history of the Official Baseball Rules is not available for public inspection.<sup>58</sup> The League President's statements and the drafters' public statements regarding their intent, therefore, must be scrutinized. According to Calvin Griffith, a member of the Playing Rules Committee, "[g]uys were slopping that pine tar stuff all over their bats. The balls were all getting discolored. The rule was put into effect to keep the bats from discoloring the balls and having them thrown out."<sup>59</sup> In addition, the accumulation of pine tar was also thought to allow a pitcher to cause the ball to behave erratically when thrown, similar to the outlawed "spit-ball."

The circumstances surrounding the passage of the legislation may also be examined to determine the intent of the drafters.<sup>60</sup> In response to a player being called out for excessive use of pine tar,<sup>61</sup> the rules were amended to provide that "material, including pine tar, which extends past the 18 inch limitation . . . shall cause the bat to be removed from the game."<sup>62</sup> Thus, despite the language of the rules, the drafters apparently intended this to be the exclusive remedy for a pine tar infraction.

Given these legislative purposes, the League President's decision was correct. This conclusion, however, must be viewed in light of the recent judicial trend towards relying upon the express language of a statute rather than ascertaining legislative intent through the use of extrinsic evidence.<sup>63</sup> Under this philosophy of statutory construction, the League President should not have considered the purpose of the drafters. The true purpose of the rule, however, may thus be frustrated. Despite this trend toward literal interpretation, courts usually examine the legislative history of a statute in order to reinforce their decision.<sup>64</sup> Thus, Mr. MacPhail should not be faulted for attempting to ascertain and follow the intent of the drafters. The correctness of his decision nevertheless depends upon the school of interpretation in vogue<sup>65</sup> at the time of the adjudication of the controversy.

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58. For an irrelevant yet interesting discussion of unpublished opinions see *Fenner v. Dependable Trucking Co.*, 716 F.2d 605, 606 (9th Cir. 1983) (Chambers, J., dissenting) ("Someone here has the horse headed the wrong way between the shafts of the buggy. His head is up against the single tree and the dashboard, and I do not think the first memorandum should be 'depublicized.'").

59. *St. Louis Post Dispatch*, July 26, 1983, at 30, col. 1.

60. See *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1280 (9th Cir. 1980).

61. *Brett Decision*, *supra* note 12, at 2.

62. Off. Baseball R. 1.10(b) (*Sporting News* 1983) (amended 1984).

63. See *Clear Statements*, *supra* note 37, at 894.

64. See *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 273-80 (1980); *Mohasco Corp. v. Silver*, 447 U.S. 807, 823, 826 (1980). *But see Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (no discussion of legislative history).

65. See, e.g., *New Ground Rules—Shoes, Stockings and more*, *Vogue*, July 1983, at 184; *Vogue Patterns: The All-Star Wardrobe*, *id.* at 240.

## IV. PRECEDENT

*In re Brett* is not the first case involving excess pine tar to come before Mr. MacPhail. At least two players have had hits nullified by an umpire's pine tar call. In 1975, both Thurman Munson<sup>66</sup> of the New York Yankees and Steve Stone<sup>67</sup> of the Chicago Cubs were called out for use of excessive pine tar.<sup>68</sup> Neither of these incidents were protested to the league office. A third incident in which the umpires did not call the batter out is the only case in which a formal protest forced the league to establish precedent.<sup>69</sup> In that case, the California Angels protested a loss to the Kansas City Royals on the ground that John Mayberry,<sup>70</sup> who hit two home runs in the game, had pine tar on his bat beyond the 18 inch limit. The protest was denied.<sup>71</sup> Mr. MacPhail ruled that a ball hit with a bat covered with excess pine tar was not "an illegally batted ball under Rule 6.06(a)."<sup>72</sup> Thus, Mr. MacPhail's decision in *Brett* was consistent with the rationale in *Mayberry*.

## V. POLICY CONSIDERATIONS

The pine tar decision may have a significant impact on the game of baseball. By overturning the umpire's decision, Mr. MacPhail has taken away a traditional managerial tactic—to use the rules to your best advantage. "[C]lever ploys and gambits are a part of the essence and history of baseball . . ." <sup>73</sup> and tampering with this tradition erodes part of the game's charm.

66. Position: catcher. Batted right, threw right. Batted .318 in 1975, despite being called out for use of excessive pine tar. See 1976 Topps Baseball Card no. 650.

67. Position: pitcher. Bats right, throws right. 1976 Topps Baseball Card no. 378. Taking away a base hit from a pitcher is almost cruel and unusual punishment. See U.S. Const. amend. VIII.

68. Boswell, *supra* note 13, at C6, col. 1.

69. *Id.*; St. Louis Post Dispatch, July 26, 1983, at 30, col. 1.

70. Position: first base. Bats left, throws left. Had 34 home runs in 1975, due in part to the favorable ruling. 1976 Topps Baseball Card no. 440.

71. Boswell, *supra* note 13, at C6, col. 1; St. Louis Post Dispatch, July 26, 1983, at 30, col. 1.

72. *Brett* Decision, *supra* note 12, at 2.

73. Berkow, *supra* note 47, at B9, col. 3; see B. Catton, *The Great American Game*, in *The Third Fireside Book of Baseball* 90, 91 (C. Einstein ed. 1968) (Baseball has "borrowed nothing from the 'sportsmanship' of more sedate countries . . . . Anything goes; victory is what counts."). *Contra* St. Louis Post Dispatch, July 26, 1983, at 30, col. 3 ("Games are supposed to be decided by skills of players, not technicalities and loopholes.").

Baseball is filled with such artful uses of the rules. Perhaps the most famous is the case of Eddie Gaedel, a midget, being sent to bat for the St. Louis Browns. The act was not favored by the league and the rules were changed to eliminate this possibility from occurring again. See B. Veck & E. Linn, *Veck—as in Wreck*, in *The Third*

Moreover, the impact of the pine tar decision may be felt far beyond the immediate controversy. The sanctity of an umpire's ruling is undermined. The pine tar ruling was the first instance during Mr. McPhail's tenure as League President in which an umpire's decision was overruled.<sup>74</sup> This reversal of a technically valid decision may diminish the respect<sup>75</sup> afforded umpires' decisions in the future.<sup>76</sup> It may be argued that the power to overrule a decision made on the field should be reserved for situations in which there is a clear abuse of discretion by an umpire or when there is a clear error in applying the rules.<sup>77</sup> Of course, there will be decisions by the umpires that the

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Fireside Book of Baseball 479, 479-86 (1968). Perhaps the most consequential use of the rules involved Fred Merkle of the New York Giants in 1908—it cost the Giants the pennant. On September 23, 1908, the Giants were playing against the Chicago Cubs. The score was tied 1-1 as the Giants batted in the bottom of the ninth inning. The Giants put men on first and third with two outs. The next batter singled to center field. The runner on third base crossed home plate with the apparent winning run. The crowd poured onto the field. The runner on first base, Fred Merkle, however, failed to touch second base, instead running for the clubhouse. The Cub's second baseman noticed this and called for the ball. Following a number of mishaps including the ball being thrown into the stands, a substitute ball was thrown to second base. The umpire called Merkle out, and the run did not count. The league office ruled that Merkle was out when he failed to touch second base. Thus, despite the unfairness of the situation, the literal application of the rule was upheld, which disallows any runs scored during a play resulting in the final out of an inning. See C. Gregory, H. Kalven & R. Epstein, *Cases and Materials on Torts* 926-27 (3d ed. 1977); J. Rosenberg, *The Story of Baseball* 51-58 (1966). Other instances of artful manipulation of the rules include the hidden ball trick, and decoying runners to set up force outs on fly balls. Berkow, *supra* note 47, at B9, col. 3.

74. Boswell, *supra* note 13, at C6, col. 1.

75. For a deeper understanding of respect *hear* O. Redding, *Respect*, on The Soul Years-Atlantic Records 25th Anniversary (A. Franklin ed. 1967) (Atlantic Record no. ST-A-732887 PR); R. Dangerfield *passim*.

76. N.Y. Post, July 29, 1983, at 88, col. 3 (Tim McClelland, home plate umpire during the pine-tar game, stated that "[t]he rulebook is the only thing we have to go by, and if someone wants to make a farce of the rules by saying they're not in the spirit of the game, then we'll have to be men and take it."); *id.* at 82, col. 6 (Richie Phillips, a former umpire and counsel for the Major League Umpires Ass'n stated that the decision "is not going to sit well with our membership. They have a concern about how much support they get from the league offices. . . . [T]his is not going to help.")

77. An example of an umpire clearly misreading the rules occurred in a game between the Boston Red Sox and the Chicago White Sox at Fenway Park on September 3, 1983. Chicago's Jerry Dybzinski came to the plate with none out and runners on first and second. The count was no balls and two strikes when the next pitch hit Dybzinski, who started toward first even though he bunted at the ball, only to be called out by the first-base umpire. While he argued, the two base runners moved up one base. When the "discussions" ebbed, both runners were allowed to remain on second and third base. See *Boston Globe*, Sept. 4, 1983, at 44, col. 2. This is clearly an incorrect result as Rule 6.08(b) states that "[w]hen the batter is touched by a pitched ball which does not entitle him to first base, the ball is dead and no runner

League President will consider to be within the letter of the rules, but not the spirit. Instructing umpires to conform to the spirit of the rules in the future can resolve these inconsistencies.

The umpires' decision in the pine tar controversy could be viewed as a clear abuse of discretion, even though technically defensible, because it was contrary to previous decisions of the League President. This argument, however, assumes that the umpires had a<sup>78</sup> knowledge of the appeals that had been ruled on by the league.<sup>79</sup> An annotated rule book containing the decisions in all appeals may solve this problem. Alternatively, the rules could clearly set out the league policy on various issues and those rules that are in direct conflict with these policies could be eliminated.

#### CONCLUSION

Kansas City Royals 5, New York Yankees 4.

*Jared Tobin Finkelstein\**

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may advance." Off. Baseball R. 6.08(b) (Sporting News 1983). In this case, the umpire involved freely admitted that he had made a mistake in allowing both runners to move up a base. Boston Globe, Sept. 4, 1983, at 44, col. 2. This would be an appropriate instance for the league president to overrule an umpire's decision.

78. "A" stands for answer to the trivia question, *supra* note 17. The four Triple Crown winners who were not Most Valuable Players were Chuck Klein, Lou Gehrig, and Ted Williams twice. D. Lally, *A Bartender's Guide to Baseball* 71, 221 (1981).

79. One commentator notes that the umpires should have known of the *Mayberry* protest and the two other 1975 pine tar incidents and were irresponsible for not following the *Mayberry* ruling. See *Sports Illustrated*, Aug. 8, 1983, at 60.

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