BILLY MARTIN AND JURISPRUDENCE: REVISITING THE PINE TAR CASE

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INTRODUCTION

Almost thirty years ago, Hall-of-Famer George Brett accomplished an unenviable feat: he hit a "game-losing home run."[1] Acting upon an objection from the manager of the opposing team, the umpires called Brett "out" after he had smashed a home run that put his team ahead in the ninth inning. He was the final out of the contest. Brett had hit the ball with a bat that had been smeared with too much pine tar, and the umpires concluded that the rules of Major League Baseball dictated the penalty.[2] However, after Brett's team protested the decision, the American League president overruled the judgment of the umpires (the Brett Decision).[3] This series of events (the Pine Tar Case) has come to be identified as a classic conflict between the letter of the law and the spirit of the law.[4]

In this essay, I set the stage and describe the events surrounding the Pine Tar Case. I explain the right of appeal in Major League Baseball and list the rules governing the case as they were then written. I outline the relevant precedents in the Pine Tar Case and explain the judgment of the umpires. I then sketch some common principles of statutory interpretation. Invoking jurisprudential theory—the legal positivism of H. L. A. Hart, the interpretivism of Ronald Dworkin, and my critical pragmatism—I analyze the distinction between easy cases and hard cases in judicial decision making. I then state and explain American League President Lee MacPhail's decision in the Pine Tar Case. Having done so, I apply both the principles of statutory interpretation and jurisprudential theory in order to assess the judgment of the umpires. Finally, I describe the short-term and long-term effects of the Brett Decision. My thesis is that,

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[1] Mike McKenzie, *Umpires Ruling Beats the Tar Out of Royals*, KAN. CITY STAR (Mo.), July 25, 1983, *reprinted in* GEORGE BRETT: A ROYAL HERO 77 (Mark Zeligman et al. eds., 1999).

[2] Jared Tobin Finkelstein, *In re* Brett: *The Sticky Problem of Statutory Construction*, 52 FORDHAM L. REV. 430, 430 (1983).

[3] *Id.* at 430–31.

[4] *See id.* at 431; Joseph Lukinsky, *Law in Education: A Reminiscence with Some Footnotes to Robert Cover's* Nomos and Narrative, 96 YALE L.J. 1836, 1855 (1987); Donald J. Rapson, *A "Home Run" Application of Established Principles of Statutory Construction: UCC Analogies*, 5 CARDOZO L. REV. 441, 444 (1984); Michael J. Yelnosky, *If You Write It, (S)he will Come: Judicial Opinions, Metaphors, Baseball, and "the Sex Stuff,"* 28 CONN. L. REV. 813, 828 (1996); Ira Berkow, *Sports of the Times*; *The Eternal Pine-Tar Case*, N.Y. TIMES, Aug. 9, 1983, at B9.

contrary to what is commonly believed, the Pine Tar Case is not a genuine example of the conflict between the letter and spirit of the law. In fact, understanding the Pine Tar Case as a battle between the letter and spirit of law obscures important truths in the rules of baseball and in jurisprudence. Instead, the umpires in the Pine Tar Case applied the rules and the governing material incorrectly. The umpires blew the call.

I. THE BACKGROUND

Legendary sports columnist Jim Murray described Billy Martin flawlessly, "Some people have a chip on their shoulder. Billy has a whole lumberyard."[5] Martin's best friend and former teammate, Mickey Mantle added, "Billy, he was the only guy I ever knew who could *hear* someone givin' him the third finger."[6] Feral, cunning, paranoid, self-destructive, belligerent . . . Billy Martin was all of these things and more. He boasted, "I wouldn't beg for water if my heart was on fire."[7] Martin was also one of the best quick-fix managers in Major League Baseball history. On numerous occasions, he assumed command of losing, listless teams and transformed them into energized winners.[8]

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[5] JOHN C. MAXWELL, WINNING WITH PEOPLE 144 (2004) (quoting *What They Said: Quotes About Billy Martin*, ESPN CLASSIC, http://espn.go.com/classic/s/quotesmartinbon000806.html (last visited Sept. 9, 2011)).

[6] Ross Wetzsteon, *The Mick Hits 60*, N.Y. MAG., Sept. 30, 1991, at 40, 46.

[7] RAYMOND ANGELO BELLIOTTI, WATCHING BASEBALL, SEEING PHILOSOPHY: THE GREAT THINKERS AT PLAY ON THE DIAMOND 18 (2008).

[8] *Id.* at 26.

> During all his managerial stints, Billy was always a fan favorite. They admired his enthusiasm, fire, combative nature, refusal to lose. He was an ordinary blue-collar worker who conjured magical results. They did not have to live with him. They were not subject to his excesses.
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> He was fired, ostensibly for a fight with one of his players, after winning a dramatic divisional title in Minnesota. One year stint. He won a divisional title with the Detroit Tigers in 1972 in his second year. He was fired prior to finishing his third year, presumably for ordering his pitchers to throw at opposing batters in retaliation. Less than [a] three year term. He finished that year with the Texas Rangers, took the team from last to second in 1974, but was fired during the following season. Two hundred seventy-nine game tour. Martin finally landed his dream job, manager of the Yankees, late in 1975. The next two seasons, he won American League pennants and a world championship. But soon after mid season in 1978, he collapsed with intractable disputes with Reggie Jackson and owner George Steinbrenner. The Yankees went on to win another world

So, in the spring of 1983, when Yankees third baseman Graig Nettles informed Martin that Kansas City Royals star George Brett was using a bat splattered with pine tar more than eighteen inches above the handle, the wily skipper filed the intelligence away in his deranged, but shrewdly calculating mind. He would wait for a propitious occasion to deflate the glory of Mr. George Brett, wielder of an illegal weapon.

II. THE EVENT

On July 24, 1983, the home team New York Yankees led the Kansas City Royals 4-3 in the top of the ninth inning. Approaching home plate with two outs and teammate U. L. Washington on first base was George Brett. Yankees ace reliever Rich "Goose" Gossage was, as always, throwing pure "gas." On a 2-ball, 1-strike count, Brett, a superb hitter, was expecting Gossage's best fastball. As anticipated, Goose fired his "heat" and Brett slammed the horsehide over the left field wall even faster. Secure in the knowledge that he had given his team a 5-4 lead and a probable victory, George Brett triumphantly scampered around the bases.[9] But in the Yankees dugout, Billy Martin stirred.

Martin did not rush out with characteristic indignation. Instead, he strolled out purposefully, the personification of reasonableness. He approached rookie home plate umpire Tim McClelland and offered his wisdom, "That bat is illegal. . . . There's too much pine tar. Measure it."[10] Measuring the bat against the seventeen inch width of the home plate, McClelland

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championship without him.

He was hired and fired again by Steinbrenner in 1979. Martin landed with the Oakland A's in 1980 and transformed them into divisional winners in 1981. He was canned at the end of 1982. He bounced back to manage the Yankees for all of 1983, most of 1985, and almost half of 1988, with firings spaced between.

Billy Martin was the greatest quick fix manager of all time. He would swagger into any team situation, no matter how bleak, energize the troops, and make them winners. He commanded respect, made players believe in themselves, circled the wagons, and demanded intensity. Most ballplayers responded eagerly, at least for a time. Most opponents wilted, at least a tad, under the pressure. *Id.*

[9] *See* McKenzie, *supra* note 1, at 77.

[10] Rick Weinberg, *Pine Tar Nullifies Home Run, So Brett Goes Ballistic*, ESPN.COM, http://sports.espn.go.com/espn/espn25/story?page=moments/67 (last visited Sept. 9, 2011).

concluded that Martin was correct.[11] After a brief conference with his cohorts, McClelland pointed at Brett, who was accepting congratulations in the Kansas City dugout, and signaled that he was "out." The umpires had determined that because he used an illegal bat, they must declare Brett "out" for hitting an illegally batted ball. As this constituted the final out of the ninth inning, the Yankees were declared the 4-3 victors.

To say that Brett was enraged at the decision is akin to describing Shaquille O'Neal as somewhat large. Eyes popping, arms flailing, mouth foaming, Brett charged at McClelland with the evilest intentions. Several teammates, his manager, and an umpire struggled to restrain Brett. However, Brett's theatrics were futile. Billy Martin smugly hopped back into the Yankees dugout, relishing his guile. If self-congratulations were currency, the dead-end perpetual kid from West Berkeley, California, would have been a billionaire, "It's a terrible rule, but if it had happened to me I would have accepted it. . . . It turned out to be a lovely Sunday afternoon."[12]

The Kansas City Royals appealed the decision of the umpiring crew by filing an official protest of the game with the office of American League of Professional Baseball Clubs' President, Lee MacPhail.[13]

III. THE RIGHT OF APPEAL

Under certain conditions, a Major League Baseball team may appeal an umpire's decision by protesting the game under Rule 4.19.[14]

- Such protests pertain only to an umpire's alleged misapplication of the rules and not to alleged errors of judgments as to fact (for example, as to whether a base runner was safe or out on a close play, whether a pitch was a ball or strike).
- All such protests will be directed to the appropriate League President whose decision shall be final. The appropriate League President, then, is the only and highest appellate adjudicator.

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[11] Finkelstein, *supra* note 2, at 430; Murray Chass, *Brett Homer Nullified, So Yankees Win*, N.Y. TIMES, July 25, 1983, at A1.

[12] Chass, *supra* note 11.

[13] Finkelstein, *supra* note 2, at 430–31.

[14] Off. Baseball R. 4.19 (Sporting News 1983).

- In the event that the League President determines that the umpires have misapplied a rule, the remedy for the infraction will be a replay of the game from the point of the infraction with the rule applied properly.
- This remedy is triggered if and only if the League President determines that (a) the umpires misapplied a rule and (b) the infraction adversely affected the protesting team's chances of winning the game. Thus, protests of an umpire's alleged misapplication of the rules that did not materially affect the outcome of the contest will lack a remedy even if successful. Such protests might, however, serve to clarify an ambiguous rule, depending on the League President's decision.
- Such protests must be lodged in a timely fashion. A protest arising from a *game-ending* play may be filed until twelve noon the following day. All other protests must be lodged immediately: the umpires must be notified at the time the play under protest occurs and prior to the next pitch, play, or attempted play.[15]

IV. RELEVANT RULES AND REGULATIONS IN THE PINE TAR CASE

The relevant rules and regulations, as they were written at the time, in the Pine Tar Case, were as follows:[16]

- **Rule 6.06(a):** "A batter is out for illegal action when . . . he hits an illegally batted ball."[17]
- **Rule 2.00:** "[Among other occasions] an illegally batted ball is . . . one hit with a bat which does not conform to rule 1.10."[18]
- **Rule 1.10(b):**
  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 . . . . [the material must not improve the reaction or distance factor of the bat. A ball hit with a bat] treated with any material (including pine tar) which extends past the 18 inch limit . . . shall cause the bat to be removed from the game.[19]
- **Rule 6.06(d):** "[A player using a bat that] has been . . .

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[15] *Id.*
[16] *See id.* R. 1.10, R. 6.06(d).
[17] *Id.* R. 6.06(a).
[18] *Id.* R. 2.00.
[19] *Id.* R. 1.10(b).

tampered with in such a way to improve the distance factor or cause an unusual reaction on the baseball . . . . [is not only to be] called out, [but also to] be ejected from the game and may be subject to additional penalties . . . ."

- **American League Regulation 4.23:** "The use of pine tar in itself shall not be considered doctoring the bat. The 18 inch rule will not be cause for ejection or suspension."[20]

V. PRECEDENTS

Several previous decisions on the propriety of pine tar on bats had been recorded prior to the Pine Tar Case. On July 19, 1975, New York Yankee catcher Thurman Munson rumbled into the batter's box in the first inning. Teammate, Roy White, occupied second base with two outs. Munson spanked a weak single into the outfield that scored White.[21] The opposing Minnesota Twins objected that Munson's bat was lavished with tar par beyond the eighteen inch limit. The home plate umpire measured the bat on home plate, determined that the Twins were correct, and called Munson out.[22] The Yankees complained strongly, but were denied. The final score of the game was Minnesota 2, New York 1.[23]

However, the Yankees did not officially protest the umpire's decision to the American League president. Why not? Yankees manager Bill Virdon froze on the job. As the play occurred in the first inning, it was not a game-ending event and thus Virdon was required to lodge an immediate protest if he was to preserve his

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[20] *See McPhail Accepts Blame for Incident*, SARASOTA HERALD TRI., July 29, 1983, at 14-B (quoting American League Regulation 4.23). Each of the two professional baseball leagues is permitted to adopt its own regulations. *See generally* Off. Baseball R.

[21] This has been at times erroneously reported as a home run. *See, e.g.*, George Vass, *Baseball: A Game of Never-Ending Strange Plays*, BASEBALL DIG., Aug. 1, 2007, at 30, 33 (reporting Munson's hit as a homerun). In fact, Munson swatted a weak single. In 1975, Munson hit only 12 home runs in 661 plate appearances. *See Thurman Munson*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/players/m/munsoth01.shtml (last visited Sept. 9, 2011).

[22] *See* Rick Marazzi, *Baseball Rules: Reversed Calls by Umpires can Incite Further Problems*, BASEBALL DIG., Aug. 2006, *available at* http://findarticles.com/p/articles/mi_m0FCI/is_6_65/ai_n26921264.

[23] *Thurman Munson*, THEBASEBALLPAGE.COM, http://oldsite.thebaseballpage.com/players/munsoth01.php (last visited Sept. 9, 2011).

appellate rights. He did not. Virdon was replaced as Yankees manager a few weeks later by Billy Martin.

Within days of assuming the managerial reins, Martin objected that an opposing California Angels hitter was using a bat that exceeded the pine tar limit. The home plate umpire finessed the matter by claiming that he could not determine whether the substance was pine tar or merely dirt.[24]

On August 18, 1975, Chicago Cubs pitcher Steve Stone led off the third inning with a single to right field. The opposing Los Angeles Dodgers objected that Stone's bat exceeded the limit for pine tar application. After determining that the Dodgers were correct, the home plate umpire called Stone out.[25] Final score: Los Angeles 3, Chicago 1.[26] However, the Cubs did not officially protest the umpire's decision to the National League president.

On September 7, 1975, the Kansas City Royals defeated the California Angels 8-7.[27] John Mayberry, Royals designated hitter/first baseman, hit two home runs and batted in three runs during the contest. The Angels objected that Mayberry was using a bat that exceeded the limit for pine tar application and officially protested the result of the game to American League President Lee MacPhail. MacPhail denied the protest (the Mayberry Decision). The crucial part of the decision read as follows:

> The Playing Rules and the American League Regulations make it clear that pine tar is not to be considered in the same vein as a "doctored" or "filled" bat, under Rule 6.06(d). I would not consider that a ball hit with a bat with pine tar too far from the handle was necessarily an illegally batted ball under Rule 6.06(a), as one hit with a bat not conforming to Rule 1.10. Although Rule 1.10 limits a foreign substance to 18 inches from the handle, we are not talking about a material that improves the reaction or distance factor of the bat.[28]

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[24] Vass, *supra* note 21, at 33–34.

[25] *See* Thomas Boswell, *Justice is Done with a Sticky Wicket*, WASH. POST, July 29, 1983, at C1. *See also* Finkelstein, *supra* note 2, at 438 (discussing Stone being called out for excessive pine tar use).

[26] *Aug. 18, 1975, Dodgers at Cubs Play by Play and Box Score*, BASEBALL-REFERENCE.COM, www.baseball-reference.com/boxes/CHN/CHN197508180.shtml (last visited Sept. 9, 2011).

[27] *Sept. 7, 1975, Royals at Angels Play by Play and Box Score*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/boxes/CAL/CAL197509070.shtml (last visited Sept. 9, 2011).

[28] *Text of League President's Ruling in Brett Bat Case*, N.Y. TIMES, July 29, 1983, at A16 (quoting MacPhail's Mayberry decision); *see* Off. Baseball R. 1.10(c), R. 6.06(a), R. 6.06(a) cmt., R. 6.06(d) (Sporting News 1983). *See also* Nick Bremigan, *Views of Sport; How Baseball Became Unstuck by a Rules*

VI. THE UMPIRES' DECISION IN THE PINE TAR CASE

The umpiring crew in the Pine Tar Case claimed that they were simply following the rules. They postured as strict constructionists, judicial formalists who had no choice but to follow "the letter of the law."[29] Their supposedly formalist decision was simple and compelling, at least to them:

(1) A batter is out for illegal action if he hits an illegally batted ball (Rule 6.06(a));
(2) If a bat does not conform to Rule 1.10, then balls struck with such a bat are illegally batted balls (Rule 2.00);
(3) The bat handle for not more than eighteen inches from the end may be covered by material, including pine tar, to improve the grip (Rule 1.10(b));
(4) Any ball hit with a bat covered by pine tar in excess of the eighteen-inch limit does not conform to Rule 1.10 and is thus an illegally batted ball;
(5) From (1)–(4), the batter who hits such an illegally batted ball must be declared out;
(6) George Brett used a bat on July 24, 1983, that exceeded the eighteen-inch limit for the application of pine tar;
(7) George Brett's apparent home run on July 24, 1983, was an illegally batted ball. [30]

Ergo, the umpiring crew must declare Brett out and nullify the apparent home run.

As Nick Bremigan, member of the umpiring crew, later wrote, "Putting these three rules together, one can readily see that the letter of the law clearly indicates that there was no choice but to call Brett out and nullify his home run."[31]

VII. SOME PRINCIPLES OF JUDICIAL INTERPRETATION

Several well-established principles of judicial interpretation are relevant to the Pine Tar Case. The plain meaning approach requires, "the meaning of a statute must . . . first . . . be sought in the language in which the act is [expressed]."[32] If a statute's language is plain and clear then the judicial "duty of

Dispute, N.Y. TIMES, Aug. 7, 1983, at E2 (explaining that the American League did not include Pine Tar in Rule 6.06(d)).

[29] Bremigan, *supra* note 28.

[30] *Id.*

[31] *Id.*

[32] Caminetti v. United States, 242 U.S. 470, 485 (1917).

interpretation does not arise."[33] *Expressio unius est exclusio alterius* ("the express mention of one thing excludes all others") assumes items not included on the list are not to be covered by the statute. [34] However, where a list of examples is preceded by words such as "includes" or "such as," that list is intended to be illustrative, not exhaustive.[35] The rule of lenity provides that the judiciary should resolve the ambiguity in favor of the defendant when construing ambiguous criminal statutes.[36] Legislative purpose requires a determination of the legislative purpose of the statute when a statute's language is not sufficiently plain or clear to establish that statute's meaning.[37] What ultimate purpose did the ruling body intend this statute to facilitate or attain? In answering this question, the legislative history of the statute is commonly examined. Spirit of the act interpretation allows the court to act in accordance with the design of the act "[w]here a literal rendering will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter."[38] At times, the words of a statute "may be expanded or limited according to the manifest reason and obvious purpose of the law. The spirit of the legislative direction prevails over the literal sense of the terms."[39] Avoiding absurdity assumes that the legislative body did not intend absurd or manifestly unjust outcomes. Thus, statutes must "not be construed to lead to absurd results."[40]

Underlying all such principles of statutory interpretation are the cornerstones of the Rule of law: treating like cases alike, providing notice of the law's requirements, constructing impersonal and general decrees, advancing legal requirements that are accessible and capable of being readily understood, and

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[33] *Id.*

[34] *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 188 (1978); 82 C.J.S. *Statutes* § 426 (2009); Finkelstein, *supra* note 2, at 433.

[35] *Id.*

[36] Finkelstein, *supra* note 2, at 435. *See also* McNally v. United States, 483 U.S. 350, 374–75 (1987) (applying the rule of lenity).

[37] *See* Potomac Electric Power v. Dir., OWCP, 449 U.S. 268, 275–80 (1980); Finkelstein, *supra* note 2, at 435–36.

[38] Rapson, *supra* note 4, at 442 (citing New Jersey Builders, Owners & Managers Ass'n v. Blair, 288 A.2d 855, 859 (N.J. 1972)).

[39] Rapson, *supra* note 4, at 442 (quoting New Capitol Bar & Grill Corp. v. Div. of Employ. Sec., 135 A.2d 465, 467 (N.J. 1957)); *see also* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

[40] Rapson, *supra* note 4, at 450 (quoting State v. Provenzano, 169 A.2d 135, 137 (N.J. 1961)); *see also Green*, 490 U.S. at 527 (Scalia, J., concurring).

ascribing neither crime nor punishment in the absence of relevant and established law. Such principles aspire to ensure neutrality, uniformity, and predictability in the formulation and application of law.[41]

These principles of interpretation do not always rest together easily. For example, the plain meaning principle, the appeal to legislative purpose, and the invocation of the spirit of the act will sometimes produce conflicting judgments. To soften such conflict, philosophers have advanced numerous theories to guide and to justify judicial decision making.

VIII. EASY CASES AND HARD CASES

H. L. A. Hart, a legal positivist, concludes that "judicial decision making involves 'rules plus discretion'—the vast majority of cases are resolved by routine application of rules [to particular] facts, but 'hard cases' are resolved by judicial discretion [as adjudicators invoke] social policy and in effect reach a legislative solution."[42]

According to Hart, at least three areas of indeterminacy pervade law. First, a statute may have unclear and contestable instances of application. Second, in certain situations, determining and formulating the appropriate precedents to be applied may be problematic. Third, law often summons highly general standards, such as the standard of due care in negligence, the application of which often requires contestable judgments.[43]

Instead of lamenting the presence of indeterminacy in law, Hart accepts it as inevitable and desirable. Because of our need to make fresh choices, the flexibility of our current collective aims, and the impossibility of prior knowledge of future circumstances, a measure of legal indeterminacy has salutary

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[41] FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 210–12, 214–15 (Phoenix ed. 1978) (1960); Raymond A. Belliotti, *The Rule of Law and the Critical Legal Studies Movement*, 24 U.W. ONTARIO L. REV. 67, 67, 72 (1986); Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 145, 151, 156 (1958); *see also* F. A. HAYEK, THE ROAD TO SERFDOM 80–84 (50th Anniversary ed. 1994) (discussing the purposes of the rule of law); *see generally* A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 110, 114-15, 120 (LibertyClassics 1982) (1915) (discussing general principles of the rule of law).

[42] RAYMOND A. BELLIOTTI, JUSTIFYING LAW: THE DEBATE OVER FOUNDATIONS, GOALS, AND METHODS 47 (1992) [hereinafter JUSTIFYING LAW] (citing H. L. A. HART, THE CONCEPT OF LAW 132–33 (1961)).

[43] *See, e.g.*, HART, *supra* note 42, at 95, 123–29, 132 (discussing the judicial adjudication process).

effects.[44] He tells us that formalists who aspire to eliminate indeterminacy fail to recognize the unwelcome consequences of doing so.

> To [end indeterminacy in law] is to secure a measure of certainty or predictability at the cost of blindly prejudging what is to be done in a range of future cases, about whose composition we are ignorant. We shall thus indeed succeed in settling in advance, but also in the dark, issues which can only reasonably be settled when they arise and are identified. We shall be forced by this technique to include in the scope of a rule cases which we would wish to exclude in order to give effect to reasonable social aims, and which the open textured terms of our language would have allowed us to exclude, had we left them less rigidly defined. The rigidity of our classifications will thus war with our aims in having or maintaining the rule.[45]

Accordingly, questions of interpretation of meaning that arise in the penumbra—outside the settled core of paradigm instances—cannot be decided by logical deduction or any other alleged resort to formalism. Such questions, says Hart, must be resolved by the application of criteria purporting to support "what the law ought to be" on some social policy or purpose.[46] Laws often have gaps and judges must exercise creative choices to answer some legal questions. These creative choices can still be rational, although free. The choices are free in the sense that legal rules do not apply in a mechanical fashion, but rational in the sense that judicial decision making is constrained by numerous policies and principles which structure decisions by excluding most rationales. Judges address penumbra cases by confronting the purposes of the relevant statute in light of the interests of the respective litigants. Often, judges must weigh and balance conflicting factors in arriving at their decisions. In some cases, this weighing and balancing may not produce a uniquely correct answer to the case at bar.[47] In hard cases, judges must appeal to social purposes and goals that sometimes have, and sometimes lack, a moral component. Thus, penumbra cases are resolved through the exercise of judicial discretion and the application of considerations that are often extralegal. By this

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[44] *Id.* at 124, 126–27, 132.

[45] *Id.* at 126–27.

[46] H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–08 (1958).

[47] JUSTIFYING LAW, *supra* note 42, at 78; *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 30 (1977).

series of claims, Hart distances himself from all strictly formalistic or mechanical methods of judicial decision making.

Ronald Dworkin's understanding of the distinction between easy and hard cases differs from that of Hart. In fact, Dworkin advances an ultra-sophisticated version of formalism.

> The duty of a judge is to discover the antecedent right answer and enforce the preexisting rights of litigants, not to legislate or create a new solution. This concedes "discretion" to the judge, but only in the unassailable and weak sense that it calls on her to exercise judgment. Dworkin denies explicitly that judges have discretion in the strong sense that they are free to make decisions without a prior duty to decide in one way rather than another. Accordingly, for Dworkin, judges are rationally constrained by preexisting legal materials. One of the unique aspects of Dworkin's position is the sophisticated reasoning he believes judges must employ to discover the constraints on their decisions.
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> Judges must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents[, as well as for] constitutional and statutory provisions. His scheme, [where] applied to the United States, is ordered vertically into four levels: constitutional provisions, decisions by the United States Supreme Court, legislative enactments, and lower-court decisions. The justification for lower-level principles must be consistent with the principles providing justification for [higher level] materials. The scheme is . . . ordered horizontally in that the principles [which] justify a decision or act on one level must be consistent with the justification offered for other decisions and acts at that level. The resulting judicial theory, Dworkin assures us, will reflect only what the Constitution, common law precedents, and statutes themselves require, and [will] ignore the judge's independent personal convictions about morality and optimum social policy.
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> At each vertical level of justification the judge's task is somewhat different. At the constitutional level she must develop a comprehensive theory of principles and policies that justifies the constitution as a whole. She does this by [; (a)] generating possible explanatory theories [which] justify different aspects of the scheme[; (b)] testing the resulting theories against the nature of more general political institutions[;] and [(c)] upon exhaustion of the effectiveness of that test, elaborating the successful theory's contested concepts. At the statutory level, judges must decide which arguments from principle and policy could properly have convinced the legislature to enact particular statutes. Judges here are not trying to discern the "[*original*] *intent* of the framers"; [instead], they are trying to discover the *best justification* of settled

> doctrine. The actual intentions of the legislature are relevant only when necessary to choose between equally appropriate theories. At the common law level, judges must recognize that earlier decisions exert a "gravitational force" on later decisions insofar as arguments from principle justify such decisions.[48]

The best justificatory theory for existing law must furnish a more consistent fit with legal materials and must provide a more compelling moral justification in light of background morality than those accounts provided by competing theories.[49] Suppose, however, that one theory stigmatizes fewer aspects of legal doctrine as mistakes and thus provides the more consistent fit, while an opposing theory better meets the requirements and aspirations of background morality. Dworkin apparently suggests the following as a plausible, but probably too crude, answer: the consistent fit criterion is the threshold requirement; once two or more competing theories equally fulfill this requirement, background morality becomes the adjudicating criterion.[50]

Dworkin concedes straightaway that individual judges constituted by different backgrounds will construct different, mutually inconsistent theories. Moreover, it will often be impossible to demonstrate that only one of those theories is uniquely correct. Nevertheless, a judge must believe that there is some single correct justificatory theory, which announces a single

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[48] JUSTIFYING LAW, *supra* note 42, at 77–78 (emphasis added) (footnotes omitted). If prior decisions are justified by a particular set of principles, which act as reasons for those decisions, and those principles dictate a certain judgment in the instant case, and those principles have neither been "recanted [n]or . . . institutional[ly] regret[ted]," then that judgment applies to the instant case.

> This comprehensive scheme incorporates a theory of mistakes. That is, the scheme must limit the number and nature of events that can be stigmatized as mistakes and [outline] for future decision making why such events are mistakes. To disparage an event as a mistake is to deny its continued gravitational force—its authority for future judicial decision making—but not its specific institutional authority—its authority to effect the particular institutional consequences the event encompasses. A mistake will be "embedded" when the event's specific institutional authority is situated firmly and outlives the loss of its gravitational force. A mistake will be "corrigible" when the event's specific institutional authority depends on its continued gravitational force.

Id. at 78 (footnotes omitted); *see also* DWORKIN, *supra* note 47, at 115, 121 (defining the difference between embedded and corrigible mistakes).

[49] Ronald Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1254 (1977).

[50] *Id.* at 1252.

solution for each case. Dworkin rejects the notion that the truth of a proposition of law must be demonstrated on the basis of both physical facts and facts about human behavior. In his view, the presence of controversy among reasonable legal insiders acting reasonably is not logically sufficient to yield the inference that antecedent right answers do not exist.[51]

Dworkin then insists that legal positivists, such as Hart, make hard cases indeterminate because their jurisprudence concedes too easily that the law has run out in such cases and that judges must legislate an answer using policy and morality. Instead, Dworkin argues that virtually every legal question has a preexisting answer and denies that (strong) judicial discretion is required in so-called hard cases.

My favorite theory of judicial decision making is critical pragmatism.[52] Using Dworkin's justificatory scheme as a springboard, critical pragmatism rejects his conviction that one best justificatory legal theory of law must emerge. Instead, several legitimate, sometimes conflicting, legal ideologies pervade rules, principles, and precedents. Judges will often differ as to which of these ideologies they invoke.[53]

Still, critical pragmatism insists that there are right answers in law in at least three senses of that phrase. There are right answers in the sense that the internal constraints and theoretical presuppositions of a particular ideology will demand certain specific answers to numerous legal questions.[54] Such answers are correct in the relativized sense: Once a judge adopts the requisite presuppositions and recognizes the internal constraints of a

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[51] DWORKIN, *supra* note 47, at 282–83.

[52] *See* JUSTIFYING LAW, *supra* note 42, at 221–54 (discussing the ideology and philosophy behind Critical Pragmatism, and the methodology of applying Critical Pragmatism in jurisprudence).

[53] *Id.* at 237.

[54] *See id.* at 240. Legitimate legal ideologies are produced from a complex method of reasoning that seeks to justify extant law. These ideologies will

> roughly reflect general political philosophies such as centrist-liberalism, centrist-conservatism, socialism, economic-libertarianism, and [the like]. Trying . . . to forge [a] "master legal theor[y]," [a la Dworkin] by taking principles and policies from each legitimate legal ideology and assigning relative weights in accordance with their embodiment in extant legal doctrine, is unlikely to be successful. Except in . . . homogeneous societies, such a project is doomed to interminable confusion and conflict. Thus, no single, demonstrably best, legal ideology is likely to emerge from [the] analysis—but the field [will have] been narrowed. *Id.*

particular ideology, certain conclusions will follow in concrete legal situations. Moreover, there are also right answers in the sense that otherwise divergent ideologies will nonetheless converge on some matters. Although ideologies such as socialism, feminism, liberalism, conservatism, and economic analysis are unquestionably distinct, they still share some common prescriptive presuppositions; they often agree on the validity of numerous legal rules and extant doctrine; and thus their conclusions converge on many issues. Finally, there are right answers in the sense that antecedently existing doctrine on a specific legal question may overwhelmingly reflect one particular legitimate legal ideology.

It must be admitted, however, that these are limited senses of right answers which will strike some as odd or inadequate. These rights answers are not demanded by reason itself, or immune from revision, or uncontaminated by conventionalism, or incontestable, or fully required by the one proper interpretation of extant legal doctrine, or demonstrably correct from a neutral vantage point. Critical Pragmatism acknowledges that the cat is out of the bag: law and judicial decision making are political in that judicial interpretations implicate descriptive and prescriptive world visions. But not just any world vision passes the tests for a legitimate legal ideology, nor are we committed to the simple-minded proposition that one vision is no better or worse than any other.

Recall also that the very distinction between easy and hard cases suggests that the phenomenology of judicial decision making includes more convergence than divergence. Indeed, such convergence is contingent: largely a result of the selection, education, and professional socialization of lawyers and judges, and on areas of agreement among otherwise disparate ideologies. Moreover, as an empirical matter, members of the legal profession and elected government officials, perhaps reflecting the dominant views of wider constituencies, are overwhelmingly political centrists.

By accepting the existence of easy cases:

> Critical Pragmatism does recognize and reinforce a limited conservative (status quo preserving) bias in judicial decision making and has accepted a modest formalism. But this need not result in wholesale conservatism or in mechanical jurisprudence. Recall that Critical Pragmatism states that as a contingent reality legitimate legal ideologies will converge on numerous legal questions. The majority of legal questions . . . are not even

litigated. Only interesting hard cases comprise the law texts that preoccupy legal academics[, and this may give the erroneous impression that judicial divergence is more prevalent than it genuinely is]. Usually, disparate ideologies agree on the appropriate legal doctrine that decides legal questions and on its proper application. To agree, as Critical Pragmatism does, that legal language, logic, and normative reasoning are not fully determinate does not imply that easy cases are fictions. [55]

[M]aking this modest right answer claim [is still important.] First, it allows us to stigmatize as mistakes those judicial decisions that incorrectly apply the presuppositions, or incorrectly ignore the internal theoretical constraints, of a particular ideology. Second, it permits us to account for the distinction between easy and hard cases, the predictability of most legal outcomes, and the convergence of otherwise divergent ideologies. Third, it grants us a way to fashion a deeper notion of the institutional and social constraints on judicial decision making. Fourth, it is compatible with the formal aspirations of the Rule of Law. Fifth, because it incorporates a merely modest formalism it is able to recognize concrete social reality: the contingency and political sources of legal conclusions; the continuing presence of class, gender, and racial oppression; and the economic and social pressures from which the judiciary is not [immune].[56]

The Critical Pragmatism in jurisprudence sketched here implies the following: (1) legal theory yields a rational, although not fully determinate, structure to open-ended legal concepts; (2) in a pluralistic culture the presence of several legitimate legal ideologies will preclude any single all-embracing theory from being able to account for the complex set of legal materials; (3) despite the lack of an all-embracing theory, the legitimate legal ideologies presuppose at least a thin, common normative framework; (4) this common framework prevents [arbitrary], unremitting ideological conflict; (5) right answers (in the senses explicated previously) exist to most legal questions; (6) hard cases should be subject to a judicial discretion bounded by the values of fallibilistic pluralism and by the independent tests a justified legal theory must pass; and (7) judicial decision making implicates ideological vision and is thus political all the way down, but it does not follow that it is irrational, merely subjective, or unconstrained.[57]

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[55] *Id.* at 244 (footnote omitted).

[56] *Id.* at 237–38.

[57] *Id.* at 241–42. Critical pragmatism concludes:

> [A] judge is obligated to decide easy cases in accord with their respective right answers, but the scope of this obligation is bounded. Judges are under the relevant obligation if and only if affirming the

Of course, the sport of baseball aspires to make all decisions involving the application of its rules easy cases. The measured amount of legal indeterminacy that Hart extols as salutary is for the most part inapplicable to the limited concerns of professional sports. Moreover, baseball management does not want umpires to undergo the sophisticated theorizing required by Dworkin and by critical pragmatism. Unfortunately, too often the members of the rules committee of major league baseball have been less than masterful in crafting the statutes of professional baseball. As a result, gaps, conflict, and indeterminacy contaminate the baseball rule book, even though its domain is miniscule when compared to the vast jurisdictions and numerous issues confronting national and state governance.

IX. PRESIDENT MACPHAIL'S DECISION IN THE PINE TAR CASE

The American League President upheld the protest lodged by the Kansas City Royals. First, MacPhail argued:

> right legal answer would not generate inordinate substantive injustice that cannot be justified on other institutional grounds. The acknowledgment that the judicial obligation to apply what are clearly the law's requirements is bounded does not open the doors to wholesale judicial civil disobedience. Judges are justified in not applying the law only after making the determination that substantive injustice would occur; . . . no other institutional justifications [can] be persuasively offered for applying the law (e.g., that the rules, principles, and policies [which support] applying the law are morally justified and . . . ignoring them in the extraordinary instant case will do them significant damage; . . . the legal system as a whole is morally justified and will be damaged more by ignoring the law's requirements than the good that is produced, or harm prevented, in the instant case); . . . there are no less drastic means of resolving the problem (e.g., negotiation, alternate dispute resolution) . . . .

Id. at 248 (footnote omitted). See Richard J. Bernstein, *Pragmatism, Pluralism and the Healing of Wounds*, 63 AM. PHIL. ASS'N. 5, 15 (1989), which states engaged fallibilistic pluralism:

> means taking our own fallibility seriously—resolving that however much we are committed to our own styles of thinking, we are willing to listen to others without denying or suppressing the otherness of the other. It means being vigilant against the dual temptations of simply dismissing what others are saying by falling back on one of those standard defensive ploys where we condemn it as obscure, woolly, or trivial, or thinking we can always easily translate what is alien into our own entrenched vocabularies.

Id. *See also* JUSTIFYING LAW, *supra* note 42, at 241 (discussing fallibilistic pluralism).

> Rule 1.10 specifically provides that if . . . pine tar extends past the 18 inch limitation, the bat shall be removed from the game. If it was intended that this 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.[58]

Second, MacPhail, citing American League Regulation 4.23, pointed out that "[l]eague regulations and bulletins [directives] specifically provide that pine tar violations do not fall under the provisions of [Rule 6.06(d) that pertains to bats that have been altered to improve the distance factor or cause an unusual reaction on the baseball]."[59] Accordingly, the remedies, including calling the offending hitter out, provided for in Rule 6.06(d) apply only to bats that have been doctored in order to gain an undue competitive advantage. No one alleges, and no facts exist that support the conclusion, that using pine tar beyond the eighteen-inch limit has such effects.

Third, MacPhail, after consulting with several members of the Rules Committee, stated that the eighteen-inch limit on pine tar application "was primarily intended to keep from spoiling the ball and requiring new balls to be constantly brought into the game."[60] This purpose is what triggered the remedy in Rule 1.10(b) that a bat that exceeds the eighteen-inch limit shall be removed from the game.

Fourth, MacPhail claimed that when excessive pine tar on bats has been "noticed by umpires or complained about by the opposing team, [the general procedure] has been to require use of a new bat or require that the old bat be cleaned up."[61] He does note the Munson exception, but adds that "[p]artly as a result of [the Munson case], Rule 1.10(b) was amended and the following new language added, 'material, including pine tar, which extends past the 18 inch limitation shall cause the bat to be removed from the game.'"[62] Quite properly, MacPhail did not mention the Stone case as that was a National League event and beyond his jurisdiction.

Finally, MacPhail pointed out his judgment in the Mayberry case where he denied the California Angels protest that Mayberry, who hit two home runs in that game, should have been

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[58] *Text of League President's Ruling in Brett Bat Case*, *supra* note 28.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*

called out for excessive use of pine tar on his bat. MacPhail quoted the passage noted above in the Mayberry Decision, which occurred prior to the amendment to Rule 1.10(b).

Along the way, the league president paid homage to the umpires in the Pine Tar Case. He called their application of the rules "technically defensible,"[63] exonerated them from all blame ("Although the umpires are being overruled, it is not in my opinion the fault of the umpires involved, but rather is the fault of the Official Playing Rules, which in some areas are unclear and unprecise [sic]."),[64] and accepted responsibility for the ambiguity that triggered the protest. Apparently MacPhail, who cheerfully concluded in the Mayberry Decision that the relevant rules and regulations were "clear," had second thoughts in the Pine Tar Case. In both the short and long run, MacPhail's generous handling of the umpires' judgment would fuel the myth that the core of the Brett Decision was the conflict between the letter of the law versus the spirit of the law.

X. ASSESSING THE UMPIRING CREW'S DECISION IN THE PINE TAR CASE

Umpire Nick Bremigan's strictly formalist rendering of the decision in the Pine Tar Case is compelling only if we restrict the universe of relevant material to the parts of the rules he cited. But examining only the parts of the rules he cites as dispositive of the relevant material to be considered is erroneous. For example, the umpires might have argued that the statutory principle e*xpressio unius est exclusio alterius* militates Regulation 4.23 by specifically excluding suspension and ejection as proper penalties for excessive use of pine tar on a bat retains the penalty of calling the batter out. As Regulation 4.23 excludes pine tar infractions from only two of the three penalties (suspension and ejection) for doctored bats specified in Rule 6.06(d), the third penalty (calling the batter out) still pertains.[65]

But Rule 1.10(b) stated that a ball hit with a bat treated with any "material, including pine tar, which extends past the 18 inch limitation . . . shall cause the bat to be removed from the game."[66] No mention of any penalty to the offending hitter is included in

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[63] *Id.*
[64] *Id.*
[65] Finkelstein, *supra* note 2, at 433–34.
[66] *Id.* at 437.

the very provision that allegedly defines an illegal bat. The rule does not include nullifying a hit by a batter with excessive pine tar on his bat or calling that batter out among its penalties. Thus, the only specified sanction under Rule 1.10(b) is that the offending bat is to be removed from the game. Moreover, where the penalty of calling a batter out is specified (Rule 6.06(d)), it pertains specifically to players using bats that have been altered to improve the "distance factor or cause an unusual reaction on the baseball."[67] But Regulation 4.23 specifically excludes excessive pine tar use from the category of "doctored" bats.

The specious formalist argument of the umpires, outlined above, that concluded Brett must be called out can be countered by an equally hollow formalist argument that concludes Brett should not be called out.

(1) No mention of any penalty to the offending batter is included in the provision that defines the use of an illegal bat (Rule 1.10(b));
(2) The only response mentioned in that rule is that a bat with excessive pine tar shall be removed from the game (Rule 1.10(b));
(3) Where the penalty of calling a batter out is specified, that penalty applies to players using bats that have been doctored to improve distance factor or to cause unusual reaction (Rule 6.06(d));
(4) Excessive pine tar use is not an instance of doctoring a bat to improve distance factor or to cause unusual reaction (Regulation 4.23);
(5) George Brett used a bat on July 24, 1983, that exceeded the eighteen-inch limit for the application of pine tar;
(6) George Brett's home run on July 24, 1983, was not struck with a doctored bat.[68]

Ergo, the umpiring crew cannot declare Brett out, but it shall remove his bat from the game.

Both formalist arguments are unsound because they ignore part of the relevant material that should guide the decision. To conclude that indeterminacy or conflict pervades these rules, when they are considered as a whole, is reasonable. In such cases, the rule of lenity (where there is ambiguity, construe the statute in favor of the "defendant" and against the authority of

[67] Off. Baseball R. 6.06(d) (Sporting News 1983).
[68] The formalist approach used here is *expressio unius est exclusio alterius*.

the "government"—in this case, the umpires), the principle against nurturing absurd results (assume the rule makers did not intend to facilitate absurd results), and the rule of law proscription against penalties without clear notice (no "crime" or punishment without notice) all weigh in favor of Brett. Without even invoking the alleged "spirit" of the law, a decision maker might well have concluded that common statutory principles guiding adjudicators grappling with ambiguous rules line up in favor of not calling Brett "out." Accordingly, the Pine Tar Case is not a genuine conflict between the letter of the law and spirit of the law. Instead, the Pine Tar Case centers on a misapplication of the rules fueled by a failure to consider all the material governing the decision.

As further evidence of my conclusion, we must examine additional relevant material that the umpires seemingly ignored. After the 1975 season, the American League office issued a supplemental directive or bulletin to umpires:

> This penalty [of calling the batter out] was considered too severe to enforce for a bat that simply had pine tar more than 18 inches up the handle. The rules committee intended to keep the 18-inch limitation in effect, but *the intended penalty was only that the bat be removed from the game*.
>
> A supplemental directive to umpires from the American League office made it clear that a pine-tar bat was not to be included in rule 6.06(d), which refers to doctored bats. The directive ended, however, with the statement that the 18-inch limit would still apply. This *clearly removed* a pine-tar bat from the penalties in rule 6.06(d)—that is, [the penalties that] the batter is out as well as automatically ejected and possibly subjected to further discipline, but it still left intact the 18-inch limit.[69]

Thus, at least after the 1975 season, the American League office had specifically instructed umpires to exclude bats with excessive pine tar from *all* Rule 6.06(d) penalties. Only by ignoring that directive could the umpires in the Pine Tar Case reach their decision. And where did I learn of the earlier American League directive? From none other than umpire Nick Bremigan, who claimed to have been aware of the directive at the time he participated in the Pine Tar Case![70]

Why didn't the Rules Committee simply make the meaning of Rule 6.06(d) as clear as it was described in the American League

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[69] Bremigan, *supra* note 28 (emphasis added).
[70] *See id.*

directive? How could the umpiring crew be aware of that directive yet rule as it did? Did the umpires simply ignore the directive because they considered it irrelevant to their task? Were they, in fact, unaware of the directive at the time of their decision, but later tried to cover their ignorance by after-the-fact explanation?

But the matter worsens for the umpires. What about the Mayberry Decision, a precedent precisely on point? The reasoning of that case, which is quoted above, specifically precludes the interpretation of the rules that underwrote the umpiring crew's decision in the Pine Tar Case. Recall that the Mayberry Decision was a ruling by the highest appellate authority; it was "settled law," not having been overturned in the eight years prior to the Pine Tar Case. It was squarely on point and consistent with the American League directive that was issued after the 1975 season. Should the umpires have known about the Mayberry Decision? Absolutely! Given how carefully they guard their prerogatives and authority, umpires would have been buoyed that the league president's decision in Mayberry upheld their brethren's application of the rules. Moreover, the Mayberry Decision was crucial to future applications of the pine tar rule and it was announced in an official press release from the American League. Finally, the Mayberry ruling was consistent with and probably helped spawn the American League directive to the umpires that instructed them to exclude bats with excessive pine tar from all Rule 6.06(d) penalties. To be a finer point on this matter: The American League office is clear that "all umpires attend rules meetings, received update bulletins and 'are expected to know the rules.'"[71]

Yet umpire Bremigan later stood by several conclusions that coalesce uneasily: (1) "there was no choice but to call Brett out and nullify his home run";[72] (2) "[w]hat Lee MacPhail . . . actually did was . . . rule against an ambiguous and contradictory set of rules that allowed the entire situation to develop in the first place";[73] (3) the umpires' "decision was abselutely [sic] inescapable and in full accordance with the letter of the law";[74] (4) one would "never even find an umpire who thinks that calling Brett out for such a trivial infraction was the fair, just or honest thing to have

[71] Herm Weiskopf, *Inside Pitch*, SPORTS ILLUSTRATED, Aug. 8, 1983, at 63.
[72] Bremigan, *supra* note 28.
[73] *Id.*
[74] *Id.*

to do."[75]

If the rules were ambiguous and contradictory then how could the crew's decision be inescapable? Were the umpires culpably ignorant of the clarity of the Mayberry precedent or the relevant league directive? Or were they aware of them but decided, oddly, to simply ignore them—even though under any plausible understanding of decision making they were crucial to the proper ruling? Why would the American League issue directives and bulletins to umpires if the league office did not expect such material to be applied? If calling Brett "out" for the trivial infraction was neither fair, just, nor honest—under circumstances where the rules were ambiguous and contradictory, and controlling precedent, and a league directive dictated that Brett should not be called "out"—why call him "out"? Umpire Bremigan's retreat into a feckless formalism is radically misplaced once he concedes that the rules were ambiguous and contradictory.

Under Hart's legal positivism, despite the ambiguity of the rules, the Brett Decision is either an easy case (because of controlling precedent and the league directive, both of which would be required "legal material" for Hart) or it is a relatively simple hard case as everybody involved conceded that all extra-legal considerations of policy, equity, and the like favor Brett.

After all, Brett's infraction—excessive application of pine tar to his bat—did not gain him a wrongful competitive advantage; the penalty of nullifying his home run was disproportionate to his offense. Whether Brett could have had clear notice of this penalty is doubtful—especially because he was the third baseman in the 1975 game that triggered the Mayberry Decision; the rule of lenity weighs in Brett's favor, and everyone involved agreed that nullifying a hit and calling a batter "out" under these circumstances was an absurd result.

Under Dworkin's jurisprudence, the best overall justification of baseball rules would certainly decide in favor of Brett. Dworkin's sophisticated formalism would conclude that calling Brett "out" was clearly the wrong answer. Again, the controlling Mayberry Decision precedent, the clear League directive, and the host of policy and equity considerations noted would all be considered by Dworkin as part of the best justification of the rules of baseball.

Under critical pragmatism, the same understanding of the

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[75] *Id.*

material governing the decision would result in all legitimate legal ideologies converging and concluding that the right answer demanded that Brett not be called "out." Accordingly, the three theories of jurisprudence, although differing in several important respects, would all agree that the umpires in the Pine Tar Case muffed the call.

In fairness to the umpiring crew in the Pine Tar Case, they, unlike trial judges, cannot call a recess and examine all precedents and legal material prior to rendering a judgment. Of course umpires must consider only a relatively meager amount of relevant material: the rule book, a few League directives, and the league president's decisions of protested applications of the rules. Even if sympathetic spectators chose to exonerate the umpires from culpability because of the timing factor, a charitable rendering of Bremigan's later stumbling foray into logic and justification strains the imagination.

XI. SHORT-RANGE REACTIONS TO THE PINE TAR CASE

Predictably, the umpires stood their ground. Bremigan decried "the countless inconsistencies and ambiguities that currently abound in the official playing rules,"[76] and repeated, "[O]ur decision was abselutely [sic] inescapable and in full accordance with the letter of the law."[77] Crew chief Joe Brickman sputtered, "I don't like [MacPhail's ruling], but there's nothing I can do about it."[78] Home plate umpire McClelland sulked, "We can't arbitrarily rule on which rules we're going to enforce."[79] He continued, "The rule book is the only thing we have to go by. If somebody wants to make a farce of the rules, then we'll just have to be men and take it."[80] Richie Phillips, former umpire and general counsel to the Major League Umpires Association, opined that he did not believe that MacPhail had "the right to 'consider equity' in making . . . decision[s] based on the rules." [81]

Thus grew the bogus legend that the Pine Tar Case involved a conflict between the letter and the spirit of the law. Typically reluctant to admit mistakes and protecting their presumed

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[76] *Id.*
[77] *Id.*
[78] Jane Leavy, *MacPhail Overrules Umpires, Allows Homer by Brett*, WASH. POST, July 29, 1983, at C1.
[79] Weinberg, *supra* note 10.
[80] Weiskopf, *supra* note 71.
[81] Leavy, *supra* note 78.

absolute authority with deranged avidity, the umpires bristled at being overruled. McClelland drew the ego-saving conclusion that in the end he and his cohorts would take MacPhail's ruling like men. He might have been better advised to explain why the entire crew either willfully dismissed or were ignorant of the Mayberry Decision and the league bulletin that explicitly directed that the only appropriate penalty for excessive pine tar use was removal of the offending bat.

Was the fear of the umpires that their prerogatives of power were corroded by the Brett Decision reasonable? Well, if we consider his entire ten year term as American League president, and add the Brett Decision to the other occasions when he overruled applications of the rules made by his umpires, Lee MacPhail overturned their decisions exactly once! One might well conclude that any lesser number would suggest that the appellate process was an utter sham. Given the controlling precedent of the Mayberry Decision, MacPhail could not have consistently upheld the umpires' decision in the Pine Tar Case.

Yankees majority owner George Steinbrenner added his unique brand of outrage: "(MacPhail) is certainly not a scientist and in no position, I feel, to make such a judgment,"[82] that excessive use of pine tar does not increase the distance factor of a baseball bat . . . "[i]f you are asking for one word to describe the rationale behind that decision . . . the word would be 'ridiculous.'"[83] "It sure tests our faith in our leadership. If the Yankees lose the American League pennant by one game, I wouldn't want to be Lee MacPhail living in New York. Maybe he should go house hunting in Kansas City."[84] Never one to rest only on words when legal action was possible, Steinbrenner filed for a preliminary injunction barring the completion of the game. The New York Supreme Court in the Bronx granted that injunction.[85] The American League Office appealed to the New York Appellate Division, which overruled the Supreme Court less than three hours prior to the scheduled continuation of the game.[86]

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[82] *Id.*

[83] *"Tar Wars": MacPhail Overrules Umpires*, ASSOCIATED PRESS, July 29, 1983, *available at* http://www.rrstar.com/news/x469166026/Tar-Wars-MacPhail-overrules-umpires.

[84] PETER GOLENBOCK, WILD, HIGH, AND TIGHT 371–72 (1994).

[85] Steve Wulf, *Pine-Tarred and Feathered*, SPORTS ILLUSTRATED, Aug. 29, 1983, *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1121163/index.htm.

[86] *Id.*

Yankees outfielder Lou Piniella, a renowned umpire-baiter, piously defended his erstwhile foils: "The American League expects the umpire to interpret the rules . . . [a]nd when they do, it's proper that they be backed up."[87] Yankees catcher Rick Cerone went further: "[T]he integrity of the umpires is being questioned . . . . They showed me a lot of character that day, and if I was an umpire, I know I'd be making some pretty strong statements right now."[88]

Of course, the *integrity* of the umpires was never questioned. Cerone's Seton Hall education apparently did not include a session on the difference between "integrity" and "judgment." Indeed, MacPhail was so overly diplomatic that he did not even impugn the decision making of the umpires, calling it "technically defensible"—a claim I would vigorously dispute. The other remarks from Yankees partisans reek of sour grapes.

His self-congratulations having evaporated, Billy Martin reverted to default mode: petulance leavened by guile. He announced, "There's no question we were cheated. MacPhail changed the rules against us."[89] On August 18, 1983, the remaining part of the July 24 game was completed because of MacPhail's reversal of the umpires' judgment. Kansas City led 5-4 with two outs, bases empty, top of the ninth inning. Never one to ignore an opportunity to mock authority, Martin placed pitcher Ron Guidry in center field and left-handed fielding rookie first baseman Don Mattingly at second base. Prior to the first pitch, Martin contended that Brett had not touched first or second or third base on his trip to home plate on July 24. Martin intended to obstruct the completion of the contest. The umpiring crew on August 18 was completely different from the original crew of July 24. Thus, the new crew could not possibly be able to rule on Martin's claim. Anticipating Martin's lame shenanigans, the

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> That morning [of the scheduled replay of the game] Justice Orest V. Maresca of the State Supreme Court in the Bronx granted an injunction preventing the game. One of the Yankees' arguments was that their security force, which would be at one-quarter strength, would be ill-equipped to handle the throngs. The American League, which had to borrow National League lawyers, went to the Appellate Division of the Supreme Court, and at 3:35 Justice Joseph P. Sullivan said, "As far as the stay, I guess I can state it best in two words: 'Play ball.'" *Id.*

[87] *"Tar Wars": MacPhail Overrules Umpires*, *supra* note 83.

[88] *Id.*

[89] GOLENBOCK, *supra* note 84, at 372.

league office had prepared a notarized statement from the original umpiring crew confirming that Brett and teammate U. L. Washington had touched all the bases on their journey home on July 24. Billy Martin's last gasp theatrics failed. Within twelve minutes the game was concluded and Kansas City won 5-4.[90]

XII. LONG-RANGE REACTIONS TO THE PINE TAR CASE

The American League rewrote the relevant rules to make it blazingly clear that the only appropriate punishment for excessive pine tar application to a baseball bat was removing the offending stick from the game.[91]

However, the Brett Decision is still invoked as the precedent to overturn virtually any apparent injustice in Major League Baseball and as the cornerstone of the conclusion that the spirit of baseball law should trump the letter of baseball law.[92] For example, on June 2, 2010, Detroit Tigers pitcher Armando Galarraga had retired the first twenty-six Cleveland Indians batters he had faced. On the cusp of pitching a perfect game, Galarraga faced the potential final out, Indians shortstop Jason Donald. Donald hit a routine ground ball to the right of Tigers first baseman Miguel Cabrera, who fielded the horsehide and tossed it to Galarraga, who was covering first base. The ball was

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[90] *George Brett Pine Tar Game Enhanced Box Score*, BASEBALL ALMANAC, http://www.baseball-almanac.com/boxscore/07241983.shtml (last visited Sept. 9, 2011).

[91] Off. Baseball R. 1.10(b) (2011).

> If pine tar extends past the 18-inch limitation, then the umpire, on his own initiative or if alerted by the opposing team, shall order the batter to use a different bat. The batter may use the bat later in the game only if the excess substance is removed. If no objections are raised prior to a bat's use, then a violation of Rule 1.10(c) on that play does not nullify any action or play on the field and no protests of such play shall be allowed.

Id. *See also* Off. Baseball R. 1.10(c), *available at* http://mlb.mlb.com/mlb/downloads/y2011/Official_Baseball_Rules.pdf ("NOTE: If the umpire discovers that the bat does not conform to [Rule 1.10](c) . . . until a time during or after which the bat has been used in play, it shall not be grounds for declaring the batter out, or ejected from the game.").

[92] *See* Brian Cronin, *Sports Legend Revealed: The Pine Tar Game*, L.A. TIMES SPORTS BLOG (June 8, 2010, 11:00 AM), http://latimesblogs.latimes.com/sports_blog/2010/06/sports-legend-revealed-the-pine-tar-game.html. "The Pine Tar Game is the shining beacon that pretty much all sportswriters (or fans) will point to when they wish to make an argument about why a sports league should make a certain decision that, while not necessarily according to the rules of the game, seems to be the 'fair' decision." *Id.*

caught by Galarraga a step or more prior to Donald touching the bag but umpire Jim Joyce judged that Donald had beaten the throw.[93] Replays showed conclusively that Donald was "out." Galarraga retired the next batter and was credited with a one-hitter. After the game, to his credit, an inconsolable Jim Joyce admitted he botched the call.[94]

Numerous commentators and fans insisted that the American League president or the Commissioner of Major League Baseball should have intervened to overturn Joyce's decision on the Donald play and award Galarraga his deserved perfect game. Some pundits invoked the precedent of the Brett Decision to add ballast to their petition.

For example, serial bloviator Keith Olbermann, supported by documentarian Ken Burns, advanced the Brett Decision as precedent that could permit the reversal of Joyce's decision and restore justice. When it was apparent that Major League Commissioner Bud Selig was unwilling to accept Olbermann's invitation, Keith indicted Selig as the "Worst Person in the World," a daily feature on Olbermann's program.[95]

Columnist Mike Lupica also cited the Brett Decision in criticizing Selig's failure to act:

> Overturning Joyce's call would not have made the stars fall out of the sky or made the earth stop spinning on its axis. This would have been a proud variation of what Lee MacPhail, then the American League president, did with the Pine Tar Game, Yankees vs. Royals, back in the 80s.
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> . . . .
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> [MacPhail] invoked the spirit of the law in sports, not the letter of it. He said that the rule about pine tar HADN'T been written to take game-winning home runs out of the stands.
>
> At the time, MacPhail basically reinterpreted a baseball rule, mostly in the interest of fairness . . . .
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> It was such a fine moment for baseball. This could have been another . . . .[96]

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[93] *Id.*

[94] Jason Beck, *Missed Call Ends Galarraga's Perfect Bid*, MLB.COM (June 3, 2010, 1:34 AM), http://mlb.mlb.com/news/ article.jsp?ymd=20100602&content_id=10727590.

[95] David Barron, *Galarraga Saga Brings Reaction Pitcher Lauded, Selig Chastised in Aftermath*, HOUSTON CHRON., June 4, 2010, (Sports), at 2.

[96] Mike Lupica, *Hopes of Saving Armando Galarraga's Perfect Game End With Bad Call by MLB Commish Bud Selig*, NYDAILYNEWS.COM (June 3, 2010), http://articles.nydailynews.com/2010-06-03/sports/27066148_1_jim-joyce-bud-selig-pine-tar (last visited Sept. 9, 2011).

Apparently, Olbermann and Lupica are honor graduates of the Nick Bremigan School of Logic. Even if people are firmly convinced that the Joyce call should have been remedied (a view I reject), advancing the Brett Decision in support of that conviction is wildly misplaced. First, the Pine Tar Case centered on an application of a rule, while the Joyce call involved only a judgment as to fact. As such, the Pine Tar Case was appealable under Rule 4.19, while the Joyce call was not. Second, neither Rule 4.19 nor any other rule of baseball provides a remedy for errors as to judgments of fact. Third, the Joyce error did not materially affect the outcome of the game. The umpires' decision in the Pine Tar Case did affect the outcome of the game. In sum, the Joyce error, unlike the umpires' decision in the Pine Tar Game, could not be appealed by protest of the game. To change the result of a play based on a realization that an umpire made an erroneous judgment of fact would be unprecedented. Just because the Brett Decision was a fair, correct result does not imply that it is appropriate precedent to invoke to remedy any perceived injustice or to rectify any mistaken judgment of umpires that afflicts Major League Baseball.

Most important, from my standpoint, is that the Pine Tar Game was not fundamentally a dispute between the letter of the law and the spirit of the law. The adjudicating umpires agreed that the rules were ambiguous and indeterminate. That they bizarrely insisted later that their decision was "abselutely [sic] inescapable and in full accordance with the letter of the law"[97] should not obscure this point. That American League President MacPhail delicately described that decision as "technically defensible"[98] and struggled mightily to pay deference to the judgment and authority of the umpires should not obscure this point.

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[97] Bremigan, *supra* note 28.
[98] *Id.*