

Calling Balls and Strikes

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ABSTRACT

Chief Justice Roberts's metaphor of judges as umpires has been often criticized for being a bad theory of legal adjudication. Critics of Roberts's metaphor argue that judges are not mechanical reporters of clear-cut normative truths, but little attention has been paid to the question whether calling balls and strikes is indeed mechanical. The traditional theory, shared by both Roberts and his critics, is that "truth in baseball is clear-cut." In this Article, I argue that this theory of baseball is mistaken. Calling balls and strikes, despite its apparent simplicity, is an inherently interpretive practice. It is shaped not only by clear-cut rules, but also by shared practices and unwritten principles on how the game ought to be played.

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I am an outsider of baseball. Growing up in Europe, where baseball is largely an exotic curiosity, my fascination with this game was initially shaped by literature and cinema. Robert De Niro's speech in *The Untouchables*; Malamud's *The Natural*; and above all the sappy and mysterious *Field of Dreams* and the epic first chapter of DeLillo's *Underworld*. To my teenage self, baseball seemed to be the interpretive key to the American mind; but this being the pre-internet era, there was no way for me to crack that code—no books on the rules and practice of baseball and no acquaintance who had the basic knowledge to explain them to me. Although my current knowledge of baseball is quite decent, I still am, and consider myself, an outsider. After all, I have never played the game, and I learn new things every week. It is in this dual spirit of outsider *and* fan that I approach the topic of this Essay. Which is dedicated to the memory of my father, who, unlike his older son, was a true sports fan but did not have the opportunity to contemplate the beauty of baseball.

INTRODUCTION

Perhaps the most successful metaphor in modern legal discourse is Chief Justice Roberts's quip that judges should be like baseball umpires. The judge's job, Roberts famously said, is to merely "call balls and strikes,"¹ that is, to be a neutral and somewhat mechanical reporter of pre-determined legal truths, rather than a lawmaker.² By creating this image, Roberts joined an august group of legal thinkers who had portrayed judges as men³ who merely say out loud what the pre-existing truths of the law are.⁴ Indeed, this "vocal" conception of adjudication is much older than baseball and the United States. Montesquieu, with a metaphor that worked quite well for two centuries before Chief Justice Roberts's appointment to the U.S. Supreme Court, called judges *la bouche de la loi*—"no more than the mouth that pronounces

¹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J., D.C. Circuit).

² Some perceptive readers of Roberts's statement have argued that Roberts did not necessarily mean to advance a mechanical theory of adjudication, but merely a theory of judges as neutral actors, independent from the parties. See Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641, 644 (2012). I think, however, that Roberts's statement contains enough references to the figure of the judge as "rule-applier" rather than "rule-maker" to justify the way in which his metaphor has been generally received by scholars, practitioners, and the general public. See, e.g., Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 702 (2007) ("[Chief Justice Roberts's] umpire analogy would have judges 'just' decide constitutional cases according to 'the rules.'").

³ Roberts's precursors could not have conceived of women as judges, although progress had disrupted this assumption by the time Chief Justice Roberts made his famous statement. This has not been the case, however, in Major League Baseball, where the first woman ever to umpire an MLB game, Jen Pawol, made her debut only in the second half of the 2025 season. See Elizabeth Muratore, *Pawol Makes History as 1st Woman to Umpire Regular-Season MLB Game*, MLB.COM (Aug. 9, 2025), <https://www.mlb.com/news/jen-pawol-on-her-journey-to-becoming-1st-woman-to-umpire-mlb-game> [<https://perma.cc/8DYH-J9K4>].

⁴ John Roberts was not the first to propose the judge-umpire analogy. However, previous versions of the analogy did not seem to suggest a formalistic, rule-based conception of either judging or umpiring. See John Q. Barrett, *Justice Jackson on Umpires and Judges*, PRAWFSBLAWG (Mar. 21, 2009), https://prawfsblawg.com/2009_03_this-post-was-written-by-john-q-barrett-of-st-johns-and-the-robert-h-jackson-center-it-was-sent-to-the-jackson-list-and/ [<https://perma.cc/24LS-37JE>]; Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113 (2010), <https://yalelawjournal.org/essay/the-justice-as-commissioner-benching-the-judge-umpire-analogy> [<https://perma.cc/9YFE-BVD5>].

the words of the law, mere passive beings.”⁵ Montesquieu probably took this image from English legal writers of the seventeenth century⁶—notably, Sir Edward Coke wrote that “*judex est lex loquens*” (the judge is the law speaking),⁷ by which he probably meant that the judge is the mouthpiece, not the source, of the law. And English jurists very likely took it from Cicero, who wrote that “a magistrate is a speaking law, and law a silent magistrate.”⁸

By incorporating baseball in this tradition of vocal metaphors, however, Roberts added a layer of complexity. He proposed not only a theory of adjudication, but also a theory of baseball. Many scholars have rejected the former without questioning the latter. Indeed, the typical objection to Roberts’s metaphor is that judges—and especially Supreme Court Justices—are not at all like umpires. “Truth in baseball is clear-cut,” one exemplary critique goes, “a ball is fair or foul, the runner is safe or out, the pitch is a ball or a strike.”⁹

⁵ CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 180 (Thomas Nugent trans., 1773).

⁶ See generally K.M. Schönfeld, *Rex, Lex et Judex: Montesquieu and La Bouche de La Loi Revisited*, 4 EUR. CONST. L. REV. 274 (2008).

⁷ Calvin’s Case (1608) 77 Eng. Rep. 377, 381 (K.B.).

⁸ Marcus Tullius Cicero, *The Laws*, in *THE REPUBLIC AND THE LAWS* 150 (Niall Rudd trans., 1998). We should be very cautious about making connections between Cicero’s and Montesquieu’s statements, and even between Montesquieu’s and Roberts’s. The original historical contexts were so different that any parallelism will inevitably be seriously flawed. I will just note that, regardless of their historical and philosophical differences, all these metaphors represent the role of judges (and in Cicero, more broadly, the role of government officials) as a “vocal” one.

⁹ Eric Smith, *Some Thoughts on Engaged Judging*, 55 CT. REV. 154, 156 (2019). For other examples of traditional responses to Roberts, see Vaughn R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. ILL. L. REV. 1207 (2012); Fried, *supra* note 2 (generally accepting the notion that umpiring is much more mechanical than judging); Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 8–9 (2006) (arguing that while Roberts’s analogy is “sound in the sense that the judges for the most part really are neutral between litigants in the same way that a good umpire is neutral between the teams,” it is “preposterous” in the sense that, unlike umpires, Supreme Court Justices and appellate judges make political decisions that “are not dictated by the unambiguous language of authoritative documents”); Ronald Dworkin, *Judge Roberts on Trial*, N.Y. REV. OF BOOKS (Oct. 20, 2005), <https://www.nybooks.com/articles/2005/10/20/judge-roberts-on-trial/> [<https://perma.cc/6XRC-58P8>] (“As Senator Joseph Biden reminded Roberts, an umpire cannot set the strike zone: that is determined by the explicit rules of baseball. But a Supreme Court justice faces no such constraint.”); Siegel, *supra* note 2, at 706 (“If Supreme Court Justices are mere umpires . . . then surely the nominee could have told us, say, whether the regulations of abortion at issue in *Casey* were a ball or a strike, foul or fair”).

To be sure, a few commentators have noted that baseball umpires do much more than just calling balls and strikes, and that some calls in baseball are less mechanical than calling balls and strikes.¹⁰ Yet theorists of legal adjudication have ignored the most glaring flaw in the metaphor. Even calling balls and strikes is a much more complicated affair than Roberts suggested. Despite its apparent bright-line simplicity, calling balls and strikes is an interpretive practice, like baseball in general. Whatever the merits of Roberts's theory of adjudication, his theory of baseball is wrong.¹¹

In the "law and baseball" tradition,¹² there is a well-known story about the philosophy of umpiring. Three umpires discuss how they make calls. The first says: "I call them as I see them." The second says: "I call them as they are." And the third says: "They ain't nothing till I call them."¹³ These three umpires—which I will treat as paradigmatic and will refer to as the First Umpire, the Second Umpire, and the Third Umpire, respectively—embody three common theories of umpiring.

Roberts's theory resembles very closely that of the Second Umpire. Balls and strikes are out there in the objective world, the theory goes, and the umpire can only take notice of them, just like Montesquieu's "passive being."

The most radical opponents of Roberts's theory side with the Third Umpire. They argue that balls and strikes exist only when the umpire makes them so. Stanley Fish—who defended the thesis that interpreters do not decode texts but make them¹⁴—liked to quote a real-world exemplar of the

¹⁰ See Howard Wasserman, *Pine Tar: Of Baseball and Law*, PRAWFSBLAWG (July 24, 2011), https://prawfsblawg.com/2011_07_pine-tar-an-older-of-baseball-and-law/ [<https://perma.cc/8AEN-VT2T>] ("Umpiring—it's a lot more than calling balls and strikes.").

¹¹ For a sustained defense of the view that the calling of balls and strikes is and should be strictly rule-based, see Ahmed E. Taha, *The Jurisprudence of Baseball: Rules versus Standards*, 59 GONZ. L. REV. 257, 276–85 (2023/2024). In what follows, I will try to show that this traditional view should be reconsidered.

¹² I refer to the copious body of legal scholarship engaging with baseball by using the semi-serious label introduced by Charles Yablon. See Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L. J. 227, 233 (1994). Since Yablon's essay, legal theorists have made significant progress in studying sports and games as normative systems worthy of rigorous analysis. For a seminal text in this field (commonly called "jurisprudence of sport") and a comprehensive overview of the main issues, see MITCHELL N. BERMAN & RICHARD D. FRIEDMAN, *THE JURISPRUDENCE OF SPORT: SPORTS AND GAMES AS LEGAL SYSTEMS* (2021).

¹³ See, e.g., Robert L. Birmingham, *Teaching Contracts: Coming Home to Roost*, 69 B.U. L. REV. 435, 455 (1989) (referring to this story as a "trope").

¹⁴ See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 327 (1980).

story's Third Umpire to illustrate his own theory of interpretation.¹⁵ According to baseball lore, Bill Klem—a legendary figure who umpired eighteen World Series and is commonly credited for introducing arm signals for umpires¹⁶—was behind the plate when a pitch came through and the batter did not swing. Because Klem was hesitating to make a call, the impatient batter turned to him and asked: “So what was it, a ball or a strike?” And Klem replied: “Sonny, it ain’t nothing ‘til I call it.” For Fish, this means that umpiring (just like adjudication or literary interpretation) is a matter of power. Those who hold official power determine what counts as normative truth.¹⁷

Finally, the First Umpire, who “calls them as [they] see them,” treats calling balls and strikes as an epistemological rather than a metaphysical problem. There is an objective truth of the game out there, but it’s sometimes hard to access. Umpires strive to make accurate calls, but their judgments are inherently constrained by the limits of human perception.

This Article argues that each of the three umpires from the old story fail, in some way, to capture the reality of calling balls and strikes. Contrary to the First and Second Umpires’ (and Chief Roberts’s) theories, strikes and balls

¹⁵ See Nick Paumgarten, *No Flag on the Play*, NEW YORKER, Jan. 2003, at 32 (reporting Fish’s retelling of the story).

¹⁶ David W. Anderson, *Bill Klem*, in THE SABR BOOK OF UMPIRES AND UMPIRING 47 (Larry R. Gerlach & Bill Nowlin eds., 2017).

¹⁷ See Frances Ferguson, *On Getting Past Yes to Number One*, 30 CRITICAL INQUIRY 369, 372 (2004) (“Fish . . . treats the performative [that is, the speech act that alters the normative world, such as calling balls and strikes] as if it were largely an exercise in establishing hierarchy within groups. [His reading] makes the performative revolve around identifying who is boss.”). I should note that Fish explicitly rejected the labels of relativist or nihilist. In particular, he argued that the interpreter is not “free to confer on an utterance any meaning he likes,” and that “while relativism is a position one can entertain, it is not a position one can occupy.” FISH, *supra* note 14, at 310, 319. Nonetheless, he kept defending the view that rules do not constrain the interpretive process. See generally Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984). Similar (and perhaps more radical) views of interpretive freedom have been a major philosophical influence on various versions of critical legal theories since the 1980s. See Richard Rorty, *Nineteenth-Century Idealism and Twentieth-Century Textualism*, 64 THE MONIST 155 (1981); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Sanford Levinson, *Law as Literature*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 155, 159–162 (1988). A more modest characterization of the Third Umpire’s view is proposed in J.S. Russell, *The Concept of a Call in Baseball*, 24 J. PHIL. SPORT 21 (1997). Russell takes Bill Klem’s quip as an illustration of a theory of calls as performative utterances, in the sense introduced by John Austin, but not necessarily unmoored from rules or principles. I will use the Fish-Rorty version of the Third Umpire as it is a purer and crispier version of this theory of umpiring.

do not always exist independently of an interpretive judgment. Still, they are not an arbitrary creation of the umpire as the Third Umpire would suggest.

There are right calls and bad calls in baseball. When umpires make a call, they compare an event to its ideal version. They do not merely believe that a pitch was a strike; they claim that we and others *ought to* believe that it was a strike when trying to make sense of what happened. In other words, the umpire's calls are normative propositions, and their normativity is not based on authoritative and arbitrary commands but on rules, shared practices, and unwritten principles on how the game should be played. Indeed, what makes a call good or bad is a principled conversation—among umpires, players, fans, managers, and all other members of the baseball community—that tries to make common sense of what happened in the game.

Baseball principles, however, are neither eternal nor immutable. They are immanent in the game and therefore subject to change and decay. For decades, a subtle transformation in the collective understanding of baseball has been underway. The theory of baseball proposed here—though still consistent with the game as it is actually played—is slowly being eroded by a mechanistic view fostered by the pervasive use of technology. Chief Justice Roberts's theory could eventually become an accurate theory of baseball, but only because baseball itself would have become a different game.

The rest of the Article is organized as follows. Part I tries to present Roberts's (and the Second Umpire's) theory of balls and strikes in its best light, by examining the detailed, and apparently clear-cut, official rules of baseball. Part II examines the textual ambiguities and inconsistencies within these rules and shows that the actual practice of calling balls and strikes does not align with the official written rules. Part III builds on this analysis to argue that the misalignment between written rules and actual practices is neither accidental nor the product of epistemic failure (as the First Umpire might suggest) but rather reflects a shared understanding of the game and the central role that human judgment plays in it. A corollary of this point is that technology in baseball improves the game when it enhances the role of human judgment, not when it replaces it. Part IV argues that, contrary to the Third Umpire's theory, calling balls and strikes is not an act of power or mere discretion, but an interpretive practice based not only on clear-cut rules but also on principles. Part V discusses the differences between this theory of baseball and Ronald Dworkin's interpretivism and suggests that the Aristotelian concept of practical wisdom may help explain these differences. The last Part recapitulates and concludes.

I. RULES AND DIAGRAMS

A. *The Central Question*

Let's start from the beginning. The action in baseball begins when the umpire calls "Play!"¹⁸ After that moment, "[t]he pitcher shall deliver the pitch to the batter who may elect to strike the ball, or who may not offer at it, as he chooses."¹⁹ What happens after the pitch depends on several details. The most common consequences of a pitch, however, are balls and strikes.

Whether a pitch is a ball or a strike is a question of the utmost importance in baseball. Even casual observers know the familiar maxim: three strikes and you're out. Under the official rules, "[a] batter is out when . . . [a] third strike is legally caught by the catcher,"²⁰ whereas a batter "is entitled to first base without liability to be put out . . . when . . . four 'balls' have been called by the umpire."²¹ The difference between balls and strikes is therefore crucial, because in baseball "[t]he offensive team's objective is to have its batter become a runner, and its runners advance,"²² while "[t]he defensive team's objective is to prevent offensive players from becoming runners, and to prevent their advance around the bases."²³ Simply put, whether a pitch is called a ball or a strike determines whether each team advances toward its core objective.

The question at the center of this Article is how the umpire is to decide whether a pitch is a ball or a strike, and how that determination relates to the normative reality of balls and strikes. Chief Justice Roberts's implicit theory of umpiring conceives of the decision as a mechanical one: the umpire need only observe whether the facts fit the official definition of a "strike" or a "ball," and say it out loud.

In Roberts's statement, such a theory of baseball remains mostly implicit. He presents umpiring as an ideal benchmark against which legal adjudication can be measured, but he only hints at how he thinks about umpiring.

¹⁸ Rule 5.01(b), OFFICIAL BASEBALL RULES (Vanish Grover & Raquel Wagner eds., 2025). Hereinafter, any references to a "Rule," "Definition," or "Appendix," unless otherwise specified, is made to Rules, Definitions, and Appendices published in the above edition of the Official Baseball Rules.

¹⁹ Rule 5.01(c). If you are struck by the elegance of this Rule, you are not alone. See Richard K. Neumann, *Elegance in the French Civil Code and in the Rules of Baseball*, 28 GREEN BAG 2D 199, 203 (2025).

²⁰ Rule 5.09(a)(2).

²¹ Rule 5.05(b).

²² Rule 1.02.

²³ Rule 1.03.

It is quite clear, however—or at least it has been so received by scores of commentators—that Roberts’s view of umpiring is strictly formalistic.²⁴

Yet, as it happens whenever we use one thing (umpiring, in this case) to assess another (legal adjudication), we may incur two very different problems. The most obvious is that the act of measurement may be flawed—in our case, adjudication may not be like umpiring. This has been the traditional response to Roberts’s metaphor among his critics. The less obvious, but equally important, is that the measurement tool itself may be flawed.²⁵ In our case, calling balls and strikes may not be a strictly formalistic and mechanical task. This is the thesis defended in this Article.

Roberts’s decision not to elaborate on his theory of baseball likely reflects its intuitive appeal. To understand the theory’s shortcomings, let us first consider the reasons for its *prima facie* plausibility.

B. *The Case for the Clear-Cut Truth of Balls and Strikes*

The Rules of Baseball provide explicit definitions of balls and strikes. A ball “is a pitch which does not enter the strike zone in flight and is not struck at by the batter.”²⁶ A strike, in contrast, is “a legal pitch when so called by the umpire”²⁷ in any of seven different circumstances, the most common of which are commonly termed the “called strike” (when the pitch “[i]s not struck at, if any part of the ball passes through any part of the strike zone”²⁸ and the “swinging strike” (when the pitch “[i]s struck at by the batter and is missed”).²⁹

The Rules also define the “strike zone” as follows:

The STRIKE ZONE is that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and

²⁴ For the widespread reception of Roberts’s metaphor as a formalist theory of adjudication, see Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1051 (2006).

²⁵ Nassim Taleb called a variant of this mechanism the Wittgenstein’s Ruler. See NASSIM NICHOLAS TALEB, *FOOLED BY RANDOMNESS* 224 (2d ed. 2005) (“Unless you have confidence in the ruler’s reliability, if you use a ruler to measure a table you may also be using the table to measure the ruler.”). For a similar observation, see BERMAN & FRIEDMAN, *supra* note 12, at 361.

²⁶ Definition of “Ball.”

²⁷ Definition of “Strike.”

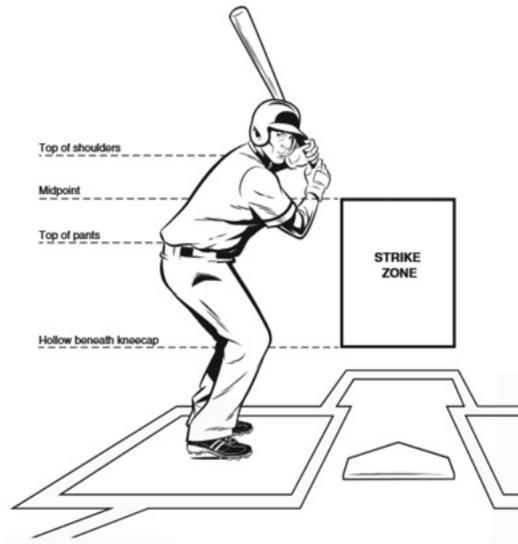
²⁸ *Id.* at (b).

²⁹ *Id.* at (a). Interestingly, in the early history of baseball, only swinging strikes were strikes. See JOHN THORN, *BASEBALL IN THE GARDEN OF EDEN* 75 (2011) (“Called strikes did not enter the game until 1858 and called balls were an innovation of 1863.”).

the top of the uniform pants, and the lower level is a line at the hollow beneath the kneecap.³⁰

A preliminary observation should be that the “top of the shoulders,” the “top of the uniform pants,” and the “hollow beneath the kneecap” are somewhat open-textured concepts.³¹ However, the Rules include a visual representation of the strike zone in an Appendix.³² The figure in question, reproduced below as Figure 1, shows a rectangle: its base is of the same size of the wider edge of the home plate, and its height goes from just below the kneecaps to the armpit of the batter. Anyone who has watched a baseball game on television in the last twenty years or so has almost certainly seen an electronic version of this rectangle on the screen.³³

Figure 1. The Strike Zone in the Appendix to the Official Rules



³⁰ Definition of “Strike Zone.”

³¹ I refer, of course, to the concept discussed in H.L.A. HART, *THE CONCEPT OF LAW* 127-128 (2d ed. 1994) (“Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.”)

³² See Appendix 5.

³³ The superimposed electronic representation of the strike zone debuted on ESPN in 2001, to be used only in replays. See André Guézic, *Tracking Pitches for Broadcast Television*, 35 *COMPUT. 38*, 38–43 (2002). At the time of this writing (Fall 2025), the electronic strike zone is a fixed feature of any shot of a pitch seen from behind the pitcher.

On its face, then, the question of whether the pitch is a ball or a strike seems to be a mere question of geometry. This is the theory that the Rules and the diagram included in the Appendix seem to suggest, and one seemingly reinforced by the electronic strike-zone graphics displayed on television broadcasts. According to this view, an imaginary rectangle—its dimensions and position precisely delineated in the Rules—intersects with a physical sphere observable in the real world. For a called strike, the question to answer is whether the sphere has touched the rectangle. And for a swinging strike, the question to answer is if the batter has swung at the ball and missed it. In both instances, the answers are to be found in empirical observations of physical events. These may be difficult empirical observations, to be sure, but they are empirical nonetheless.

What, one might ask, could be more mechanical than this? Roberts, it would seem, must be right. There are, however, several complications with this theory. Some of them have to do with the text of the rules themselves, others with the practice and principles of baseball. I examine them in turn in the remainder of the Article.

II. BALLS AND STRIKES IN BOOKS AND IN ACTION

A. Contradiction and Vagueness

One textual complication for Roberts's theory of baseball is that the rules governing balls and strikes are somewhat internally inconsistent.³⁴ The diagram of the strike zone that we find in the Appendix does not accurately represent the description that we find in the Definitions. The Rules define the strike zone as the "area over home plate," but home plate is a trapezoid, which makes the "area over home plate" a tridimensional trapezoidal prism, not the bidimensional rectangle depicted in the Appendix. Only one face of this prism—the one facing the pitcher—corresponds to the rectangle in the diagram. A pitch, however, may enter the strike zone through other faces of the prism, a possibility that the diagram does not capture.

This may seem a pedantic observation of little consequence, but it is not. In the real world, many pitches do indeed touch the tridimensional

³⁴ I use "rules" here as synonymous of written rules or communicative content of written rules. For a distinction between this and other meanings of "rule," as applied to the jurisprudence of sport, see Mitchell N. Berman, *The Concept of a Rule in Baseball: An Essay in Honor of J.S. Russell, Jurisprudent of Sport*, 52 J. PHIL. SPORT 189 (2025).

strike zone without touching the pitcher-facing rectangle.³⁵ For example, the ball may take a curved trajectory, miss the frontal face of the strike zone by an inch, and catch the back corner of the plate. These are strikes according to the Definitions but not according to the Appendix. For many years, this contradiction was made more vivid and troubling by the electronic strike zone regularly shown on television, which used to be even less faithful to the text of the Definitions. The televised strike zone is often not only a rectangle but a fixed rectangle—its size and position are the same for all batters.³⁶ In contrast, according to the Rules “[t]he Strike Zone shall be determined from the batter’s stance as the batter is prepared to swing at a pitched ball.”³⁷ Because the strike zone is defined from the batter’s stance at the moment he is prepared to swing, it can vary not only from one batter to another (because of body size) but for the same batter across pitches: for example, if he adopts a deeper crouch, widens his knees, or stands more upright. The televised strike-zone graphic has misled viewers into thinking that the geometry of the strike zone is far more simplistic than the rulebook specifies. Only more recently, thanks to the advances of ball-tracking technology, television networks began using tridimensional strike zones and strike zones that adjust to the height of the hitter.³⁸

Another textual complication is that the Rules do not explain what it means to “strike at” a pitch in the case of a swinging strike. A swinging strike

³⁵ For persuasive empirical evidence, see Eric Lang, *Analyzing the Strike Zone as a Three-Dimensional Volume*, *HARDBALL TIMES* (Sept. 15, 2015), <https://tht.fangraphs.com/analyzing-the-strike-zone-as-a-three-dimensional-volume/> [<https://perma.cc/G494-2FDT>].

³⁶ See, e.g., Bor-Yao Tseng et al., *Pitching-Motion: Pose-Based Pitch Trajectory Overlay System*, 26TH INT’L CONF. ON ADVANCED COMM’NS TECH. (2024).

³⁷ Definition of “Strike Zone.”

³⁸ ESPN unveiled what they actually called “K-Zone 3D” during the 2017 American League Wild Card Game. That’s the first time they showed the pitch flying through a 3-dimensional strike zone that the spectator could view from different angles. In 2018, they began to use this tool more frequently, including in regular season’s games. See Ken Fang, *ESPN Will Use More of K-Zone 3-D and Provide Even More Graphics on Sunday Night Baseball*, *AWFUL ANNOUNCING* (Mar. 19, 2018), <https://awfulannouncing.com/espn/espn-will-use-more-k-zone-3d-provide-even-more-graphic-sunday-night-baseball.html> [<https://perma.cc/K6P5-HWC7>]. Fox Sports claims that the height of the strike zone in its FoxTrax system varies from hitter to hitter. See Jeffrey Flanagan, *How Accurate is Foxtrax? Within One-Third of a Baseball*, *FOX SPORTS* (June 18, 2013, 10:49 ET), <https://www.foxsports.com/stories/other/how-accurate-is-foxtrax-within-one-third-of-a-baseball> [<https://perma.cc/M95R-N9V4>]. However, these systems typically do not take into account the specific posture of the hitter.

occurs only if the batter strikes at the pitch (and misses it).³⁹ In other Rules—and in common baseball parlance—this movement is called a “swing.” However, there is no official definition for it. When the batter starts swinging and then stops—typically, because they realize that the pitch is outside the strike zone—the umpire will have to decide whether what just happened was an attempt to strike at the pitch or not. In practice, umpires use different heuristics to make this decision—for example, whether the barrel of the bat passed over the plate or whether the batter’s wrists broke—but these are necessarily imperfect proxies for the application of a highly vague standard.

This predicament mirrors a familiar problem in criminal law. In most jurisdictions, the law punishes not only completed crimes but also attempts to commit crimes. However, identifying an attempt is not always easy. An assassin who pulls the trigger but misses the victim is very likely guilty of attempted murder, because they did everything in their control to bring about the prohibited result. But what about someone who spills gasoline in the basement of their enemy’s home but is then interrupted before igniting it? Is this a criminal attempt? The law recognizes a *locus poenitentiae*—a space to repent—but how broad this *locus* should be is a contentious question.⁴⁰

The swinging-strike rule in baseball presents an analogous challenge: the umpire must make a judgment call about whether an incomplete action counts as an attempt under the rules. In both contexts, applying a formal standard requires interpretation and judgment, not mere mechanical observation.

B. Interpreting The Zone

The problems with the application of Roberts’s theory to the strike zone are not only textual problems. There is also copious evidence that the practice of baseball does not perfectly align with the written rules.⁴¹

³⁹ I will assume that the concept of “missing the ball” does not raise interpretive questions.

⁴⁰ See, e.g., Andrew Ashworth & Lucia Zedner, *Prevention and Criminalization: Justifications and Limits*, 15 NEW CRIM. L. REV. 542 (2012).

⁴¹ See, e.g., Aaron S.J. Zelinsky, *The Supreme Court (of Baseball)*, 121 YALE L.J. ONLINE 126, 155 (2011), <http://yalelawjournal.org/forum/the-supreme-court-of-baseball> [<https://perma.cc/D5C3-55PV>] (“[E]nforcement of the strike zone has been a controversial issue: umpires have often declined to follow the official rules.”). Lax enforcement or discretionary applications of rules are not infrequent in sports. See, e.g., WILLIAM D. POPKIN, JUDGMENT: WHAT LAW JUDGES CAN LEARN FROM SPORTS OFFICIATING AND ART CRITICISM 15–18 (2017).

One example is well known to baseball fans, especially those who followed the game several decades ago: the phenomenon of the shrinking strike zone. The 1960s were an era of pitching dominance. In Major League Baseball (“MLB”), the average of earned runs averages, a measure intended to capture how many runs a pitcher gave up, fell from 3.98 in the period between 1947 and 1962 to 2.98 in 1968.⁴² In response to this phenomenon, which made baseball games less engaging,⁴³ the Rules were changed to rebalance the relative strength of defense and offense. The upper limit of the strike zone was lowered from the batter’s shoulders to his armpits, and the pitcher’s mound was lowered from fifteen to ten inches.⁴⁴

However, players and spectators noticed that “sometime in the 1970s . . . the upper limit of the strike zone mysteriously shrank [even more] from the armpits to somewhere between the armpits and the waist.”⁴⁵ This shift was not the result of another official amendment to the rules but a change in how umpires called balls and strikes in practice. Call it the strike zone in action, as opposed to the strike zone in the books.⁴⁶

A similar phenomenon may be happening in the current season (2025). Players have observed that “[e]verybody’s zone has shrunk.”⁴⁷ According to some commentators, the origin of the new shrinking strike zone is due to the recent labor agreement between MLB and the Major League Umpires Association.⁴⁸ This agreement, like the previous one, includes a system for grading umpires’ calls with automated ball-tracking systems. Called strikes that fall outside what the computer thinks is the official strike zone, as well as called balls that fall within it, are graded “incorrect.” However, there is a buffer for minor mistakes. Under the previous agreement, umpires had a two-inch

⁴² See Douglas J. Jordan, *Eras of ERA*, SPORT J., <https://thesportjournal.org/article/eras-of-era/> [<https://perma.cc/QK7F-ZXY5>].

⁴³ Most of my European friends (and many of my American friends) would object that baseball is intrinsically boring, regardless of the size of the strike zone. Of course, baseball *is* boring, according to a certain conception of boredom. But that is a feature, not a bug, of the game. See ALVA NOË, *INFINITE BASEBALL* 36–38 (2019).

⁴⁴ See WILLIAM F. McNEIL, *THE EVOLUTION OF PITCHING IN MAJOR LEAGUE BASEBALL* 96 (2006).

⁴⁵ *Id.*

⁴⁶ The reference is, of course, to Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

⁴⁷ Jayson Stark, Ken Rosenthal & Eno Sarris, *MLB made a change that players say shrank the strike zone — and caught them by surprise*, ATHLETIC (May 2, 2025), <https://www.nytimes.com/athletic/6328105/2025/05/01/mlb-umpire-strike-zone-buffer-zone-change/> [<https://perma.cc/WYT5-P8SN>].

⁴⁸ See *id.*

buffer, while in the new agreement the buffer has shrunk to three-fourths of an inch. This likely explains why the strike zone in action has shrunk.

These episodes are two very visible examples of how umpires shape the strike zone. But there are many others. Umpires approach their task of calling balls and strikes as a very active, interpretive job. For example, they engage in “pitch management,” by enlarging the strike zone to speed up an unreasonably slow game. They randomize consecutive close calls to be fair to both teams. They tweak their approach in response to a manager’s vigorous protests. Nobody acquainted with the reality of umpiring would believe that calling balls and strikes is a purely mechanical task.⁴⁹

Perhaps no group understands the active role of umpires in interpreting the strike zone better than baseball parents. As the children grow, so grows their ability to play the game (on average). Umpires know that, of course, and their strike zone adjusts to these different levels of abilities, regardless of what the written rules say. A popular website for umpires, for example, suggests that the strike zone’s upper limit should be just above the waistline for players aged fifteen and older, but much higher for twelve-year-olds.⁵⁰ The website underscores that these are simple rules of thumb, and the relevant ages of the players are just an approximation. “You must adapt to the skill level,” the guide recommends, “which *tends* to correlate with age, but doesn’t always.”⁵¹ Another guide for umpires notes that “[d]ifferent levels and leagues expect a different definition of high [pitch]. For 13 and under, the shoulders are probably a good definition or you will be there all day.”⁵² These tweaks and adjustments are generally accepted, but they do not align with the official rules. Indeed, the official definitions of the strike zone in the MLB Rulebook and in the Little League Rulebook are almost identical.⁵³

⁴⁹ All these examples, and some others, can be found in Zack Helfand, *Kill the Umpire*, NEW YORKER, Aug. 30, 2021, at 25. For additional examples of real-world umpiring, see BRUCE WEBER, AS THEY SEE ‘EM: A FAN’S TRAVELS IN THE LAND OF UMPIRES (2009).

⁵⁰ See *Calling Balls & Strikes*, UMPIREBIBLE.COM, <https://www.umpirebible.com/index.php/rules-pitching/calling-balls-strikes> [<https://perma.cc/ZT56-L8U7>] (last visited Dec. 20, 2025).

⁵¹ *Id.*

⁵² Peter Osborne, *Working the Plate, Part 2: Advanced Ball & Strike Calling*, UMPIREBIBLE.COM, <https://www.umpirebible.com/files/Osborne02.pdf> [<https://perma.cc/MZ5Y-GYPY>] (last visited Dec. 20, 2025).

⁵³ See *Definition of the Little League Strike Zone*, LITTLE LEAGUE UNIV., <https://www.littleleague.org/university/articles/definition-little-league-strike-zone/> [<https://perma.cc/DT5Q-NKFE>] (last visited Dec. 20, 2025) (defining the strike zone as “that space over home plate which is between the batter’s armpits and the top of the

C. *The Interpretive Negotiation*

By now, it should be quite clear that umpires do not practice Roberts's mechanical conception of baseball. They shrink and enlarge the strike zone for many different reasons, including within the same game. But what of the pitcher, catcher, and batter? How do these players think about and respond to the strike zone? Consider some of the additional skills and practices that their roles demand.

First, pitchers expect umpires to bring their own interpretation of the strike zone and adjust their pitches accordingly. A pitching guide written by a veteran MLB pitcher warns readers that although they naturally "ha[ve] an idea as to which pitches are strikes and which ones will be called balls," it is not at all uncommon that they encounter an "umpire [who] doesn't call [their] bread and butter pitch a strike."⁵⁴ In these cases, pitchers must adjust their strategy. For example, the guide advises the pitcher to "pitch ahead in the count,"⁵⁵ or "rely more on changes of speed." Moreover, pitchers "must stay consistent," because "[u]mpires like to see... [that] a pitcher knows where he is throwing the ball."⁵⁶ If pitchers do this, the guide explains, umpires might change their approach and start calling a consistent pitch a strike.⁵⁷ In other words, pitchers do expect umpires to interpret the strike zone, and they enter a sort of conversation with the umpire to try to influence their interpretation.

Second, batters obviously respond to the pitcher's adjustment to the umpire's interpretation of the strike zone. A pitch is, first and foremost, a subtle conversation between pitcher and batter, in which the pitcher tries to create a misleading expectation about the upcoming pitch, and the batter tries not to be misled. As Robert Francis wrote in a poem, referring to the differences between pitchers and fielders, "The others throw to be comprehended.

knees when the batter assumes a natural stance"). This definition is very close to the MLB Definition. *See supra* note 30 and accompanying text.

⁵⁴ Geoff Zahn, *Uncooperative Umpires*, MASTER PITCHING INST. (Oct. 15, 2014), <https://masterpitching.com/uncooperative-umpires/> [<https://perma.cc/8GCW-E2XX>].

⁵⁵ The "count" is how many strikes and balls have been pitched at a given moment against a batter. Being ahead in the count means having pitched more strikes than balls. While "pitching ahead in the count" is obviously good in any situation, it becomes mandatory when the umpire has a quirky strike zone, because it builds leverage against the batter earlier and therefore mitigates the risk of unexpected calls. It also avoids the temptation to try counterproductive strategies (such as pitching in the middle of the zone to avoid balls, which makes hits much more likely).

⁵⁶ Zahn, *supra* note 54.

⁵⁷ *See id.*

He / Throws to be a moment misunderstood.”⁵⁸ This conversation happens in the shadow of the umpire’s determination—which pitch should be called a strike and which one a ball—a meta-expectation, as it were. Changing this meta-expectation naturally changes the boundaries of the conversation.

Third, batters and catchers often speak directly with the umpire. “Would that have been a strike?”, a batter may ask after he swung and missed a pitch. Or “is that the bottom of the zone?” when looking at a strike called at the edge of the zone.⁵⁹ Catchers speak to umpires to comment on pitches. In fact, as the aforementioned pitching guide suggests, it is important that “a pitcher has a catcher that is continually talking to an umpire on his behalf”⁶⁰—a form of advocacy.⁶¹

Fourth, catchers engage in a well-known practice called “framing”: attempting to catch a close pitch in a way that is more likely to be called a strike than a ball. This may sound like cheating—and is sometimes perceived as such—but it is officially recognized as part of the game. The MLB Glossary defines framing as “the art of a catcher receiving a pitch in a way that makes it more likely for an umpire to call it a strike.”⁶² As for every important skill in baseball, framing has its own statistic and ranking. In the current season (2025), at the time of this writing, Patrick Bailey of the San Francisco Giants and Alejandro Kirk of the Toronto Blue Jays lead the MLB in the art of framing.

Fifth, managers complain about calls that they consider wrong. Sometimes these episodes turn into vigorous protests and may even result in the ejection of the manager from the game.⁶³ One might wonder why a highly

⁵⁸ Robert Francis, *Pitcher*, in *THE ORB WEAVER* 8, 8 (1960).

⁵⁹ Matt Antonelli, a former professional baseball player who played in MLB for the San Diego Padres, discusses some of these conversations in a video on his YouTube channel. See Antonelli Baseball, *Do Hitters and Umpires Talk To Each Other in MLB?*, YOUTUBE (Feb. 7, 2024), <https://www.youtube.com/watch?v=g-w0JcSFvfQ> [<https://perma.cc/7Y7P-4T92>].

⁶⁰ Zahn, *supra* note 54.

⁶¹ *Id.*; see also Paul Finkelman, *Baseball and the Rule of Law Revisited*, 25 THOMAS JEFFERSON L. REV. 17, 19 (2002) (“Why does the batter argue at all? Because he is trying to limit the damage of the ‘precedent’ of this call.”).

⁶² *Catcher Framing*, MLB.COM, <https://www.mlb.com/glossary/statcast/catcher-framing> [<https://perma.cc/T9VX-KX9M>] (last visited Dec. 20, 2025).

⁶³ Under Rule 8.02(a), managers are prohibited from arguing judgment calls such as balls and strikes. Despite this, historical data indicates that arguing these calls is the leading cause of manager ejections. See Alex B. Rivard, *Yer out of here*, MEDIUM (Dec. 6, 2021), <https://alexbrivard.medium.com/yer-out-of-here-3507149750fb> [<https://perma.cc/N6F2-4SJU>].

paid and experienced professional would publicly lose their temper in such a dramatic way. One reason could be that in sports, emotions run particularly high and can serve a beneficial purpose, such as contributing to an athlete's motivation. This is probably true.⁶⁴ However, another reason is that managers want to be part of the conversation about the interpretation of the strike zone, and their way of participating is to express their objections with different degrees of emotional investment. Although an umpire will not overturn a call based on the vigor of a manager's complaint, they may take the objection into account for subsequent calls.

These skills and practices suggest that pitcher, batter, and catcher, as well as managers, do not behave as though balls and strikes are clear-cut facts. They behave more like lawyers before a court. They engage in acts of interpretation and persuasion in efforts to shape the outcome of an umpire's determinations. They treat baseball as an interpretive practice.

III. TECHNOLOGY AND JUDGMENT

A. *The Epistemological Theory of the Strike Zone in Action*

Thus far, I have shown that balls and strikes are not only products of written rules but also of practice, as shaped by umpires, owners, players, and managers. Still, this state of affairs may very well be a contingent and imperfect version of the game. Perhaps the calling of balls and strikes, as well as calling foul and fair balls, outs, and safes, *aspires to be mechanical*, and the members of the baseball community *ought to defer* to a technological device that corrects the flaws and limits of human perception and cognition.

On this account, the fact that baseball right now is not mechanical is an unfortunate product of accident and human imperfection. Determining what has happened on the field is difficult—that is why umpires call strikes that were not strikes and players engage in various tricks and tactics of persuasion to influence those calls. In other words, the indeterminacy of the strike zone would be understood as a bug, not a feature, of baseball.

This is the theory of baseball embraced by some of the critics of Chief Justice Roberts's metaphor. For example, Timothy Terrell has argued that uncertainty in law arises from "its constituent materials," whereas uncertainty in

⁶⁴ See Eric D. Magrum & Bryan A. McCullick, *The Role of Emotion in Sport Coaching: A Review of the Literature*, SPORT J. (May 23, 2019), <https://thesportjournal.org/article/the-role-of-emotion-in-sport-coaching-a-review-of-the-literature/> [<https://perma.cc/5EDB-BRTL>].

umpiring arises from the limits of the umpire's senses.⁶⁵ In other words, legal truths are metaphysically indeterminate, whereas baseball truths are not—our difficulty lies only in perceiving them accurately.

This philosophy of umpiring is the one offered by the First Umpire, the one who says, “I call them as I see them.” The First Umpire acknowledges the inevitable subjectivity of their job but treats it as an epistemic limitation, not a metaphysical one.⁶⁶ If we embrace this theory of baseball, we should probably welcome electronic ball-tracking systems and similar high-tech devices as desirable innovations, as they reduce the physical and cognitive flaws of umpiring and bring the game closer to perfection.

It is very likely that Chief Justice Roberts himself would subscribe to some version of this theory. Indeed, the philosophies of baseball advanced by the First Umpire (the epistemological theory) and the Second Umpire (Roberts's theory of clear-cut rules) are closely aligned. The First Umpire, like the Second (and Chief Justice Roberts), accepts an external, objective reality of balls and strikes—but qualifies this view with a strong disclaimer of epistemic humility.⁶⁷ To examine this theory, we must consider whether the misalignment between rules and practice identified in Part II can be adequately explained by this epistemological addendum.

B. Rules, Practice, and Principles

To see why this epistemological theory is mistaken, let us revisit the previous examples of the strike zone in action. While on the surface they appear to be mere instances of misalignment between rules and practice, a closer look reveals an underlying *ratio* (a reasoned justification) for why such misalignment persists.

The shrinking of the strike zone in the 1960s, for example, was a deliberate response to the excessive dominance of pitchers. The tweaking and adjustments of the zone in youth leagues aim to make the game playable for less skillful batters. Pitch management and other modification strategies aim to correct an abnormal flow of the game. The alleged shrinking of the zone

⁶⁵ See Timothy P. Terrell, *The Art of Legal Reasoning and the Angst of Judging: Of Balls, Strikes, and Moments of Truth*, 8 NW. J.L. & SOC. POL'Y 35, 38 n.7 (2012).

⁶⁶ On this view, calling balls and strikes is mainly a question of accuracy. See Michael J. Hasday, *Accuracy and the Robot Judge*, 25 J. APP. PRAC. & PROCESS 1 (2025).

⁶⁷ On the concept of epistemic or intellectual humility, see Dennis Whitcomb et al., *Intellectual Humility: Owning our Limitations*, 94 PHIL. & PHENOMENOLOGICAL RES. 509 (2015).

in 2025, which seems to be driven by a change in how umpires are rated—reflects a trend toward a more uniform and mechanical conception of the strike zone.

These are not accidental practices, transient fashions, or products of epistemic failure. On the contrary, they represent rational patterns that arise from an underlying understanding of how the game *ought to be played*. They reveal, for example, the principle that there ought to be a certain balance between offense and defense, and, when the imbalance is too much, the strike zone should be reshaped to restore the balance.

This and other implicit yet inferable rationales behind the calling of balls and strikes are, quite obviously, normative propositions. They posit that baseball *ought to be* in a certain way. Important consequences follow. For one, they suggest that rules should be amended when they conflict with these propositions. More remarkably, however, it follows that some rules should be interpreted and even tweaked or overridden in light of these propositions. I will return to this point in Part IV.

C. *Good and Bad Technology in Baseball*

At this point, a supporter of the First Umpire's theory could raise a natural objection: if the misalignment between rules and practice is not an epistemic problem, what explains the spread of high-tech in baseball? For many years, the MLB, television networks, and fans have supported technological innovations such as instant replay, the electronic strike zone, various ball-tracking devices measuring speed, angle, and other features of a play.⁶⁸ Indeed, “robo-umpires” for calling balls and strikes will debut in MLB in the 2026 season, although in a limited role.⁶⁹ It seems, then, that the members of

⁶⁸ In 2012, an informal poll by Fangraphs, a popular website for baseball fans, found that a very large percentage of respondents supported extensive use of instant replay review. See Wendy Thrum, *Fans Want More Instant Replay But Does MLB Care?*, FANGRAPHS (July 24, 2012), <https://blogs.fangraphs.com/fans-want-more-instant-replay-but-does-mlb-care/> [<https://perma.cc/K6DN-MC7U>].

⁶⁹ See Anthony Castrovince, *ABS Challenge System coming to MLB full time in '26*, MLB.COM (Sep. 23, 2025), <https://www.mlb.com/news/abs-challenge-system-mlb-2026> [<https://perma.cc/X4BZ-ZV8H>]. According to this news article, each team will be given two challenges per game (with additional challenges allowed in case of extra innings). Only the batter, the pitcher, and the catcher can challenge the umpire's call, and they must do so immediately after the call and without assistance from other players or the dugout.

the baseball community desire a more mechanical form of umpiring. Is this not a clear vindication of the First Umpire's theory?

The objection is not without merit. However, its grain of truth is better understood within the more capacious theory of baseball developed thus far in this Article.

Let us consider a successful example of technological innovations in modern baseball: the instant replay review. Instant replay review allows managers to challenge certain calls, which are then reviewed from different camera angles at the Replay Command Center in New York.⁷⁰

For many fans, the function of instant replays is to make the game fairer, which is to say, to make umpires' calls more faithful to the independent reality of the play. This is, undoubtedly, a mechanical view of the game. In practice, however, instant replay extends rather than replaces human judgment in baseball. When thousands of spectators turn toward the jumbotron to scrutinize slow-motion footage, revising or confirming their impressions of what just occurred—often in spirited debate with friends and rivals—the interpretive activity at the heart of baseball is enhanced, not diminished.

As Alva Noë observed, instant replay allows fans to reach a decision about what happened and to reconsider the play and the roles of various players in it.⁷¹ It is not the replacement of human judgment with machine judgment; on the contrary, it is an expansion of the opportunities that fans have, at the ballpark or at home, to make their own judgment about the play. In other words, the success of instant replays reveals what we are really doing when we “do baseball”—whether as players, umpires, spectators, or in other roles. We are collectively interpreting the game.⁷²

⁷⁰ See *Replay Review*, MLB.COM, <https://www.mlb.com/glossary/rules/replay-review> [<https://perma.cc/TG2D-DP2U>] (last visited Dec. 20, 2025). For a jurisprudential discussion of replay review in sports, see Mitchell N. Berman, *Replay*, 99 CALIF. L. REV. 1683 (2011).

⁷¹ See NOË, *supra* note 43, at 40.

⁷² Mitch Berman observed, in private correspondence, that replays in baseball are probably more conclusive than in other sports, such as (American) football. Email from Mitchell Berman, Professor of L. and Professor of Phil., Penn Carey L., to Roberto Tallarita, Assistant Professor of L., Harv. L. Sch. (Dec. 3, 2025) (on file with author). This is probably true on average. The concept of a foul in soccer—to mention a sport I am more familiar with—is much more open-textured than a fair/foul ball or a safe/out in baseball, and therefore replays of foul plays in soccer are more frequently open to interpretation. It is, however, a spectrum, not a binary distinction. As Noë explains, and as many fans know, replays of close calls in baseball trigger intense interpretive moments. See NOË, *supra* note 43, at 40.

This is the opposite of technology as a judgment-reducing tool. Indeed, it shows that the centrality, fallibility, and contingency of human judgment in baseball are not imperfections of the game but essential features of its character. Everyone, except those misled by the superficial function of technology, expects the game to be played this way. Baseball, as a social practice, depends on a web of complex and fallible judgments, made by a large number of people in different roles. It is, at its core, a sustained conversation centered on how to interpret what happened. Were technology to become so accurate and precise as to replace human judgment and render that conversation unnecessary, baseball would not become fairer—it would become something else entirely.

The distinction between judgment-reducing and judgment-enhancing technology is very subtle. Unlike the instant replay review, an automated ball-strike system (“ABS”)—like the one that has been tried in the minor leagues and will be introduced in MLB games in the 2026 season,⁷³ would transform the practice of calling balls and strikes into a truly mechanical exercise.⁷⁴ The strike zone, unlike the field of play captured in replay, is particularly vulnerable to mechanization. Unlike television shots in a replay, an electronic prism (or worse, a flat digital rectangle) would leave no open texture for the exercise of human judgment. This technology would have a disruptive effect on how baseball is understood and practiced.

To be sure, the very fact that calling balls and strikes has thus far remained exempt from instant replay review, and the introduction of ABS continues to face resistance from players and fans alike, suggests something important: For most of baseball’s history, and even today, calling balls and strikes has not been understood as a mechanical task. It has been understood, rather, as an interpretive practice in which human imperfection is not an error to be eliminated, but a defining feature of the game.

In a recent poll of professional baseball players, almost two-thirds of the respondents said they were against robo-umpires.⁷⁵ Current and former

⁷³ See *supra*, note 69.

⁷⁴ Amusingly, some baseball professionals believe that MLB Commissioner Rob Manfred supports the introduction of ABS because he is a lawyer and ABS is a legalistic approach to baseball. See Helfand, *supra* note 49, at 25 (“Frank Viola, the pitching coach of the High Point Rockers . . . said that ABS worked as designed, but that it was also unforgiving and pedantic, almost legalistic. ‘Manfred is a lawyer,’ Viola noted.”) On this account, law is a much more mechanical practice than baseball.

⁷⁵ See Chad Jennings, *Robo-umps Might be Coming to MLB. Are Players for or Against Them?*, ATHLETIC (June 11, 2025), <https://www.nytimes.com/athletic/6406613/2025/06/11/robo-umpires-mlb-2025-player-poll/> [https://perma.cc/3Q4U-A4G9].

catchers, for example, lament that the introduction of ABS will mean the loss of the art of framing.⁷⁶ Some prefer a human umpire because they think that, by contrast, ABS is not able to take into account the peculiarities of the ballpark and other details.⁷⁷ Others fear that what the computer will consider a strike, although perhaps accurate from a rule-based, mechanical perspective, will not fit what baseball players consider a strike in terms of shared practice.⁷⁸ More fundamentally, many think that baseball needs the “human element”⁷⁹ and the robo-umpire would “make baseball feel sterile.”⁸⁰

These widespread intuitions and reactions are not consistent with the view that the umpire’s deviations from the official rules are epistemic errors. If this were the case, ABS would be an unqualified improvement, so long as it is more accurate than human umpires. Rather, the insistence on the human element and the sterility of computerized calls reflects the shared understanding of the game as an interpretive practice.

To be sure, many fans disagree with the thesis defended here and think about the calling of balls and strikes as a mechanical activity.⁸¹ It is plausible that more fans today hold this view than they did a few decades ago. As I will discuss in Part V, baseball principles are immanent in the game and are therefore subject to change and decay. A slow evolution (or involution) towards a mechanization of the game is undeniable and could eventually result in a radical transformation of the principles I identify in this Article.

⁷⁶ See, e.g., Hannah Keyser, *What do Robo-Umps, Challenge System Mean for Catchers? Some Coaches are Concerned*, YAHOO! SPORTS (Jan. 4, 2023), <https://sports.yahoo.com/what-do-robo-umps-challenge-system-mean-for-catchers-some-coaches-are-concerned-005531648.html> [<https://perma.cc/GU8Z-GEJR>].

⁷⁷ See Matt Kawahara, *How Houston Astros View Baseball’s Latest Experiment: The Automated Ball-Strike Challenge System*, HOUSTON CHRONICLE (Feb. 21, 2025), <https://www.houstonchronicle.com/sports/astros/article/automated-balls-strikes-system-20179422.php> [<https://perma.cc/2NDT-5LYN>].

⁷⁸ See Matt Weyrich, *Orioles reset: Some Players in no Rush for Automated Ball-Strike System to Reach MLB*, BALTIMORE SUN (May 28, 2024, 05:00 ET), <https://www.baltimoresun.com/2024/05/27/orioles-reset-automated-ball-strike-system/> [<https://perma.cc/UV47-9RC7>].

⁷⁹ See Will Walkey & Meghna Chakrabarti, *Are Robo-Referees Making Sports More Fair or Less Fun?*, WBUR (Oct. 2, 2025), <https://www.wbur.org/onpoint/2025/10/02/automation-sports-baseball-robot-referee> [<https://perma.cc/NUR2-VX63>].

⁸⁰ Owen Kelly, *The Death of the Human Umpire Will Robot Umpires Kill Baseball’s Tradition?*, LINKEDIN (Oct. 2, 2024), <https://www.linkedin.com/pulse/death-human-umpire-robot-umpires-kill-baseballs-tradition-owen-kelly-2txee/> [<https://perma.cc/R82S-YWRZ>].

⁸¹ See, e.g., WNEP, *Local Fans React to Robot Umpires As MLB Plans Debut*, YOUTUBE (Sep. 24, 2025), <https://www.youtube.com/watch?v=MgWGYFXNv1A> [<https://perma.cc/WZU7-US9C>].

IV. THE SENSE OF A STRIKE

Thus far, I have tried to establish four related propositions. First, truth in baseball is not always ‘clear-cut’; it requires an interpretive judgment, even in an activity that appears as mechanical as calling balls and strikes. Second, the exercise of such judgment in baseball is based on certain principles about how the game ought to be played. Third, this state of affairs is not the product of epistemic failure but reflects the way the game is *normatively* understood. And fourth, technology is successful in baseball when it expands and enhances the role of judgment and interpretation, not when it diminishes it.

This line of argument is, I believe, an effective refutation of Chief Justice Roberts’s theory of baseball. If judges should “call balls and strikes” just like umpires, as Roberts argued, then they should adjudicate legal cases based on rules *and* principles—judges, like umpires, are not mechanical “passive beings” (à la Montesquieu)⁸² but participants in a broader interpretive conversation.

The recognition that baseball has principles and calling balls and strikes is about judgment and interpretation raises further difficult questions: What are these principles? From where do they arise? How do we find them? Do they change over time? And if so, how? While a full treatment of these questions is beyond the scope of this Article, this Part addresses one significant dimension of this interpretive practice: the problem of the umpire’s discretion. What does it mean to make an interpretive judgment in baseball? How exactly is this judgment different from an exercise of discretion, as the Third Umpire suggests?

A. *The Normativity of Balls and Strikes*

The crucial difference between the theory defended in this Article and the theory of the Third Umpire is a belief in the normativity of balls and strikes. According to Stanley Fish (and the Third Umpire) calling balls and strikes is a pure exercise of power.⁸³ By contrast, as discussed thus far, judgment and interpretation require normative standards.

When we judge or interpret, in the sense proposed, we compare something to a normative standard. We do not merely believe that a pitch was a strike; we claim that we and others *ought to* believe that it was a strike. We do not merely look at what the batter and the pitcher did; we compare what they

⁸² See *supra* note 5 and accompanying text.

⁸³ See *supra* notes 14–17 and accompanying text.

did with what they *ought to have done*. We are interested in the ways in which the play could have been better and more perfect.⁸⁴

Thus, rejecting Chief Justice Roberts's theory of umpiring does not imply rejecting the idea that there are right and wrong calls and concluding that all calls are therefore arbitrary and subjective. We can still believe that there are right and wrong calls but acknowledge, at the same time, that calling them is not a mechanical act but an act of interpretive judgment.

To understand this point more fully, we must examine another mistaken theory of baseball. In one of his early writings, Ronald Dworkin argued that judges do not have discretion, and, to demonstrate this point, he proposed a comparison between law, baseball, and several hypothetical variants of the game.⁸⁵ Discretion, Dworkin argued, is when a judge, umpire, or scorer is entitled to decide as they wish.⁸⁶ Exercising discretion, for Dworkin, meant choosing an outcome based on the chooser's private preferences rather than on any governing rule or standard. In baseball, Dworkin argued, umpires have no discretion because they may not decide if a pitch is a ball or a strike based on private preferences.⁸⁷ In this respect, Dworkin was right. None of the features of umpiring examined thus far fit Dworkin's definition of discretion.

Dworkin then contrasted real-world baseball with an imaginary version of baseball, which he called "Policies." In Policies, the umpire's job is to pursue certain specific policy goals, such as "reducing the number of injuries to players" and "allowing individual players of greater [talent] to become stars."⁸⁸ In this game, the umpire makes her calls based on what decision is most conducive to those goals. This is *not* discretion, either—Dworkin argued—because the umpire's decisions may not be based on the umpire's private criteria or preferences. In Policies, the umpire must pursue certain specific goals,

⁸⁴ I am freely paraphrasing from the brilliant opening paragraph of Christine Korsgaard's most famous book. See CHRISTINE M. KORSGAARD, *THE SOURCES OF NORMATIVITY* 1 (1996).

⁸⁵ See generally Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624 (1963).

⁸⁶ *Id.* at 626-27. In later works, Dworkin called this form of discretion "discretion in a strong sense." See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31-33 (2d ed. 1978).

⁸⁷ *Id.* We could, however, imagine a variant of baseball, which Dworkin called "Scorer's Discretion," in which umpires call balls and strikes as they wish. Unlike in real baseball, these umpires do have discretion. Dworkin borrowed this imaginary game from H.L.A. Hart. See H.L.A. Hart, *THE CONCEPT OF LAW* 139-42 (1st ed. 1961). However, Hart's version of Scorer's Discretion did not seem to be a variant of a specific real-world game.

⁸⁸ Dworkin, *supra* note 84, at 629.

and players are entitled to the correct decision in light of those goals, even if identifying that decision is difficult in practice.

Dworkin's aim was, of course, to show that law is, in this respect, like Policies. If a legal rule does not provide a clear-cut solution to a hard case, it does not follow that judges have discretion to decide the case in whatever way they prefer. The parties are still entitled to the *right* decision, and the judge will have to deliver one, not based on her private preferences, but based on principles of justice.⁸⁹ What Dworkin did not appreciate, however, is that baseball is *not* qualitatively different from law or Policies. He described baseball as follows:

The rules of baseball . . . specify precisely which events are to have which consequences, and the events designated in the rules are the only events having any significance whatsoever. Officials applying such rules therefore concern themselves almost exclusively with making authoritative reports, rather than characterizations, of what has happened. Infrequent disputes about the rules themselves are settled by reference to an authoritative rule book. . . . [A] conflict [between rules], or a material ambiguity, would be regarded as intolerable⁹⁰

As I have tried to show in this Article, this characterization of baseball is mistaken.⁹¹ In embracing it, Dworkin was not describing the real practice of baseball, but just another imaginary game. In baseball, officials do far more than make “authoritative reports.”⁹² They engage in an interpretive process of making sense of what has happened based on rules, practices, and normative principles. Most of the time, as in most legal cases, this process is straightforward: the facts fit neatly with the established rules. Sometimes, however, umpires—and everyone else trying to make sense of the game—must engage in a more complex judgment that appeals to a shared normative understanding of the game.⁹³

⁸⁹ *Id.* at 631.

⁹⁰ *Id.* at 631.

⁹¹ It is not clear whether Dworkin's theory of baseball evolved over time. In a later article on the same topic, he discussed at length the task of the referee in a game of chess but did not mention baseball. See RONALD DWORKIN, *Hard Cases, in* TAKING RIGHTS SERIOUSLY 101–04 (1978).

⁹² Dworkin, *supra* note 84, at 631.

⁹³ Recognizing the existence of principles and their important role in umpiring does not mean advocating anti-formalist interpretation. In fact, the principles of a sport may in theory favor a literalist adherence to the rules. See Mitchell N. Berman, *On Interpretivism and Formalism in Sports Officiating: From General to Particular Jurisprudence*, 38 J. PHIL. SPORT 177 (2011).

The way the game is structured, with its discrete actions and a detailed normative grammar that assigns credits and debits to players for each of these actions, continually calls for judgment informed by both rules and principles—much like legal reasoning or the decision-making in the imaginary game of Policies. In fact, rules in baseball sometimes yield to principles. This happens not only when the rules are amended by the governing body of baseball to try make the game more faithful to its principles, but also when umpires try to solve hard cases through principled interpretation rather than mechanical application.

B. An Illustration: October 8, 1956

There are a few famous examples of contentious hard cases in baseball, in which the umpires faced unusual situations that were not plainly resolved by the official rules.⁹⁴ But even calling balls and strikes, where the rules are apparently clear, is ultimately subject to principles. In a beautiful essay, evolutionary biologist and lifelong baseball fan Stephen Jay Gould discussed a famous episode in the history of baseball which exemplifies this point.⁹⁵

⁹⁴ Perhaps the most famous of these cases is the Pine Tar Incident of 1983. At the top of the ninth inning, George Brett of the Kansas City Royals hit a winning homerun against the New York Yankees, but the homerun was voided and Brett was called out because his bat had too much pine tar on it, in violation of then-Rule 1.10(b). The Royals appealed the decision to the President of the American League, Lee McPhail, who reversed and ordered the continuation of the game. McPhail reasoned that although Brett's bat was illegal and should have been replaced with a regular bat, the pine tar did not confer any unfair advantage to Brett. The rationale of the rule was an economic one, according to McPhail. Back when there was much less money in baseball, too much pine tar would compromise the ball. The ball needed to be replaced, thus wasting resources. Although Brett's bat should have been replaced, the additional sanctions decided by the umpires were unjust. For an exhaustive story of the incident, its background and its aftermath, see generally FILIP BONDY, *THE PINE TAR GAME: THE KANSAS CITY ROYALS, THE NEW YORK YANKEES, AND BASEBALL'S MOST ABSURD AND ENTERTAINING CONTROVERSY* (2015). Scholars of jurisprudence of sport have discussed the case at length. A particularly lucid and enlightening analysis is Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1370–76 (2018) (arguing that while the “principle of textual meaning” supported the formalist decision by the umpire, other baseball principles, including the principles of legal intention and athletic excellence, supported the final decision made by Commissioner McPhail).

⁹⁵ See Stephen Jay Gould, *The Strike That Was Low and Outside*, N.Y. TIMES, (Nov. 10, 1984), <https://www.nytimes.com/1984/11/10/opinion/the-strike-that-was-low-and-outside.html> [<https://perma.cc/2L3Z-GF3G>].

It was October 8, 1956, and the Brooklyn Dodgers were playing the New York Yankees at Yankee Stadium in the fifth game of the World Series.⁹⁶ At the mound for the Yankees was Don Larsen, a 27-year-old pitcher from Indiana, in his third season in the big leagues. Larsen pitched eight innings without conceding a single base to the Dodgers.⁹⁷ At the top of the ninth, the Dodgers were still baseless, and the first two batters were put out: Furillo hit a fly ball to the right fielder, and Campanella grounded out.

The third batter for the Dodgers was Dale Mitchell, a veteran left-fielder at the end of his career, who had been recently acquired by the Dodgers to be employed as a reliable pinch hitter.⁹⁸ Mitchell was the last batter who could prevent Larsen from completing the first perfect game in the history of the World Series.⁹⁹ “With a count of one ball and two strikes,” Gould writes, “Larsen delivered a pitch low and outside—close, but surely not, by any technical definition, a strike.”¹⁰⁰

The plate umpire was Babe Pinelli. Born Rinaldo Angelo Paolinelli, the son of immigrants from Lucca, Italy,¹⁰¹ Pinelli had an incredible career. He umpired four All-Star Games, six World Series, and many historic

⁹⁶ I refer, of course, to the old Yankee Stadium, built in 1923 and used as home of the Yankees until 2008. I watched my very first live baseball game at the old Shea Stadium, home of the New York Mets, but my encounter with the old Yankee Stadium exercised on me such a strong fascination that for several years I thought I was a Yankees fan. I was wrong.

⁹⁷ See *New York Yankees 2, Brooklyn Dodgers 0*, RETROSHEET, <https://www.retrosheet.org/boxesetc/1956/B10080NYA1956.htm> [<https://perma.cc/T6N6-6P7A>] (last visited Dec. 10, 2025).

⁹⁸ See Scott Longert, *Dale Mitchell*, SOC’Y FOR AM. BASEBALL RSCH., <https://sabr.org/bioproj/person/Dale-Mitchell/> [<https://perma.cc/MVG9-P2A8>] (last visited Dec. 10, 2025).

⁹⁹ A perfect game in baseball is a game in which a pitcher plays at least nine inning and the opponent team gains no bases at all.

¹⁰⁰ Gould, *supra* note 94. Gould misremembered the play: the ball was high, not low. See Charles F. Faber, *October 8, 1956: Don Larsen Throws a Perfect Game in the World Series*, SOC’Y AM. BASEBALL RSCH., <https://sabr.org/gamesproj/game/october-8-1956-don-larsen-throws-a-perfect-game-in-the-world-series/> [<https://perma.cc/2APR-YD4N>]. (“Mitchell thought the ball was high, but umpire Babe Pinelli called him out.”). In a later article, Gould recalled being corrected by famous baseball announcer Red Barber. See Stephen Jay Gould, *Baseball: Joys and Lamentation*, in TRIUMPH AND TRAGEDY IN MUDVILLE, 301, 315 (2004) (“Red spent one of his broadcasts correcting me for misidentifying the last pitch of Don Larsen’s perfect game in the 1956 World Series (I had called it low and outside, but the pitch was high).”).

¹⁰¹ See Larry R. Gerlach, *Babe Pinelli*, in THE SABR BOOK OF UMPIRES AND UMPIRING 107 (Larry R. Gerlach & Bill Nowlin eds., 2017).

games, including the first night game in MLB history (May 24, 1935) and Jackie Robinson's major-league debut with the Brooklyn Dodgers (April 15, 1947).¹⁰²

Larsen's pitch was slightly outside the strike zone, according to Gould and others.¹⁰³ Mitchell let the pitch go by, and Pinelli called strike three. Larsen had completed a perfect game. Gould elaborates:

"Outside by a foot," groused Mitchell later. He exaggerated, for it was outside only a few inches, but he was right. Babe Pinelli, however, was more right. A man may not take a close pitch with so much on the line. Context matters. Truth is a circumstance, not a spot. . . . Truth is inflexible. Truth is inviolable. By long and recognized custom, by any concept of justice, Dale Mitchell had to swing at anything close. It was a strike—a strike low and outside. Babe Pinelli, umpiring his last game, ended with his finest, his most perceptive, his most truthful moment. Babe Pinelli, arbiter of history, walked into the locker room and cried.¹⁰⁴

There is truth in baseball, but it is not mechanical as Chief Justice Roberts and Ronald Dworkin seemed to believe. We can disagree with Pinelli's (and Gould's) interpretation of what happened that night,¹⁰⁵ but Pinelli's

¹⁰² See *id.*

¹⁰³ See Gould, *supra* note 94. Mitchell remained of the view that the pitch was outside. See Scott Ostler, *Dale Mitchell Watched Big One Go By*, L.A. TIMES (Jan. 7, 1987, 00:00 PT), <https://www.latimes.com/archives/la-xpm-1987-01-07-sp-2380-story.html> [<https://perma.cc/TLQ9-8XCD>] (quoting Mitchell saying that "[t]he pitch was high and away. It wasn't a strike. Pinelli retired after that Series. He should have retired before it."). According to Lew Paper, the consensus among the Yankees was that the pitch was outside the zone. See LEW PAPER, PERFECT: DON LARSEN'S MIRACULOUS WORLD SERIES GAME AND THE MEN WHO MADE IT HAPPEN 308 (2009) ("Berra, Larsen, and Pinelli, of course, had a different opinion. . . . But every other Yankee on the field who had a good look at the pitch agreed with Mitchell.").

¹⁰⁴ Gould, *supra* note 94.

¹⁰⁵ In fact, we can be rightfully suspicious of Gould's interpretation of Larsen's pitch, as Gould was a hardcore Yankees fan. In private correspondence, Mitch Berman observes that Gould (and I) might be conflating "two types of *oughts*...: prudential and normative... Dale Mitchell ought (prudentially) to have swung at that pitch because it was close enough that he risked being called out (as he was). But that doesn't mean he ought (normatively) to have swung, even if he was prepared to take that risk, such that his failure to do so is a reason in favor of the call made." Email from Mitchell Berman, *supra* note 72. Berman may be right about Gould; however, my claim is not that Mitchell ought to have swung according to an unwritten rule, but that the conversation about whether such an unwritten rule existed is a valid conversation, which cannot be silenced by observing that there is no such rule in the official rulebook.

call was neither the certification of a mechanical reality nor an act of mere discretion. It was a principled judgment of what a batter ought to have done in that circumstance, which Mitchell did not do. The strike zone is a delicate balance between the normative ideal of batter's and pitcher's performances. It is about *ought*, not *is*. But claims about what a player *ought to have done* are based on interpretive judgments, not mere recapitulation or acknowledgment of facts. Calling balls and strikes means assigning responsibility and credit.¹⁰⁶ Pinelli judged that Mitchell was to blame.

When judgment enters the picture, everything changes. We are no longer in the realm of mechanical actions but in the realm of value. What has happened is not just a fact but the evaluation of that fact in light of what ought to have happened. Judgment is a mysterious force. Once unleashed, it will unrelentingly try to make sense—normative sense—of everything. Understanding baseball requires understanding how it is a constant, ceaseless exercise of judgment.

C. *Another Illustration: June 21, 2025*

A personal anecdote might prove instructive.¹⁰⁷ Recently, my older son was trying to learn the fundamentals of scoring and was confused about a play that we had scored differently. Scoring is the quintessential activity of the true baseball fan. It involves interpreting and recording a very large number of plays from start to finish. What happened was that Andrew Knizner, the San Francisco Giants' batter, hit a ground ball to the Red Sox's second baseman David Hamilton; Hamilton did not handle the ball cleanly, and when he threw it to first baseman Toro, it was too late—Knizner had reached first base.

The young scorekeeper next to me marked a single hit for Knizner, but I did not. I thought that Hamilton's handling of the ball was to be considered a defensive error, and therefore the play should not be credited to Knizner but blamed on Hamilton. Hamilton had not done what he *ought to have done*. It was not a hit, but rather a fielding error.

¹⁰⁶ Alva Noë puts it well: “[Baseball] is a *forensic* sport . . . [I]n baseball, we are less interested in what happens than in who is liable, or responsible, for what happens; we are interested in apportioning praise and blame.” *Supra* note 43, at 51.

¹⁰⁷ Traditionally, personal anecdotes are considered an inappropriate tool for the objective and detached rhetorical posture used in academic writing. This attitude is, I believe, warranted in most circumstances, but exceptions should be allowed.

To distinguish between a hit and an error, the scorer (whether she is a fan or the official scorer of the game) must make a normative judgment. There is a sense in which scoring, with its detailed numerical reporting, is a form of bookkeeping.¹⁰⁸ However, it is not the kind of mechanical bookkeeping employed to report crude facts, as Dworkin thought, but a form of normative judgment, in which what is recorded in the book is an assessment of facts against normative standards. It is more similar, to use some rhetorical flourish, to the kind of bookkeeping evoked in apocalyptic scenes, where the dead are judged “out of those things which [a]re written in the books, according to their works.”¹⁰⁹

My son paused for a moment and thought about it, then looked at me with a smile. “Makes sense,” he said. Even if that was the first time he had ever heard of a hit that *was not* a hit because it *ought* to have been an out, he understood why I thought that this was what had happened on the field. It made sense to him. He understood the principles of baseball.

V. BASEBALL FOR FOXES

I have argued so far that the principles underlying baseball (including the calling of balls and strikes) are normative in nature. The question remains of what kind of normative propositions they are. In this Part, I will sketch an outline for a possible answer. First, I will discuss how the interpretivist theory of baseball proposed here differs from Dworkin’s legal interpretivism. Dworkin’s theory is a monistic theory, arguing that law, morality, and justice are all part of one normative system, and the ideal judge—whom Dworkin calls Hercules—should be able to reconstruct and integrate the entire system. In contrast, the theory of baseball proposed here is pluralistic: the principles of baseball are immanent in the game, may be incompatible with normative principles found in other systems, and may evolve and decay. In Dworkin’s own figurative language (borrowed from Isaiah Berlin and the ancient poet Archilochus), Dworkin’s theory is a theory for hedgehogs, my theory of

¹⁰⁸ See ROGER ANGELL, *Box Scores*, in *THE SUMMER GAME* 4 (1972) (“[E]very player in every game is subjected to a cold and ceaseless accounting; no ball is thrown and no base is gained without an instant responding judgment—ball or strike, hit or error, yea or nay—and an ensuing statistic.”).

¹⁰⁹ *Revelation* 20:12 (King James) (“And I saw the dead, small and great, stand before God; and the books were opened: and another book was opened, which is the book of life: and the dead were judged out of those things which were written in the books, according to their works.”).

baseball is a theory for foxes. Furthermore, the way umpires make sense of the games is less an analytical reconstruction of the system than a form of trained intuitive knowledge. I will discuss how certain contemporary jurisprudential approaches that borrow from Aristotle's ethics may illuminate these aspects of baseball umpiring.

A. *Babe Pinelli Was no Hercules*

Dworkin's (misguided) contraposition of baseball and law is premised on the idea that adjudication, unlike umpiring, is based on 'principles of justice.' But, if umpiring is based on principles as well, are these principles of baseball akin to Dworkin's 'principles of justice'? Was Babe Pinelli a Hercules with only a fourth-grade education?¹¹⁰

Philosophers of sport have discussed the relevance of Dworkin's theory of law for sports and games.¹¹¹ Perhaps the authors who most closely embraced Dworkin's views are Robert Simon and especially J.S. Russell. They argued that in addition to rules and conventions, sports have underlying principles,¹¹² which express a "coherent and principled account of the point and purposes that underlie the game."¹¹³ This approach to philosophy of sport is similar to the theory of balls and strikes proposed in this Article. However, I would like to outline three important points that suggest a sharp deviation from Dworkin's views.

The first difference concerns the autonomy of baseball principles from broader principles of morality or justice. The argument presented so far does not require that calling balls and strikes be coherent with broader

¹¹⁰ I refer of course to Dworkin's ideal judge, whom he called Hercules to hint at the superhuman tasks Dworkin assigned to him. See RONALD DWORIN, *LAW'S EMPIRE* 239 (1986). While Dworkin's Hercules had plausibly received a graduate education, Babe Pinelli left fourth grade at age ten to get a job and help his family. See Gerlach, *supra* note 100, at 107.

¹¹¹ In the past few decades, philosophy of sport has been significantly influenced by legal philosophy. See J.S. Russell, *Remarks on the Progress of a Jurisprudence of Sport*, 63 N.Y.L. SCH. L. REV. 175 (2018). This is unsurprising given that "as formal rule-governed practices, sports and law often pursue similar goals and confront many of the same challenges." Mitchell N. Berman, "Let 'em Play": *A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325, 1330 (2011). For the state-of-the-art treatment of the new field, see BERMAN & FRIEDMAN, *supra* note 12.

¹¹² See, e.g., Robert L. Simon, *Internalism and Internal Values in Sport*, 27 J. PHIL. SPORT 1, 7 (2000).

¹¹³ J.S. Russell, *Are Rules All an Umpire Has to Work With?*, 26 J. PHIL. SPORT 27, 35 (1999).

moral values or principles of justice, but simply with intrinsic or immanent principles of the game. Dworkin, especially in his later work, vigorously defended a unitary view of law and morality. He called his approach “justice for hedgehogs,”¹¹⁴ as a reference to the ancient proverb “The fox knows many tricks, the hedgehog one, but it’s a big one.”¹¹⁵ In the twentieth century, this image was famously employed by Isaiah Berlin to contrast pluralistic (foxes) and monistic (hedgehogs) theories of the world.¹¹⁶ Dworkin’s view of law and morality was a monistic one.

Dworkin’s hedgehog-like view of law and morality is one in which the principles of legal interpretations are the same principles of morality and justice. But the principles of baseball, as understood in this Article, are to be found within the game itself; they are not necessarily the same principles governing our moral or political lives. Dworkin’s interpretivism is often characterized as a way to fill legal gaps with moral principles once the social practice of law ‘runs out.’ But in baseball there is no external reservoir of principles—moral, political, or otherwise. The principles of baseball are the intrinsic sense of the game. It is a theory of baseball for foxes, not hedgehogs.¹¹⁷

The second difference concerns the actual practice of umpiring. Dworkin’s ideal judge, Hercules, would approach a difficult interpretive question by first considering different “candidates for the best interpretation.”¹¹⁸ Then, Hercules would exclude those interpretations that do not fit the existing body of law and precedent, and those that conflict with principles of justice.¹¹⁹ Finally, Hercules would consider “the great network of political structures and decisions of his community” and would ask whether a certain interpretation “could form part of a coherent theory justifying the network as a whole.”¹²⁰

¹¹⁴ See generally RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011).

¹¹⁵ Archilochus, *Fragment 201*, in *GREEK IAMBIC POETRY* 217 (Douglas E. Gerber ed., 1999).

¹¹⁶ See ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY’S VIEW OF HISTORY* (2d ed. 2013).

¹¹⁷ This theory of sports and games has become widely accepted among scholars. Indeed, the philosophy of sport of Simon and Russell is usually referred to as “internalism” or “broad internalism,” because of their view that the principles of a sport are internal to the game. See John William Devine & Francisco Javier Lopez Frias, *Philosophy of Sport*, in *STAN. ENCYC. PHIL.* (Edward N. Zalta ed., 2023). To be sure, broad internalists “do not speak with one mind on [what this view entails].” William J. Morgan, *Broad Internalism, Deep Conventions, Moral Entrepreneurs, and Sport*, 39 *J. PHIL. SPORT* 65, 65 (2012).

¹¹⁸ DWORKIN, *supra* note 109, at 240.

¹¹⁹ See *id.* at 242–44.

¹²⁰ *Id.* at 245.

Dworkin acknowledges that this method requires superhuman abilities and, nevertheless, suggests that judges should attempt to imitate it.

It would be silly to imagine Babe Pinelli, on October 8, 1956, in the fraction of a moment after Yogi Berra caught Larsen's pitch, intent on parsing the vast complexity of baseball to find the call that best fit and justified the entire system. Pinelli saw the pitch and called it a strike. He did not give any reasons why it was a strike; umpires do not have to explain their judgements. Pinelli did not have to theorize about principles. He was already profoundly enmeshed in the game of baseball. His intuitions and reactions had been trained for decades on tens of thousands of calls. He had officiated "almost a thousand games over the course of twenty-two years."¹²¹ It is reasonable to expect that his calls, just like those of any experienced umpires, were based on a form of intuitive knowledge that is born out of practice and refined by constant attempts to make sense of the game. As I will explain in Part V.B, unlike Hercules's systematic knowledge of the law, the umpire's knowledge of baseball principles closely resembles a form of Aristotelian practical wisdom.

The third difference concerns the dynamic nature of the principles of baseball. Principles are persistent, and certainly more persistent than rules. As we have seen, rules may yield to principles: rules are amended when they no longer accord with principles, and they are re-interpreted to be made consistent with principles. That said, principles are not exogenous forces. They live within the game and emerge from the game.

Dworkin often writes from the point of view of a moral realist, who believes that there are objective moral truths.¹²² Therefore, even if he recognized that our best interpretation of the law may evolve over time, his underlying principles of justice should be considered fixed and immutable.¹²³ In contrast, baseball principles can and do change if the rules and practices of the game keep deviating from them.¹²⁴ There is a constant interaction, a feedback loop, between principles, rules, and practices. In normal times, rules yield to principles when they become inconsistent with them. Over time, however, if the inconsistency becomes irreconcilable, principles will inevitably change.

¹²¹ PAPER, *supra* note 102, at 8.

¹²² See, e.g., Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFFS. 87 (1996).

¹²³ This is at least how I understand his theory. As H.L.A. Hart thought, Dworkin employed a "fluid and sometimes elusive analytic style," which sometimes makes interpreting what he meant difficult. NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* 330, 350 (2004).

¹²⁴ For a similar conception of principles in legal theory, see Berman, *supra* note 92; Mitchell N. Berman, *How Practices Make Principles and How Principles Make Rules*, 28 J. ETHICS & SOC. PHIL 299 (2024).

Let us consider the example of technology in baseball. As I argued in Part III, technology is most successful in baseball when it enhances rather than diminishes the role of human judgment. This does not mean that bad technology—that is, technology that reduces the role of human judgment in baseball—cannot transform the game. Indeed, technology is already changing the principles of the game, even if unwittingly.

For example, umpires' calls are now rated on the basis of high-tech ball-tracking systems. This innovation's new role in the game likely stems, at least in part, from the recognition that these systems are engaging and appealing to spectators. When technology is better for the business of baseball (making more money for owners, players, and other workers in the industry), the transformation is more readily accepted. However, the growing practice of using ball-tracking systems to rate umpires inevitably shapes the perception of the game and ultimately its principles.

This use of technology lends support to the view that calling balls and strikes is or should be a mechanical job, which can easily result in the conclusion that umpires should be replaced altogether with automated systems. In the long run, as fans and players get used to electronic strike zones and sophisticated ball-tracking systems, the general understanding of the game could change in a way that more closely resembles Roberts's theory.¹²⁵

B. Aristotle at the Ballpark

The three differences discussed in the previous section between Dworkin's legal interpretivism and the theory of baseball proposed in this Article can perhaps be coherently explained by a concept borrowed from Aristotle: practical wisdom. In the *Nicomachean Ethics*, Aristotle defines practical wisdom (*phronesis*) as some kind of intellectual perception of what is conducive to the good life.¹²⁶ It is neither a purely rational skill (such as the one that

¹²⁵ The topic of how technology changes the nature of sports is a central one in current work on the jurisprudence of sport. See, e.g., David Pozen, *What Are the Rules of Soccer?*, BALKINIZATION (June 20, 2019), <https://balkin.blogspot.com/2019/06/what-are-rules-of-soccer.html> [<https://perma.cc/3KfV-S53W>]; David Pozen, *The Rulification of Penalty Kicks—and a Reform Proposal*, BALKINIZATION (July 23, 2018), <https://balkin.blogspot.com/2018/07/the-rulification-of-penalty-kicksand.html> [<https://perma.cc/GS9H-6ED5>]; Harry Collins & Robert Evans, *You Cannot Be Serious! Public Understanding of Technology With Special Reference To "Hawk-Eye"*, 17 PUB. UNDERSTANDING OF SCI. 283 (2008); Harry Collins, *The Philosophy of Umpiring and the Introduction of Decision-Aid Technology*, 37 J. PHIL. SPORT 135 (2010).

¹²⁶ ARISTOTLE, *NICOMACHEAN ETHICS* 107–08 (Roger Crisp ed., 2009).

would produce an analytical list of decision rules) nor a purely practical one (because it works by ‘grasping reasons’).¹²⁷ Practical wisdom is a form of cultivated ability to understand practical situations and to make good decisions in those situations.¹²⁸

The concept is hard to operationalize; indeed, legal theorists who apply it to the practice of law and legal adjudication often employ definitions that may seem too vague to many readers. Lawrence Solum, for example, has defined judicial wisdom (a version of *phronesis* applied to legal adjudication) as “excellence in knowing what goals to pursue in the particular case and excellence in choosing the means to accomplish those goals” and has equated this virtue to what Karl Llewellyn called “situation sense.”¹²⁹

Appeals to “practical wisdom” rather than to specific criteria and procedures often sound like appeals to a mysterious, almost esoteric form of insight.¹³⁰ But the vagueness is justified. The problem with a transparent list of criteria and procedures is that the world is much messier and unpredictable than what a clear-cut algorithm could comfortably capture. We cannot simply have clear-cut rules for every possible situation.¹³¹

Yet, the lack of an exhaustive list of criteria and procedures *ex ante* does not mean that the wise adjudicator is not capable of providing precise reasons for her decision *ex post*. Quite the contrary: a practically wise adjudicator should be able to explain why she believes her decision to be the right one given the circumstances.¹³² In other words, there are well-defined reasons behind a decision based on practical wisdom; the problem is that they cannot be fully specified in advance for all possible permutations of the world.

¹²⁷ See HERBERT McCABE, *ON AQUINAS 134* (Brian Davies ed., 2008) (“[P]ractical wisdom cannot be simply an intellectual disposition like mathematics, or for that matter any other science; it must involve also our sense knowledge and sense experience.”).

¹²⁸ For discussions of Aristotle’s *phronesis*, see Richard Kraut, *Aristotle’s Ethics*, in *STAN. ENCYC. PHIL.* (Edward N. Zalta ed., 2022); Rosalind Hursthouse & Glen Pettigrove, *Virtue Ethics*, in *STAN. ENCYC. PHIL.* (Edward N. Zalta ed., 2022); Daniel C. Russell, *Phronesis and the Virtues (NE VI 12–13)*, in *THE CAMBRIDGE COMPANION TO ARISTOTLE’S NICOMACHEAN ETHICS 203* (Ronald Polansky ed., 2014).

¹²⁹ Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 *METAPHIL.* 178, 192 (2003).

¹³⁰ See Claudio Michelon, *Practical Wisdom in Legal Decision-Making*, in *LAW, VIRTUE, AND JUSTICE 29, 37* (Amalia Amaya & Ho Hock Lai eds., 2013).

¹³¹ See McCABE, *supra* note 126, at 56–57 (“[P]ractical wisdom . . . has to deal with concrete individual situations, for all human actions are individual and unique.”).

¹³² See NEIL MACCORMICK, *PRACTICAL REASON IN LAW AND MORALITY 17* (2009).

What does any of this have to do with baseball? In Part IV, I argued that the calling of balls and strikes is not based just on written rules but on unwritten principles, and what umpires do is to try to make sense of the pitch in light of rules, practices, and principles. Then, in Part V.A, I argued that this way of understanding baseball differs from Dworkin's interpretivism in at least three relevant respects: the principles of baseball are intrinsic, an umpire's judgements are based on intuitive knowledge, and the principles are subject to change over time as the game evolves. These three aspects of umpiring can be better explained by practical wisdom. Let me offer a very brief sketch of this argument.

First, I argued that baseball's principles are immanent in the game; they are not part of a unitary body of principles that governs morality, law, or other domains of human life. This idea of an internal logic of a given practice—law, baseball, or morality—is close to the Aristotelian concept of *telos*, i.e. the intrinsic goal or purpose of something, which determines what is "excellence" in a particular context.¹³³ A good umpire knows the rules but has also a deep and nuanced grasp of what the game is about and what excellence in the game looks like.

Second, I argued that in making their principle-based interpretive judgements, umpires do not build comprehensive theories of baseball but react almost intuitively, based on years of experience. This is precisely how Aristotle thought of practical wisdom, as a *habitus* that allows the decision-maker to make good decisions.¹³⁴ What Babe Pinelli saw on October 8, 1956, is not a mystery: it can be explained and discussed. Indeed, a plausible version of such an explanation can be found in Part IV.B. Yet Pinelli was able to make that decision not because the specific situation had been regulated somewhere in advance, but because he was immersed in the principles and practice of baseball. With a much more prosaic metaphor, Karl Llewellyn called this skill "horse-sense," that "extraordinary and uncommon kind of experience, sense

¹³³ Another way to express this idea is that baseball is a "practice," in the sense proposed by MacIntyre. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 187 (1997) ("By a practice I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.")

¹³⁴ On the distinction between habit and *habitus* and its relevance for practical wisdom, see McCABE, *supra* note 126, at 56–57.

and intuition which was characteristic of an old-fashioned skilled horse trader in his dealings either with horses or with other horse traders.¹³⁵

Third, I argued that baseball's principles are subject to change. Rules yield to principles, but over time principles may and do change, to the point that fans may not recognize the game they used to know. Practices, including baseball, can and do deteriorate to the point that they become something else altogether. Echoes of this idea that practices are vulnerable to change and decay can be found in contemporary thinkers who have engaged in depth with the concept of practical wisdom.¹³⁶

C. *A Final Illustration: December 28, 1883*

In Ken Burns's *Baseball*, the following amusing statement is attributed to Charles Eliot, President of Harvard from 1869 to 1909:

This year I'm told the team did well because one pitcher had a fine curve ball. I understand that a curve ball is thrown with a deliberate attempt to deceive. Surely this is not an ability we should want to foster at Harvard.¹³⁷

The quotation is probably apocryphal, but a less pithy version of it was likely uttered by Charles Eliot Norton, Professor of History of Art at Harvard and a cousin of the more famous Charles Eliot.¹³⁸ During the Christmas holidays of 1883, faculty members and administrators of elite universities met in New York to discuss the thorny topic (then as well as now) of college sports.¹³⁹ On this occasion, Norton criticized how pitchers in baseball “use[d] every

¹³⁵ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 201 (1960). On the connection between Llewellyn's “prudential realism” and Aristotle's practical wisdom, see ANTHONY T. KRONMAN, *THE LOST LAWYER* 209–25 (1993).

¹³⁶ See generally MACINTYRE *supra* note 132; KRONMAN, *supra* note 134.

¹³⁷ *Baseball* (PBS Prods. 1994).

¹³⁸ See Richard Hershberger, *With a Deliberate Attempt to Deceive: Correcting a Quotation Misattributed to Charles Eliot, President of Harvard*, *BASEBALL RES. J.* (Spring 2017), <https://sabr.org/journal/article/with-a-deliberate-attempt-to-deceive-correcting-a-quotation-misattributed-to-charles-eliot-president-of-harvard/> [<https://perma.cc/MQ3V-R2DT>].

¹³⁹ *Id.* (quoting *NEW YORK CLIPPER*, Jan. 19, 1884). I believe that the meeting in question is the one discussed in RONALD A. SMITH, *SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS* 136–137 (1988).

effort to deceive [the batter] by curving ... the ball.”¹⁴⁰ For Norton, this was a perversion of the game “in the direction of fraud and deceit.”¹⁴¹

To modern readers, these words sound quaintly amusing because curveballs—alongside many other types of “deceitful” pitches—are a common tool of the game.¹⁴² The mere association of curveballs and immorality would strike fans as ridiculous. But Norton’s view of curveballs, while already a minority opinion in 1883, would not have sounded strange a few decades earlier, when pitchers were expected to throw balls that could be hit by most pitchers most of the time, in order to put the ball in play.¹⁴³

This anecdote well illustrates the points outlined in the previous section. Baseball’s principles do not necessarily coincide with the principles of personal morality—trying to deceive someone is wrong according to the latter but not to the former, at least when it comes to pitching. The fox knows when deceit is morally permissible (or even obligatory) and when it is not. Furthermore, baseball’s principles are not immutable. They change and evolve with the game. What seemed obvious in the 1850s became old fashioned in the 1880s and ridiculous a few decades later.

The same thing may happen, and is probably already happening, with the role of human judgment and interpretation in calling balls and strikes, due to the increasing habituation of fans and players to the use of ball-tracking systems. Chief Justice Roberts’s “balls-and-strikes” theory could, after all, become an accurate theory of baseball, but only because baseball will have turned into something different.

CONCLUSION

In this Article, I have argued that Chief Justice Roberts’s metaphor of judges as umpires raises complicated questions not only for legal adjudication but also for the role of umpires in baseball. Although Roberts and his critics sharply disagree on how legal adjudication works, they seem to agree that umpires in baseball are mechanical reporters of clear-cut truths. My thesis in

¹⁴⁰ Hershberger, *supra* note 137.

¹⁴¹ *Id.*

¹⁴² For a similar observation, see BERMAN & FRIEDMAN, *supra* note 12, at 485 (“Today, the view that all deception is cheating, or should be prohibited, will strike most people as someplace between quaint and crackpot.”)

¹⁴³ The original Knickerbocker rules of 1845 stated that the ball “must be pitched, and not thrown, for the bat.” See THORN, *supra* note 29, at 74 (“[T]he pitcher . . . was not regarded as an adversary to the batter, but merely a server; the batter’s true opponents were the fielders.”).

this Article is that this theory of baseball is wrong. Umpires are not like Montesquieu's "passive beings" but rather active participants in a complex practice of judgment and interpretation.

Indeed, all the three umpires from an old story on the philosophy of baseball are somewhat mistaken. The First Umpire ("I call them as I see them") is wrong because a call is not just a matter of accurate or inaccurate perception; it is more than an epistemic and technological problem. Technology in baseball is successful only when it expands, not when it narrows, the scope for human judgment. The Second Umpire ("I call them as they are") is wrong because balls and strikes do not always exist as clear-cut truths codified in written rules. They are also the result of interpretation, grounded in complex practices and principles. Finally, the Third Umpire ("They ain't nothing until I call them") is wrong because balls and strikes are not a matter of pure discretion or power. When umpires interpret the strike zone, they are trying to get the call right. They do not base their calls on private criteria or personal preferences but rather on principles that they believe make normative claims on themselves and others.

We need a new version of the story, one which includes a Fourth Umpire. Her line should be: "I call them to make sense of the game."

Babe Pinelli's last call is a great real-world example of this Fourth Umpire. He thought that Dale Mitchell *ought to have swung*, and therefore the pitch was a strike. We can argue about the merits of this specific call, but it would be clearly wrong to think that the pitch was a strike based on clear-cut rules, or that it was perceived as such by Pinelli, or that Pinelli decided that it was a strike based on his own whims or private preferences. It was a strike, according to Pinelli (and to many others who watched or thought about that game), because that call was consistent with the rules, practices, and principles of baseball. The call *made sense*.

However, baseball's principles, unlike Dworkin's principles of justice, are not a branch of morality. Rather, they are part of the intrinsic logic of the game, and umpires have a good grasp of them thanks to years of practical experience. The way umpires make their call is a form of practical wisdom: a *habitus* that allows them to make good decisions in the most disparate situations. If we had to appoint a famous philosopher as a patron saint of this theory of baseball, Aristotle would be a better candidate than Ronald Dworkin.

Rules in baseball sometimes yield to principles, but when practices keep deviating from the principles, principles eventually change. In other words, baseball's principles are fragile and can be distorted or perverted. Those who care about them should be vigilant: practices can deteriorate to the point that they become unrecognizable.

Can this theory of baseball teach us something about legal adjudication? Can Chief Justice Roberts's metaphor be re-interpreted in the sense that judges, just like umpires, should go beyond the formalistic application of clear-cut rules and try to make sense of the law by cultivating and exercising practical wisdom? Perhaps judges should indeed be like umpires, but if that is the case, the implication would be very different from what Roberts meant. While a fuller discussion of these implications is beyond the Article's ambitions, the metaphor can still offer fertile ground for thinking about law and adjudication.