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The Tell-All Hurler: Jim Bouton and "Ball Four"

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Chapter 7

The Tell-All Hurler: Jim Bouton, *Ball Four,* and the Breach of Confidentiality

I. Introduction (Or an Overly Long, Inappropriately Melodramatic, Patti Labelle-Like Rendition of Our National Anthem)

Jim Bouton deserved better than this. Oh, the room was appropriately austere, that was for sure: musty, darkly wooden; late afternoon sunlight streaming in through the stained glass windows and spilling all over the threadbare oriental rug; smelling of moldy books and powdering glue. All of the necessary university speaking-engagement accoutrements. No, that was as it should be for a talk given by one of the most significant people in the history of sports. It was everything else that was the problem.

I had arrived early in order to guarantee a seat up front, where I would be certain to hear him. For I have been to enough of these things to know that when it comes to student-run audio-visual departments, you typically get what you paid for. I chose a seat in the third row, off to the side. Where I could see him but remain out of his line

of sight. It made me uncomfortable to stare at another man with his knowledge. This is my failing, I know. But nevertheless.

I chose my seat and placed my knapsack under my chair. For the first time since I'd left my car I was separated from my mace. I was fairly certain that I wouldn't need it now that I was inside, within the confines of the two-inch-thick steel doors that closed like a prison's behind me when I entered the building. There was a guard at the door as well. True, he appeared to be otherwise well into his retirement and dozing in his chair, but who was I to say that he didn't have things under control? He was probably a sharpshooter, able to jump to action at a moments' notice, licensed to kill, all of that good stuff. At least that was what I was telling myself as I hurried into the most brightly lit room I could find in order to gather myself and plot my next move.

These people are students, I kept repeating silently as I took in the mass of humanity passing by on both sides, they are not going to hurt me. Even that guy with the panty-hose cap and muscle shirt? Yes, even that guy. I was pretty sure that that thing in his left hand was a book. Who bludgeons someone to death with a macroeconomics text? Regardless, I wrapped my foot around the knapsack.

If need be, I could kick it up to chest level, pull the zipper and grab my mace in seconds. But only if need be.

As I waited for the room to fill and the talk to begin, I wondered how Bouton had wrangled himself into this situation. Surely, he had better offers. Offers from places which regularly graduated future Supreme Court Justices, acclaimed physicians, noted thinkers. Or at least places which, when mentioned, elicited a nonchalant shrug rather than a surprised, “I didn’t even know that was a college”. But here he was, at New Jersey City University; the academic equivalent of Class D ball. Where you washed your own jock and spent your free time dreaming of all the places in the world you’d rather be.

The room filled slowly, as classes let out or, as I suspected, the shelters closed down for the afternoon. For as it soon became apparent, it was going to be a Statue of Liberty kind of crowd (your wretched, your tired, your huddled masses, etc.). A woman in a thick, brown jacket, worn most likely in unknowing defiance of the surprising late Fall warmth, stared deeply into the recycling bin at the back of the room. She looked around, up and down and then made her way down the aisle. Although there was plenty of available seating, she chose the seat directly in front of me. A moment later, I was engulfed in the caustic

aroma of what can best be described as month-old egg salad wafting in my direction. Fantastic. A large sack of dough in stained sweatpants chose the seat to my left, clutching a shopping bag stuffed taut with items for Bouton to sign. He was sweating profusely under his grimy Yankees cap, his graying curls matted down against his slick, beefy neck. He seemed to me to be the type of person you saw at every baseball game; the guy who showed up alone, transistor radio glued to one ear, keeping score religiously; the guy who brought a large shopping bag of food to the game and finished everything off by the fourth inning; the guy who hummed to himself when not talking back to the radio. That guy.

Then there were the others: older people mostly, who arrived in groups of two or three and who seemed to know everyone else there over the age of 65. They filled the room with their conversation: about their morning, their afternoon or what they were planning on doing that evening. But not about Bouton. Nobody spoke about Bouton. Did they know who he was? Did it even matter to them? Or was this just an excuse to get out of the house, to “do something” as their doctors most likely exhorted them to do on a regular basis? The longer they chatted the more I realized

that this crowd would've shown up to just about anything that didn't require an admission fee.

Eventually, they found their seats, interspersed between the few clearly identifiable students and those who appeared to have wandered in off the street merely looking for a place to sit. This was Bouton's audience. These, for better or worse, were his "people". This, I thought to myself, wasn't right.

Not right for the man whose 1970 publication, "Ball Four" was recently selected by the New York Public Library as one of the "Books of the Century", along with the likes of "The Great Gatsby" and "In Cold Blood"[1]. Whose account of his 1969 season with the then Seattle Pilots and later, Houston Astros, provided much of the fuel for the slowly building players association movement that finally rebelled against the long-cursed Reserve Clause which tied players to an organization from the day they were drafted to the day they died, and forced its overthrow. Who drew back the curtains on the reality of life as a major league baseball player for all the world to see; a world where players were resigned to meekly signing whatever contract was placed

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[1] Jim Bouton, Jim Bouton Official Website<http://jimbouton.com/bio.html>

before them because they had no other options.[2] Who created an atmosphere where someone like Curt Flood could finally stand up to management and refuse a trade from St. Louis to Philadelphia because, goddammit, he'd worked long enough and hard enough to be entitled to have some say as to where he played his final years. Who set in motion the procedural wheels which culminated in the 1975 Andy Messersmith arbitration (during which sections of "Ball Four" were read into the record as evidence of ownership mistreatment of their players) which broke the shackles once and forever, granting free agency for the first time to professional athletes in any major American sport. Who laid the first brick on the path up the mountain. Who in 1996 was featured in "The Sports 100: The One Hundred Most Important People in American Sports History".[3] No, this was not right at all.

The crowd continued to chat or, depending on the individual, hum amongst themselves even after Bouton made

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[2] Jim Bouton, Ball Four 261 (20th Anniversary Edition, MacMillan 1990).

[3] Brad Herzog, The Sports 100: The One Hundred Most Important People in American Sports History (Paperback, Hungry Minds Inc. 1996)

his appearance in the back of the room. Although I am too young to recall his days with the Yankees (where, in 1963 he won 21 games and made the All-Star team, and in 1964 won 18 and twice defeated the eventual world champion Cardinals in the World Series), I couldn't help but identify him immediately even though surrounded as he was by various academic types waiting to usher him to the podium up front. Despite the fact that he was 23 years removed from his last appearance on the Major League scene (in a surprising comeback with the then sad-sack Atlanta Braves), he still looked like an athlete, although shorter than I had expected. He waited, as if in the bullpen anticipating the call from the mound, neatly dressed in a crisp gray suit accented with a Ferrari red tie. Recalling the pictures I'd seen from his Yankee days, I noticed that he had reprised his crew cut. As such, he should have been instantly recognizable to these denizens gathering just across the river from where he first made his name. But either he wasn't or they just had more pressing topics on their minds. So they continued on, happily I supposed, until they were so rudely interrupted by the procession which finally made its way down the aisle. The Nerve, many of them probably muttered under their breath.

His introduction was handled by a member of the faculty who appeared to not just have met him moments earlier, but to have heard of him as well. It was awkward, listening to this professor fumble through the litany of statistics that so often define everything but tell nothing when it comes to baseball. It was clear from his introduction that he had come up angrily short in his attempt to secure today's speaking slot for his candidate; a poet no doubt, given the numerous poetry references contained within his introductory remarks. This failure obviously still smarted, as he repeated more than once that Bouton was not an academic and as such, not the sort who usually spoke at these things. A smile crossed his face every time. Those few in the audience paying attention laughed politely. The other members on the dais squirmed in their seats, his arrow obviously having found its mark. After a few minutes, a final forced analogy between baseball and poetry was attempted without success and then mercifully, the introduction, much like America's involvement in Vietnam, came to an end.

An uncomfortable moment passed as Bouton stepped up to the podium. The chatter, which dimmed only in minute degrees during the introduction, revved up again. The humming once again became audible. Snack wrappers roared

as several of the elderly women roamed through their massive purses in search of “just a little something” as the woman behind me announced to the rest of her row. Poor Jim Bouton, I thought. He was heading into a buzz-saw. There was no way the journeyman pitcher would be able to compete with everything else that occupied the minds and hands of the disinterested masses gathered ostensibly in his honor this unfortunate afternoon.

However, right away, I realized that much like many who stepped up to the plate against him during his playing days, I had sorely underestimated him. Because his first pitch was an off-the-cuff comment that caught the black of the plate. The crowd laughed. Bouton laughed. I laughed. Immediately thereafter, he zinged another one over for a strike and we laughed again. And again after that. Soon I noticed that he was speaking without notes. But even without paper, the journeyman pitcher had material. A warehouse full of it. Nearly 60 years worth, ranging from when he was a boy chasing after Willie Mays at the Polo Grounds to his predictions on the future of baseball. It didn’t take long for me to see that without our even realizing it, we were his. We were hanging on his every word. We wanted more.

He went on, first with some stories about his high school days, where he was known as “Warm Up Bouton” because, not trusted to actually pitch in a real live game, that was all he ever did. Next he recounted his minor league days, leading up to spring training 1962 where he unexpectedly entered an extra-inning game only because there was no one left in the bullpen and pitched shutout ball for several innings, causing management’s eyebrows to raise and leading to an eventual spot on the Yankees. This segued into stories about Yogi Berra, Mickey Mantle, heavy drinking and serious womanizing. I looked around the room. The crowd was enthralled. The chatter was gone, the humming nonexistent. Everybody was hanging on Bouton’s next word.

By now the musty room was filled to capacity, the overflow packed into the hallway, straining their necks in the doorway in an effort to catch a glimpse of the man who changed the afternoon plans of the several who apparently passed by the room on their way to other appointments only to stop and be drawn in by the wit, ease and charm of the journeyman pitcher. And that’s when it finally hit me. That’s when I understood just what it was about Jim Bouton

and "Ball Four" that so thoroughly scared the hell out of Major League Baseball ("MLB")[4] more than thirty years ago.

Because here he was: at an institution that, for the most part, didn't seem to want him, speaking to a crowd that, for the most part, didn't want to listen to him, and he grabbed them, snap! like that. For the remainder of the afternoon they were his, laughing, nodding in agreement, searching for something, anything for him to sign afterwards at the reception. I now understood that as much as you try, you can't not listen to Jim Bouton. Armed with such allure, anything that came out of his mouth carried the potential for danger. Anyone could have written a "Ball Four". Nobody other than Bouton could've written it such that millions of people would read it.

Major League baseball in 1969 (the year chronicled in "Ball Four") was not as most folks believed it to be. Back then, before the explosion of the NFL, it was still our national pastime and its players still larger than life; heroes even. Basketball fans may have known who Lew Alcinder was but *everybody* knew Mickey Mantle. Was there

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[4] Hereinafter, "MLB" will refer to the corporate power-structure of major league baseball, consisting of the various team owners as well as the commissioner's office.

anything better than life as a major league baseball player? Surprisingly, as documented in "Ball Four", the answer was a resounding "Yes". The minimum salary was $7,000;[5] raises were at the sole discretion of management. You didn't like it, you went back home to Iowa. Even if you did like it, you worked construction in the off-season just to make ends meet, despite the fact that the game itself, due to expansion, television contracts and sheer dominance of the sporting and entertainment market, was bringing in exponentially more revenue from one year to the next. Baseball, the proverbial goose that laid the golden egg, was growing more plump and fertile by the year. So it was with good reason that ownership was growing increasingly worried that one day, their egg was going to crack.

And crack it did. Spilling messily all over the national consciousness with the publication of "Ball Four" in 1970. Which showed the American public for the first time that life as a major league baseball player wasn't all Wheaties Box covers and movie-star wives. It was work. Hard work. Hard work without adequate compensation in many cases; with lies and deception from management thrown in to

[5] Bouton, Ball Four at 409.

boot. Told in a style that drew the rapt interest of even the most casual of baseball fans. Was it any wonder that ownership saw the book as a direct threat to its way of life? As Bouton mentioned during his speech that afternoon, it wasn't the boozing or womanizing in the book that so scared management. No, it was everything else; everything that changed the national mindset when it came to major league baseball. Everything which caused a nation of baseball fans to become sympathetic to their heroes; to make them actually *feel sorry* for them. "Ball Four" altered the mood of the country toward its national game. After its publication, the goose would never be so fertile again.

So it was no wonder that commissioner Bowie Kuhn ("The Ayatollah", as Bouton referred to him more than once that afternoon) tried to force him to renounce every single word after "Ball Four"'s publication.[6] Tried to muscle him into signing a statement which effectively said that he had made the whole thing up. After all, Kuhn and his cohorts didn't become millionaires by accident. They knew where all this was headed. Towards Curt Flood; towards Andy Messersmith; towards Alex Rodriguez and the creation of the $25 million

[6] Id. at 408.

dollar-a-year player. Oh, maybe not the next day, or the day after that. But eventually. So they pulled out all the stops in an effort to prevent their goose from running free.

Or did they?

Because in the end, the arm-twisting that occurred in the commissioner's office that day back in 1970 was the extent of MLB's attempt to stanch the bleeding which would eventually divert much of the sport's economic lifeblood from the owners' veins to the players'. The release of "Ball Four" started the trickle and, in retrospect, the owners have been on the defensive ever since; losing battle after battle until practically everything was lost. While it is impossible to reconstruct events exactly as they occurred over 30 years ago, it's safe to assume that, given the astronomical rise in player salaries and the overwhelming power of today's players union, the legal course chosen by the owners over the past quarter century hasn't provided optimum results, at least from their perspective.

This chapter will attempt to "un-ring the bell" so to speak, and travel back to the time of the release of "Ball Four" in order to determine if there was a better response to the book, one which would have stemmed the tide right

then and there. Although there was most likely no weapon available to the owners which would have frozen the economic landscape such that the balance of power would foreverafter remain as it was in 1970, perhaps there was some other approach which would have left more money in the owners' pockets than is presently the case. Given the current economic state of the game, there had to be.

In fact, there is support in the law for the proposition that the stories and anecdotes revealed by Bouton in "Ball Four" constituted legally protected confidential information. After all, there can be no question that the locker room tales told within its pages (tales of pill-popping, salary disputes and a hung-over Mickey Mantle) were exactly the ones that ownership took great pains to keep from the public in its ongoing efforts to maintain the image of the virtuous, happy, "Wheaties Box" player which drew generation after generation of admiring and envious fans to the ballpark.

However, whether the divulgence of this information constituted grounds for relief depends greatly on the categorization of this information. For as the following will show, while these "secrets" fail to meet the requirements typically imposed upon information classified under the highest and most fiercely protected type of

commercial information: that rising to the level of a legally protected trade secret, they may nevertheless have served as the basis for a cause of action grounded in a breach of the fiduciary duty of loyalty.

II. Strike One: The Publication of "Ball Four" as a Divulgence of a Protected Trade Secret

"What you say here, what you see here, what you do here and what you hear here, let it stay here", read a sign hanging in the locker room of the Milwaukee Brewers clubhouse in 1969, a sign similar to the ones hanging in locker rooms across the Major Leagues at the time.[7] Communication with the outside world (particularly with reporters-the conduits to the public) on matters other than the happenings on the diamond was frowned upon.[8] The rule was clear: baseball players were to talk about baseball; management was to discuss everything else, and on their terms. This, for example, allowed ownership to publicly

[7] Id. at 219.

[8] Id. at 34.

announce Mickey Mantle's $100,000 salary with great fanfare while keeping the droves of $9,000-12,000 salaries secret.[9]

Before becoming a player himself and discovering the truth, Bouton notes in "Ball Four" that the public perception of player salaries at the time was that if stars like Ted Williams were making $125,000, then the average players must be making at least $60,000.[10] The public discovery of the gross absence of any such middle-ground at the time would go a long way to discrediting management's very public posture that the players were well paid and fairly treated.[11]

The divulgence of this type of information, first by Bouton and later in the Curt Flood and Andy Messersmith cases, would eventually lead to the reshaping of the economic landscape. Therefore, it is not an understatement to say that the fortunes of ownership depended heavily on the maintenance of this deeply imbedded cloak of secrecy. However, although the ultimate purpose of trade secret law is to protect the sanctity of internal corporate communications and workings like those mentioned above, the

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[9] Id. at x.

[10] Id. at 4.

[11] Id. at x.

absence of a competitive environment of rival baseball leagues ultimately renders the relief offered through trade secret law inaccessible to Major League Baseball.

There is little question that the type of information divulged by Bouton otherwise meets the tests commonly applied to the determination of misappropriation of a trade secret (1: the existence of a trade secret; 2: breach of a confidential relationship or improper discovery of a trade secret; 3: use of the trade secret; and 4: damages).[12] Regardless, courts have repeatedly refused to find in favor of misappropriation if the information disclosed was not intended to be used competitively for advantage against the employer.[13] Since baseball enjoyed (as it still does today) the benefits of a judicially protected antitrust exemption

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[12] See e.g. IBP, Inc. v. Klump, 2001 WL 1456173 (Tex.App-Amarillo 2001); Taco Cabana Int'l v. Two Pesos, Inc., 932 F.2d 1113 (5th Cir. 1991).

[13] Id. See also Robert Unikel, Bridging the "Trade Secret" Gap: Protecting "Confidential Information" Not Rising to the Level of Trade Secrets, 29 Loy. U. Chi. L.J. 841 (1998) (analyzing the purpose of trade secret law as a body of law intended to protect certain types of corporate information from improper competitive tactics).

which prevents exactly this type of competition, there is not much likelihood that it could find relief under the trade secret rubric.

Simply stated, Major League Baseball's secretly guarded "11 herbs and spices" would receive no legal protection because the Supreme Court, back in 1922[14] effectively prohibited the creation of the baseball equivalent of McDonalds, Burger King and Wendy's. And without such competitors, it is likely that a court would find no harm in the public disclosure of baseball's secret recipe. After all, what could possibly be done with such information to harm the competitive advantage of a corporation that has been granted an enforceable and absolute monopoly? Ironically, it is the very element created to protect the supremacy of Major League Baseball in the sports marketplace that ultimately rendered it impotent to defend itself (at least under the trade secret rubric) when its supremacy was finally and fatally challenged through the publication of "Ball Four". Most

[14] Federal Base Ball Club of Baltimore v. National League of Professional Base Ball Clubs, 259 U.S. 200 (1922).

assuredly, Kennesaw Mountain Landis[15] never foresaw the likes of Jim Bouton during the golden era of baseball. But then again, it is the rare emperor who recognizes the overthrow of his dynasty before his head is actually on the guillotine.

III. Strike Two: "Ball Four" and Prior Restraint

Moreover, even if the information contained within "Ball Four" did rise to the level of legally protected trade secrets, it is highly unlikely that the remedy MLB would most likely have sought (a permanent injunction barring the publication of the book) would have been granted. Therefore, in any event, the cat would have been let out of the bag, the bell would have been rung, and strained metaphors and similes would have exploded like game-ending homerun fireworks. Because the doctrine of "prior restraint" would have permitted eventual publication in any event.

The Supreme Court has held:

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[15] The Commissioner of baseball at the time of the Supreme Court's 1922 antitrust ruling.

> [A]lthough the prohibition against prior restraint is by no means absolute, the gagging of publication has been considered acceptable only in 'exceptional cases'. Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this 'most extraordinary remedy' only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.[16]

Although the last phrase appears to give hope to the owners' plight (for it is difficult to imagine an alternative remedy which would have protected the owners' interests as fully), even the most cursory review of prior restraint law indicates that a permanent injunction against publication would be near-impossible to achieve.

As the Sixth Circuit determined (in an opinion representative of the overall approach to the prior restraint doctrine): "the private parties' interest in protecting their vanity or their commercial self-interest

[16] CBS v. Davis, 510 U.S. 1315, 1317 (1994).

does not qualify as grounds for imposing prior restraint."[17] Only in instances where the overthrow of the government, publication of obscene material or publication of troop movements during wartime is at issue has the Court favorably considered the notion of prior restraint.[18] Indeed, the most well-noted prior restraint case of all, the Pentagon Papers case[19], resulted in a holding quashing the government's attempt to enjoin the New York Times and Washington Post from publishing a classified study on U.S. policy-making in Vietnam.[20] Although occurring during a time of war and despite the government's plea of protection of the national interest, the Court found an insufficient basis to uphold the injunction. By contrast, MLB's interest in protection of their judicially created empire would hardly merit the Court's attention, let alone favorably.

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[17] Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225 (6th Cir. 1996).

[18] Ford v. Lane, 67 F.Supp. 2d 745, 751 (1999) (citing Near v. Minnesota, 283 U.S. 697 (1931).

[19] New York Times Co. v. United States, 403 U.S. 713 (1971).

[20] Id.

So what have we learned? We've learned (and you would too if you'd only pay attention) that the information contained within "Ball Four" would likely not rise to the level of a legally-protectable trade secret and that even if it did, an injunction prohibiting the publication of the book would most likely fail to withstand legal scrutiny. So all appears lost. Regardless of MLB's tactics, the slippery slope started by Bouton would have led to Flood and Messersmith anyway, giving rise to the $25 million dollar ballplayer of today, right?

Well, not necessarily. Because there was an avenue available to the owners which may have at least entitled them to money damages as a result of the publication of Bouton's book, damages which might have taken some of the steam away from the hard-charging players union and made it somewhat more open to compromise and negotiation and less willing to take the Messersmith arbitration to verdict. By focusing on a lesser (but still legally protected) class of confidential information, the owners might have saved a few more slices of the metaphorically-challenged baseball pie for themselves.

IV. Strike Three? "Ball Four" as a Breach of the Duty of Loyalty Resulting in Unjust Enrichment for Bouton and the Players Association: Appeal to the First Base Umpire

Various jurisdictions have held that certain confidential information may in fact be legally protected even if it does not rise to the level of a "trade secret". This type of information receives its protection due to the violation of a confidential relationship which results from its divulgence. Thus, it is the violation of a fiduciary trust (a breach of loyalty), as opposed to the dissemination of information considered confidential regardless of who divulges it, which forms the basis of this cause of action.

As stated by the 11th Circuit: " A confidential relationship is distinguished by the expectations of the parties involved, while a trade secret is identified through rigorous examination of the information sought to be protected."[21] While the locker room secrets fail the trade secrets test due to baseball's anti-competitive antitrust exemption, they may nevertheless be legally

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[21] Roboserve, Ltd. v. Tom's Foods, Inc., 940 F.2d 1441, 1456 (11th Cir. 1991).

protected given the clear and explicit intention on behalf of ownership (and repeated on the wall of every clubhouse in the Major Leagues) to keep precisely the type of information revealed by Bouton within the four walls of the locker room.

Indeed, MLB could have made a plausible argument that given the players' status as high-level employees of the game, they owed their employers (as well as corporate parent MLB) a fiduciary duty of loyalty. Concurrent with this responsibility is the prohibition from doing exactly what Bouton did- using or disclosing information for his own advantage.[22] Moreover, the divulgence of this information not only benefited Bouton personally through the receipt of royalties of his best-seller, it detrimentally affected his employers, as can be clearly shown through the downward spiral of events which quickly followed its publication. Courts throughout the country have found employees liable for exactly this type of

[22] See Unikel, 29 Loy. U. Chi. L.J. at 860 (discussing the parameters of a breach of loyalty or trust tort).

conduct despite the absence of a legally protectable trade secret.[23]

Although, as stated above, efforts to obtain an injunction prohibiting the release of "Ball Four" would most likely have failed due to overriding First Amendment concerns, substantial money damages may have been available to the owners should they have won on liability. Under the doctrine of unjust enrichment (if such enrichment could be proven), Bouton (and by extension, the Players Association) would have been required to forfeit the full amount of all improperly-obtained benefits.[24]

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[23] See Id. at 865-66. The author cites, in footnote 110, decisions from the 4th and 5th Circuits, as well as several state court decisions which so held.

[24] See Unikel, 29 Loy. U. Chi. L.J. at 865-66.

But was Bouton's enrichment unjust?[25] After all, he may have breached a confidentiality which would entitle MLB to some measure of damages, but the information contained within "Ball Four" comes to the reader first-hand. Bouton was present for all of the conversations and incidents reported in the book, there was no serious contention (other than in his private conversation with Bowie Kuhn in

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[25] See Sikes v. McGraw-Edison Co., 665 F.2d 731 (5th Cir. 1982) The court held that a proper measure of damages in a breach of confidentiality action (in that instance, wrongful appropriation of a trade secret) may include an award consisting of both actual damages as well as the amount by which the defendant was unjustly enriched as a result of the breach. As these are two distinct theories of damages, it follows that each would require its own burden of proof. Therefore, in the hypothetical case of MLB v. Bouton, MLB would need to demonstrate not only its own damages suffered as a result of the publication of "Ball Four", but the measure of improperly gained benefits by both Bouton and the Players Association as well in order to recover on an "unjust enrichment" theory. As such, it would necessarily have to prove ownership of the information contained within the book.

1970-a conversation that Kuhn demanded be kept from the public)[26] that any of the information within the book was anything but truthful. So why wasn't Bouton entitled to repeat and print what he himself heard? Surprisingly, here is one area where baseball's antitrust exemption actually would have helped MLB prove sole ownership of every piece of locker room gossip and negative opinion held by each and all of its players. As such, the unauthorized release of any of this information for profit (or benefit to the players to the detriment of MLB) would be tortious.

Here's how: since the antitrust exemption prevented competition by rival professional baseball leagues, it follows that the economic benefits derived from the professional baseball "pie" were exclusively reserved to those within the Major League Baseball corporate structure. Moreover, the prohibition of outside competition necessarily created, as a byproduct, an internal competition between the players and owners within MLB for these judicially-created scarce resources.

However, the antitrust exemption provides a strong indication that the Supreme Court also ruled that the vast majority of the "pie" rightfully belonged to the owners and

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[26] Bouton, Ball Four at 408.

not the players. After all, without outside competition, players were prevented from going elsewhere to sell their services. This necessarily diminished the value of their unique and valuable skills-skills that otherwise would most likely have fetched a high price in a free and competitive marketplace.

The antitrust exemption, coupled with the Reserve Clause which bound a player for life to the team that drafted him, reduced the galaxy of potential bidders on these skills to a universe of one. It was this, judicially-approved, system that restricted quality veteran players like Bouton to a salary of $22,000[27] in a marketplace where the top salaries (of the very few and very well-known) were in excess of $120,000;[28] that permitted owners to set league minimum salaries ($7000 in

[27] Id. at 345.

[28] Id. at 4. Bouton notes that the salary of Ted Williams, as reported by Arthur Daley of The New York Times, was widely reported to be $125,000 at some point in the late 1950's or early 1960's.

1969)[29] in a vacuum-a vacuum so air-tight and free from market forces and player input that players openly laughed and chided Bouton when he suggested that the players take steps to raise the minimum;[30] that created an atmosphere whereby players were powerless to negotiate their yearly salary and had little choice but to meekly sign whatever contract was mailed to them that season.[31]

While all of the above might be described by the academic as "socially undesirable" or by the layman as "really lousy", it's important to remember that this system was *judicially approved.* The Supreme Court had spoken, and so it was done. Each and every inequality was absolutely legal, proper, and, what's more, mandated by the highest

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[29] Id. at 233. Bouton notes that the minimum salary was set at $7000 in 1958 and hadn't risen in the subsequent 11 years.

[30] Id.

[31] Id. at 261. Recalling a conversation with teammate Fred Talbot on his negotiating strategy and whether he ever considered using statistics as a bargaining tool. "Aw hell," remarked Talbot, "I don't keep statistics. Whatever they send me I just sign and send back. Of course, I call them a few names first."

court of the United States. The judiciary was not about to readdress these issues, settled half a century earlier, in the absence of a compelling reason. And the only weapon in the players' arsenal powerful enough to convince the courts to visit the issues again was public opinion. If they could somehow rouse public sentiment against the owners, there was the possibility that MLB would be forced to share at least a little of what was otherwise legally theirs.

As stated earlier, this weapon was not unknown to the owners, however. And in an ongoing effort to keep the public's nose out of their empire, they repeatedly took the offensive to prevent the release of unofficial information. Hence the ubiquitous clubhouse signs, as well as confidential reprimands of players who spoke, in the eyes of ownership, a bit too freely about issues outside of the white lines of the playing field.[32] Moreover, each spring,

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[32] Id. at 49-50. ("Mike Marshall was in the Tigers organization for a while and he says that, like the Yankees, they frown on players telling reporters the truth. A reporter asked Mike what he was being paid and he said he didn't feel he could say, but it was less than the minimum. The reporter printed it and asked how the hell the Tigers could be paying their No. 1 reliever less than the minimum.

Commissioner Bowie Kuhn made the rounds of each training camp and issued a speech best described by Bouton in his book:

> The Commissioner said that baseball is a tremendous, stupendous game and that it didn't need any drastic changes, that we simply needed to improve our methods of promotion. One of the things that none of us should do, he said, is knock the game. He said if we were selling Pontiacs we wouldn't go around saying what a bad transmission it has. In other words, don't say anything bad about baseball.[33]

By writing "Ball Four", Bouton broke the explicit code of silence, knocked the game, and stirred up public opinion which led to a groundswell of support for players who the public learned, for the first time, were badly mistreated

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So Mike got called in by Jim Campbell, the general manager. Campbell wasn't angry that Mike was making less than the minimum, but that he told.")

[33] Id. at 56.

and underpaid by management.[34] The shifting public winds paved the way for Flood, Messersmith and, eventually, Barry Bonds and Alex Rodriguez.

Of course, it would be absurd to argue that the owners aren't making millions upon millions of dollars themselves in the current economic structure. However, with the average yearly salary currently hovering in the $2 million range and with quality veterans (players of comparable stature and experience to Bouton back in 1969) making $5-7 million, there can be no question that ownership is necessarily keeping less for itself than it otherwise would have if the slippery slope created by Bouton had never been traversed at all.

Given the implicit acknowledgement of the antitrust exemption that the owners were legally entitled to set salaries as they desired, it is not unreasonable to conclude that "Ball Four", which altered this monopolisitic system in direct violation of the purpose of the exemption, led to unjust enrichment not only to Bouton (who directly profited from the dissemination of confidential

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[34] Id. at 407. Discussing baseball's traditional "code of silence" and how, by breaking that code, he has become, in the eyes of Major League Baseball, a deviant.

information) but to each and every player who indirectly benefited through the increase in salaries forced upon the owners by the events which ensued thereafter.

V. Conclusion

The information contained within "Ball Four" was: (1) confidential in that all employees and fiduciaries of MLB were repeatedly exhorted not to discuss exactly the types of activities contained with the book; (2) valuable to the owners, in that its confidentiality permitted them to enjoy the fruits of their antitrust exemption; and (3) used for the personal advantage of both Bouton and the players association. In fact, Bouton not only testified at the Messersmith arbitration which eventually resulted in the dismantling of the reserve clause, he read excerpts of "Ball Four" into the record.[35] Thus, even though the information contained within the book would not qualify as a legally protected trade secret, it appears as if it still would be protected as confidential information released in the course of a breach of Bouton's duty of loyalty to MLB,

[35] Id. at x.

leading to unjust enrichment of Bouton and the players association as a whole.

Of course, under the prior restraint doctrine, nothing could have been done to prevent the publication of the book in any event. However, the threat of significant money damages may have given the owners some leverage in an arena where hindsight shows they had none. Perhaps they could have used the prospect of litigation as a tool to force the players association to the negotiating table in the Messersmith arbitration, thereby avoiding the eventual ruling which permanently dismantled the system that had been in place for nearly a century. Perhaps. We'll never know. All we do know is that anything would have been more effective than the defense actually used in the arbitration, a defense which resulted in a complete and total defeat for MLB.

If one were inclined to believe the owners, they still haven't recovered from this defeat, and it is the current system (the one brought on by Bouton) which is the cause of all of what ails baseball today. If this truly is the case, then it is most likely with great regret to the owners that the extent of MLB's response to the publication of "Ball Four" wasn't more than a little arm-wringing in the Commisioner's office one spring afternoon. As

displayed both in print and in-person, the persuasive power of Jim Bouton's wit and wisdom required a counter-offensive utilizing the totality of baseball's arsenal and not the cap-gun employed by a commissioner cloaked in secrecy. Given MLB's meager response to the publication of "Ball Four" back in 1970, not only is it not surprising to find the balance of power shifted as radically as it has today, it is surprising that the owners have any power at all.