THE ART OF DISCRETION: UMPIRES AS JUDGES

Carrie Leonetti
THE ART OF DISCRETION: UMPIRES AS JUDGES

by Carrie Leonetti *

“Baseball is like church: ‘Many attend but few understand.’”1

It’s that time of year again. No, not Supreme-Court confirmation season. Baseball season [playoffs]. And in the spirit of baseball season, this Essay seeks to clear up a longstanding misunderstanding among jurists, politicians, practitioners, and academics about what, exactly, baseball umpires do.

With every new set of Supreme Court confirmation hearings, at least one Senator or jurist dusts off the old judges-as-umpires analogy, usually in the context of opposition to so-called judicial activism (the point being that judges should not, well, judge, but rather should just stick to “calling them as they see them” – with no detectable irony as to the “as they see them” part of the analogy). As inevitably, these anti-“activism” diatribes are followed by a new rash of critiques, by academics and jurists, of the inappropriateness of this oft-repeated analogy.2 While these critiques are varied and nuanced, for the most part, they can be summarized as follows: those who think that judging is like umpiring do not really understand what judges do.

---

* Carrie Leonetti is an Assistant Professor at the University of Oregon School of Law. She wishes to thank Derek Larwick, as always, for his brilliant research assistance, which he performed without questioning why he was spending his time researching baseball.


2 See, e.g., In re: Warrick, 278 B.R. 182, 189 (9th Cir. 2002) (Klein, J., dissenting); Morrison & Snodgrass Co. v. Hazen, 10 Ohio N.P. (N.S.) 353 (1910) (“A judge presiding at the trial of a jury case is not a mere umpire of a game of ball, to call balls and strikes, nor is he a mere moderator between contending parties, but he has active duties to perform in maintaining justice and in seeing that the truth is developed, and he may for such purpose put proper questions to the witnesses, and even leading questions.”); Moon v. Texas, 572 S.W.2d 681, 689 (Tex. Crim. App. 1978) (Phillips, J., concurring) (“The Court's decision in Alford also serves to refute what I believe to be the second, albeit unstated, assumption contained in the majority opinion: that the trial judge is merely an umpire, nothing more than a caller of balls and strikes. I cannot agree with this conclusion.”); Sarah Cravens, U. MIAMI L. REV. 947, 948-49 (2010) (noting that judges have "discretion," which implies that judges do not act as mere "umpires"); Jeffrey A. Van Detta, The Decline and Fall of the American Judicial Opinion, Part II: Back to the Future from the Roberts Court to Learned Hand - Segmentation, Audience, and the Opportunity of Justice Sotomayor, 13 BARRY L. REV. 29, 67-68 (2009).
This Essay posits essentially the opposite hypothesis: that those who object to the judges-as-umpires analogy (not to mention many of those who employ it) do not really understand what umpires do. While it is true that judges are not simply automatons, who can apply simple rules without the exercise of a substantial amount of individual judgment and discretion, the point of this Essay is that neither are umpires. As Bruce Weber put it: “[B]aseball . . is the least programmatic, the least technological of games.”

Calling balls and strikes is highly complicated, nuanced, discretionary stuff. According to the official rules of major league baseball, a “ball” is a pitch that does not enter the strike zone in flight and is not struck by the batter. Simple enough. Here is where it gets trickier. A “ball” also occurs when the pitcher fails to deliver the ball to the catcher within twelve seconds of receiving it, if the bases are unoccupied, if the pitcher makes an illegal pitch with no runners on base, or if the ball hits the batter outside of the strike zone and the batter has made no attempt to avoid being touched by the ball. In other words, in order properly to call a ball, an umpire often must determine the intent of the pitcher in the windup to the pitch and/or the intent of the batter in avoiding (or failing to avoid) being hit by a pitched ball.

The calling of strikes can be even more complicated. A “strike” is a legal pitch, “when so called by the umpire,” that is, inter alia: struck at by the batter and missed; not struck at, if any part of the ball passes through any part of the strike zone; or a pitched ball touches the

---

4 See Rule 2.00 of the Official Baseball Rules. This includes a pitch that touches the ground and bounces through the strike zone unless the batter hits such a pitch. See Comment (Ball) to Rule 2.00 of the Official Baseball Rules. A batter is entitled to advance to first base, without risking being put out, when four “balls” have been called by the umpire. See Rule 6.08 (a) of the Official Baseball Rules. This is called a “base on balls.” See Rule 2.00 of the Official Baseball Rules.
6 See Comment to Rule 8.05 (e) of the Official Baseball Rules.
7 See Rule 6.08 (b) of the Official Baseball Rules.
8 Rule 2.00 of the Official Baseball Rules.
batter in the strike zone (irrelevant of whether the batter attempts to avoid the ball). The “strike zone” is the area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow beneath the knee cap. The strike zone is determined from the batter’s stance (which is, of course, not stationery, as its location changes every time the batter bobs up and down) as the batter prepares (i.e., goes through a pre-swing ritual dance of wrist-strap unfastening and refastening, sock sliding, tobacco (or, these days, bubble-gum) spitting, dead-relative saluting, etc. in preparation for the incoming pitch) to swing at a pitched ball. The umpire also must call a strike, without the pitcher having to deliver a pitch, if the batter “refuses” to take his/her position in the batter’s box during his/her time at bat after a “reasonable opportunity” to do so or intentionally and illegally leaves the batter’s box and delays play, although the umpire has the discretion to issue a warning to a batter in lieu of calling an automatic strike for the batter’s first violation of this rule, as long as the umpire judges the violation to be “brief and inadvertent.”

The umpire must call a third strike if a runner on third base attempts to steal home base on a legal pitch when there are two strikes on the batter and the ball touches the runner in the batter’s strike zone. If the umpire in chief (the “plate umpire”), whose responsibility it is to call balls and strikes, calls a half swing a ball, such call may be appealed to the base umpire (a strike call is not appealable), who may reverse the call of a ball to a call of a strike. See Rule 6.08 (b) of the Official Baseball Rules. The second of these three types of strikes is known colloquially as a “called strike.” See Rule 2.00 of the Official Baseball Rules. A batter is out when a third strike is legally caught by the catcher. See Rule 6.05 (b) of the Official Baseball Rules. See Rule 2.00 of the Official Baseball Rules. Rule 6.02 (c) of the Official Baseball Rules & Commentary. See Rule 6.02 (d) of the Official Baseball Rules & Commentary. See Rule 6.05 (n) of the Official Baseball Rules. See Rule 9.04 (a) of the Official Baseball Rules. See Comment to Rule 9.02 (c) of the Official Baseball Rules. In the meantime (during the appeal of the “ball” call by the plate umpire to the base umpire), the ball is in play. See id.
Clearly, much of this language of “intent,” “inadvertence,” and “reasonableness” is legalese at its most vague and ambiguous and open to professional judgment and interpretation. In fact, if anything, being a plate umpire imbues one with more unbridled, activist discretion than being a judge. Unlike judges, umpires are explicitly granted the authority to rule on any point not explicitly covered in the official rules, and an umpire’s judgments about whether a pitch is a strike or a ball are unreviewable (in fact, it is an ejectable offense even to “object” to such calls).

What is more, even the core assumption of the analogy – that the parameters of the strike zone are fixed and not a matter of personal judgment – is faulty. While the definition of the strike zone is fixed by the baseball rules, every umpire interprets the strike-zone rule differently in application. The strike zone is, in other words, “a box of air with dimensions that have proven impossible to specify.” Different umpires differ on when/whether a pitch has passed through the strike zone as defined by the rules. At one extreme, a (conservative? pro-offense?) umpire may require the entire ball, seams and all, to pass within the strike zone before calling a strike. At the other extreme, a (liberal? pro-defense?) umpire may call a strike if any portion of the ball, even just the seams, passes within any portion of the strike-zone boundary. Judges also bring with them more nuanced and individualized ideologies – an umpire might be liberal on inside strikes but conservative on outside ones. It turns out that umpire “activism” has gotten so bad in recent years that, in 2001, Major League Baseball had to remind its conservative umpires to call “high” and “inside” strikes and its liberal ones to stop calling low, outside ones.

---

17 See Rule 9.01 (c) of the Official Baseball Rules.
18 See Rules 9.02 (a) & (c) to the Official Baseball Rules and Commentary.
19 Weber, supra note xxx.
20 See Jim Armstrong, Clearing Up the Confusion Over the Strike Zone, BASEBALL DIGEST, November 200; Peter Gammons, What Ever Happened to the Strike Zone?, SPORTS ILLUSTRATED 66 (14), April 6, 1987, at 36, 45-46.
21 See John Romano, Baseball Adapts to a New Zone, ST. PETERSBURG TIMES, February 27, 2001.
It turns out, umpires “aren’t observers passing judgment on the legality of given actions . . .”

In short, it is time to give the old judges-should-just-be-like-umpires rant a rest, not because judges’ jobs are difficult, nuanced, and require a great deal of professional judgment and the exercise of discretion (which they are and do), as so many commentators have already pointed out, but because umpires share that job description. Judges are like umpires – they have skills that most of us lack, they bring inherent ideologies and philosophical baggage to the plate with them, and no two will ever perform the same job exactly alike.

---

22 Weber, supra note xxx.