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CUSTOM'S LAST STAND: WHY MLB TRUSTS TRADITION TO POLICE PLAYER CONDUCT AND THE NFL DOESN'T

By

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This article examines the divergent ways player conduct is governed within the NFL and Major League Baseball and presents a hypothesis that might explain the differences. It surveys the governing principles of participant comportment within both sports and asserts that while Major League Baseball is, and has been since the game's inception, ruled largely in this regard by informal custom, the NFL eschews such an approach in favor of the formation, application and regular updating of formal, positive law. As for why these different governing approaches exist, this article posits that the answer can be found within the origins of both sports. Specifically, this article asserts that baseball's reliance on custom as the barometer of acceptable player behavior stems from the game's earliest development, where it grew out of mid-nineteenth century social clubs that were self-governed and which valued sportsmanship (and extolled the virtue of the selfless "sportsman") above all else. This article then tracks the development and growth of the game, evolving as it did into a competitive rather than a friendly one but one which nevertheless retained its link to its origins, which was likewise a link to the dwindling days of the use of custom as an accepted and recognized basis of law in society overall. This article likewise traces the very different development of the playing of football – a game that evolved later in time and which came of age after the final nail had already been hammered in custom's coffin as a legitimate source of law nationwide. As such, it was only natural that football, developed in a more modern era and in the laboratory of Northeastern college campuses where the young men who played it were nothing like the gentlemanly older men who first took to baseball, be governed quite differently. This article shows that these rough and tumble college students played to win, and to win at all costs; the rewards of selfless sportsmanship motivated few who played the earliest incarnation of what we now call football. As a consequence, and as this article demonstrates, formal positive law was required to render their game fair and to legitimize the victors, which – legitimized, unassailable victory -- was what these young men prized above all else. Thus, as this article suggests, it was differences in era and in values that were primarily responsible for the differences in how player conduct within baseball and football are governed and adjudicated even today. Finally, this article shows that baseball, as anchored to its past as it may be, is nevertheless creeping away from its reliance on informal custom in some respects, as evidenced by recently implemented positive laws enacted to make the modern game quicker and safer – areas in which the game's customs have been shown to be significant impediments. As such, Major League Baseball looks more like the National Football League in how it governs player conduct today than ever before.

I. INTRODUCTION

To call baseball an anachronism is in many ways to state the obvious: the pastoral setting, the molasses pace, the absence of a clock all seem to hark back to an earlier era, one long forgotten but for the reminders inherent within the twenty-first century version of the game that prompt us to recall a world vastly different from our own. As we're regularly reminded, baseball used to be our national game because it allegedly aligned so well with American values, ethics and the pace of American life. As we're likewise regularly reminded, the last several decades has seen the ascension of football to that perch; a rise that now seemed inevitable given how well that game apparently aligns with the more modern America: faster, more programmed, every moment accounted for down to the final second. Whether these thumbnail sketches of baseball, football and their nexus with America are, in fact, accurate was and is open to debate.

What is less debatable is the distinctions between how these two sports – our nation's most popular regardless of their nationalistic connections – are governed, i.e., how the "law of" each sport is applied to them. Here there is no question that the games as well as the actions of their players are ruled and regulated quite differently from one another and whereas the oft-made connections between these sports and American values may very well be bunk, when it comes to examining the law of each sport (and when this article is referring to the "law" or "rule" or governance of either baseball or football it is referring to conduct on the field and not the regulation of either sport as a business or legal entity) some real, demonstrable differences emerge. Differences that provide perhaps the strongest illustration of how baseball is after all a game that not only embraces its past but is a remnant of it as well. Setting aside the hokum of baseball as a

barometer of national values, analyzing the law of the game (on the field) provides real insight as to the game's, as well as American society's, structural origins and is in fact a time capsule to the mid-nineteenth century – to an era where the very nature of the law that governed the nation, as well as the playing of the game, was quite different than it is today. Examining the law of the National Football League provides similar insights in that the NFL not only routinely ignores its past, it is governed by a system of formal rules that likewise suggest modern society writ large – for better and worse.

This article digs deep into the governing principles of the playing of both sports and asserts that while Major League Baseball is, and has been since the game's inception, ruled largely by informal custom, the NFL eschews such an approach and exists for the most part through the formation, application and regular updating of formal, positive law. As for why these different governing approaches exist, this article argues that one only has to look at the origins of both sports. Such an exercise will reveal that baseball's reliance on custom stems from the game's earliest development, where it grew out of mid-nineteenth century social clubs that were self-governed and which valued sportsmanship (and extolled the virtue of the selfless "sportsman") above all else. This article will also track the development and growth of the game, evolving as it did into a competitive rather than a friendly one but one which retained its link to its origins, which was likewise a link to the dwindling days of the use of custom as an accepted and recognized basis of law in society overall.

This article will likewise trace the very different development of the playing of football – a game that evolved later in time and which came of age after the final nail had already been hammered in custom's coffin as a legitimate source of law nationwide. As

such, it only made sense for this game, developed in a more modern era and in the laboratory of northeastern college campuses where the young men who played it were nothing like the gentlemanly older men who first took to baseball, to be governed quite differently. As this article will show, these rough and tumble college students played to win, and to win at all costs; the rewards of selfless sportsmanship motivated few who played this game. As a consequence, and as this article will demonstrate, formal positive law was required to render their game fair and to legitimize the victors, which – legitimized, unassailable victory -- was what these young men prized above all else.

Thus, as this article will show, it was differences in era and in values that were primarily responsible for the differences in how the playing of baseball and football are governed even today. But these sports, like the law, are not wholly static. Baseball, as anchored to its past as it may be, is nevertheless creeping away from its reliance on informal custom in some respects, as is evidenced by recently implemented positive laws enacted to make the modern game quicker and safer – areas in which the game’s customs have been shown to be significant impediments. Might baseball custom give way in toto at some point, such that the rules governing conduct on the field begin to resemble the formalized, centralized governing structure of the NFL more closely? As this article contends, only time will tell.

II. CUSTOM AS A BASIS FOR LAW

From as far back as the Dark Ages, custom reigned as a primary source of fundamental legal rights. “What was not customary was not right” was a prevailing principle of law for centuries.¹ As for how customary norms were to be recognized and, therefore, enforced, locals and, most importantly, local elders, were charged with

determining accepted custom and announcing the “consensus” upon which transactions and other business and interactions within their communities would be governed.² A 1270 French ordinance made this clear: “Several wise men, in good repute, are to be called. Once they are called, the custom is to be proposed to them by the mouth of one of their number. The custom having been proposed, they are to declare and honestly transmit what they know and believe and have seen to be the practice with regard to the custom in question.”³ As for how many “wise men” were to be engaged to determine the local custom, French lawyers often went by the maxim “decem faciunt populum”: “ten makes the people.”⁴

More modern British legal theory, as well, was grounded, at least in part, in the principles of custom. By the seventeenth century the jurist Sir Edward Coke theorized that the principles of fundamental law consisted of some combination of custom, natural law, religious law, enacted law and reason.⁵ As for what constituted “fundamental” or “constitutional” law, Henry St John, 1st Viscount Bolingbroke (“Bolingbroke”) theorized that it was an amalgam that essentially boiled down to “custom mediated by reason”: “that Assemblage of Laws, Institutions and Customs, derived from certain fix’d Principles of Reason, directed to certain fix’d Objects of publick Good, that compose the general System, according to which the Community hath agreed to be govern’d.”⁶ Although both Coke and Bolingbroke’s theories were of the British opposition, they found their way into the minds of those who would later sit down and pen the United States Constitution.⁷

Accordingly, the drafters of the American Constitution combined two predominant theories of governance in their document: the idea of “fundamental” law (as

acknowledged in the Declaration of Independence's pronouncement of certain "inalienable rights") and custom – guiding principles agreed upon as just by the community at large.⁸ By 1787, and drawing upon the theories of British as well as French legal theorists and philosophers, Americans understood the idea of a constitution to be a declaration of fundamental law that could invalidate contradictory positive law. However, a constitution itself was not viewed as fundamental law and certainly not as positive law. Rather, it was merely, as one commentator termed it, "a declaration of indubitable truths and time-tested customs."⁹ This would evolve as the nation's Constitution was being debated and drafted.

By the time of its ratification, the idea of the United States Constitution, itself, had morphed somewhat into a document that both derived from the people but which became, upon ratification, a source of law imposed from above, which, consequently, no longer relied upon the continuing support of the people (save for the extreme and cumbersome process of amendment).¹⁰ This had the effect of separating law from morality as no longer was community support required to enforce any of the Constitution's provisions. This marked a turning point as written law (as evidenced within the body of the Constitution itself) now appeared to trump unwritten, customary practice. But the shift did not occur overnight and for a time written (through the Constitution) and unwritten (through the notions of natural law and custom) sources of law were considered by American jurists to be of equal stature.¹¹ Indeed, this was what some delegates to the Constitutional Convention envisioned: a United States governed equally by both sources of law.¹²

For a time, this vision was predominant. During the first decades of the nation, judges routinely looked to concepts of natural law as well as custom along with the newly ratified Constitution itself to determine the validity of a given statute. Justice Marshall, himself, in *Marbury v. Madison* looked beyond the Constitution to resolve part of the case, holding that individual rights could be found in fundamental principles of natural law rather than in the Constitution itself.¹³ However, when he turned to the final question posed by the case, that of whether the legislature had the authority to compel the judiciary to act pursuant to its wishes, he turned to the Constitution for support and authority.¹⁴ This approach was typical; between 1789 and 1820 the Supreme Court often looked to both in order to resolve what we would consider today to be purely Constitutional questions.¹⁵ Gradually, however, reliance on natural law, and then custom, began to recede as accepted sources of American legal authority.

Throughout the nineteenth century, courts at all levels within the American judicial system would turn to the concepts of natural law or custom to resolve legal issues although increasingly they relied upon formal positive law instead. In 1838 the Supreme Court wrestled with the concept of whether “law” could include accepted notions of custom and usage and ultimately ruled in the affirmative, reasoning that “Custom is the law or rule which is not written and which men have used for a long time.”¹⁶ As for what constituted a sufficiently “long time,” the Court held that “Ten years must have elapsed among persons present, and twenty at least among persons absent.”¹⁷ Lower courts, for a time, held similarly. An 1851 California Supreme Court decision embraced the concept of custom, remarking that, as both Spanish and Roman maxims decreed, “Custom is the best interpreter of the law.”¹⁸ The court went on to elucidate the three types of customary

law: 1) custom without law; 2) custom according to law; and 3) most interestingly, custom *in opposition* to law – the idea that entrenched custom could abrogate positive law that contradicted it.¹⁹ Baseball law, as will be discussed herein, would develop a particular fondness for this third category of customary law.

A decade later, courts were still turning to custom, at least at times, for support. In 1861 the Pennsylvania Supreme Court held that “A custom is something which has the force and effect of law; is law by the usage and consent of the people. But it must be uniform and universal within the sphere of its action, and so ancient ‘that the memory of man runneth not to the contrary.’”²⁰ In 1882, a Louisiana district court wrote that “Customs result from a long series of actions constantly repeated, which have, by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent.”²¹ As for how to determine what constituted “common consent,” an 1890 Georgia district court judge instructed a jury that although “the custom must be shown by proof to be certain, you must not understand that it must be used by everybody, and at all times; it must be certainly shown, however, to be the custom, -- the general usage of the trade...”²² If such could be demonstrated, nineteenth century courts were prepared to give it the force of law. Indeed, a Pennsylvania Supreme Court justice invoked Coke and his concept of the “triangle of law” in order to enforce custom within the Pennsylvania judiciary: “‘*Consuetudo*,’ said Sir Edward Coke, ‘is one of the main triangles of the laws of England; those laws being divided into common law, statute law and particular customs, for if it be the general custom of the realm, it is part of the common law.’”²³ Still, as the century progressed, many courts grew more and more leery of relying upon this unwritten angle within Coke’s legal triad.

As for why this increasingly became the case, one commentator noted, at least with regard to American property law, that custom lost its appeal due to its association with the concepts of natural law and rights.²⁴ As lawmakers' and jurists' reliance on these concepts waned, so did their reliance on their cousin, custom. Given that both natural law as well as custom were grounded in notions of morality and reason, the growing, diversifying nation lent itself much less comfortably to the older village values that grew out of small, uniform communities. Cities were growing larger and more impersonal, immigrants were pouring into them in increasing numbers; the idea that broad agreement existed with regard to what constituted moral and reasonable behavior and practices seemed far-fetched. The maxim "decem faciunt populum" seemed hopelessly outdated in cities where many residents not only didn't know each other but often didn't even speak the same language.

Within this larger, diversifying nation, the concept of legal positivism began to have more appeal and, accordingly, gradually displaced custom and natural law. As one commentator noted, "positivism is in part motivated by a search for neutrality that responds to a perceived lack of agreement about morality upon which older natural law and natural-rights thinking depended."²⁵ Through legal positivism, neutrality rather than morality became the lodestar in the promulgation of the rules governing transactional and interpersonal behavior. As another commentator wrote, "legal positivism was a creature of modernity and a consequence of the steady leeching away of some underlying religious or customary sense of the common good or justice. The whole notion of positivism was built on the claim that we cannot agree on any of these things anymore; it

replaced that kind of justification for law with a purely structural or formal justification which was entirely content-free.”²⁶

Necessarily, along with positivism came legal centralism: the idea that these content-free laws must emanate from above – from a central authority charged with propagating and then enforcing these neutral laws.²⁷ As such, custom, decentralized and informal as it is, is not only inapposite to legal centralism, some consider it to be an outright threat to it. Through the concepts of positivism and legal centralism, the link between morality, custom, natural rights and the law became severed. By 1937, the Supreme Court largely abandoned these traditional bases of the law in favor of reliance upon specific clauses of the Constitution for legal support, “even when doing so,” in the opinion of some, “stretches the language to the limits of credibility.”²⁸

III. THE ROLES OF THE SPORTSMAN AND THE ATHLETE IN THE DETERMINATION OF WHETHER CUSTOM OR POSITIVE LAW GOVERNS COMPETITION

Turning to athletics, whether informal custom or formal, centralized positive law predominates in the governing of player conduct largely depends on how the competitors classify themselves. Simply stated, if they consider themselves to be above all else sportsmen, custom is likely to predominate; if they consider themselves athletes first, they’ll be more likely to look to centralized positive law to govern their sporting behavior and interactions. As it turns out, the eras in which both baseball and football first developed play an outsized role in this determination even today.

Perhaps the most incisive treatise on the nature and being of the sportsman was written over a half-century ago, by James Keating. His article, “Sportsmanship as a

Moral Category,” resonates still in the twenty-first century and deserves examination herein.²⁹ In it, he attempted to define “sportsmanship” and to quantify it as it applies (or not) in modern athletic contests, which may appear to be “win at all cost” affairs but are, on occasion, surprisingly not.

Keating spends much time attempting to define the concept of “sportsmanship,” quoting a former Rutgers University president who stated in 1937: “I care not who makes the laws or even writes the songs if the code of sportsmanship is sound, for it is that which controls conduct and governs the relationships between men,”³⁰ and the legendary football coach (and product of Yale’s divinity school) Amos Alonzo Stagg who defined sportsmanship as a “delightful fragrance that people will carry with them in their relations with their fellow men,”³¹ and found these and similar grand pronouncements (such as Herbert Hoover’s: “The rigid volunteer rules of right and wrong in sports are second only to religious faith in moral training,” – which was prominently displayed at Cincinnati’s Crosley Field for decades³²) wanting. As Keating realized, while Stagg and his ilk were expounding on something that approached a morality code – something that spoke to the competitors’ best selves, most real-world “sportsmanship codes” were (and are) the opposite – descriptions of minimally acceptable conduct: “one step this side of criminal behavior.”³³ This would explain a Missouri high school athletic “sportsmanship” code that outlined the penalties for assaults or threats directed at officials. As Keating realized, when it comes to most competitive athletic events, true sportsmanship – a community-wide agreement upon a moral code governing the interaction among and between competitors (the bulwark of custom) -- has no place.

Rather, as Keating recognized, most athletic competitions are played by individuals who do not consider themselves to be “sportsmen” as that term is best understood. Instead, they are merely athletes, engaging in an endeavor that emphasizes not communal but self-satisfaction: one side must win, the other must lose. “Co-operation (among competitors) [cannot] be the goal. The objective of the athlete demands exclusive possession. Two cannot share in the same victory unless they are team mates, and, as a result, the problems of competition are immediately in evidence.”³⁴ The problems of competition largely boil down to the simple fact that an athletic contest necessitates a struggle and in that struggle morality becomes subsumed to the desire for victory. It is triumph that is paramount and in order to legitimize it, the athlete prizes formal, centralized positive law above all else to govern the conduct between competitors. Keating writes: “The athletic contest is designed to serve a specific purpose – the objective and accurate determination of superior performance and, ultimately, of excellence. If this objective is to be accomplished, then the rules governing the contest must impose the same burdens upon each side. Both contestants must be equal before the law if the test is to have any validity, if the victory is to have any meaning....As a result...the athlete will tend toward a legal interpretation of the rules.”³⁵ Morality plays no role in these rules; rather, they are most effective when they are both neutral and content-free: “Fairness, then, is rooted in a type of equality before the law, which is absolutely necessary if victory in the contest is to have validity and meaning.”³⁶

In an athletic contest, what matters most when it comes to the governing rules is predictability – each side needs to know what to expect so each competitor can plan accordingly. Within this framework, the rules don’t need to be moral or even agreed-

upon as just among or between the contestants, they just need to be clear, foreseeable and applied equally. Even if the competitors believe them to immoral they will nonetheless serve their purpose if both sides are equally subjected to them. In such an environment a victor can be fairly determined and victory legitimized. Illegitimate victory comes not from the application of immoral rules but instead from the perception that one side did not understand what the rules were or how they were to be applied. In such a scenario, victory will be tainted and the goal of the competition thwarted. In a pure athletic contest, then, “fairness” is a content-free term, signifying only that both sides were subjected to equal treatment regardless of the moral consequences of the treatment. Provided that one subscribes to the philosopher Bernard Suits’s definition of a game as nothing more than, “the voluntary attempt to overcome unnecessary obstacles,” this would make sense and morality would never enter into the picture.³⁷ “Honorable victory,” continued Keating, “is the goal of the athlete and, as a result, the code of the athlete demands that nothing be done before, during, or after the contest to cheapen or otherwise detract from such a victory. Fairness or fair play, the pivotal virtue in athletics, emphasizes the need for an impartial and equal application of the rules.”³⁸

Contrast this with the sportsman. As Keating understood the term, a sportsman “is a person who can take loss or defeat without complaint or victory without gloating and who treats his opponents with fairness, generosity and courtesy.”³⁹ Accordingly, “Sportsmanship is not merely an aggregate of moral qualities comprising a code of specialized behavior; it is also an attitude, a posture, a manner of interpreting what would otherwise be only a legal code.”⁴⁰ However, there is no formal “legal code” governing the sportsman as there is the athlete. Instead, these morally-steeped attitudes and

behaviors are developed, understood and enforced informally and through the shared values of fellow sportsmen. In other words, through custom – the community-wide accepted set of behavioral standards that, over time, have come to govern the competition along with the sportsmen themselves. Sportsmen may be athletes but athletes with a higher calling, subject as they are to an unwritten yet vigorously enforced code of conduct and comportment that governs the “athletic transaction” above and beyond the formal, content-free law that otherwise police the contest. Sportsmanship, then, is a code where what is most important is not merely that all of the competitors agree and understand it but that it is, above all else, agreed-upon as moral and just.

Pursuant to this sportsmanship code, the ultimate goal is not victory but, rather, “to derive pleasure from the attempt to do so and to afford pleasure to one’s fellow participants in the process.”⁴¹ In such an environment, the game becomes “a co-operative endeavor to maximize pleasure or joy, the immediate pleasure or joy to be found in the activity itself,” rather than in triumph over one’s opponent.⁴² This comports with the Aristotelian view of any such activity in that it is considered good if it produces pleasure and bad if it does not.⁴³ “The sportsman is not in search of legal justice,” Keating continues. “He prefers to be generous whenever generosity will contribute to the fun of the occasion. Never in search of ways to evade the rules, the sportsman acts only from unquestionable moral right.”⁴⁴

This does not mean, however, that the sportsman does not play to win. To the contrary, “[i]t is common practice for him, once the game is under way, to make a determined effort to win. Spirited competitor that he often is, however, his goal is joy in the activity itself and anything – any word, action, or attitude – which makes the game

itself less enjoyable should be eliminated. He ‘fights’ gallantly to win because experience has taught him that a determined effort to overcome the obstacles which his particular sport has constructed, adds immeasurably to the enjoyment of the game. He would be cheating himself and robbing the other participants of intense pleasure if his efforts were only halfhearted.”⁴⁵ As such, just as in a pure athletic contest, the competition may be fierce, however here, the competitors are not struggling for exclusive possession of something only one side may ultimately own. Rather, since pleasure from the game itself can be enjoyed by all, success is measured less by the scoreboard than by whether the participants enjoyed the endeavor as it was occurring. According to the philosopher Thomas Hurka, “Game-playing must have some external goal one aims at, but the specific features of this goal are irrelevant to the activity’s value, which is entirely one of process rather than product, journey rather than destination.”⁴⁶

When introduced into what would otherwise be a pure athletic contest, sportsmanship thus creates a paradox for the competitors in that on the one hand they’re asked to compete in what is a serious, winner-take-all event but, on the other, expected to act as if this struggle was little more than a pleasant diversion. “After an athlete has trained and sacrificed for weeks, after he has dreamed of victory and its fruits and literally exhausted himself physically and emotionally in this pursuit – after all this – to ask him to act with fairness in the contest, with modesty in victory, and an admirable composure in defeat is to demand a great deal.”⁴⁷ And yet, to inject sportsmanship into an athletic competition is to expect the athlete to comport himself accordingly nonetheless and to disparage him when he fails to do so.

Because of the enormity of these expectations, pure sportsmanship is too much to ask of the athlete engaged in high stakes competition. With ever-increasing amounts of money at stake, and salary determinations riding on individual performance and outcomes, morality-based custom can only be an insufficient governor of player conduct. Consequently, in the deadly serious world of professional athletics, formal, centralized positive law reigns. Wherever and whenever we assume that all competitors are willing to do anything to gain an edge, we cannot assume that they will also police themselves and give their opponents the benefit of the doubt. It would be foolhardy in such an environment to assume that there are any agreed-upon standards of acceptable behavior beyond simply doing whatever necessary to win the game. Due to the absence of morally-conscious, like-thinking community members, formalized, centralized positive law is required to save the game from savagery. Nowhere is this more apparent than in the world of football, which neatly illustrates not only this concept but the growing mistrust and waning influence of custom in American society at large during the era in which the game was first developed.

IV. THE RISE OF FOOTBALL AND ITS RELIANCE ON POSITIVE CENTRALIZED LAW AS A GOVERNING FORCE IN PLAYER CONDUCT

The sport as we know it today has its origins on Ivy League campuses in the early to mid-nineteenth century when it was developed by students as a way to release their energies. Although its exact origin is somewhat murky, the game appears to have been developed around this time to the disdain of faculty members, many of whom were members of the clergy, who discouraged any sort of athletic competition at all – even the

playing of marbles was frowned upon and sleigh riding was explicitly forbidden, being, as they were, “unbecoming gentlemen.”⁴⁸ In protest, students at Princeton developed a rough and tumble, largely unorganized, game that made sleigh riding and marbles look like, well, sleigh riding and marbles. Given as it was explicitly created to allow college boys to blow off steam, it was brutal from the start; these competitors were anything but sportsmen. In fact, that was the point – to create a game that permitted participants to shed the oppressive gentlemanly code that governed their lives the rest of the day.

By 1827 Harvard undergraduates were playing an annual intramural game on a day they referred to as “Bloody Monday,” and other schools such as Columbia, Yale and Penn followed suit with contests that were similar in both style and tone.⁴⁹ By 1860, Harvard outlawed the game but with the conclusion of the Civil War came former soldiers to campuses in search of rough, aggressive games along with an intolerance for those who would try to ban them.⁵⁰ In 1869 the game of football was formalized in an intercollegiate match between Rutgers and Princeton and the first such game was played on November 6th. With school pride and bragging rights on the line, the game turned violent very quickly; at one point players on both squads lunged for the ball so vehemently that they crashed through a fence and sent onlookers flying. Although the teams had planned a three-game series, faculties at both schools were so alarmed at the violence they ordered the series finale cancelled.⁵¹ Other football games were similarly chaotic and vicious: broken bones and sucker punches were so commonplace that one fan, on his way to an 1876 Harvard-Yale match, made a detour to a local slaughterhouse to dip his jersey in blood so as to capture the spirit of the affair.⁵²

As was clear to even the most casual fan, these were hardly matches scheduled with the goal of deriving pleasure and in the spirit of benign comradeship. Rather, they were pitched, bloody contests where the competitors were vying for athletic supremacy; there was no expectation that all would part happy regardless of who emerged victorious. Because conquest was the ultimate goal, players routinely thought little of subverting whatever notions of fair play they had theretofore internalized in their zeal to come out on top; they kicked and punched each other, some greased themselves with tallow in order to make them more difficult to tackle, and cheating of any sort was expected.⁵³ Fans from as far away as the other end of the field could hear fists smack opposing faces as well as incessant arguing over the rules as each squad maneuvered to gain an edge. Any notion that, violent as they were, these matches were nonetheless all in good fun was dashed during an 1880 Harvard-Yale game when, on a field that rain had transformed into a bog, a Yale player attempted to drown his opponent by forcing his face into a puddle.⁵⁴ Clearly, these were not men who could be trusted to agree on customary rules of play or agree on any moral code whatsoever. Left to their own devices, it seemed as if they might not only try to murder each other, but, egged on by fans yelling “Break his neck!” and “Kill him!” they might eventually succeed in doing so.

By 1884, the Harvard faculty had seen enough and abolished intercollegiate football. The year prior, a consortium of faculty members took it upon themselves to watch every Harvard game during the '84 season and concluded what had become obvious – that “the spirit of fair play is not expected to govern the players, but that on the contrary the spirit of sharpers and of rougths has to be guarded against.”⁵⁵ Thus was made by this consortium a call for centralized positive law, enacted and enforced from above,

to govern those who appeared to be unable to govern themselves. This was in keeping with the times as by the 1880's the by-now quaint notions of custom, natural law and agreed-upon moral codes were waning in the increasingly diverse, expanding nation. Formal, centralized positive law had become predominant in society writ large. The faculty group merely called for the emerging game of football to be governed accordingly.

In 1886 the call was answered and formal rules were enacted to rein in player conduct and make the game safer.⁵⁶ This was enough to satisfy the powers-that-be at Harvard, which responded by reinstating intercollegiate football after a year's absence. More rules were enacted in 1887 and '88 with an eye toward regulating player conduct, although in practice they only succeeded in making the game even more brutal (hence necessitating additional rules).⁵⁷ Thus began a pattern in football that survives today – external rule-making boards in first the college and then later the professional game, convening regularly to decide upon formal rules designed to ensure fair competition and player safety followed by the players themselves doing whatever possible to skirt these rules, followed by additional rules responding to such conduct, and so on. For the most part, these rules, today as in the nineteenth century, are content-neutral, intended as they are not to impose a morality upon the players but, rather, merely to provide to all involved clear guidelines regarding acceptable and unacceptable conduct such that the games can be fairly contested. The only purpose of these rules is to delineate clearly-understood boundaries; whether the players consider them “just” or “moral” is irrelevant. All that matters is that they comprehend them as well as the penalties for breaking them.

As this short history of the game illustrates, internal self-governance – a customary code of behavior agreed-upon among the players – never developed within the game of football and has little sway in the game today. And why would it? The game, from its origins as an intercollegiate sport, has always been a purely athletic affair, engaged in primarily to win rather than for the mutual enjoyment of all competitors. Perhaps “blowing off steam” provided the impetus for the crude game that ultimately evolved but once it became formalized it morphed into a violent game of strength and will where success was measured solely by the scoreboard. More broadly, organizing and regulating the game from above by means of centralized positive law was in keeping with the times. It only made sense to regulate player conduct as society was likewise being regulated. A modern game demanded a modern governing structure.

Today’s NFL is a living legacy of these two notions. The game is dominated by positive law enacted and enforced centrally and from above in the league’s commissioner as well as its “Competition Committee” – a consortium of two club owners, two club presidents, two general managers and three head coaches -- which is charged with developing and proposing content-free rules designed to maintain competitive balance, govern player safety, and prevent the games themselves from descending into farce and anarchy.⁵⁸ The NFL’s rulebook is tweaked, revised and, in some respects, entirely rewritten from year to year (much more so than the rulebooks of any other major American sport) and is expected to be followed to the letter. Inherent within this structure is the assumption that if left to their own devices, the players would be unable to police themselves and the games would devolve into meaningless affairs.

Because the outcomes of these games was of most importance, the NFL understood early on that it was important to signal to paying customers as well as the players that the rules were being equally and fairly applied. In the league's formative years, referees would blow a horn to signal an infraction; by 1948 the horns were replaced with red flags, which were replaced with bright yellow ones in 1965.⁵⁹ The horns, and later the flags, served as indicia of the contests' legitimacy – notice to all that victory had meaning in that the best team truly had won the game and that “justice” in the form of neutrally-applied, content-free rules, had been fairly administered.

Besides setting forth the basic rules of the game, the NFL rulebook is chock full of delineated infractions that fall into a category misnamed as “unsportsmanlike conduct” penalties, given that they hardly seek to impose upon the players the conduct of the sportsman. Instead, they outline and punish activity that is oftentimes the proverbial “one step this side of criminal behavior.” Many NFL fans will recall referee Ben Dreith's humorous explanation for throwing a flag on Jets' defensive lineman Marty Lyons in 1986 for his actions directed toward the opposing quarterback: “There's a personal foul on number 99 of the defense. After he tackled the quarterback, he's giving him the business down there. That's a 15-yard penalty!”⁶⁰ In actuality, Lyons was mugging Bills' quarterback Jim Kelly such that if he had done so on the street instead of the playing field he may very well have been arrested for assault.

A quick perusal of the type of conduct warranting a 15-yard “unsportsmanlike conduct” flag demonstrates the wide range of activities prohibited by the league: late hits, head slaps, leg whips, kicking an opposing player, hitting a defenseless player and so on.⁶¹ Beyond the quasi-criminal activity, the league also charges game officials with

ensuring that players do not subvert the integrity of the competition. Penalties are assessed against players who engage in “disconcerting acts or signals,” illegally hiding out in restricted areas off the field, who attempt to conceal the ball under their uniform, who signal for an invalid fair catch (thereby tricking the opposing team), etc.⁶² Finally, while there are legitimate “sportsmanlike” standards contained within the rules, they hardly represent agreed-upon community-wide (assuming that the community constitutes the players on the field) standards for comportment, given that they are enacted and enforced by the league and not the players. 15-yard penalties are called whenever players engage in “excessive celebration” after a touchdown (such as when the Saints’ Joe Horn pulled out a cellphone he had hidden in the goalpost padding before the game and pretended to call a friend during the game after catching a touchdown pass), or taunt an opponent.⁶³ It is likely that many players find nothing immoral in pulling out a goalpost pylon and pantomiming a golf swing with it after scoring (as Bengals’ wide receiver Chad Ochocinco did⁶⁴) but morality has nothing to do with these examples of centralized positive NFL law. It is enough that the league office finds the outlawed activities to be unacceptable; the continued existence of these rules does not depend at all on Bolingbroke’s notion that they can only survive for as long as “the Community hath agreed to be govern’d” by them.

In all, the compendium of rules contained within the ever-expanding NFL rulebook hardly set forth the league’s “moral code.” Indeed, morality is largely absent within it as, with the few exceptions delineating and enforcing the league’s idea of how an NFL “sportsman” should comport himself after scoring a touchdown, it is not making a value judgment. Instead, it is merely setting forth the parameters of the game and

outlining the sort of activity that might delegitimize victory. In so doing, it doesn't even matter if the rules are considered stupid, silly, or just plain wrong; what matters most is that they are clearly stated and understood by all. In recommending and promulgating these rules, the NFL's Competition Committee is nothing like the town elders or community leaders of centuries past because the Competition Committee does not pretend to speak on behalf of the community. Instead, the Committee speaks only for management, the coaches and the league itself in discussing and suggesting potential rule changes that will then be enforced upon the players. Pursuant to NFL rules, if a suggestion clears the Competition Committee it must then be approved by 75% of the club owners before it can be added to the rulebook, where the league's officials will then be charged with enforcing it.⁶⁵ The voices of the community to be governed by this rule hardly predominate this process (the NFL's website notes that "The [competition] committee's deliberative process takes into consideration the input of experts, clubs, players, league committees, the NFL Players Association and others sources"⁶⁶ but there does not appear to be any formal process for soliciting or measuring the consent of the players along the way).

V. THE ROLE OF CUSTOM IN THE DEVELOPMENT OF BASEBALL

By comparison to the above, the creation and development of baseball could not have been more different. As a direct consequence of the circumstances surrounding the establishment of what would become America's pastime, the entirety of the game's governing structure deviates from that of football. As noted within perhaps the most well-known law review article of all time, "The Common Law Origins of the Infield Fly

Rule”: “The original attitude toward baseball developed from distinctly English origins...The first ‘organized’ games were played in 1845 by the Knickerbocker Base Ball Club of New York City, and the rules which governed their contests clearly indicate that the game was to be played by gentlemen. Winning was not the objective; exercise was. The New York club players were ‘gentlemen in the highest social sense’ – that is, they were rich –the earliest clubs were really trying to transfer to our unwilling soil a few of the seeds of the British cricket spirit. This spirit, which has been variously described as the attitude of the amateur, of the gentleman, and of the sportsman, would have kept the rules simple and allowed moral force to govern the game.”⁶⁷ While some of the facts in the above quotation are up for debate (there is some evidence that the first organized baseball game occurred prior to 1845)⁶⁸, the essence of its point remains: organized baseball, as opposed to football, was, to a degree, created and promoted by older, established men who were seeking both respite and status and not competitive advantage.⁶⁹ Although the game quickly turned competitive and professional, with the combatants’ zeal for victory rivaling that of competitive football players, the quaint, sportsmanlike, gentlemanly notion of the game from its origin somehow survived and to a large degree remains today, despite the millions of dollars at stake in the modern game.

This is the case even as some within the game’s modern era claim otherwise. “We are paid to win games,” former big league manager George Bamberger once said. “There are rules, and there are consequences if you break them. If you are a pro, then you often don’t decide whether to cheat based on if it’s ‘right or wrong.’ You base it on whether or not you can get away with it, and what the penalty might be.”⁷⁰ This sounds like football’s ethos and if Bamberger was correct it would be one and the same. But

he's not. Of course, players in MLB want to win as badly as those in the NFL do. However, the win *at all costs* ethos that exists in the NFL never took hold within the world of baseball, even at the professional level. Simply stated, there are actions baseball players will not engage in (without consequence, sometimes from their own teammates) even if they might increase their team's chances for victory. Further, some activities that have no bearing on the outcome of the games are likewise verboten in baseball, given that they are considered contrary to the game's moral code. This code, better known as the "baseball code," is a relic of the gentlemanly origins of the game and the embodiment of the customs that have developed over time and which are still, to a great extent, agreed upon as just by the players themselves. Football has nothing like it.

Unlike the football squads that popped up on college campuses, early baseball clubs were in fact clubs, with all the trimmings. Mid-nineteenth century urban middle and artisan class men who sought the status that went with membership to the upper class clubs (which were oftentimes centered around cricket) of which they were denied admission created "base ball" clubs instead, hoping that by doing so they would establish themselves as "gentlemen" as well.⁷¹ The Knickerbocker club was representative of this sense of social striving in that it was comprised of clerks, merchants, bank tellers, insurance salesmen and, among the rest, one cigar dealer and one hatter.⁷² In short, these were professional men who found themselves one step below the city's elite and who desired entrance into the top tier of society. They banded together to form the Knickerbockers but they weren't out to win games; they wanted to demonstrate their superior social class. Thus, for a time at least, they would only schedule matches with clubs they considered their societal equals.⁷³ In these matches, it was the gentlemanly

spirit and a sense of fair play that counted most; the results on the scoreboard were secondary, if that. In all, they cared more about the status and comportment of their fellow club members than their ability to hit or field a ball. This spirit would soon be threatened through the professionalization of the game but would become re-established with the establishment of the National League.

By the 1860s the gentlemen were largely pushed out of their clubs by “ringers” and later, outright professionals who were largely mercenaries – taking top dollar to either help a club win or, if there was more money in it for them, to lose.⁷⁴ With the gentlemanly spirit fading from the game (along with the status of the old-time club members), a consortium banded together to form a new professional league – one in which they’d own the clubs rather than play on them. This new league – the National League – successfully blended the old with the new: the spirit of the sportsman alongside the competitive fire of the professional. This hybrid remains today (after all, while other players dress for games in locker rooms, baseball players do so in their “clubhouse”). The “baseball code” that emerged from this arrangement over a century ago speaks to the consortium’s desire to maintain the gentleman’s club feel of the professional game⁷⁵ but was largely developed by the players themselves and, as such, has the feel of widespread community consensus.

So, what sort of rules comprise the baseball code? In the words of baseball historian Paul Dickson, the code represents “a set of time-honored customs, rituals, and good manners that show a respect for the game, one’s teammates, and one’s opponent.”⁷⁶ Even twenty-first century players recognize its moral foundation: “It’s called the Gentleman’s Code,” Colorado Rockies outfielder Brad Hawpe reminded a sportswriter in

2007.⁷⁷ Hawpe felt the need to point this out in the aftermath of a breach of baseball custom (Yankee third baseman Alex Rodriguez's intentionally distracting an opposing player trying to catch a pop-up) that has a corollary in the centralized, positive law of the NFL. In baseball, such rules have more power through enforcement via community consensus than from above via the rulebook because, as George Will once noted, they exist as "a generally understood etiquette" of which violation brings both shame and possibly retaliation.⁷⁸ Through the baseball code, the game retains a nineteenth-century feel even though it is fiercely competitive.

In fact, the mechanics of reconciling two seemingly contradictory goals – winning and selfless sportsmanship – lay at the heart of the code. In essence, the code dictates that players should try their best to win but still take it upon themselves to conduct their business on the field and in the clubhouse in a manner that respects others and honors the spirit of the game's origin. Although it is constantly evolving (as custom does), it nevertheless harks back to the notions of Coke and Bolingbroke and which inspired the drafters of the Constitution – that rule "by the people" and with the widespread consent of the governed is best. This is not positive, centralized law; rather, the code is of and by the community and is hardly content-free. It is a moral code that embodies the concepts of right and wrong, although the logic of some of it might seem bizarre to outsiders.

That the code might not make perfect sense to outsiders and, indeed, might appear to be downright contradictory in places, only further marks it as pure, unvarnished custom. For the code is not designed with the goal of delineating the boundaries of a fairly-contested match or of signaling to outsiders that the game was contested on an even playing field such that the winner is thereby "legitimized." Rather, it exists solely for the

members of the baseball community themselves and no one else. It's all about respect and conduct. "Less strategic than moral, these rules collectively drive the game, forming not just a code but the Code, the ultimate measure used to shape ballplayers' attitudes toward themselves, each other, and the game they play."⁷⁹ As a moral force, when enough players ignore a given rule for a long enough time, it disappears and is replaced by something that carries greater moral weight. In this sense it is truly a code that depends upon the consent of the governed. When the consent goes, so does the rule.

In direct contradiction to football's centralized positive law, the baseball code in some areas sanctions the bending of the game's formal rules and in others, permits outright cheating. For example, although Rule 8.02(a) of the Official Rules of Baseball prohibits pitchers from applying saliva or other foreign substances to the ball, the code permits it in that doctoring a baseball is hardly considered a moral failing.⁸⁰ Indeed, pitcher Gaylord Perry was largely celebrated for "getting away" with throwing spitballs throughout his career and was ultimately enshrined in the Hall of Fame for his ability to do so. The Official Rules are silent as to sign-stealing but under certain circumstances this appears to be within the code as well, provided that it is done in a manner consistent with the community's approval. Accordingly, players and coaches in uniform are permitted via the code to attempt to steal the signs from the opposing team's catcher to the pitcher as well as those being relayed from the opposing team's bench to the fielders.⁸¹ However, they may not do so if they employ mechanical or electronic aids in the process.⁸² In 2010 Phillies bullpen coach Mick Billmeyer was spotted by the Colorado Rockies using binoculars from his perch in the outfield bullpen to spot the signs being flashed by Rockies' catcher Miguel Olivo. The Rockies promptly filed a grievance

with the League.⁸³ Because he was in uniform, if only Billmeyer was able to see the signs with his naked eye his ability to do so would have been considered “smart baseball.” In the end, it was the binoculars that violated the code, not the act of cheating itself. Similarly, sign-stealing of any sort – with or without the use of electronic or mechanical devices – violates the code if it is done by out-of-uniform personnel. “That’s cheating,” said former Brooklyn Dodger Don Zimmer when it was revealed decades later that the 1951 New York Giants employed an out-of-uniform spy to signal to Giant hitters what was coming, presumably aiding them in their improbable comeback during the last two months of the season where they overtook the Dodgers to win the pennant.⁸⁴ Of course it is. But so is a runner on second base relaying those same signs to his teammate at the plate. Solely based on community consensus, the code forbids the former but encourages the latter. This is a clear example of how the code does not exist to “legitimize” victory. Instead, it exists purely to protect and promote an agreed-upon way of doing things within the game.

Further support for this point comes from those parts of the code that punish players for doing what fans might naturally expect them to do – play to win at all costs. When, in 2001, Padres catcher Ben Davis attempted to break up Arizona Diamondbacks’ pitcher Curt Schilling’s perfect game by bunting in the 8th inning of a 2-0 game, he was chastised throughout baseball for violating the code provision which says that, no matter what, a batter NEVER attempts to break up an opposing pitcher’s no hitter via a bunt.⁸⁵ Even though Davis’s successful bunt single allowed the Padres to bring the game-tying run to the plate, the code forbids such tactics. Diamondbacks’ manager Bob Brenly called Davis’s decision “chicken” and he became reviled throughout the game for

violating the code.⁸⁶ He never lived this down even though, on a purely competitive level, his decision was undoubtedly the correct one.

The code likewise encourages – or at least sanctions -- players to “lay down” a bit when an opponent is going for a personal record or milestone. In 1968 Tigers pitcher Denny McLain had his catcher relay to Yankee slugger Mickey Mantle, who was in the final days of his career, that McLain would throw him a pitch wherever he wanted it so that Mantle could hit one more home run and pass Jimmie Foxx on the all-time list. Mantle pointed to where he wanted the pitch, McLain threw it there, and Mantle got his home run.⁸⁷ By contrast, when, in 2001, Green Bay Packers quarterback Brett Favre essentially fell to the ground unaided on a play during the final game of the season so as to permit New York Giants’ lineman Michael Strahan (who was the nearest opposing player to Favre) to be awarded his record-breaking 22nd-and-a-half quarterback sack, he was vilified for doing so, there being no similar community-wide consensus within the NFL.⁸⁸ Because Favre’s act violated the athletic rule that requires all players on both squads to strictly adhere to the official rules at all times, the legitimacy of the game, as well as the record, was put into question. To this day fans as well as players in the NFL challenge the legitimacy of Strahan’s sack record.⁸⁹ In the nearly half-century since Mantle retired, nobody questions his place among the all-time home run leaders.

Formal adherence to the official rules is so prevalent in football that opposing teams routinely file formal appeals and protests to the league office whenever one of them is thought to have been breached. Such appeals are encouraged because by doing so all involved – players, teams and fans – receive confirmation that the rules are being equally applied. Thus explains the righteous indignation expressed by the Indianapolis

Colts in 2015 when they filed a grievance with the league upon their suspicion that the New England Patriots were using improperly deflated footballs in their 2015 AFC Championship Game matchup. “We notified the league about our concerns,” explained Colts general manager Ryan Grigson. “We took the proper steps...now it’s up to the league to make sure” that the rules were adhered to and the game played fairly.⁹⁰ Implicit within Grigson’s statement was his reliance on the league, rather than the Colts or their players, to resolve the situation. In baseball, the code forbids players, coaches and managers from similarly appealing to formal, centralized positive law. During the 2006 World Series, Detroit Tigers pitcher Kenny Rogers was spotted by television cameras with a brown muddy substance on his hand, suggesting that he was altering baseballs not unlike Patriots quarterback Tom Brady was suspected of doing with footballs. However, St. Louis Cardinal manager Tony LaRussa refused to report what he saw to the league office. Why? Because complaining to the league regarding such infractions was itself a violation of the code.⁹¹ In fact, LaRussa was on the other end of such a situation in 2004 when one of his pitchers was caught by umpires using pine tar to doctor the ball. LaRussa considered it “an example of bullshit baseball” when his pitcher was suspended by the league.⁹² What irked LaRussa wasn’t the use of pine tar by one of his pitchers (a ball-doctoring tactic permitted by the code) but that reprimand came formally from above rather than informally from the community of baseball. And in 2005 Washington Nationals manager Frank Robinson was chastised by Los Angeles Angels manager Mike Scioscia for his “lack of etiquette” when he formally complained to the umpires when he spotted pine tar on the glove of an Angels pitcher.⁹³ In football, because there is no code there is no such concept as “etiquette.” Instead, there are merely the formal rules, which

predominate at all times. In baseball, etiquette – that being the code of conduct by and among gentlemen – is governed and enforced by the gentlemen so governed.

Of course, many aspects of the code appear to outsiders as outdated but that is precisely the point: it exists primarily to preserve a nineteenth century sense of gentlemanly behavior that would otherwise be subsumed by the competitive nature of the game itself. Fans may howl, commentators may groan, but so long as it maintains the consent of the governed, baseball custom survives nevertheless. Thus, players are admonished against “showing up” their opponents through acts such as flipping their bat or admiring the flight of the ball after hitting a home run, stealing bases when a game is considered out of reach or gesturing on the mound after striking out a hitter. In the NFL, taunting is handled from above, via a flag and a 15-yard penalty or via a league fine such as when Cincinnati Bengals quarterback Carson Palmer was fined \$11,576 by the league in 2015 for pumping his fist and thrusting his pelvis toward the end of a victory over the Seattle Seahawks.⁹⁴ In baseball, such activities are handled by the players themselves, often via a fastball near the head of the offending player the next time he is at-bat. Few players demonstrate the differences between the NFL and MLB more starkly than Deion Sanders, who starred in both leagues. In the NFL he was known as “Prime Time” and “Neion Deion” and was as flashy as anybody in the league, governed as he was only by the formal rulebook. In MLB he was a walking testament to the power of the code as he went about his business on the field quietly, careful not to draw attention to himself, aware as he was that his conduct was subject to the approval of his fellow players and not the league.⁹⁵

As Sanders understood, retaliation in baseball is considerably harsher than anything the NFL league office could dish out. There's just something about a 90 mph fastball at the head that speaks to players more plainly than anything aimed at their wallets. What's more, while an NFL official may miss a particular act and fail to throw a flag, there's little chance that the baseball code will be ignored, being that it is enforced by each and every player. Cardinals pitcher Bob Gibson was a particularly staunch advocate of the code and never hesitated to enforce it via a blazing fastball; on one occasion he enacted baseball justice during an Old-Timers game, knocking down a hitter who, fifteen-years earlier, had shown him up on the field while both were still active.⁹⁶

Retaliatory pitches in baseball are particularly fascinating in that they represent one of the most curious and time-honored forms of custom described by the California Supreme Court back in 1851 – custom in opposition to law. Officially, Rule 8.02(d) prohibits pitchers from intentionally throwing at a batter and empowers an umpire to eject the pitcher (along with his manager) from the game for doing so. In practice, however, retaliatory pitches are so ingrained within the fabric of the game that they are not only permitted within baseball (although umpires do eject pitchers and managers on occasion), they have been legally recognized as a legitimate part of the game, official rules be damned. Here, even the courts have recognized and deferred to custom in baseball in a way they never have with regard to football.

The California Supreme Court had occasion to consider its nineteenth century discussion of custom within the context of baseball in a 2006 case involving a community college baseball game.⁹⁷ During that game the plaintiff, Jose Avila, was the victim of a retaliatory pitch delivered by a Citrus Community College pitcher. The pitch,

intentionally delivered at his head, hit him in the helmet, causing various injuries. A majority of the Court acknowledged rule 8.02(d) but nevertheless held that “Here, even if the Citrus College pitcher intentionally threw at Avila, his conduct did not fall outside the range of ordinary activity involved in the sport.”⁹⁸ Further, despite official rules to the contrary, the Court held that “One who enters into a sport, game or contest may be taken to consent to physical contacts consistent with the *understood rules of the game*.” (Emphasis added).⁹⁹ The Court went on to highlight the fact that the understood rules of baseball differed from the official rules in that “[b]eing *intentionally* hit is...an inherent risk of the sport, so accepted by custom that a pitch intentionally thrown at a batter has its own terminology: ‘brushback,’ ‘beanball,’ chin music.’ In turn, those pitchers notorious for throwing at hitters are ‘headhunters.’ Pitchers intentionally throw at batters to disrupt a batter’s timing or back him away from home plate, to retaliate after a teammate has been hit, or to punish a batter for having hit a home run. Some of the most respected baseball managers and pitchers have openly discussed the fundamental place throw at batters has in their sport.”¹⁰⁰ In short, the Court held that when it came to brushback pitches, custom trumped oppositional positive law. In dissent, a Justice focused on what would most likely prevail had this case involved football, namely that the rules explicitly prevented the act.¹⁰¹ To this Justice, this was all that mattered. In baseball, though, it rarely is.

This hardly means that baseball’s official rules of comportment are irrelevant. To the contrary, there is one in particular that is followed to the letter. Specifically, the Infield Fly Rule, which dates back to the nineteenth century, is centralized positive law outlining and enforcing player conduct. In this sense it appears to be an anachronism and

at first glance looks strikingly like the sort of legislation one would expect to see in football. A peek behind its language into its origins and purpose, however, demonstrates that it was created to preserve and promote baseball custom and not in opposition to it.

As noted within “The Common Law Origins of the Infield Fly Rule,” the provision constituted “a legislative response to actions that were previously permissible, though contrary to the spirit of the sport.”¹⁰² The rule was developed, in stages, during the last decade of the nineteenth century, during the relatively early days of the game as a competitive, openly professional sport (the first openly professional club being the Cincinnati Reds in 1869). However, and as noted above, it was still run by either by the gentlemen of the earlier clubs or men who sought to operate the game in their spirit (while winning as many games as possible, of course). During an 1893 contest between New York and Baltimore, a Baltimore batter hit an infield pop fly with a runner on first base. Rather than catch the easy fly, the New York fielder let the ball drop and then tagged second base, forcing the helpless runner who had no choice but to remain at first while the ball was in the air.¹⁰³ As the out was recorded via subterfuge by the New York fielder rather than by pure competitive spirit, club owners realized that they needed to legislate this tactic out of the game in order to preserve the spirit of sportsmanship (indeed, the Baltimore club, itself, presented a visceral reminder to all that professional baseball was fiercely competitive. The Baltimore club enjoyed its well-deserved reputation as a club willing to do whatever necessary to win). Ultimately, the club owners revised the rule two more times before they arrived at what is currently codified in rule 5.09(a)(12): “A batter is out when...an infielder intentionally drops a fair fly ball or line drive, with first, first and second, first and third, or first, second and third base

occupied before two are out. The ball is dead and runner or runners shall return to their original base or bases.”¹⁰⁴ More specifically, “An INFIELD FLY is a fair fly ball (not including a line drive nor an attempted bunt) which can be caught by an infielder with ordinary effort, when first and second, or first, second and third bases are occupied, before two are out. The pitcher, catcher and any outfielder who stations himself in the infield on the play shall be considered infielders for the purpose of this rule. When it seems apparent that a batted ball will be an Infield Fly, the umpire shall immediately declare ‘Infield Fly’ for the benefit of the runners. If the ball is near the baselines, the umpire shall declare “Infield Fly, if Fair.” The ball is alive and runners may advance at the risk of the ball being caught, or retouch and advance after the ball is touched, the same as on any fly ball.”¹⁰⁵

As noted within the “Common Law” article, the rule enforces “the sporting approach to baseball. A gentleman, when playing a game, does not act in a manner so unexpected as to constitute trickery; in particular he does not attempt to profit by his own unethical conduct. The gentleman’s code provides the moral basis for the rule; it is the focal point of the rule, just as the more general precept of fair play provides a unifying force to the conduct of the game.”¹⁰⁶ In this sense, “fair play” does not mean an even playing field such as would be the overriding purpose of any rule in a typical athletic contest. Rather, it refers primarily to sportsmanship. Compelled sportsmanship, to be sure, but sportsmanship nonetheless. Undergirding the Infield Fly Rule are two assumptions regarding baseball: 1) that it is a game for gentlemen; and 2) that not all, or even most, players are gentlemen. Thus was necessitated a rule that coerced gentlemanly conduct upon the naturally ungentlemanly. Although some commentators have rightly

noted that the Infield Fly Rule does indeed promote fair competition and a level playing field and in that sense “legitimizes” the victor,¹⁰⁷ this is but a byproduct of a rule that was grounded in the sportsman’s concept of fair play rather than the athlete’s.

Significantly, the Infield Fly Rule was designed to preserve the character of the game, not change it. The club owners determined that within their gentlemanly game there resided a loophole that, if unchecked, could threaten the moral structure of their sport. So they closed it so as to avoid the need for further legislation. In short, by acting positively here, the owners believed they were merely enforcing the custom of the baseball code that existed elsewhere within the game. Failure to enact positive law here might lead to a breakdown of the code in other areas so they created, and then tweaked only to the extent necessary, the Infield Fly Rule so as to preserve the morality of the game. In so doing, they hoped to avoid what was at that very moment occurring within the growing game of football – the implementation, seemingly on an annual basis, of all sorts of rules regarding player conduct. Here, the owners created the single rule they believed would obviate the need for further rules; the one rule that would preserve the game’s reliance on custom and prevent it from becoming yet another sport that looked solely to centralized positive law for the boundaries of acceptable behavior on the field. In this they succeeded.

VI. THE CREEP OF POSITIVE LAW IN 21ST CENTURY BASEBALL

Nevertheless, positive law has been making inroads into the custom-dominated world of baseball, transforming it, at least in places, into a sport that now more than ever resembles football in how it polices player conduct. This is most clearly apparent via two innovations within the game in recent years: replay review and the countdown clock.

Whether they, like the Infield Fly Rule, represent minimally invasive attempts to preserve the character of the game or are a harbinger of radical change remains to be seen.

Replay Review

For well over a century and as discussed above, decorum on the field as well as the boundaries of acceptable player behavior and tactics were dictated by the baseball code, with enforcement via a fastball near the noggin or, at a minimum, a talking-to by one's teammates (who feared that retaliation for the indiscretion might be directed at *them* should they not take steps to correct their teammate's behavior). For example, a second baseman or catcher might take an overly-aggressive rookie aside and counsel him to avoid a dangerous take-out slide or home-plate collision because retribution for such acts (provided they were considered violative of the code) would oftentimes be directed at them at the next opportunity once the roles were reversed. Although the Official Rules of Baseball were amended in 1978 to legislate against dangerous take-out slides (in the commonly known "Hal McRae Rule," Rule 6.01(a)), custom nevertheless predominated over the ensuing decades such that the rule was ignored in all but the most blatant instances.

No more. In 2014, in response to a brutal collision at home plate three years earlier which resulted in Giants' All-Star catcher Buster Posey breaking his leg, MLB enacted Rule 7.13 (now recodified as Rule 6.01(i)(1)) which states in relevant part: "A runner attempting to score may not deviate from his direct pathway to the plate in order to initiate contact with the catcher (or other player covering home plate), or otherwise initiate an avoidable collision. If, in the judgment of the umpire, a runner attempting to score initiates contact with the catcher (or other player covering home plate) in such a

manner, the umpire shall declare the runner out.” In tone, this rule appears little different than the previously codified McRae Rule (which technically applied to slides at any base, including home plate).¹⁰⁸ In practice, this rule (popularly known as the “Buster Posey Rule”) is very different in that unlike the McRae Rule, the Posey Rule (along with its corollary, Rule 6.01(i)(2) which prohibits the catcher from blocking home plate and obstructing the pathway of the runner unless he is in possession of the ball) is reviewable by league higher-ups via in-game instant replay back in its New York headquarters.¹⁰⁹ The reviewability of the play fundamentally altered the impact of the rule, elevating it to uncontradictable positive law, centrally enforced by the league office. No longer were home plate collisions governed by the baseball code and enforced through the consent of the players. Now, via the combination of the Posey Rule and enforcement of it via in-game replay review, such plays were to be regulated from above. Whether the players considered the rule to be just and moral was now irrelevant.

Predictably, many players took offense to this stripping away of their moral authority. Detroit Tigers outfielder Torii Hunter perceptively noted that the shift in the nature of enforcement of home-plate collisions was nothing less than “messing with the structure of the game.”¹¹⁰ Catcher A.J. Pierznyski added, “I understand why they made the rule, but at the same time, it’s been part of the game for 150 years.”¹¹¹ Fellow catcher Brayan Pena added: “I know MLB is trying to protect the players, and avoid concussions, but we all grew up learning how to catch the ball, and protect home plate, no matter what. You save a run, and you’re a hero.”¹¹² Pena and Pierznyski, and to an extent Hunter as well, were referring to the rule itself but what really bothered them was that now, due to instant replay, it was going to be rigidly enforced from above with the players no longer

having any input as to the determination of right and wrong. For over a century the players were in control of how home-plate collisions were policed. Certain tactics were endorsed via the baseball code, others were considered out-of-bounds and would be dealt with informally and between and among the governed. Now, thanks to the double whammy of the Posey Rule and the implementation of replay review, these plays would be adjudged much like “unnecessary roughness” and “interference” calls in the NFL. That quickly, custom had been legislated out of the game.

Custom was further eroded in 2016 when the league, responding to a rough take-out slide at second base by the Dodgers’ Chase Utley in a 2015 playoff game, announced that, going forward, the McRae Rule as written in the Official Rules (and revised via Rule 6.01(j)) would now be strictly enforced via replay review.¹¹³ This had the additional effect of wiping out a longstanding baseball custom in opposition to law – the so-called “neighborhood play” at second base.¹¹⁴ Although Rule 5.09(b)(6) states, in relevant part, that a runner is out if “the next base is tagged before he touches the next base, after he has been forced to advance by reason of the batter becoming a runner,” the neighborhood play, as it developed over the course of the game’s history, said otherwise.

Acknowledging the potential for injury should a middle infielder be compelled to strictly comply with the Rule as a runner barreled down the base path towards him, the neighborhood play permitted the infielder to glide past the bag, or straddle it, so as to avoid the oncoming runner. If the ball beat the runner to the bag, the runner would be called out even if the fielder never touched the bag. By updating and enforcing the updated McRae Rule via replay review, the league was now in charge of determining the propriety of take-out slides as well as whether a middle infielder in fact tagged the base

as the Rule requires him to do. A senior vice president of MLB dismissed the neighborhood play as “a product of history, rather than a product of the rule book,”¹¹⁵ but that was precisely the point – custom governed that play for over a century. Now, in the blink of a replay monitor all of that was wiped away.

The Countdown Clock

While baseball famously has been described as a game untethered to time in that it is not governed by a clock, this is increasingly no longer the case. In 2015, in an effort to speed the pace of games, MLB mandated that countdown clocks be installed in all 30 Major League stadiums to govern everything from the time between innings to, starting in 2016, the length of mound visits by coaches and managers.¹¹⁶ In addition, although as of now still ungoverned by the clock, umpires were encouraged by the league to enforce the technical rule (Rule 5.04(b)(4)) directed at keeping batters in the batter’s box for the length of their at-bat.¹¹⁷ Historically, it was the players themselves who governed the pace of play of their game irrespective of this rule, with pitchers enforcing customary rules via brushback pitches to hitters they perceived as dawdling in the batter’s box, or hitters doing so by stepping out when they perceived a pitcher attempting to disrupt their timing by either quick-pitching them or freezing them in the batter’s box by holding onto the ball indefinitely. In the process, the rhythm of a baseball game was nothing like that of a football game – something many baseball fans highlighted when extolling the virtues of their game. However this rhythm, which in many ways was a means of policing behavior on the field, increasingly did not play well on television, particularly when compared with the predictable rhythm of football which led to more easily foreseeable

commercial breaks and other game interruptions. So the league stepped in and obliterated this longstanding custom as well.

Moreover, aside from outside intervention, there have been recent indications that the baseball code is under threat from within. As stated above, because it is pure custom, the code is hardly static -- any particular element of it exists only to the extent there is community-wide support for it. At the point enough community members decide that a given code provision lacks moral force it disappears. This appears to be occurring in several areas of on-field comportment. Envious of the on-field/court freedom of NFL and NBA players (beholden as they are to centralized positive law only), Washington Nationals outfielder Bryce Harper remarked that “Baseball is tired. It’s a tired sport because you can’t express yourself. You can’t do what people in other sports do.... Look at those players – Steph Curry, LeBron James (of the NBA). It’s exciting to see those players in those sports. Cam Newton (of the NFL) – I love the way Cam goes about it. He smiles, he laughs. It’s that flair. The dramatic.”¹¹⁸ Harper is not the only young player in the modern game disdainful of the baseball code. Several young players share his sentiments and are increasingly emboldened to express themselves on the field in ways that the code considers sacrilege. Fist pumps, stare-downs, admiring home runs from the batter’s box – the immorality of these activities is not as clear as it once was. Slugger Jose Bautista flipped his bat in celebration after hitting a crucial home run that sent his Toronto Blue Jays to a playoff victory over the Texas Rangers in October 2015 and while some players criticized him for doing so, others defended him, applauding his show of emotion.¹¹⁹ The community appears to be increasingly divided on this issue.

Still, the code isn't quite dead yet. Frayed at the edges, the game's sportsman ethos survives – Bautista was targeted by the Rangers when the teams met in May, 2016 and a brawl ensued between the clubs with Bautista on the receiving end of baseball “justice.”¹²⁰ Further testament to the power of custom in baseball comes from David Bell, a third generation major leaguer (his father, Buddy, and grandfather, Gus, having preceded him) who inhaled the baseball code with his first breath: “The name of the game is trying to win, but you have to keep it in perspective. Show people respect. You want to walk away from a game or a career saying, ‘I feel good about the way I treated people, about the way I competed.’ It’s nice to say you won, but I think, in the long run, those are the things that you are going to feel best about.”¹²¹ Coming from a baseball player, Bell’s words read like pabulum, unworthy of particular note in a game summary given how often these sentiments are repeated by his fellow ballplayers. Had they been uttered by an NFL lineman, however, they likely would have been front page news.

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¹ James Q. Whitman, *Why Did The Revolutionary Lawyers Confuse Custom And Reason?*, 58 U. Chi. L. Rev. 1321, 1330 (1991).

² *Id.*

³ *Id.* at 1334.

⁴ *Id.* at 1335.

⁵ See Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1129-30 (1987).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 1132.

⁹ *Id.* at 1146.

¹⁰ *Id.*

¹¹ *Id.* at 1155-56.

¹² *Id.*

¹³ See *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁴ *Id.*

¹⁵ See Sherry, at 1175.

¹⁶ *Strother v. Lucas*, 37 U.S. 410, 445-46 (1838).

¹⁷ *Id.* at 446.

¹⁸ *Panaud v. Jones*, 1 Cal. 488, 499 (1851).

¹⁹ *Id.* at 498-99.

²⁰ *Hursh v. North, Chase & North*, 40 Pa. 241, 243 (1861).

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- ²¹ *Lindsay, Gracie & Co. v. Cusimano*, 12 F. 504, 506 (E.D. La., 1882).
- ²² *Minis v. Nelson*, 43 F. 777, 779 (S.D. Ga., 1890).
- ²³ *Adams v. Pittsburgh Insurance Company*, 95 Pa. 348, 355 (1880).
- ²⁴ Henry E. Smith, *Custom In American Property Law: A Vanishing Act*, 48 Tex. Int'l. L.J. 507 (2013).
- ²⁵ *Id.* at 519.
- ²⁶ Desmond Manderson, *Modernism, Polarity, And The Rule Of Law*, 24 Yale J.L. & Human. 475, 487 (2012).
- ²⁷ *See* Smith, at 520.
- ²⁸ *See* Sherry, at 1176.
- ²⁹ 75 Ethics 25 (Oct., 1964).
- ³⁰ *Id.*
- ³¹ *Id.* at 26.
- ³² *See* Tyler Kepner, *Dodgers Pitcher Takes a Big Step Up*, The New York Times, April 17, 2016, Sports Sunday 2).
- ³³ Keating, at 27.
- ³⁴ *Id.* at 31.
- ³⁵ *Id.* at 33.
- ³⁶ *Id.* at 34.
- ³⁷ Bernard Suits, *The Elements of Sports*, Ethics in Sports, 9, 14 (Human Kinetics, 2007).
- ³⁸ Keating, at 35.
- ³⁹ *Id.* at 29.
- ⁴⁰ *Id.*
- ⁴¹ *Id.*
- ⁴² *Id.* at 30.
- ⁴³ *See* Thomas Hurka, *Games and the Good*, Ethics in Sports, 21, 27 (Human Kinetics, 2007).
- ⁴⁴ Keating, at 30.
- ⁴⁵ *Id.*
- ⁴⁶ Hurka, at 28.
- ⁴⁷ Keating, at 32.
- ⁴⁸ Mark F. Bernstein, "Football: The Ivy League Origins of an American Obsession," 4 (University of Pennsylvania Press, 2001).
- ⁴⁹ *Id.* at 5.
- ⁵⁰ *Id.* at 6.
- ⁵¹ *Id.* at 6-7.
- ⁵² *Remington and the Eli Eleven*, American Heritage, October-November, 98 (1981).
- ⁵³ *See* Bernstein, at 15.
- ⁵⁴ Lewis Sheldon Welch & Walter Camp, "Yale, Her Campus, Class-Rooms and Athletics," 519 (L.C. Page, 1899).
- ⁵⁵ Henry Bancroft Twombly, "Personal Reminiscences of a Yale Football Player in the Early 'Eighties," 45-46 (Yale University Press, 1940).
- ⁵⁶ *See* Bernstein, at 34-36.
- ⁵⁷ *Id.*
- ⁵⁸ *See* "The NFL Competition Committee," detailing the makeup, purpose and process of the committee. According to the league's website: "The NFL's process for modifying or adopting rules and regulations is systematic and consensus-oriented. The Competition Committee reviews all competitive aspects of the game, including (but not limited to) playing rules, roster regulations, technology, game-day operations and player protection." <http://operations.nfl.com/football-ops/league-governance/the-nfl-competition-committee/>
- ⁵⁹ *See* Ben Austro, "So You Think You Know Football?," 129 (Taylor Trade Publishing, 2015).
- ⁶⁰ *See* Ben Austro, *25 years ago, the most famous call... ever: "Giving him the business down there"* Football Zebras.com, October 12, 2011, <http://www.footballzebras.com/2011/10/12/25-years-ago-the-most-famous-call-ever-giving-him-the-business-down-there/>
- ⁶¹ *See generally* "Rule 12: Player Conduct" within the *2015 Official Playing Rules of the National Football League*.
- ⁶² *See* Austro, "So You Think You Know Football?," at 148-49; 204-06.
- ⁶³ *Id.*

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- ⁶⁴ See “Top 10 End Zone Celebrations,” <http://www.nfl.com/videos/nfl-videos/09000d5d82adbcb/Top-10-End-Zone-Celebrations-Chad-Johnson> (Ochocinco’s ranked #4).
- ⁶⁵ See “The NFL Competition Committee” website.
- ⁶⁶ *Id.*
- ⁶⁷ *The Common Law Origins Of The Infield Fly Rule*, 123 U. Pa. L. Rev. 1474, 1476 (1975). Although officially uncredited, the article was written by William S. Stevens.
- ⁶⁸ See John Thorn, “Baseball in the Garden of Eden: The Secret History of the Early Game,” 26, 38-39 (Simon & Schuster, 2011).
- ⁶⁹ Of course, there were all sorts of clubs beyond the gentlemanly clubs discussed herein. Baseball, in one form or another, was played by men and boys of all classes during this time. However, the point here is that it was most likely the upper-class clubs (like the Knickerbockers and their ilk) who exerted the most influence, given that these clubs’ games were more likely to be reported in the newspapers and discussed most widely. Stevens overstates his case within his article, but his point is nevertheless a valid one, at least to an extent.
- ⁷⁰ See Jason Turbow, “The Baseball Codes,” 182 (Pantheon Books, 2010).
- ⁷¹ See Mitchell Nathanson, “A People’s History of Baseball,” 4-10 (University of Illinois Press, 2012).
- ⁷² See Harold Seymour, “Baseball: The Early Years,” 16 (Oxford University Press, 1960, 1989).
- ⁷³ *Id.* at 23.
- ⁷⁴ This was the spirit embodied in the short lived National Association, which lasted from 1871-75. By no stretch of the imagination was the National Association a consortium of gentlemen.
- ⁷⁵ The National League was not created solely, or even primarily, for this purpose. In many ways, it was little more than a professional league just like the National Association, albeit one controlled more tightly by the owners rather than the players. However, the owners preached the “gentlemanly” values they claimed to be inherent in their game to the public incessantly, largely in an effort to distinguish their league from the disreputable National Association it had just toppled. See Nathanson, “A People’s History of Baseball,” 12-21.
- ⁷⁶ Paul Dickson, “The Unwritten Rules of Baseball: The Etiquette, Conventional Wisdom, and Axiomatic Codes of Our National Pastime,” 3-4 (HarperCollins, 2009).
- ⁷⁷ *Id.*
- ⁷⁸ *Id.*
- ⁷⁹ Turbow, “The Baseball Codes,” 3-4.
- ⁸⁰ See “Official Rules of Baseball, 2015 Edition,” Rule 8.02.
- ⁸¹ See Dickson, 81.
- ⁸² *Id.*, at 83-84.
- ⁸³ See Tracy Ringolsby, *MLB Says Phillies Have Been Warned*, FoxSports, <http://www.foxsports.com/mlb/story/Rockies-complain-Phillies-stole-signs-MLB-issues-warning-051110> May 11, 2010.
- ⁸⁴ See Dickson, at 83-84.
- ⁸⁵ See Bernie Wilson, *Some D’Backs Not Happy Davis Derailed Perfection*, USA Today Baseball Weekly.com, <http://usatoday30.usatoday.com/sports/baseball/diamondbacks/2001-05-27-schilling.htm> May 28, 2001.
- ⁸⁶ *Id.*
- ⁸⁷ See Turbow, at 72-73.
- ⁸⁸ See Mike Freeman, *Cheap Sack Will Cost Favre and Strahan*, The New York Times, <http://www.nytimes.com/2002/01/07/sports/on-pro-football-cheap-sack-will-cost-favre-and-strahan.html> January 7, 2002
- ⁸⁹ See Bob Wolfley, *Michael Strahan on tainted record-setting sack against Brett Favre: 'It's not worth it'*, Milwaukee Wisconsin Journal-Sentinel, <http://www.jsonline.com/blogs/sports/228065491.html> October 16, 2013.
- ⁹⁰ See Seth Walder, *Colts GM: We Alerted NFL to Patriots Football Issue Days Prior to AFC Title Game*, The New York Daily News, <http://www.nydailynews.com/sports/football/colts-gm-alerted-nfl-football-issue-title-game-article-1.2121797> February 19, 2015.
- ⁹¹ See Turbow, at 199-201.
- ⁹² *Id.*
- ⁹³ *Id.*, at 202.
- ⁹⁴ See *Celebration Costs Palmer*, The New York Times, November 21, 2015, B12.

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- ⁹⁵ See Dickson, at 7.
- ⁹⁶ See Turbow, at 129.
- ⁹⁷ *Avila v. Citrus Community College District*, 38 Cal 4th 148 (2006).
- ⁹⁸ *Id.*, at 165.
- ⁹⁹ *Id.* at 166.
- ¹⁰⁰ *Id.*, at 164.
- ¹⁰¹ *Id.*, at 168.
- ¹⁰² *The Common Law Origins Of The Infield Fly Rule*, at 1477.
- ¹⁰³ *Id.* at 1477-78.
- ¹⁰⁴ See “Official Rules of Baseball, 2015 Edition,” Rule 5.09(a)(12).
- ¹⁰⁵ See “Official Rules of Baseball, 2015 Edition,” Definitions of Terms.
- ¹⁰⁶ *The Common Law Origins Of The Infield Fly Rule*, at 1479.
- ¹⁰⁷ See Howard M. Wasserman, *The Economics of the Infield Fly Rule*, Utah Law Review, 479 (2013).
- ¹⁰⁸ See Turbow, at 55.
- ¹⁰⁹ See *MLB Adopts New Rule for Home Plate Collisions in Wake of Posey Injury*, CBS SF Bay Area, <http://sanfrancisco.cbslocal.com/2014/02/25/mlb-adopts-new-rule-for-home-plate-collisions-in-wake-of-posey-injury/> February 25, 2014.
- ¹¹⁰ Bob Nightengale, *Managers, Players Want Home-Plate Rule Changed – Or Dumped*, USA Today, <http://www.usatoday.com/story/sports/mlb/2014/08/28/mlb-home-plate-collision-rule-713-playoffs-buster-posey/14742421/> August 28, 2014.
- ¹¹¹ *Id.*
- ¹¹² *Id.*
- ¹¹³ See Benjamin Hoffman, *Rule Changes On Sliding Are Adopted*, The New York Times, February 26, 2016, B9.
- ¹¹⁴ See Paul Hagen, *Slip Slidin’ Away: New Rules Music To All Ears?*, MLB.com, <http://m.mlb.com/news/article/165429062/pace-of-game-changes-new-slide-rule-adopted> February 25, 2016.
- ¹¹⁵ See Hoffman.
- ¹¹⁶ See Hagen.
- ¹¹⁷ *Id.*
- ¹¹⁸ Tim Keown, *Sorry Not Sorry*, ESPN The Magazine, http://espn.go.com/espn/feature/story/_/id/14935765/washington-nationals-bryce-harper-wants-change-baseball-forever March 10, 2016.
- ¹¹⁹ See William Rhoden, *This Postseason, Decorum Police Aren’t Stopping the Party*, The New York Times, October 18, 2015, SportsSunday 6.
- ¹²⁰ See *Simmering Feud Erupts in Texas*, The New York Times, May 16, 2016, D4.
- ¹²¹ See Turbow, at 257.