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Swinging at the Facts: How Baseball Informs Legal Argument

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Swinging at the Facts: How Baseball Informs Legal Argument

Josephine (Jo) R. Potuto*

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* Potuto is the Richard H. Larson Professor of Constitutional Law at the University of Nebraska College of Law. This Article combines two areas of prime interest: writing and baseball. Potuto’s book, *Winning Appeals*, discusses the elements of good writing and persuasive argument. She has taught the subject to law students and practicing lawyers. In a past life, Potuto worked in editing and production. Potuto is a lifelong New York Yankees baseball fan from a large extended family of Yankee fans. Ettie Ward compiled a book of essays on the New York Yankees, *Courting the Yankees: Legal Essays on the Bronx Bombers* (Carolina Academic Press 2003). Her contributors were law professor Yankee fans. Potuto admits to both deep regret and envy that she was not one of them. Potuto owes many and deep thanks to law professors and baseball fans Bill Lyons (Boston Red Sox) and John Lenich (Chicago White Sox). Each spent more time than she deserved—but certainly time that was warranted—in a close review of an earlier draft of this article. Each provided many helpful comments. Potuto also owes thanks to the University of Nebraska College of Law for the support provided through the McCollum Summer Research Fund.

INTRODUCTION

Baseball has been called a church¹ and a path to God.² It is the only sport with its own widely recognized song³ and an iconic poem.⁴ It boasts the cleverest and perhaps most loved comedy routine ever performed⁵ as well as Casey Stengel and Yogi Berra—two of the best-known philosophers of modern times. Baseball is the subject of movies spanning from ribald comedies⁶ to biographies and histories⁷ to exercises in pure nostalgia.⁸ Writers

1. BULL DURHAM (Orion Pictures Corp. 1988).

I believe in the Church of Baseball. I've tried all the major religions, and most of the minor ones. I've worshipped Buddha, Allah, Brahma, Vishnu, Siva, trees, mushrooms, and Isadora Duncan. . . But it just didn't work out between us. The Lord laid too much guilt on me. . . It's a long season and you gotta trust it. I've tried 'em all, I really have, and the only church that truly feeds the soul, day in, day out, is the Church of Baseball.

Id.

2. See JOHN SEXTON, *BASEBALL AS A ROAD TO GOD: SEEING BEYOND THE GAME* (2013).

3. JACK NORWORTH, *Take Me Out to the Ballgame* (York Music Co. 1908). Other songs also pay tribute to baseball. See, e.g., JOHN FOGERTY, *Centerfield*, on *CENTERFIELD* (Warner Bros. 1985). There may be popular songs written in tribute of other sports. I can think of none.

4. Ernest Thayer, *Casey at the Bat*, S.F. EXAMINER, June 3, 1888, at 4. Another baseball poem was written about the famous Chicago Cubs double play combination. Franklin Pierce Adams, *Baseball's Sad Lexicon*, N.Y. EVENING MAIL, July 12, 1910, at 6.

5. The routine is Abbott and Costello's famous sketch, *Who's on First?* See *The Abbott and Costello Show: The Actor's Home* (T.C.A. Productions television broadcast May 15, 1953). For the full routine, see the Appendix. I could not resist including it.

6. These movies include *Major League* and *Bull Durham*. See Mike Oz, 'Major League' Turns 25 — Here Are 15 Things You Didn't Know about the Movie, YAHOO SPORTS (Apr. 7, 2014), <https://sports.yahoo.com/blogs/mlb-big-league-stew/-major-league--turns-25---here-are-15-things-you-didn-t-know-about-the-beloved-film-091540571.html> [<https://perma.cc/675F-X4XP>]; Roger Cormier, *15 Major Facts About Bull Durham*, MENTAL FLOSS, <http://mentalfloss.com/article/65034/15-major-facts-about-bull-durham> (last visited June 28, 2017) [<https://perma.cc/DC2R-GNA4>].

7. One such biography is the biography of Lou Gehrig. *THE PRIDE OF THE YANKEES* (Samuel Goldwin Prods. 1942). One such history details the Chicago White Sox throwing the 1919 World Series. See *EIGHT MEN OUT* (Orion Pictures Corp. 1988). The movie was based on a novel by the same name. See ELIOT ASIMOV, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* (Henry Holt and Co. 1963).

8. See W.P. KINSELLA, *SHOELESS JOE* (1982). The reclusive writer/baseball fan in the story is another famous author, J.D. Salinger (named in the book,

F. Scott Fitzgerald,⁹ John Grisham,¹⁰ Bernard Malamud,¹¹ and Ernest Hemingway¹² all have used baseball or baseball players as a central focus or as important background context. Quotes from baseball personalities, real and fictional, are familiar even to non-sports fans.¹³ Baseball also has had real-world impact. Jackie Robinson's breaking of the color barrier in baseball was a milestone in racial integration.¹⁴ The game also spawned the most famous sports cheating scandal ever to have occurred in American sports.¹⁵ Baseball has its own antitrust exemption.¹⁶ Its games not only are theoretically

referred to as Terence Mann in the movie *Field of Dreams*). *Id.*; see also FIELD OF DREAMS (Universal Pictures 1989).

9. F. SCOTT FITZGERALD, *THE GREAT GATSBY* (1925). The novel focused on the American Dream. Jay Gatsby, the main protagonist, was caught up in the Black Sox Scandal. See Douglas Linder, *The Black Sox Trial, An Account*, UNIV. OF MO.-KANSAS CITY SCHOOL OF LAW (2010), <http://law2.umkc.edu/faculty/projects/ftrials/blacksox/blacksoxaccount.html> (discussing the details of the scandal) [<https://perma.cc/2HJA-EE78>].

10. JOHN GRISHAM, *CALICO JOE* (2012).

11. BERNARD MALAMUD, *THE NATURAL* (1952).

12. See, e.g., ERNEST HEMINGWAY, *THE OLD MAN AND THE SEA* (1952).

13. The following are three examples: (1) "Say it ain't So Joe," reportedly said by a child to Shoeless Joe Jackson regarding his involvement in the Black Sox Scandal. Eliot Asinof, *Shoeless Joe Jackson*, ENCYCLOPEDIA BRITANNICA (last updated Apr. 28, 2017); (2) "Today I consider myself the luckiest man on the face of the earth," spoken by a dying Lou Gehrig at his appreciation day at Yankee Stadium. *Lou Gehrig*, NAT'L BASEBALL HALL OF FAME, <http://baseballhall.org/discover/lou-gehrig-luckiest-man> (last visited June 28, 2017) [<https://perma.cc/J74N-UCUD>]; (3) "If you build it, he will come." FIELD OF DREAMS (Universal Pictures 1989).

14. See The Editors of *Encyclopaedia Britannica*, *Riding Freedom: 10 Milestones in U.S. Civil Rights History*, BRITANNICA, <http://www.britannica.com/list/10-milestones-in-us-civil-rights-history> (last visited June 28, 2017) [<https://perma.cc/S3WL-C798>]; see also William C. Kashatus, *Living up to Jackie Robinson*, ORIGINS: CURRENT EVENTS IN HISTORICAL PERSPECTIVE, OHIO STATE UNIV. (Apr. 7, 2007), <http://origins.osu.edu/history-news/living-jackie-robinson> [<https://perma.cc/FX8R-KWSB>].

15. See Linder, *supra* note 9.

16. See *Flood v. Kuhn*, 407 U.S. 258, 285 (1972); *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953); *Fed. Baseball Club v. Nat'l League*, 259 U.S. 200, 208–09 (1922).

endless,¹⁷ but they also may be perfect.¹⁸ Its rules fascinate and intrigue legal scholars who have created a large canon of baseball legal lore.¹⁹ Finally, and

17. The Pawtucket Red Sox and Rochester Red Wings once played a 33-inning game that began on April 18, 1981, continued on April 19, and concluded on June 23, 1981. Pawtucket eventually prevailed three to two. *The Longest Game in History*, PAWSOX, http://www.milb.com/content/page.jsp?ymd=20080903&content_id=41224646&sid=t533&vkey=team1 (last visited June 28, 2017) [<https://perma.cc/YQ38-K82J>]. The game pales in comparison to a fictitious game played between the Chicago Cubs and an Iowa minor league team. That game lasted more than 2,000 innings. See W. P. KINSELLA, *THE IOWA BASEBALL CONFEDERACY* (1986).

18. In a perfect game, there are no hits, no walks, and no errors; therefore, it is impossible for the opposing team to score a run. In a no-hitter, by contrast, batters may reach base on walks or errors; through successive walks and/or errors it is possible, although very unlikely, for the opposing team to score a run. There have been only 23 perfect games in the history of major league baseball. See *History of the Game*, MLB, http://mlb.mlb.com/mlb/history/rare_feats/index.jsp?feature=perfect_game (last visited June 28, 2017) [<https://perma.cc/YG3F-DYBM>]. The most famous perfect game was pitched by Don Larson of the New York Yankees in Game 5 of the 1956 World Series against the then Brooklyn Dodgers. It is the only perfect game pitched in a World Series. *Perfect Game*, BASEBALL-REFERENCE, http://www.baseball-reference.com/bullpen/Perfect_game (last visited June 28, 2017) [<https://perma.cc/ZZ66-5J77>].

19. See, e.g., Garrett Broshuis, *Restoring Integrity to America's Pastime? Moving Towards A More Normative Approach to Cheating in Baseball*, 14 TEX. REV. ENT. & SPORTS L. 119 (2013). At least 11 law review articles are devoted to the infield fly rule alone, and it is mentioned in a host of others. Note, *The Common Law Origins of The Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975); Howard Wasserman, *The Economics of the Infield Fly Rule*, 2013 UTAH L. REV. 479 (2013); Howard Wasserman, *An Empirical Analysis of the Infield Fly Rule*, 4 J. OF LAW 127 (2014); Robert M. Jarvis & Phyllis Coleman, *The Uncommon Origins of 'The Common Law Origins of The Infield Fly Rule'*, 19 ENT. & SPORTS LAW 17 (2002); Neil B. Cohen & Spencer Weber Waller, *Taking Pop-Ups Seriously: The Jurisprudence of The Infield Fly Rule*, 82 WASH. U. L.Q. 453 (2004); Eldon L. Ham, *The True Precedent of Baseball in Law*, 13 MARQ. SPORTS L. REV. 213 (2003); Anthony D'Amato, *The Contribution of The Infield Fly Rule to Western Civilization (And Vice Versa)*, 100 NW. U. L. REV. 189 (2006); Alexander M. Sanders, Jr. & Katie Fowler Monoc, *William S. Stevens (1948-2008) and 'The Common Law Origins of The Infield Fly Rule'*, 4 CHARLESTON L. REV. 423 (2010); Margaret Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*, 5 FED. SENTENCING REP. 96 (1992); Mark W. Cochran, *The Infield Fly Rule and The Internal Revenue Code: An Even Further Aside*, 29 WM. & MARY L. REV. 567 (1988). A 12th article brought football into the picture. Howard M. Wasserman, *Football and The Infield Fly Rule*, 61 UCLA L. REV.

the focus of this Article, a batter at the plate is the ideal prototype for legal writing and analysis.²⁰

I. BASEBALL AND LITIGATION, BRIEFLY AND SIMPLY

The parallels between baseball and litigation are easy to see.²¹ The parallels also offer a convenient entrée to a discussion of the relationship between hitting and legal argument.

Baseball games consist of hitting, or offense, pitching, and fielding, or defense. When one team is at bat, the other team is in the field. Teams switch from offense to defense every half inning for nine innings.²²

Trials and appeals consist of plaintiffs, who play the role of the offense, and defendants, who act as the defense.²³ Plaintiff's lawyer goes first, presenting the case-in-chief, with defendant's lawyer counterpunching through cross-examination and objections. Defendant's lawyer takes a turn once the plaintiff's side rests, with plaintiff's lawyer now counterpunching.²⁴ On appeal, the first

DISCOURSE 272 (2014). Yet another rule, regarding pine tar on bats, triggered two law review articles. Raymond Belliotti, *Billy Martin and Jurisprudence: Revisiting the Pine Tar Case*, 5 ALB. GOV'T L. REV. 210 (2012); Jared Finkelstein, *In Re Brett: The Sticky Problems Of Statutory Construction*, 52 FORDHAM L. REV. 430 (1983).

20. Perhaps all law may be explained by resorting to the rules of baseball. For a baseball fan, it is tempting to conclude that all of life may be so explained. See SISTER WYNONA CARR, *The Ball Game, on THE BALL GAME* (Specialty Records 1953). Sister Wynona's rendition of baseball as life has a decided religious tone.

21. In comparing baseball, and particularly hitting, to law, and particularly legal argument and persuasive writing, I have generalized regarding both and, in turn, this means I have overstated both. Although a batter at the plate offers apt illustration for constructing legal arguments, the comparison is not perfect. Greater, and more nuanced, textual development and explanation would have been more accurate in its detail, but it also would have impeded the clarity of the comparison. Both baseball and litigation are contests in which one side wins and the other loses. Trials and appeals offer the best analogue and the clearest examples to assess legal argument and analysis through reference to batters at the plate.

22. A game may end after five innings if it is called because of rain or after eight and one-half innings if the home team is ahead at the end of the top half of the ninth inning. It also may go into extra innings if tied at the end of nine.

23. Litigation, unlike baseball, may involve more than two sides, but, for ease of discussion, this Article discusses cases as two-sided only. The two or more sides to legal cases are not restricted to litigation but also may occur in contracts, negotiations, and the purchase of a house.

24. To push the analogy farther, perhaps a bit too far: each trial witness might be considered an inning in baseball, half innings considered the direct or cross, and objections considered the trial lawyer's equivalent to fielding. In this

lawyer at bat, the appellant, is the one who lost at trial. Then the appellee gets a turn.²⁵

The parallel between baseball umpires and judges as rule-enforcers, not rule-makers, is oft described.²⁶ Umpires are expected to be impartial and aspire to be infallible.²⁷ At his confirmation hearing, Chief Justice Roberts observed that “Judges are like umpires. . . . The role of an umpire and a judge is critical. They make sure everybody plays by the rules”²⁸

The parallel between baseball umpires and judges, however, is not perfect. Lawyers may appeal findings of fact even if the standard of review is quite narrow.²⁹ By contrast, a home plate umpire’s ball and strike calls are unassailable.³⁰ Trials can take months; the appeal process can take years.³¹ If each baseball game took as long as the trial or appeal process, baseball would

rendition, lawyers switch from offense to defense for each witness and also for the entire case.

25. Appellate argument also offers rebuttal. One might describe the baseball equivalent as the bottom of the ninth—and the extremely rare win on rebuttal equivalent to the equally rare walk-off home run.

26. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.). This hearing kicked off a discussion of the analogies between the two. *See, e.g.*, Theodore McKee, *Judges As Umpires*, 35 HOFSTRA L. REV. 1709 (2007); Neil S. Siegel, *Umpires At Bat: on Integration and Legitimation*, 24 CONST. COMMENT. 701 (2008).

27. Of course they fall short. Umpire calls once were final and unreviewable. Some now may be reviewed, and corrected, through instant replay, upon the manager’s use of one of the team’s challenges. Reviewable calls include home runs, ground rule doubles, fan interference, trap plays in the outfield (not infield), batters hit by a pitch, tag plays, pickoffs, and the ball/strike count (but not whether a pitch is a ball or a strike). *See MLB Clubs Unanimously Approve Expansion of Instant Replay*, MLB (2014), <http://mlb.mlb.com/news/article.jsp?cid=mlb&contentid=66737984&vkey=prmlb&ynd=20140116> [https://perma.cc/HMT5-XKLP].

28. McKee, *supra* note 26, at 1709 n.1. Some argue that the comparison is inapt and that judges are more involved and active than umpires. *See, e.g., id.* at 1709; *see also* Siegel, *supra* note 26, at 701. Comparisons of the roles of judges and umpires has a long pedigree. *See* Aaron S.J. Zelinsky, *The Justice As Commissioner: Benching The Judge-Umpire Analogy*, 119 YALE L. J. ONLINE 113 (2010).

29. *See* discussion of appeals *infra* Part III.

30. At one time, that was the case for all umpire calls, but some umpire calls now are reviewable. *See MLB Clubs, supra* note 27.

31. The length of a trial and appeals, while in part necessary, nonetheless can cause harm. Charles Dickens described the consequences of one such trial, *Jarndyce v. Jarndyce*. CHARLES DICKENS, BLEAK HOUSE (1853).

be no more.³² If one treats a home plate umpire as equivalent to a United States Supreme Court Justice, the parallel between baseball umpires and judges holds. Justice Jackson once famously remarked about the United States Supreme Court that “[w]e are not final because we are infallible, but we are infallible only because we are final.”³³ Or, stated in baseball terms, “even the devil can’t win an argument with an umpire.”³⁴

II. ELEMENTS OF HITTING

A pitcher initiates baseball plays by throwing the ball to a batter. A batter aims to get on base and help his team score runs. He uses a bat to hit the ball. The most skilled batter cannot hit the ball without a bat, even if he were willing to risk injury and endure pain. To be an effective tool, a bat must be solid, strong, smooth, and at least 30 inches long.³⁵ A banana does not work. A straw does not work. A bat shaped like a corkscrew does not work. A bat with doughnut holes is useless both for hitting and dessert.

A bat is an essential condition precedent to hitting, but it is no more than that. A batter still needs to make contact with the ball. A batter’s success at the plate depends on variables within and outside his control:

32. There are, of course, other differences between baseball and trials, umpires and judges. Litigants will meet only once on the issues that gave rise to the litigation, and they will prevail or not based on that one opportunity. By contrast, major league baseball teams meet 18 times in a season against teams in their own divisions. Al Yellen, *Will MLB’s Realignment Create Fair Schedules for Everyone?*, SBNATION (May 8, 2012), <http://www.sbnation.com/2012/5/8/3007645/mlb-realignment-2013-schedule-changes> [<https://perma.cc/B7LY-SRHR>]. In addition, the overall, ultimate winner in baseball (World Series Champion) is decided on the basis of 162 games played plus post season. Hannah Keyser, *Why are Baseball Seasons 162 Games Long?*, MENTAL FLOSS (Sept. 11, 2014), <http://mentalfloss.com/article/58831/why-are-baseball-seasons-162-games-long> [<https://perma.cc/PVC7-KQSW>]. Presumably, therefore, umpire errors will balance out.

33. *Brown v. Allen*, 344 U.S. 443, 540 (1952) (Jackson, J., concurring).

34. See DOUGLASS WALLOP, *THE YEAR THE YANKEES LOST THE PENNANT* 234 (1954) (“For that afternoon had proved an axiom long known to baseball men . . . And this was that not even the devil could force an umpire to change his decision.”). The umpire in question was a home plate umpire; the call that provoked the devil, however, related to whether a runner was safe at the plate and, thus, had scored the winning run. Today that call would be reviewable. See *supra* note 27.

35. Bat length and weight varies according to the height and weight of a batter, and also batter preferences. Children use bats shorter than 30 inches. *How to Choose A Bat*, LOUISVILLE SLUGGER, <http://www.slugger.com/en-us/how-to-choose-a-bat> (last visited June 28, 2017) [<https://perma.cc/ZSW9-UM45>].

hand-eye coordination; reaction time; preparation and practice; reputation as a hitter; and the game situation based on the inning, score, number of outs, pitch count, batting lineup, whether there are runners on base, and, if so, which bases, how many runners, and how fast they run, among other variables. Perhaps the biggest variable, and certainly the most vexing, is an umpire's strike zone. A batter's success also depends on how proficient the fielders are and where they are positioned when the ball is hit. Fielders shift from batter to batter and even from pitch to pitch.³⁶

A batter is only a still life at the plate until a pitcher pitches to him. A pitcher is perhaps the most important variable in how well a batter hits. The better the pitcher and the better the pitcher's strengths match a batter's weaknesses, the more difficulty a batter will have getting a hit, and vice versa.

A batter's at-bat can end in different ways. Batters can hit a single, double, triple, or home run. They can get on base by walking, by a throwing or fielding error, by a passed ball, by being hit by a pitch, or by a fielder's choice.³⁷ They can make an out by striking out, popping up, flying out, being thrown out trying to beat out a ground ball, or, again, by a fielder's choice. Batters can cause two outs—a double play—or even three outs—a triple play. On occasion, batters sacrifice themselves to move runners along on the bases.

36. Fielders position themselves differently for a fastball pitcher than they would for a pitcher who throws "junk." They shift with runners on base. In a close game with a runner on third and no outs, the third baseman may play in, anticipating a bunt. In the bottom of the ninth, with the home team at bat, the game tied, and runners on first and third and no outs, an outfielder will position himself to keep a runner at third, or to throw him out at the plate. The most dramatic, and most famous, shift happened to the "splendid splinter," Boston Red Sox outfielder Ted Williams. Williams was a top left-handed hitter who invariably pulled the ball to the right. The shift moved all infielders near or to the right side of second base; outfielders also veered to the right. Dayn Perry, *Just Because: The "Ted Williams Shift"*, CBSSPORTS (Dec. 16, 2013), <http://www.cbssports.com/mlb/eye-on-base-ball/24378251/just-because-the-ted-williams-shift> [<https://perma.cc/RPP9-E5F7>]. For discussion of the shift, and whether it works, see Liz Moyer, *Judgment Day for the Shift*, WALL ST. J., Sept 10, 2014, at D6.

37. A fielder's choice is

a play in which a runner is able to advance a base due to a choice made by the defense. It will most often be an attempt to get another player out at a different base, or indifference to the player advancing a base. It is called a fielder's choice because the defender, or fielder, has an option of where to throw the ball to get an out or not let a runner advance.

Fielder's Choice, SPORTING CHARTS, <https://www.sportingcharts.com/dictionary/mlb/fielders-choice.aspx> (last visited July 29, 2017) [<https://perma.cc/WSQ7-C7KV>].

How batters act at the plate is affected by their strengths as hitters and by the hitting identity of their team, ranging from power to “small ball.”³⁸ Within those parameters, batters need to assess the status of a game and what they might do in the moment to help their team win.³⁹ Good batters think tactically. They may foul off a series of pitches hoping that ultimately they will get a more desirable pitch to hit. Sometimes they swing away and try to hit a home run. With runners on base, they might try just to get on base, hoping that a series of hits will score runs. All hits are not equal. Triples are better than doubles, and both are better than singles. A home run is the only way batters can score unaided by their teammates.

III. ELEMENTS OF LEGAL ARGUMENT AND LITIGATION

Legal arguments start with black letter rules. Black letter rules define the formal scope of legal rights. A lawyer cannot construct an effective argument or trial strategy unless he knows and articulates the relevant black letter law.

To argue that a party breached a contract, a lawyer must know the black letter rules governing an offer and acceptance⁴⁰ and the black letter rules governing what constitutes a breach. To argue that a client’s right of publicity was appropriated, a lawyer must know the elements of the right, as well as the elements of the available defenses.

Knowing the elements of a black letter rule means that good trial lawyers know what factual inquiry they need to make and what facts advance their arguments. In turn, good trial lawyers know what exhibits and documentary evidence to use and whether to consult experts.

As with batters at the plate, what lawyers do at trial depends on variables both within and outside their control: bench or jury trial; stage of litigation—preliminary hearing, evidentiary motion, preliminary injunction, motion to

38. For an explanation on small ball, see *Small Ball*, SPORTING CHARTS, <https://www.sportingcharts.com/dictionary/mlb/small-ball.aspx> (last visited Aug. 29, 2017) [<https://perma.cc/QKU6-XNVS>].

39. This reference is to batter making the tactical choices, but it may be the manager who decides. Batters are expected to follow manager directives. A famous incident when a batter failed to do what his manager wanted involved the New York Yankees’ Reggie Jackson, hitter, and Billy Martin, manager. *Yankees’ Turmoil, Angry Martin Threatens Reggie Jackson*, WILMINGTON MORNING STAR (July 24, 1978), <https://news.google.com/newspapers?nid=1454&dat=19780723&id=OsksAAAAIBAJ&sjid=KxMEAAAIBAJ&pg=5760,4630597&hl=en> [<https://perma.cc/JR7U-5EPU>].

40. Of course there are other black letter rules relevant to contract law, such as consideration.

dismiss, summary judgment, trial; burden of proof and on whom the burden falls; and the testimony elicited on direct and cross-examination. A lawyer's presence and demeanor may make him likeable and credible to a fact finder. In a close case, these qualities may sway a result. Understanding the rules of evidence means lawyers can optimize their ability to get testimony and exhibits into the trial record, even over the objections of their adversaries, and at the same time, exclude evidence their adversaries proffer.⁴¹ Just as good fielding and pitching affect what batters do at the plate, and their success doing it, what lawyers do, and their success doing it, is affected by an adversary's skill and the strength of the case he presents.

As with the umpire's strike zone, the facts at the heart of a case are the major factors outside a lawyer's control. Skill in locating and using facts is the prime variable that locates legal advocacy on a continuum from very poor to very good. A lawyer may not invent facts to help his case—at least not without violating the rules of professional responsibility or possibly suborning perjury. A skilled lawyer evaluates the elements of a black letter rule to identify what facts would be useful and then proceeds to see if those facts exist. Lawyers skilled in interviewing ferret out all relevant facts from witnesses and clients. Skill in oral and written advocacy helps lawyers weave facts into an easy-to-follow, credible, and persuasive story contained in an opening statement and closing argument.

The role of appellate lawyers in crafting a persuasive argument mirrors that of trial lawyers. Appellate lawyers seek out the strongest case precedent that supports their legal contentions, anticipate and counter the argument to be made by the other side, write clearly, and frame and organize what they say. Finding and using facts is just as important on appeal as at trial. On appeal, the trial record is the field of play. It does not matter what may *really* have happened. The only facts that matter are those set forth in the trial record.

A trial verdict means that one side's version of the facts prevailed. Fact finding may be reversed on appeal only if an appellant—translation: the loser at trial—can show that the finding of fact was clearly wrong⁴² or unsupported by legally sufficient evidence.⁴³ It may be an interesting informational nugget

41. Failing to make an important objection might be seen as the equivalent of a fielding error. So too the failure to make an argument or to make it well.

42. Clear error governs appellate review of most judge fact findings. *See, e.g.*, FED. R. CIV. P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

43. A civil jury verdict may be overturned only when unsupported by substantial evidence. *See, e.g.*, *Huddleston v. United States*, 45 U.S. 681, 684–85 (1988).

that on the facts at trial a trier of fact reasonably could have made a different fact finding,⁴⁴ but interesting nuggets do not win appeals.⁴⁵

As with hits, not all legal arguments are equal.⁴⁶ If one legal argument is powerful and the others are comparatively weak, then a lawyer might swing away and try for a home run by focusing exclusively on that argument so as not to limit its persuasive thrust by including weaker arguments. When there is no home run argument, a lawyer might try for a series of singles—or doubles and triples—of legal arguments and hope that in combination they can bring home a win. At the same time, a lawyer needs to capitalize on errors made by his adversary and respond to the case he presents. Whatever the tactical choice, the use of facts is critical.

IV. BASEBALL AND PERSUASIVE WRITING: PUT ‘EM TOGETHER AND WHAT HAVE YOU GOT?

Legal writing instructors teach the Issue, Rule, Application, Conclusion (“IRAC”) method as a guide for constructing a legal argument.⁴⁷ The Issue or Issues (“I”) is the focus of the legal dispute. The Conclusion (“C”) is how each side believes the issue should be resolved. The scope of a lawyer’s job lives in Rule (“R”) and Application (“A”). The Rule is the black letter rule

44. A fact finding may be stated expressly in a trial judge’s opinion or through a special verdict or special interrogatories to a civil jury. *See, e.g.*, FED. R. CIV. P. 49. A fact finding also may be implicit in a judge’s opinion or in general jury verdict if such an implicit fact finding is seen to be a necessary precondition to the ultimate decision that was reached. *See, e.g.*, *La Vallee v. Della Rose*, 410 U.S. 690 (1973).

45. These arguments elsewhere have been described as “So What?” arguments. *See* JO POTUTO, *WINNING APPEALS: THE ART OF PERSUASIVE WRITING* 42 (1992).

46. The success of a plaintiff’s lawyer in part may depend on how well a defendant’s lawyer fields. If the latter lawyer makes errors, such as misstating the law, or is positioned incorrectly to make a play by failing to identify helpful facts or to make persuasive arguments, then a plaintiff’s lawyer may be able to win a weak case.

47. *See, e.g.*, Michele G. Falkow, *Pride and Prejudice: Lessons Legal Writers Can Learn from Literature*, 21 *TOURO L. REV.* 349, 366 (2005); Troy Simpson, *The Art of Written Persuasion: From IRAC to FAILSAFE - A Compilation of Legal Problem-Solving Models, Law Technology Resources for Legal Professionals*, LLRX (Oct. 11, 2008), <https://www.llrx.com/2008/10/the-art-of-written-persuasion-from-irac-to-failsafe-a-compilation-of-legal-problem-solving-models/#more-2559> [<https://perma.cc/A6N7-2NPD>]; Leonard Tourney & Gina Genova, *IRAC: How to Write about Legal Cases*, UNIV. OF CAL., SANTA BARBARA, <http://www.writing.ucsb.edu/sites/secure.lsit.ucsb.edu.writ.d7/files/sitefiles/people/genova/IRAC%20How%20to%20Write%20about%20Legal%20Cases.pdf> (last visited Aug. 29, 2017) [<https://perma.cc/45VX-7CGV>].

or legal standard that defines the legal right governing the dispute. The Application is the matching of relevant facts to black letter rule. Done well, R + A leads inexorably to C, the conclusion a lawyer advocates.

The principles of hitting offer a concrete illustration of R and A. A bat is a condition precedent to hitting just as a black letter rule is a condition precedent to constructing a legal argument. With bat or black letter rule in hand, it is time to play ball.

Hitting requires a batter to connect bat to ball. Constructing a legal argument requires applying black letter law to relevant facts. Having a bat in hand does not mean a batter will make contact with the ball, let alone get a hit. Similarly, articulating a black letter rule does not mean a lawyer will apply relevant facts correctly to the rule, let alone make a cogent and persuasive legal argument.

When batters go up to the plate with a well-made bat, they optimize their chances to connect with the ball. When they hit the ball squarely on the sweet spot of the bat, the ball will sail away. Combined with power, the hit could be a home run. Likewise, when lawyers state the elements of a black letter rule completely and precisely, they optimize their chances of making the best available argument on the facts. They also then must find and use all helpful facts. Combined with a well-written and organized recitation of the facts geared to persuade, the argument will be a hit.⁴⁸

A poorly or imprecisely articulated black letter rule equates to a poorly made bat. Even if a lawyer finds great facts, the legal argument will be defective because the black letter rule is. The converse yields the same sorry result, in that even a perfectly articulated black letter rule is of little use unless matched with relevant and helpful facts. In either case, the best a lawyer can hope for is a squibbler down the first base line⁴⁹ and perhaps a weak single. More likely, a lawyer will make an out or foul the ball away.

Black letter law and relevant facts are both critical to a persuasive legal argument. A well-made bat and connecting with the ball are critical to successful hitting. In the words of an old song, love and marriage go

48. Whether an argument is a home run depends on an additional variable—the existence of helpful facts. *See* discussion *infra* notes 49–50 and accompanying text.

49. A squibbler is a batted baseball that is either off the end of the bat or with the batter swinging very late. This puts a side spin on the ball as it rolls typically to the first baseman. The ball is difficult to catch and can be trouble for the infielder to make a play.

Squibbler, WIKIPEDIA GLOSSARY OF BASEBALL, https://en.wikipedia.org/wiki/Glossary_of_baseball_%28S%29 (last visited June 28, 2017) [<https://perma.cc/2G38-TWJ6>].

together like “a horse and carriage.”⁵⁰ In the song, “you can’t have one without the other.”⁵¹ Whether that still is true for love and marriage in the 21st century may be debatable. It is true for legal argument and hitting, however, unless you are prepared to lose.

V. HORSE AND CARRIAGE ILLUSTRATED

The point is eminently clear: black letter law and facts are both necessary to a successful legal argument.

Consider a convenience store robbery. Three witnesses describe the robber as a tall, slender, blond-haired woman in her mid-20s dressed in a pink, wraparound dress and wearing flip flops. Officer Oscar sees Defendant Deborah on the street in the vicinity of the robbery. Deborah matches the witness description in all particulars. Officer Oscar stops Defendant Deborah and asks to talk to her about the robbery, and she agrees. Defendant Deborah ultimately is indicted.

Officer Oscar did not give Defendant Deborah Miranda warnings before talking to her about the robbery. Defendant Deborah’s lawyer now moves to suppress what Deborah told Officer Oscar on the ground that failure to give Miranda warnings violated her privilege against self-incrimination. A pretrial hearing is held.

A. Example 1: Holding a Banana, Not a Bat

Deborah’s lawyer is Olivia OnlyFacts. Lawyer OnlyFacts’s articulation of the Miranda requirement is that police questioning of a suspect must be preceded by Miranda warnings or any consequent statement is inadmissible at trial. For Lawyer OnlyFacts, the two prime elements of the black letter rule are (1) questioning; and (2) the fact that the individual questioned is a suspect. The correct black letter rule is that police questioning of a suspect *in custody* must be preceded by Miranda warnings or any statement is inadmissible at trial.⁵²

50. Frank Sinatra, *Love and Marriage*, on THAT’S SINATRA! (Capital Records 1955).

51. *Id.*

52. *See* *Miranda v. Arizona*, 384 U.S. 436, 491–92 (1966). Throughout the discussion in text, this Article discusses black letter law in the singular. This is grossly oversimplified and done for ease of discussion. A case most likely involves multiple black letter rules, and the dimensions of any one of them may have multiple components, each involving black letter rule articulation. There are a variety of factors, for example, that determine whether there was questioning for purposes of Miranda warnings—form of the question, whether questions relate

Lawyer OnlyFacts adduces facts from both Deborah and Officer Oscar. Both Deborah and Officer Oscar agree that he asked her specific questions about the robbery. There was questioning for purposes of Miranda. So far, so good. Lawyer OnlyFacts also adduces facts to show that Deborah was a suspect. Deborah testifies that Officer Oscar's demeanor and questions led her to conclude that she was a suspect. Officer Oscar recites the particular questions that he asked. Without setting them forth here, be assured that the questions support the conclusion that Officer Oscar questioned Deborah as a suspect and not as a witness to the robbery. Officer Oscar also testifies that (1) he was investigating the robbery when he stopped Deborah; (2) Deborah matched the witness description of the robbery; (3) in a two-hour period, Deborah was the only woman he stopped to question; (4) before he questioned Deborah, he phoned police headquarters to say he had a suspect and might need a police cruiser for transport to police headquarters; and (5) he arrested Deborah immediately after questioning her.

Lawyer OnlyFacts did a first-rate job showing that Deborah was a suspect. Because she did not understand the black letter Miranda rule, however, she did a woeful job of articulating operative black letter law. The operative element to be proved was that Deborah was in custody—not that she was a suspect. Lawyer OnlyFacts loses the motion to suppress.

B. Example 2: Holding a Super Bat, but Whiffing

Deborah's lawyer now is Omar OnlyLaw. There is a major difference this time in the encounter between Officer Oscar and Deborah. In this rendition, Officer Oscar arrests Deborah as soon as he walks up to her. He then asks to talk to her about the robbery, and she agrees. Lawyer OnlyLaw correctly articulates the two black letter elements of the obligation to give Miranda warnings: questioning and custody.⁵³ Nevertheless, Lawyer OnlyLaw does not elicit facts that would show custody. In particular, he does not elicit the fact that Deborah was arrested before she was questioned. The result: Lawyer OnlyLaw loses the motion to suppress.

to elements or circumstances of crime, whether an emergency existed, triggering an exception to the obligation to give warnings, who initiated the questions related to the crime, and so on. Each of these issues might prompt additional rules of law to be articulated and for which facts would need to be applied.

53. *Id.*

C. Example 3: Holding a Super Bat, but Having No Pitch to Hit

This example mirrors Example 1 in that Officer Oscar does not arrest Deborah until after he questions her. This time Deborah's lawyer is Brian BothLaw&Facts. Lawyer BothLaw&Facts correctly articulates the black letter elements of the obligation to give Miranda warnings as questioning and custody. He also does a first-rate job of eliciting all the facts of the encounter between Deborah and Officer Oscar. Despite his first-rate job, Lawyer BothLaw&Facts still loses the motion to suppress because there are insufficient facts to support the conclusion that Deborah was in custody when she was questioned.⁵⁴ The moral is sad but true: lawyers, no matter how good, are not magicians. They can neither write controlling law to fit their facts nor create favorable facts to fit controlling law. They can brush and clean a sow's ear, dress it up, maybe even make it lovable, but they cannot turn it into a silk purse.

D. Example 4: Success

This example mirrors Example 2 in that Officer Oscar arrests Deborah before questioning her. Again, Deborah is represented by Lawyer BothLaw&Facts. This time the planets align. Lawyer BothLaw&Facts correctly articulates the black letter elements of the obligation to give Miranda warnings as questioning and custody. He also does a first-rate job of eliciting all the facts of the encounter between Deborah and Officer Oscar, including the critical fact that the arrest preceded questioning. He is not a better lawyer than he was in Example 3, but this time he can hit the ball out of the park.

VI. BATTING AND LEGAL ARGUMENT, THE CLOSER

Of course, the parallel between hitting and legal argument is not perfect. Baseball is a human-created world where perfection is exceptionally rare, but still possible;⁵⁵ where a home plate umpire is governed neither by precedent regarding a strike zone nor even law of the case regarding the strike zone over the course of a game.⁵⁶ Legal argument, by contrast, lives

54. In the absence of an arrest warrant, the burden at the motion to suppress hearing is on the prosecutor. *See, e.g., Florida v. Royer*, 490 U.S. 491 (1983); *Brown v. Illinois*, 422 U.S. 590, 604 (1975); *People v. Willis*, 46 P.3d 898, 907 (Cal. 2002). On these facts, the prosecutor will have no trouble meeting his burden.

55. *See History of the Game, supra* note 18.

56. Yet another difference—it is acceptable fan behavior to shout “kill the ump” at a perceived bad call. Shouting “kill the judge” would lead to an arrest.

in the real world where only optimal success, not perfection, is achievable, and where precedent matters. A batter may miss-hit a ball and yet continue his time at the plate. The result for a lawyer who articulates the wrong black letter rule or lacks—or fails to find—needed facts is an out, pure and simple. Unlike baseball, a lawyer does not get to foul a ball off and then try again, and again, and again. In law, we have *res judicata*.

Batters and the team for which they compete sometimes win, no matter that there is much more talent on the other team. When that happens, we applaud the underdog or note the vagaries of the law of averages. Lawyers should never win when applicable facts fail to support a win under controlling law. When that happens anyway, we call it a miscarriage of justice or suggest that a judge has exceeded his or her proper and constitutional role in a tripartite government structure.

All that is true, undeniably, but it is not the whole picture. Baseball long ago lost to football its position as the most popular American sport. Possibly, basketball now also exceeds baseball in popularity. Neither football nor basketball can claim first place as subject matter for legal scholars, however, and neither offers a concrete and easy-to-understand model of the foundational requirements for effective and persuasive writing. In these areas, the national pastime still reigns.

APPENDIX

WHO'S ON FIRST?

Abbott: Well Costello, I'm going to New York with you. You know Bucky Harris, the Yankee's manager, gave me a job as coach for as long as you're on the team.

Costello: Look Abbott, if you're the coach, you must know all the players.

Abbott: I certainly do.

Costello: Well you know I've never met the guys. So you'll have to tell me their names, and then I'll know who's playing on the team.

Abbott: Oh, I'll tell you their names, but you know it seems to me they give these ball players now-a-days very peculiar names.

Costello: You mean funny names?

Abbott: Strange names, pet names . . . like Dizzy Dean . . .

Costello: His brother Daffy.

Abbott: Daffy Dean . . .

Costello: And their French cousin.

Abbott: French?

Costello: Goofè.

Abbott: Goofè Dean. Well, let's see, we have on the bags, Who's on first, What's on second, I Don't Know is on third . . .

Costello: That's what I want to find out.

Abbott: I say Who's on first, What's on second, I Don't Know's on third.

Costello: Are you the manager?

Abbott: Yes.

Costello: You gonna be the coach too?

Abbott: Yes.

Costello: And you don't know the fellows' names?

Abbott: Well I should.

Costello: Well then who's on first?

Abbott: Yes.

Costello: I mean the fellow's name.

Abbott: Who.

Costello: The guy on first.

Abbott: Who.

Pause

Costello: Look, you gotta first baseman?

Abbott: Certainly.

Costello: Who's playing first?

Abbott: That's right.

Costello: When you pay off the first baseman every month, who gets the money?

Abbott: Every dollar of it.

Costello: All I'm trying to find out is the fellow's name on first base.

Abbott: Who.

Costello: The guy that gets . . .

Abbott: That's it.

Costello: Who gets the money.

Abbott: He does, every dollar. Sometimes his wife comes down and collects it.

Costello: Who's wife?

Abbott: Yes.

Pause

Abbott: What's wrong with that?

Costello: Look, all I wanna know is when you sign up the first baseman, how does he sign his name?

Abbott: Who.

Costello: The guy.

Abbott: Who.

Costello: How does he sign . . .

Abbott: That's how he signs it.

Costello: Who?

Abbott: Yes.

Pause

Costello: All I'm trying to find out is what's the guy's name on first base?

Abbott: No. What is on second base.

Costello: I'm not asking you who's on second.

Abbott: Who's on first.

Costello: One base at a time!

Abbott: Well, don't change the players around.

Costello: I'm not changing nobody!

Abbott: Take it easy, buddy.

Costello: I'm only asking you, who's the guy on first base?

Abbott: That's right.

Costello: Ok.

Abbott: All right.

Pause

Costello: What's the guy's name on first base?

Abbott: No. What is on second.

Costello: I'm not asking you who's on second.

Abbott: Who's on first.

Costello: I don't know.

Abbott: He's on third, we're not talking about him.

Costello: Now how did I get on third base?

Abbott: Why you mentioned his name.

Costello: If I mentioned the third baseman's name, who did I say is playing third?

Abbott: No. Who's playing first.

Costello: What's on first?

Abbott: What's on second.

Costello: I don't know.

Abbott: He's on third.

Costello: There I go, back on third again!

Pause

Costello: Would you just stay on third base and don't go off it.

Abbott: All right, what do you want to know?

Costello: Now who's playing third base?

Abbott: Why do you insist on putting Who on third base?

Costello: What am I putting on third.

Abbott: No. What is on second.

Costello: You don't want who on second?

Abbott: Who is on first.

Costello: I don't know.

Abbott & Costello Together (shouting): Third base!

Pause

Costello: Look, you gotta outfield?

Abbott: Sure.

Costello: The left fielder's name?

Abbott: Why.

Costello: I just thought I'd ask you.

Abbott: Well, I just thought I'd tell ya.

Costello: Then tell me who's playing left field.

Abbott: Who's playing first.

Costello: I'm not . . . stay out of the infield! I want to know what's the guy's name in left field?

Abbott: No, What is on second.

Costello: I'm not asking you who's on second.

Abbott: Who's on first!

Costello: I don't know.

Abbott & Costello Together (shouting): Third base!

Pause

Costello: The left fielder's name?

Abbott: Why.

Costello: Because!

Abbott: Oh, he's centerfield.

Pause

Costello: Look, You gotta pitcher on this team?

Abbott: Sure.

Costello: The pitcher's name?

Abbott: Tomorrow.

Costello: You don't want to tell me today?

Abbott: I'm telling you now.

Costello: Then go ahead.

Abbott: Tomorrow!

Costello: What time?

Abbott: What time what?

Costello: What time tomorrow are you gonna tell me who's pitching?

Abbott: Now listen. Who is not pitching.

Costello: I'll break your arm, you say who's on first! I want to know what's the pitcher's name?

Abbott: What's on second.

Costello: I don't know.

Abbott & Costello Together (shouting): Third base!

Pause

Costello: Gotta a catcher?

Abbott: Certainly.

Costello: The catcher's name?

Abbott: Today.

Costello: Today, and tomorrow's pitching.

Abbott: Now you've got it.

Costello: All we got is a couple of days on the team.

Pause

Costello: You know I'm a catcher too.

Abbott: So they tell me.

Costello: I get behind the plate to do some fancy catching. Tomorrow's pitching on my team and a heavy hitter gets up. Now the heavy hitter bunts the ball. When he bunts the ball, me, being a good catcher, I'm gonna throw the guy out at first base. So I pick up the ball and throw it to who?

Abbott: Now that's the first thing you've said right.

Costello: I don't even know what I'm talking about!

Pause

Abbott: That's all you have to do.

Costello: Is to throw the ball to first base.

Abbott: Yes!

Costello: Now who's got it?

Abbott: Naturally.

Pause

Costello: Look, if I throw the ball to first base, somebody's gotta get it. Now who has it?

Abbott: Naturally.

Costello: Who?

Abbott: Naturally.

Costello: Naturally?

Abbott: Naturally.

Costello: So I pick up the ball and I throw it to Naturally.

Abbott: No you don't, you throw the ball to Who.

Costello: Naturally.

Abbott: That's different.

Costello: That's what I said.

Abbott: You're not saying it . . .

Costello: I throw the ball to Naturally.

Abbott: You throw it to Who.

Costello: Naturally.

Abbott: That's it.

Costello: That's what I said!

Abbott: You ask me.

Costello: I throw the ball to who?

Abbott: Naturally.

Costello: Now you ask me.

Abbott: You throw the ball to Who?

Costello: Naturally.

Abbott: That's it.

Costello: Same as you! Same as YOU! I throw the ball to who. Whoever it is drops the ball and the guy runs to second. Who picks up the ball and throws it to What. What throws it to I Don't Know. I Don't Know throws it back to Tomorrow. Triple play. Another guy gets up and hits a long fly ball to Because. Why? I don't know! He's on third and I don't give a darn!

Abbott: What?

Costello: I said I don't give a darn!

Abbott: Oh, that's our shortstop.