



For The Record

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→Eckstein Hall, room 433

→5 pm



Martin Greenberg



Clark Griffith

Head Coach's Authority to Hire Assistant Coaches and the Necessity of a Paper Trail – The Jimmy Williams Case

By **Martin J. Greenberg**, Managing Member, Law Office of Martin J. Greenberg, LLC, Milwaukee, Wisconsin & **Clark Griffith**, Attorney at Law, Clark C. Griffith, P.A., and Commissioner, Northern League of Professional Baseball, Minneapolis, Minnesota

On April 2, 2007, a basketball coach had a fourteen minute telephone conversation with a prospective assistant coach who thought he was offered a job. The assistant coach was never hired and sued because he had quit his current job in reliance on the offer. A jury awarded the assistant coach \$1,247,293 in damages. This article examines the lawsuit and offers important advice in relation to a coach's authority to hire assistant coaches.

From 1971-1986, Jimmy Williams was an assistant coach for the University of Minnesota men's basketball team, first under head coach Bill Musselman and then Jim Dutcher. Williams remained with the Gophers eleven years after he was cited for NCAA violations under Musselman. During this time, the university also allowed Williams to replace Dutcher as interim head coach for 11 games in 1986.¹

Orlando "Tubby" Smith was hired as head basketball coach in 2007 after coaching at the University of Kentucky and the University of Georgia. As of the 2009-2010 season, Smith had seventeen consecutive twenty-game winning seasons during his career. More important, Smith has run clean programs free from any NCAA violations.²

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1. Sid Hartman, *Williams' Long Tenure at U Helped His Cause*, MINNEAPOLIS STAR TRIBUNE, May 27, 2010.

2. Tubby Smith, http://en.wikipedia.org/wiki/Tubby_Smith (last visited July 5, 2010).

Prior to April 2, 2007, Williams was an assistant coach for Oklahoma State University. Williams alleged that on that day, in a fourteen-minute telephone conversation, Smith verbally offered Williams a position as assistant men's basketball coach at Minnesota's for a \$200,000 salary.³ This salary included an annual salary of \$175,000 plus \$25,000 for running Smith's basketball camp, matching Williams' Oklahoma State salary.⁴ Ninety minutes later, Williams called Oklahoma State's Sean Sutton to resign from his job with the Cowboys. Smith called Williams the next morning informing him that Athletic Director Joe Maturi had to approve his contract. Smith did not seem to have any concerns that this would take place. The two even discussed a planned recruiting trip to Houston.⁵ Williams further alleged that in reliance on Smith's offer, he quickly made arrangements to sell his Oklahoma home and move to Minnesota.⁶

That afternoon, a Minnesota compliance officer e-mailed Maturi the reports from 1976 citing Williams for recruiting violations under head coach Musselman and from 1988 under head coach Dutcher. The violations included providing prospects with financial aid, airline tickets, clothing and meals. Williams was barred from recruiting for two years, and the Minnesota men's program was placed on probation for two years.⁷

Maturi immediately telephoned Smith to tell him hiring Williams was out of the question. Smith claimed that he was unaware of the seriousness of the violations against Williams. Less than seven years after Minnesota was sanctioned in a different academic fraud scandal, a scandal that many perceived, had decimated the program, Maturi was acutely sensitive to the risks surrounding coach Williams potential return. He testified that

We are talking about a men's basketball program that has had a history of social ills, a history of NCAA violations, a history of misconduct and incidents ... (that) certainly had an awful lot to do with the depths of the program in the last couple of years. . . I did not believe it was the right thing to start this new era of Minnesota basketball with one of the most highly respected coaches in America [,and then] to have someone on the staff [return] with a known listing of violations that occurred, let alone occurred while at the University of Minnesota. And when coach Smith and I had that discussion, he agreed.⁸

In response, Williams argued that the university held Smith out as having either the express or apparent authority to hire assistant coaches for the men's basketball team. Williams further alleged that Smith's offer and his subsequent acceptance created an enforceable contract that was then breached by the University of Minnesota and its athletic director.⁹

On September 25, 2007, Williams sued the Board of Regents of the University of Minnesota, Smith and Maturi, making numerous allegations.¹⁰ Because there was little documentation of the discussions between the parties and the potential contract offer that was made. The *Williams* case is a classic case of

3. *Williams v. Bd. of Regents of Univ. of Minn.*, 763 N.W.2d 646, 649-650, (Minn. Ct. App. 2009).

4. Brian Murphy, *Former Coach Jimmy Williams Lawsuit Reopens Wounds of University of Minnesota*, ST. PAUL PIONEER PRESS, May 12, 2010.

5. *Id.*

6. *Williams*, 763 N.W.2d at 650.

7. Murphy, *supra* note 4.

8. *Id.*

9. *Williams*, 763 N.W.2d at 650.

10. Murphy, *supra* note 9.

“he said – he said.” The basic issues for the court to consider were whether Smith had the actual or apparent authority to make a hire without the university placing any conditions on this authority, and whether it was reasonable for Williams to rely on the telephone conversation without any follow-up documentation before believing he had received a new job and quitting his current position.¹¹

After an eight day trial and several hours of deliberation, the seven member jury determined that Smith wrongfully misled Williams to believe he had the power to hire him. The jury believed that Smith either had the authority or falsely misrepresented to Williams that he had the final authority to hire assistants, finding the university responsible and awarding damages of \$1,247,293.¹²

A juror who was questioned after the verdict said that “the panel took into account what a reasonable person would do and the standard practice among college coaches when hiring assistants.”¹³ On September 21, 2010, Hennepin County Judge Regina Chu denied a request for a retrial, finding a reasonable basis for the jury’s verdict, but reducing the damages award from \$1,247,293 to \$1 million, the maximum limit of the University of Minnesota’s liability insurance policy.¹⁴

Under paragraph 1.2, “Duties,” Smith’s employment agreement states that during the term of employment, he had to devote his full time, attention, and best efforts in performing and discharging the usual and customary duties assigned to a head coach of an NCAA Division I basketball team, including but not limited to the following duties: “Managing and supervising all basketball coaching support staff including clerical staff, and all staff associated with training and strength and conditioning subject to the review and approval of the Director and the policies and procedures of the University and the Governing Associations.”¹⁵ Furthermore, paragraph 1.2.2 indicates that “[d]uring the term of the Agreement, Coach shall report directly to the Director who shall be his supervisor for all purposes of review and evaluation. Coach shall coordinate with the Senior Associate Athletics Director with regard to the day-to-day operation and administration of the Program.”¹⁶

The basic issues for the court to consider were whether Smith had the actual or apparent authority to make a hire without the university placing any conditions on this authority, whether it was reasonable for Williams to rely on the telephone conversation without any follow-up documentation. . .

Hiring and firing assistant coaches is a usual and customary duty of a head coach in NCAA Division I men’s basketball programs, although Smith’s contract does not specifically include this duty. However, Smith is responsible for managing and supervising all basketball coaching support staff, which presumably means hiring and firing assistant coaches, although he must consult and coordinate his decisions with the Senior Associate Athletics Directors and Athletic Director.

There are several varieties of coaching contract provisions with respect to hiring and firing assistant coaches. Some contracts are silent as to the topic. Other contracts, similar to Smith’s contract, refer to

11. Rochelle Olson, *U, Tubby on the Hook for \$1.25 Million Verdict*, STAR TRIBUNE, May 27, 2010.

12. *Id.*

13. *Id.*

14. *Vols report violations*, MILWAUKEE JOURNAL SENTINEL, Sept. 22, 2010, at 6(C).

15. Employment Agreement entered into by Orlando (Tubby) Smith and Regents of the University of Minnesota at 1-2, Mar. 22, 2007.

16. *Id.* at 2.

“usual and customary” duties in regard to the head coach managing the team’s staff subject to reporting responsibilities to the director. However, the most common language found in current men’s coaching contracts deals specifically with the head coach’s responsibility to hire and fire and often includes final approval of these decisions by the athletic director or others at the particular university. The following are some examples of contract clauses:

Mark Turgeon - Texas A&M

Employment Contract effective 4/10/07

Duties and Obligations – 2.1

Turgeon shall perform all prescribed duties subject to the provisions and pursuant to the orders, advice, and direction of the Director. Turgeon shall be able to hire and terminate assistant men’s basketball coaches subject to the policies, regulations and rules of The Texas A&M University System and UNIVERSITY; with all salaries approved by the Director in advance.¹⁷

Don Verlin – University of Idaho

Employment Agreement for period commencing 3/24/08 and terminating 3/23/2013.¹⁸

4.4 Hiring Authority. Coach shall have the responsibility and the sole authority to recommend to the Director the hiring and termination of assistant coaches for the Team, but the decision to hire or terminate an assistant coach shall be made by the Director and shall, when necessary or appropriate, be subject to the approval of President and the University’s Board of Regents.¹⁹

Travis Ford – Oklahoma State University

Employment Contract dated April 17, 2008.²⁰

12. Assistant Coaches. Subject to the approval of the Vice President for Athletic Programs and Director of Intercollegiate Athletics and in accordance with University Policy or individual contracts, the Coach shall have authority to select, establish the salaries of, and dismiss assistant men’s basketball coaches, and to direct the scope of their duties, provided the costs of employment of such coaches shall remain within the University’s allotted budget for said purposes.²¹

Francisco Martin – Kansas State University

Kansas State University Men’s Basketball Head Coach Employment Agreement effective as of April 6, 2007.²²

2.03(d) Coach has authority and responsibility to make decisions as to the hiring, continued employment, job titles, compensation, and dismissal of assistant coaches for the men’s basketball program. All such decisions will be subject to the approval of the

¹⁷. Employment Contract entered into by Texas A&M University and Mark Turgeon at 1, Apr. 10, 2007.

¹⁸. See Employment Agreement entered into by the University of Idaho and Don Verlin at 1, Mar. 24, 2008.

¹⁹. *Id.* at 8

²⁰. Employment Contract entered into by Oklahoma State University and Travis Ford at 1, Apr. 17, 2008.

²¹. *Id.* at 11

²². Kansas State University Men’s Basketball Head Coach Employment Agreement entered into by Kansas State University, Inc. and Francisco J. Martin, Apr. 6, 2007.

Athletic Director or his designee, with such approval not to be unreasonably withheld, and all hiring decisions are subject to standard IAC pre-employment inquiries, including NCAA and criminal background checks. Coach will supervise these employees, including the supervision of their compliance with IAC and University policies, and with Big 12 Conference and NCAA rules and regulations.²³

Stephen Alford – University of New Mexico

First Amendment to Addendum to Employment Agreement

1. Coach Alford and the University mutually agree that paragraph 1 of the Addendum, Position, be amended by addition of the following language at the end of the paragraph: Recognizing that success of the University's intercollegiate men's basketball program will be materially aided by continued retention of a fully qualified Associate Head Coach/Men's Basketball the University will, for the life of the Agreement between the University and Coach Alford, maintain the minimum, total compensation of the Associate head Coach/Men's Basketball at \$250,000.00. The University and Coach Alford agree that the University retains sole discretion to distribute the minimum, total compensation of the Associate Head Coach/Men's Basketball among base salary, deferred compensation, promotion of the Men's Basketball program and of University and its Men's Basketball program, or otherwise as may be negotiated between the University and any individuals filling the position of Associate Head Coach/Men's Basketball. Further, the University and Coach Alford agree that the University retains sole discretion to approve the selection and hiring of any individual to fill the position of Associate Head Coach/Men's Basketball. The sole effect of this amendment is to fix the minimum, total compensation of persons hired into that position.²⁴

John Calipari – University of Kentucky

Employment Agreement – entered into as of March 31, 2009²⁵

2(a) The employment, supervision, and discharge – subject to the reasonable approval of the Director of Athletics which will be withheld only if the Director of Athletics, in good faith, believes that any such proposed action of Coach will reasonably conflict with the University's policies and/or stated principals of which Coach has been advised – of personnel associated with or related to the men's basketball program at the University including, but not limited to, the following:

- (i) Assistant basketball coaches;
- (ii) Administrative aides;
- (iii) Strength/condition coaches;
- (iv) Administrative assistants;
- (v) Team trainers and managers; and
- (vi) Video personnel.

The employment and discharge of personnel mentioned in subparagraphs (i) through (vi)

²³ *Id.* at 2.

²⁴ First Amendment To Addendum To Employment of Head Coach Steve Alford entered into by Steve Alford and the University of New Mexico, Apr. 9, 2008.

²⁵ Employment Agreement entered into by the University of Kentucky and John Vincent Calipari, at 1, Mar. 31, 2009.

above shall also be subject to the reasonable approval of the Associate Vice President of Human Resources in accordance with University's Human Resources Policy and Procedures, Administrative Regulations, and any applicable provisions of the NCAA Manual and the Southeastern Conference (hereinafter "SEC") and Commissioner's Regulations Manual, as amended. Notwithstanding the foregoing obligation to obtain reasonable approval of personnel actions, Coach retains responsibility for employment decisions.

Bruce Pearl - University of Tennessee, Knoxville

Employment Agreement dated 10/13/2005

Article 1(A)(3)

Hiring, disciplining, and terminating the following personnel for the men's basketball program: assistant coaches, director of operations, graduate assistant coaches, and clerical and supporting staff. Coach Pearl shall comply with all applicable University policies in hiring, disciplining, and terminating personnel, and Coach Pearl's authority to hire and terminate such personnel shall be subject to approval by the Director of Men's Athletics, which approval shall not be unreasonably withheld. The hiring, discipline, and termination of the trainer and strength coach assigned to the men's basketball program shall be the responsibility of the Director of Men's Athletics, who will consult with Coach Pearl prior to hiring, disciplining, or terminating employees in these positions.²⁶

Roy A. Williams – University of North Carolina at Chapel Hill

Employment Agreement - Men's Head Basketball Coach dated April 16, 2003²⁷

II. Duties

The Coach is hereby employed by University as Men's Head Basketball Coach with all of the duties, responsibilities, obligations, and privileges normally associated with the position of Men's head Basketball Coach at a major university such as University.

During the term of this Agreement, Coach shall report to and be under the immediate supervision of University's Athletic Director and shall regularly confer with the Athletic Director on matters concerning administrative and technical decisions. Without limiting the generality of the foregoing, Coach shall have the responsibility and authority, in consultation with the Athletic Director and consistent with all applicable University policies, as such may be amended from time to time, to employ and discharge all personnel assigned to the Men's Basketball Program.²⁸

26. Employment Agreement entered into by The University of Tennessee and Bruce Pearl at 1, June 29, 2009.

27. Employment Agreement Men's Head Basketball Coach entered into by The University of North Carolina at Chapel Hill and Roy A. Williams at 1, Apr. 16, 2003.

28. *Id.* at 1-2.

William J. Donovan – The University Athletic Association (University of Florida)
University of Florida Head Coaching Agreement (Basketball)

5. Duties:

(f) Subject to the express written approval of Athletic Director, which will not be unreasonably withheld, and in accordance with University Regulations, Coach shall have the authority to select, employ and terminate assistant basketball coaches. No person shall be employed as an assistant basketball coach for whom a favorable clearance from the NCAA has not been first obtained by the Athletic Director.²⁹

The following examples are from the University of Minnesota's fellow Big-10 conference universities.

Thad Matta – Ohio State

Employment Agreement – dated 3/8/2005

4.6 Coach shall have the responsibility and the sole authority to recommend to the Director the hiring and termination of Assistant Coaches for the Team, but the final decision shall be made by the Director and shall, when necessary or appropriate, be subject to the approval of Ohio State's Board of Trustees.³⁰

Tom Crean – Indiana University

Employment Agreement dated August 11, 2008

B.2(a) Hire, train, supervise, and evaluate assistant coaches and support staff, including ensuring compliance with the Governing Rules by such coaches and support staff.³¹

John Beilein – University of Michigan

Employment Agreement dated April 3, 2007

2.03(d)

The Head Coach has authority and responsibility to make decisions as to the hiring, continued employment, job titles, compensation, and dismissal of assistant coaches and support staff for the basketball program. Men's Basketball Program will be provided with a salary fund of \$400,000 to be paid to the assistant coaches and the Director of Basketball Operations, the amounts to be determined at the discretion of the Head Coach. All such decisions will be subject to the prior approval of the Athletic Director and the Human Resources Office. The Head Coach will supervise these employees, including supervision of their compliance with University, Big 10 Conference, and NCAA rules and regulations.³²

29. University of Florida Head Coaching Agreement (Basketball) entered into by The University Athletic Association, Inc. and William J. Donovan at 5-6, Apr. 16, 2003.

30. Employment Agreement between The Ohio State University and Thad M Matta at 15, March, 8, 2005.

31. Indiana University Employment Agreement entered into by The Trustees Of Indiana University and Thomas Crean at 2, Aug. 11, 2008.

32. Employment Agreement entered into by the University of Michigan and John P. Beilein at 2, Apr. 3, 2007.

While the *Williams* case may be an anomaly, it demonstrates the dangers of an absence of a paper trail. The jury did not accept the University's position that a formal offer had not been made, or that Williams was not instructed to quit his current job. The jury was not convinced that the process was not finalized until a contract was signed. The jury believed that Smith had complete authority to hire and fire or, in the alternative, that his authority was misrepresented to Williams.³³

The legal theories of detrimental reliance and promissory estoppel came into play in the *Williams* case. The jury concluded that a promise was made, that Williams reasonably relied on that promise, and that his reliance was detrimental to his interests. By enforcing the promise, the jury seemed determined to prevent an injustice.

The *Williams* case may not be a typical situation but it is an example of what can happen when the head coach's contract does not specifically deal with the hiring and firing of team personnel. As the examples above show, in most college coaching contracts, the coach is employed as a head coach of a college sports program and is then endowed with all the duties, responsibilities, obligations, and privileges normally associated with the position. Hiring and firing of assistant coaches is normally one of those responsibilities. Most coaching contracts more specifically delineate that the coach has the authority to select, employ, discharge, terminate, create job titles, and determine compensation for assistant coaches. These contracts include further restrictions explaining that the head coach may not have the ultimate say-so, and that the hiring of an assistant coach may be subject to approval of the athletic director or ultimately by the Board of Trustees. The individual's power to hire and the conditions placed on this power must also be communicated to potential employees at the beginning of any conversation related to a potential job so that there is no doubt that decisions of the individual offering (or seemingly offering) a position must still be approved by others.

In an NCAA violation-conscious environment, any athletic director is going to want to undertake a background check of a proposed hire and any offer to hire should be made specifically contingent upon the results of the background check. In addition, oral offers of employment must be quickly followed by written documentation that indicates the specific terms and conditions of the employment offer and specifies that the offer is subject to the conditions subsequent of entering into a formal contract and securing the approval of the athletic director or another supervisory body within the university. The *Williams* case may not have been litigated if there had simply been an e-mail sent to Williams soon after his April 2nd discussion with Smith that included the specific terms of the job offer and the fact that the offer was subject to the execution of a contract and ultimate approval by the athletic director.

Even if the authority to hire and fire of assistant coaches is not specifically listed in the head coach's contract, that power can be inferred by language including broad supervisory authority or by reference to customary practices within the collegiate coaching industry. If the athletic department does not want to give the coach the final or sole power to hire and fire assistants, the contract should make this clear, should identify who has this power, and should explain the conditions that may affect the exercise of this power.

The *Williams* case serves as a warning to athletic directors that they need to take a more proactive and supervisory role in the hiring of athletic department personnel, and that this includes definitive understandings with coaches, no matter what their status and image, concerning their actual authority.

Most coaches would not resign from a current position or move to a new location until they had a signed

33. Olson, *supra* note 11.

agreement in hand. However, *Williams* demonstrates that a subordinate coach who makes arrangements based upon nothing more than a verbal offer may still be compensated for harm caused by detrimental reliance on a head coach's representations.

As Bill Carr, former Athletic Director at the University of Florida and the University of Houston, has said, "This is a matter of contract. The powers and responsibilities of the head coach with respect to hiring must be spelled out in the employment MOU or contract. The conditions of that authority must be communicated to potential hires, followed by a paper trail that documents how and when the hire becomes an official employee of the University. Such basic practices in the future will eliminate the potential financial exposures to the University and the necessity of having to take a case before a jury."

{We wish to thank law student Daniel Friedman for his assistance with respect to research, editing and footnoting.}



The Art of Discretion: Umpires as Judges

By **Carrie Leonetti**, Assistant Professor, University of Oregon School of Law

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

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

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

This essay posits essentially the opposite hypothesis: that those who object to the judges-as-umpires analogy (not to mention many of those who employ it) do not really understand what umpires do. While

1. George Will, *MEN AT WORK: THE CRAFT OF BASEBALL* (1991), at 4.

2. See, e.g., *In re: Warrick*, 278 B.R. 182, 189 (9th Cir. 2002) (Klein, J., dissenting); *Morrison & Snodgrass Co. v. Hazen*, 10 Ohio N.P. (N.S.) 353 (1910) (“A judge presiding at the trial of a jury case is not a mere umpire of a game of ball, to call balls and strikes, nor is he a mere moderator between contending parties, but he has active duties to perform in maintaining justice and in seeing that the truth is developed, and he may for such purpose put proper questions to the witnesses, and even leading questions.”); *Moon v. Texas*, 572 S.W.2d 681, 689 (Tex. Crim. App. 1978) (Phillips, J., concurring) (“The Court's decision in *Alford* also serves to refute what I believe to be the second, albeit unstated, assumption contained in the majority opinion: that the trial judge is merely an umpire, nothing more than a caller of balls and strikes. I cannot agree with this conclusion.”); Sarah Cravens, *U. MIAMI L. REV.* 947, 948-49 (2010) (noting that judges have “discretion,” which implies that judges do not act as mere “umpires”); Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part II: Back to the Future from the Roberts Court to Learned Hand - Segmentation, Audience, and the Opportunity of Justice Sotomayor*, 13 *BARRY L. REV.* 29, 67-68 (2009).

it is true that judges are not simply automatons, who can apply simple rules without the exercise of a substantial amount of individual judgment and discretion, the point of this essay is that neither are umpires. As Bruce Weber put it: “[B]aseball . . . is the least programmatic, the least technological of games.”³

Calling balls and strikes is highly complicated, nuanced, discretionary stuff. According to the official rules of Major League Baseball, a “ball” is a pitch that does not enter the strike zone in flight and is not struck by the batter.⁴ Simple enough. Here is where it gets trickier. A “ball” also occurs when the pitcher fails to deliver the ball to the catcher within twelve seconds of receiving it, if the bases are unoccupied,⁵ if the pitcher makes an illegal pitch with no runners on base,⁶ or if the ball hits the batter outside of the strike zone and the batter has made no attempt to avoid being touched by the ball.⁷ In other words, in order to properly call a ball, an umpire often must determine the intent of the pitcher in the windup to the pitch and/or the intent of the batter in avoiding (or failing to avoid) being hit by a pitched ball.

The calling of strikes can be even more complicated. A “strike” is a legal pitch, “when so called by the umpire,” that is, *inter alia*: struck at by the batter and missed; not struck at, if any part of the ball passes through any part of the strike zone;⁸ or when a pitched ball touches the batter in the strike zone (irrelevant of whether the batter attempts to avoid the ball).⁹ The “strike zone” is the area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow beneath the knee cap.¹⁰ The strike zone is determined from the batter’s stance (which is, of course, not stationery, as its location changes every time the batter bobs up and down) as the batter prepares (*i.e.*, goes through a pre-swing ritual dance of wrist-strap unfastening and refastening, sock sliding, tobacco (or, these days, bubble-gum) spitting, dead-relative saluting, etc. in preparation for the incoming pitch) to swing at a pitched ball.¹¹ The umpire also must call a strike, without the pitcher having to deliver a pitch, if the batter “refuses” to take his/her position in the batter’s box during his/her time at bat after a “reasonable opportunity” to do so,¹² or intentionally and illegally leaves the batter’s box and delays play, although the umpire has the discretion to issue a warning to a batter in lieu of calling an automatic strike for the batter’s first violation of this rule, as long as the umpire judges the violation to be “brief and inadvertent.”¹³ The umpire must call a third strike if a runner on third base attempts to steal home base on a legal pitch when there are two strikes on the batter

. . . those who object to the judges-as-umpires analogy (not to mention many of those who employ it) do not really understand what umpires do.

3. Bruce Weber, *The Perfect Asterisk*, NEW YORK TIMES, June 6, 2010, at WK3.

4. See Rule 2.00 of the Official Baseball Rules. This includes a pitch that touches the ground and bounces through the strike zone unless the batter hits such a pitch. See Comment (Ball) to Rule 2.00 of the Official Baseball Rules. A batter is entitled to advance to first base, without risking being put out, when four “balls” have been called by the umpire. See Rule 6.08 (a) of the Official Baseball Rules. This is called a “base on balls.” See Rule 2.00 of the Official Baseball Rules.

5. See Rule 8.04 of the Official Baseball Rules.

6. See Comment to Rule 8.05 (e) of the Official Baseball Rules.

7. See Rule 6.08 (b) of the Official Baseball Rules.

8. Rule 2.00 of the Official Baseball Rules.

9. See Rule 6.08 (b) of the Official Baseball Rules. The second of these three types of strikes is known colloquially as a “called strike.”

10. See Rule 2.00 of the Official Baseball Rules. A batter is out when a third strike is legally caught by the catcher. See Rule 6.05 (b) of the Official Baseball Rules.

11. See Rule 2.00 of the Official Baseball Rules.

12. Rule 6.02 (c) of the Official Baseball Rules & Commentary.

13. See Rule 6.02 (d) of the Official Baseball Rules & Commentary.

14. See Rule 6.05 (n) of the Official Baseball Rules.

and the ball touches the runner in the batter's strike zone.¹⁴ If the umpire in chief (the "plate umpire"), whose responsibility it is to call balls and strikes,¹⁵ calls a half swing a ball, such call may be appealed to the base umpire (a strike call is not appealable), who may reverse the call of a ball to a call of a strike.¹⁶

Clearly, much of this language of "intent," "inadvertence," and "reasonableness" is legalese at its most vague and ambiguous and open to professional judgment and interpretation. In fact, if anything, being a plate umpire imbues one with *more* unbridled, activist discretion than being a judge. Unlike judges, umpires are explicitly granted the authority to rule on any point not explicitly covered in the official rules,¹⁷ and an umpire's judgments about whether a pitch is a strike or a ball are unreviewable (in fact, it is an ejectable offense even to "object" to such calls).¹⁸

What is more, even the core assumption of the analogy – that the parameters of the strike zone are fixed and not a matter of personal judgment – is faulty. While the definition of the strike zone is fixed by the baseball rules, every umpire interprets the strike-zone rule differently in application. The strike zone is, in other words, "a box of air with dimensions that have proven impossible to specify."¹⁹ Different umpires differ on when/whether a pitch has passed through the strike zone as defined by the rules.²⁰ At one extreme, a (conservative? pro-offense?) umpire may require the entire ball, seams and all, to pass within the strike zone before calling a strike. At the other extreme, a (liberal? pro-defense?) umpire may call a strike if any portion of the ball, even just the seams, passes within any portion of the strike-zone boundary. Judges also bring with them more nuanced and individualized ideologies – an umpire might be liberal on inside strikes, but conservative on outside ones. It turns out that umpire "activism" has gotten so bad in recent years that, in 2001, Major League Baseball had to remind its conservative umpires to call "high" and "inside" strikes and its liberal ones to stop calling low, outside ones.²¹

It turns out, umpires "aren't observers passing judgment on the legality of given actions . . ." ²² In short, it is time to give the old judges-should-just-be-like-umpires rant a rest, not because judges' jobs are difficult, nuanced, and require a great deal of professional judgment and the exercise of discretion (which they are and do), as so many commentators have already pointed out, but because umpires share that job description. Judges *are* like umpires – they have skills that most of us lack, they bring inherent ideologies and philosophical baggage to the plate with them, and no two will ever perform the same job exactly alike.

{Professor Leonetti wishes to thank Derek Larwick, as always, for his brilliant research assistance, which he performed without questioning why he was spending his time researching baseball.}

15. See Rule 9.04 (a) of the Official Baseball Rules.

16. See Comment to Rule 9.02 (c) of the Official Baseball Rules. In the meantime (during the appeal of the "ball" call by the plate umpire to the base umpire), the ball is in play. See *id.*

17. See Rule 9.01 (c) of the Official Baseball Rules.

18. See Rules 9.02 (a) & (c) to the Official Baseball Rules and Commentary.

19. Weber, *supra* note xxx.

20. See Jim Armstrong, *Clearing Up the Confusion Over the Strike Zone*, BASEBALL DIGEST, November 200; Peter Gammons, *What Ever Happened to the Strike Zone?*, SPORTS ILLUSTRATED 66 (14), April 6, 1987, at 36, 45-46.

21. See John Romano, *Baseball Adapts to a New Zone*, ST. PETERSBURG TIMES, February 27, 2001.

22. Weber, *supra* note 3.

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