

THE *INFIELD FLY* ASIDE

AND THE

LEGAL ENTERTAINMENT

Robert A. James[†]

Graham Greene divided his writings into two categories. The first he unsurprisingly dubbed his “novels,” creations like *The Power and the Glory* and *The End of the Affair* intended to be read as serious literary works. But he also tossed off what he called “entertainments,” tales and scripts like *The Third Man* and *Our Man in Havana* that donned the form of the escapist pulp fiction crime or spy story, but that nonetheless explored profound truths. Over time, some of Greene’s entertainments have been valued more highly than some of the novels he thought were more legitimate.¹

A similar division exists in the law reviews, and that division can be dated to 1975 and the publication of the famous *Aside* reprinted here.² There have been attempts at legal humor since time immemorial, probably starting shortly after the appearance of the first lawyer. But a then anonymous University of Pennsylvania law student — later revealed to be Will Stevens, who died in 2008³ — employed the gentle tools of satire and parody while advancing legal thought in innovative ways. The present series of the *Green Bag* is the modern embodiment of Stevens’s great gift, the useful legal entertainment.⁴

This foreword will not pile onto the *Infield Fly* Rule itself or the baseball lore cited in the *Aside*, or the broader relation between law and baseball.⁵ Instead, let us celebrate the elements of style and substance that are

[†] Rob James is a partner in the San Francisco and Houston offices of Pillsbury Winthrop Shaw Pittman LLP and a lecturer at the University of California, Berkeley, School of Law. His own student legal entertainments include the *Journal of Attenuated Subtleties* trilogy from 1982, updated and reprinted at 1 GREEN BAG 2D 377 (1998), 2 GREEN BAG 2D 267 (1999), and (with Ben Zuraw) 11 GREEN BAG 2D 341 (2008).

¹ See PETER WOLFE, GRAHAM GREENE THE ENTERTAINER (1972); MICHAEL SHELDEN, GRAHAM GREENE: THE ENEMY WITHIN (1994).

² *Aside*, The Common Law Origins of the *Infield Fly* Rule, 123 U. PA. L. REV. 1474 (1975).

³ Obituaries of Stevens can be found in the *New York Times* (Dec. 12, 2008) and the *Philadelphia Inquirer* (Dec. 15, 2008).

⁴ The editors of the first series of the *Green Bag* self-deprecatingly labeled it “a useless and entertaining journal of law,” but the editors of the second series appropriately omitted “useless” from the slogan. See David P. Currie, *Green Bags*, 1 GREEN BAG 2D 1 (1997).

⁵ These topics have been handled at great length elsewhere, in addition to this Almanac. See John J. Flynn, *Further Aside, A Comment on “The Common Law Origins of the Infield Fly Rule,”* 4 J. CONTEMP. L. 241 (1978); Robert A. 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,

both common and distinctive in the works of Stevens and those who followed his path.

The legal entertainment usually cannot resist the temptation to satirize the pedantry of scholarship. The pedant has been a stock figure in comedy since Aristophanes and Terence, and worthies including Karl Llewellyn and A.P. Herbert took scholastic excess to task in their own excursions into legal humor.⁶ A novice like the Stevens of 1975 was no exception in his footnotes, documenting his very first word with a reference to the *Oxford English Dictionary*, digressing into the Book of *Genesis*, and musing about a wonder chicken.⁷ Some humorists seize the pedantic element and never lose hold of it, even to the present day. But once Stevens got the nyuk-nyuks out of his system, the text of the *Aside* assumed a higher style and conveyed a deeper substance.

The legal entertainment regularly presents the law as a game. Sort of. As Art Leff observed in his anthropologist's-eye view of American justice, "[if] the Usa Trial is not a game, it is not not a game either."⁸ Law can be literally a matter of life or death, and the fates of millions can turn on the choices made, but the entertainment frequently portrays an all-too-human contest of wills conducted under arbitrary or perverse rules. Stevens launched a genre of law review scholarship on gamelike aspects of our society.

The legal entertainment aims to startle and provoke the reader. Grant Gilmore, contemporaneous with the *Aside* but late in his career, declared in memorable prose that Contract is Dead, the consideration theory having been murdered by rival tort doctrines.⁹ For his pains, Gilmore was visited with a surfeit of critical book reviews poking holes in his thesis and his facts, sometimes ignoring or missing the remarkable truths in the general picture he painted. As Richard Danzig concluded, the reviewers had mistaken a "plum" — an entertainment — for "meat," and thereby missed out on the fun.¹⁰

The *Infield Fly Aside* drew an audacious analogy between the centuries-old evolution of the common law and a rough-hewn rule of play quickly improvised on dusty urban ballfields. What is more, Stevens carried it off with élan. His conclusion, crediting both baseball and the com-

Taking Pop-Ups Seriously: The Jurisprudence of the Infield Fly Rule, 82 WASH. U. L.Q. 453 (2004); Anthony D'Amato, The Contribution of the Infield Fly Rule to Western Civilization (and Vice Versa), 100 NW. U. L. REV. 189 (2006); see generally Charles Yablon, On the Contributions of Baseball to American Legal Theory, 104 YALE L.J. 227 (1994).

⁶ See Diogenes Jonathan Swift Teufelsdröckh, Jurisprudence: The Crown of Civilization, 5 U. CHI. L. REV. 171 (1938) (Llewellyn writing under pseudonym, affecting style of Thomas Carlyle in *Sartor Resartus*); A.P. HERBERT, UNCOMMON LAW (1935).

⁷ Even Stevens's celebrated footnoting of his opening "The" has proven prescient, as there are now scholars who agonize over that particle of speech. See Glenda Browne, The definite article: acknowledging 'The' in index entries, 22 THE INDEXER 119 (2001) (asking whether one should index "The Who" under "T" or "W"). Browne cautiously and ominously notes that treatment of "A" and "An" is "beyond the scope of this article" (*id.* at 121).

⁸ Arthur Allen Leff, Law and, 87 YALE L.J. 989, 1011 (1978).

⁹ GRANT GILMORE, THE DEATH OF CONTRACT (1974).

¹⁰ Richard Danzig, The Death of Contract and the Life of the Profession, 29 STAN. L. REV. 1125 (1977).

JAMES, INFIELD FLY ENTERTAINMENT

mon law with “changing . . . only to the extent necessary to remove the need for further change,”¹¹ could with profit be carved in marble above the entrance to every administrative agency building in America.

Stevens wrote practical articles for continuing legal education programs, but not again in the academic law reviews. He wistfully remarked, “My ego is simultaneously flattered and bruised by the notion that something I cranked out more than 25 years ago would prove to be the highlight of my professional and academic careers.”¹² The *Green Bag* publications carry his entertainer’s torch. Reader, if you seek his monument, flip the pages around you.



¹¹ Aside, *supra* note 2, at 1481.

¹² N.Y. TIMES (Dec. 12, 2008).