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## Just a Bit Aside

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## JUST A BIT ASIDE\*

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### PERVERSE INCENTIVES, COST-BENEFIT IMBALANCES, AND THE INFIELDFLY RULE

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HOWARD M. WASSERMAN†

In response to Andrew J. Guilford & Joel Mallord, A Step Aside, *Time to Drop the Infield Fly Rule and End a Common Law Anomaly*, 164 U. Pa. L. Rev. 281 (2015).

Judge Andrew J. Guilford and Joel Mallord begin their manifesto<sup>1</sup> against the Infield Fly Rule with an unrealistic hypothetical. The Chicago Cubs are at bat in the bottom of the ninth inning of Game Seven of the World Series.<sup>2</sup> They trail by one run and have the bases loaded with no outs.<sup>3</sup> The Cubs' star hitter lofts a fly ball onto the edge of the outfield grass on the right side, which the second baseman settles under, "shield[ing] his eyes from the blazing sun."<sup>4</sup>

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\* With apologies to "Mr. Baseball," Bob Uecker. See MAJOR LEAGUE (Mirage Enterprises 1989).

† Professor of Law, FIU College of Law. Thanks to Judge Andrew J. Guilford for our email exchanges as I was working on this response and to William Berry for his comments on early drafts.

1 Andrew J. Guilford & Joel Mallord, A Step Aside, *Time to Drop the Infield Fly Rule and End a Common Law Anomaly*, 164 U. PA. L. REV. 281 (2015).

2 *Id.* at 281. The hypothetical begins on an unrealistic note in having the Cubs in the World Series, something that famously has not happened since October 1945—two months after the end of World War II and six months after the death of Franklin D. Roosevelt.

3 *Id.* The hypo becomes more unrealistic in giving the Cubs a strong chance of winning the World Series. With the bases loaded and no outs, the Cubs have a run expectancy of 2.2654, *Custom Statistic Report: Run Expectations*, BASEBALL PROSPECTUS, <http://www.baseballprospectus.com/sortable/index.php?cid=1819115> [https://perma.cc/BF2Q-BCK5] (last visited Jan. 22, 2016); that is, a team scores an average of more than two runs from this situation until the end of that inning—more than enough for the Cubs to win the game and the Series. The Cubs have a win expectancy in this situation of 73.9%, meaning they have a 73.9% chance of winning the game. *Win Expectancy*, TANGOTIGER, <http://www.tangotiger.net/welist.html> [https://perma.cc/FGT7-LUKP] (last visited Jan. 30, 2016). Of course, the Cubs famously have not won a World Series since October 1908—five months before the end of Theodore Roosevelt's presidency—so they probably would find a way to defy even advanced metrics.

4 Guilford & Mallord, *supra* note 1, at 281-82. This is the most unrealistic element of all. An infielder fighting the sun's glare suggests a World Series game played in daytime, which has not

Guilford and Mallord decry that pursuant to baseball's historic Infield Fly Rule,<sup>5</sup> the umpire will call the batter out and the runners will likely remain where they are, regardless of whether the second baseman catches the ball.<sup>6</sup> The umpire dictates the outcome of this critical play in baseball's most important game, not the players and their skill or strategy.<sup>7</sup> And Cubs fans, "on the edge of their seats in anticipation," must be deflated by the anticlimactic ending.<sup>8</sup>

Speaking as a Cubs fan, however, my reaction to this hypo is "Thank goodness for the Infield Fly Rule." Without it, this play likely produces an inning-, game-, and World Series-ending triple play. Or, only slightly better, a double play on the lead base runners, leaving the Cubs with two outs and runners on first and second, still down one run. On the other hand, with the Infield Fly Rule, the Cubs still have the bases loaded and still have only one out. In other words, with the Infield Fly Rule, my team still has a pretty good chance to score runs, win the game, and win the World Series for the first time in over a century; without it, my team's chances plummet.<sup>9</sup>

## I. EXPLAINING THE INFIELDFLY RULE

Having written extensively about the Infield Fly Rule the past several years<sup>10</sup> in the face of increasing criticism of the rule, I was pleased that

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happened outdoors since Game Five of the 1984 World Series and has not happened at all since Game Six of the 1987 World Series (played indoors in Minnesota's late-but-not-mourned Hubert H. Humphrey Metrodome). Cf. *World Series Day Game*, N.Y. TIMES (Aug. 14, 1987), <http://www.nytimes.com/1987/08/14/sports/world-series-day-game.html> [<https://perma.cc/ZC4P-MMRQ>]. Even assuming Major League Baseball would allow a daytime World Series game (it will not), the bottom of the ninth inning of a World Series game that began at 1 PM would be played somewhere around 4:45 PM. The sun would not be shining, let alone be "blazing," at that hour in Chicago in late October or early November.

<sup>5</sup> OFFICIAL BASEBALL RULES 144-45 (Office of the Comm'r of Baseball 2015). The batter is out when an infield fly is declared. *Id.* § 5.09(a)(5).

<sup>6</sup> Guilford & Mallord, *supra* note 1, at 282-83.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> We can measure the loss for the Cubs in statistical terms by comparing where they stand at the end of the play with the Infield Fly call compared to where they likely stand without the Infield Fly call, assuming that, without the rule, the defense would turn a double play on the lead runners. The Cubs' run expectancy for this inning drops from more than 1.5 runs (still enough to win the game) to less than 0.5 runs (not enough to win the game), a loss of more than one full run. See Howard M. Wasserman, *An Empirical Analysis of the Infield Fly Rule*, 4 J.L. (3 J. LEGAL METRICS) 127, 158 tbl.1 (2014) [hereinafter Wasserman, *Empirical Analysis*] (measuring the decrease in run expectancy in these situations over four Major League seasons from 2010–2013). The Cubs' win expectancy tumbles from 54% to 17% without the Infield Fly Rule. *Win Expectancy*, *supra* note 3.

<sup>10</sup> See, e.g., Howard M. Wasserman, *The Economics of the Infield Fly Rule*, 2013 UTAH L. REV. 479 [hereinafter Wasserman, *Economics*]; Wasserman, *Empirical Analysis*, *supra* note 9; Howard M. Wasserman, *Football and the Infield Fly Rule*, 61 UCLA L. REV. DISC. 272 (2014), <http://www.uclalawreview.org/football-and-the-infield-fly-rule-2> [<https://perma.cc/BN7K-CDFW>].

Guilford and Mallord offered the first detailed, scholarly attack.<sup>11</sup> Their argument rests on three basic points. First, nineteenth-century conceptions of sportsmanship and a “kinder, gentler America,” which proponents offered in support of the rule at its inception, are outdated.<sup>12</sup> Second, and quite the opposite, deception and subterfuge are and always have been part of baseball, and we should welcome and celebrate good instances of them.<sup>13</sup> Third, the game benefits from the excitement of seeing whether the defense could turn the double (or triple) play or whether the Cubs could run the bases aggressively enough to induce the fielder to make a mistake, allowing the Cubs to score the tying run.<sup>14</sup> “The strategic scenarios are fascinating,” they insist; there is excitement, strategy, and skill to this play, which the game should welcome, not preempt by calling an automatic out that likely ends the play.<sup>15</sup>

I agree with the first two points. Ancient notions of sportsmanship and fair play—which were bound up with nineteenth-century ideals of amateurism and wariness of professionalized sports—are irrelevant to any conversation today.<sup>16</sup> We accept that athletes are professionals<sup>17</sup> and, so long as they stay within the basic rules of the game, they should seek any advantage in pursuit of victory and be rewarded for it. Guilford and Mallord are also correct that the rule cannot be justified on an anti-deception or anti-subterfuge rationale, as we accept and celebrate all manner of deception and trickery as part of the game.<sup>18</sup>

But they miss the real explanation and justification for the Infield Fly Rule. It is not about promoting sportsmanship or preventing deception and subterfuge—it is not an “antiquated rule, reflecting the gentility of ages past.”<sup>19</sup> Rather, the rule is about perverse incentives, highly inequitable cost–benefit disparities, extraordinary strategic imbalances, and the aesthetics

11 The website “Abolish the Infield Fly Rule” has gone defunct.

12 Guilford & Mallord, *supra* note 1, at 283–84.

13 *Id.* at 286–87.

14 *Id.* at 284–85.

15 *Id.* Guilford and Mallord refer to the umpire “declaring a play dead,” *id.* at 284, which is not quite accurate. Although the batter is out under the Infield Fly call, the ball is alive. The runners could try to advance if the ball is not caught. The difference is that they do not have to advance and they must be tagged out, something the defense occasionally forgets. See Howard Wasserman, *Walk-Off Infield Fly Rule*, PRAWFSBLAWG (May 5, 2015), <http://prawfsblawg.blogs.com/prawfsblawg/2015/05/great-story-about-a-japanese-baseball-game-on-monday-that-ended-with-a-walk-off-infield-fly-ht-my-fiu-colleague-ediberto-r.html> [https://perma.cc/4NQE-4ZQA] [hereinafter Wasserman, *Walk-Off*] (discussing a play in which a runner scored the game-winning run when the infielder failed to tag him following an infield fly call).

16 Wasserman, *Economics*, *supra* note 10, at 492–93.

17 At least until our favorite player holds out for a better contract or leaves to earn more money playing for a different team. Cf. Dan Markel, Michael McCann & Howard M. Wasserman, *Catalyzing Fans*, 6 HARV. J. SPORTS & ENT. L. 1, 3 (2015).

18 Wasserman, *Economics*, *supra* note 10, at 492–93.

19 Guilford & Mallord, *supra* note 1, at 283.

of baseball. It is the game's attempt to maintain a fair balance of costs and benefits between the sides in a given game situation, while encouraging players to make plays. Far from being a relic of the nineteenth century, the rule reflects structural concerns that resonate in the modern game.

Four defining characteristics mark the infield fly situation; the synthesis of these four characteristics offers the modern and accurate justification for the rule. I previously have described these in detail;<sup>20</sup> I summarize them here.

First, the infield fly situation produces a unique and extraordinarily inequitable cost-benefit disparity. Without the rule, an infielder could get multiple outs on a play by intentionally letting the ball fall to the ground untouched and throwing multiple runners out on the bases. It may produce an inning-ending triple play (in our bases-loaded, none-out situation) or inning-ending double play (if there already was one out). Even if it produces only two outs but does not end the inning, it dampens a rally by removing two runners from the bases and adding one additional out. With the rule, on the other hand, the defense gets only one out—either on the call or because the infielder catches the ball—with the runners free to run but likely remaining in place. This difference reflects a dramatic cost-benefit advantage to one side only. Without the rule, the defense receives overwhelming benefits—multiple outs, fewer runners on base, perhaps the end of the inning—and incurs no offsetting costs, while the offense experiences these same outcomes as overwhelming costs without offsetting benefits.

Second, that overwhelming cost-benefit advantage arises precisely because an infielder intentionally fails to perform the athletic skills that he ordinarily tries and is expected to perform: catching a routine fair fly ball on or near the infield. In fact, absent the rule, this would become the only situation in all of baseball where a team would be significantly better off not catching a batted ball in fair territory than catching it. This also represents an aesthetic concern, as we likely prefer to watch players catch easily catchable fly balls.

Third, there is a wide disparity in control over the play; rather than a “fascinating” strategic exchange, it produces a one-sided shift that always favors the defense. A ball subject to the Infield Fly Rule is, by definition, an easy play for an average Major League infielder.<sup>21</sup> He controls whether and how to catch this easily playable ball and can prepare himself to make a play. He has time to settle under the ball, wait for it to come down, decide whether to catch it, and decide where to throw it if he does not catch it. He can position himself to surround the ball as it hits the ground, quickly pick it up,

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20 See Wasserman, *Economics*, *supra* note 10, at 490-97, for a detailed analysis.

21 See OFFICIAL BASEBALL RULES 144 (Office of the Comm'r of Baseball 2015) (defining an infield fly as one “which can be caught by an infielder with ordinary effort”). Ordinary effort is the “effort that a fielder of average skill at a position . . . should exhibit on a play.” *Id.* at 147.

and throw it. His teammates similarly have time to get to their positions to field any throws and to communicate to their teammate what the runners are doing, whether he should catch the ball, and where he should throw it. And because most infield flies will be on or near the infield, the throws will be fairly short, allowing the defense to quickly make the two or three throws necessary to get multiple runners out.<sup>22</sup>

By contrast, the base runners are entirely reactive, arguably helpless, and left with no good choices. They are forced to advance to the next base if the ball falls to the ground. But if they try to advance and the ball is caught, they will be thrown out at their current base; in fact, they might be thrown out if they even stray too far from the base. The runners thus must remain on or near their current bases to see what the infielder does. If the ball is not caught, however, they then have too far to run to beat the throws to the next bases. The only hope for the offense is that the ball takes an unexpected bounce or the fielders make bad throws—a rare occurrence that the offense cannot influence. Moreover, this defensive advantage would be enhanced if, in the absence of the Infield Fly Rule, infielders practiced and became more skilled at intentionally letting the ball fall to the ground in an advantageous manner.

Finally, the combination of overwhelming cost–benefit advantage and one-sided control over the play incentivizes infielders to intentionally fail to perform those ordinary athletic skills whenever the game situation arises. The incentives—getting two (or three) outs rather than one on a play and knocking multiple runners off the bases—make it worthwhile for the defense to eschew the simple catch in favor of the inequitable advantage by intentionally not performing the expected athletic skill in the expected manner.

The Infield Fly Rule remedies the inequities that this combination creates. It eliminates the extraordinary cost–benefit imbalance by imposing a particular outcome on the play, thereby eliminating the defense’s perverse incentive to act contrary to athletic expectations. The batter is out regardless of whether the ball is caught, and the runners are not forced to advance. The outcome of the play—one out and the runners remaining in place—is the same whether the infielder catches the ball or not. An infielder thus has no incentive to intentionally fail to catch the fly ball, since he gains no additional benefits beyond that one out.<sup>23</sup>

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22 See Wasserman, *Empirical Analysis*, *supra* note 9, at 141–44 figs.1–4 (charting the location of every ball on which an infield fly was called in Major League Baseball from 2010–2013).

23 Wasserman, *Economics*, *supra* note 10, at 496–97. Some limited incentive does remain. The infielder may still intentionally drop the ball, hoping to fool a runner into trying to advance when the ball hits the ground. But since the runner is not forced to run, doing so represents his mistake in not knowing the rules or the situation. There is no reason for the rules to protect him against his own foolishness. *Id.* at 498. Moreover, because the runner is not forced to advance, he would have

On the other hand, if the rule were repealed, as Guilford and Mallord propose, these perverse incentives return. If a double (or triple) play is possible and even likely under the rules, infielders will regularly seek (and often obtain) those overwhelming cost–benefit advantages by intentionally failing to catch that easily catchable fair fly ball. This works to the detriment of both the game’s aesthetics and its individual cost–benefit exchanges.

## II. BASEBALL’S UNIQUE GAME SITUATION

Guilford and Mallord emphasize other baseball situations that all are left to ordinary rules and strategies, to show that baseball tolerates deception, subterfuge, and even intentionally uncaught balls in many contexts.<sup>24</sup> But, again, the Infield Fly Rule is not designed to eliminate deception and subterfuge.

Nevertheless, these other situations remain useful even when we shift the focus to the cost–benefit justifications for the Infield Fly Rule. They show the effect of the four relevant defining characteristics and how things change when a game situation lacks one or more of them.

Some plays involve an equitable cost–benefit exchange, in which each team incurs some costs and gains some benefits on the play. For example, they propose a situation in which an outfielder intentionally fails to catch a deep fly ball in foul territory with fewer than two outs to keep a runner from tagging and scoring from third base.<sup>25</sup> The defense loses an out (a cost), but does not surrender a run (a benefit). The offense loses a likely run (a cost), but does not give up the out and still has the same batter at the plate with a runner on third base and less than two outs (a benefit). In addition, the intentional non-catch is of a foul ball, not a fair ball. The exchange is roughly equal—the intentional non-catch ends the play with both teams in the same position as before the foul ball. Which side ultimately benefits the most from the exchange depends on what happens on subsequent plays.<sup>26</sup>

Others involve a much smaller, less inequitable cost–benefit advantage to one side, which minimizes the perverse incentive to intentionally not perform the expected skills—at least as frequently. For example, with a runner on first base and fewer than two outs, an infielder may intentionally fail to catch a fair fly ball hit by a slow batter in order to force out a faster runner at second

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to be tagged out, making the play slightly more difficult for the defense. Cf. Wasserman, *Walk-Off*, *supra* note 15.

24 Guilford & Mallord, *supra* note 1, at 287.

25 *Id.* I analyzed this game situation elsewhere and explained why it does not undermine the Infield Fly Rule. Wasserman, *Economics*, *supra* note 10, at 507–08.

26 Wasserman, *Economics*, *supra* note 10, at 507–08.

while allowing the slower batter to reach base.<sup>27</sup> While the cost–benefit exchange is one-sided, it is much smaller: The cost to the offense is low—it is surrendering one out either way—and the benefit to the defense—exchanging a fast runner for a slow runner on first base—rarely overwhelming.<sup>28</sup> Given the minimal benefits of this strategy in most situations, infielders will not be incentivized to try it nearly as often.

Others are simply examples of game play within the rules and the fight for an advantage, possessing none of the relevant features.

The point is that all of these situations are fundamentally different than the infield fly situation in lacking one or more of those defining characteristics. The absence of special rules governing them does nothing to undermine the logic or necessity of having the Infield Fly Rule to cover a situation that remains unique.

### III. ONE COMPARABLE SITUATION WITH A COMPARABLE RULE

I close by returning to Guilford and Mallord's opening hypothetical,<sup>29</sup> altered to cover the only baseball situation that is genuinely comparable to the infield fly situation. Imagine that the Cubs' star hitter does not hit a weak infield fly to the second baseman. Instead, he swings and misses at strike three. But the catcher intentionally fails to catch the ball; he allows it to pop out of his glove and land at his feet, as the three base runners watch from their bases.

Under current rules, the batter is called out and the runners are not forced to advance. A batter is out on strikes, even if the catcher does not hold onto the third strike, if first base is occupied with less than two outs.<sup>30</sup> But if that rule were changed, the ordinary rule provides that the batter would not be out and would become a base runner when the third strike is not caught.<sup>31</sup> He would have to run to first base, forcing the base runners ahead of him to advance and creating force plays at every base.

In our ninth inning of Game Seven, the catcher could pick up the ball, step on home (forcing out the runner on third), throw to third base (forcing

27 Guilford & Mallord, *supra* note 1, at 287. This exact play led baseball's rulemakers to enact what, over the next decade, evolved into the Infield Fly Rule. Wasserman, *Economics*, *supra* note 10, at 491–92; Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474, 1477–78 (1975).

28 Wasserman, *Economics*, *supra* note 10, at 503. During the 2015 season, teams had a run expectancy of about 0.5 runs with a runner on first and one out, and approximately 0.22 runs with a runner on first and two outs. *Custom Statistic Report: Run Expectations*, *supra* note 3. There is no statistical support for the conclusion that a faster runner, even a much faster runner, on first base will change those numbers significantly.

29 Guilford & Mallord, *supra* note 1, at 281–82.

30 OFFICIAL BASEBALL RULES § 5.09(a)(3) (Office of the Comm'r of Baseball 2015).

31 *Id.* § 5.05(a)(2).



out the runner on second), then the third baseman could throw either to second base (forcing out the runner on first) or to first base (forcing out the batter), completing a Series-ending triple play. This all would happen before the base runners—standing on or near their bases, not running on the pitch, and not planning to advance on a strikeout—could figure out what is going on, much less run fast enough to beat these throws or otherwise counter this play.

If this sounds familiar, it is the same parade of horrors (from the offense's standpoint) or extreme advantage (from the defense's standpoint) that likely results from an intentionally uncaught infield fly ball in the absence of the Infield Fly Rule. In fact, it may be worse, as there is even less skill involved for the defense in making the necessary plays and even less opportunity for the base runners to do anything to counter it.

The dropped third strike represents the only baseball situation that truly stands on all fours with the infield fly situation and its defining characteristics. Once again, the potential for one side to obtain extraordinarily inequitable benefits without costs and one side to incur extraordinarily inequitable costs without benefits offers a perverse incentive to the defense. Once again, the defense obtains this advantage only by intentionally failing to perform the expected athletic skill—catching a playable thrown ball—in the expected manner. And once again, control over the play rests entirely with the defense, with the runners trapped, helpless, and unable to meaningfully counter.

For purposes of the debate over the Infield Fly Rule, therefore, it is telling that baseball eliminates this strategic option for the defense with a special rule. It demonstrates that the Infield Fly Rule is not an anomalous or random relic, but baseball's consistent response to particularly imbalanced game situations. It is also telling that the third-strike rule functions on the same terms as the Infield Fly Rule. It imposes an outcome on the play—batter out on strikes, runners not forced to advance—as if the catcher caught the ball. And by imposing that outcome, the rule eliminates the perverse incentive for the defense to seek an extraordinary advantage by intentionally failing to perform the expected skill in the expected manner. There is no incentive for the catcher not to hold onto the third strike, since he gains no additional benefits by dropping it.<sup>32</sup>

Finally, it is telling that Guilford and Mallord never mention this game situation, or its structurally similar rule, in their paper. This leads to a (perhaps rhetorical) question: Would they favor a regime in which the batter is never out on strikes if the catcher fails to catch a third strike, he always becomes a base runner, and any runners can be forced to advance? That is, does the desire to see “fascinating” “strategic scenarios” extend to accepting

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32 Wasserman, *Economics*, *supra* note 10, at 499-500.

this virtually certain (assuming no bad throws) double or triple play? In other words, would Guilford and Mallord drop the dropped-third-strike rule along with the Infield Fly Rule?

If the answer is no, then they, and other critics of the Infield Fly Rule, must identify a meaningful and reasonable distinction between the dropped-third-strike situation and its special rule on the one hand, and the infield fly situation and its special rule on the other. Guilford and Mallord might suggest that an infield fly triggers an exciting play requiring strategy and skill in how the infielder executes the non-catch and the subsequent throws and in how the base runners test those skills.<sup>33</sup> But while dropping strike three might be easier than not catching a fly ball, the play entails identical interplay between infielders picking an uncaught ball off the ground and making the multiple throws for the double play while the runners attempt the near-impossible task of beating those throws. Aesthetically and strategically, the plays are the same.

If the answer is yes, they deserve credit for consistency. Our disagreement may ultimately be about baseball aesthetics, what cost-benefit inequities the game should tolerate, and whether to welcome players intentionally failing to perform expected athletic skills for strategic reasons on occasion.

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33 Guilford & Mallord, *supra* note 1, at 284; see also E-mail from Judge Andrew J. Guilford to author (Feb. 12, 2016) (on file with the University of Pennsylvania Law Review).