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## UMPIRES, JUDGES, AND THE AESTHETICS OF THE INFIELD FLY

Chad M. Oldfather\*

In his book *Infield Fly Rule Is in Effect: The History and Strategy of Baseball's Most (In)Famous Rule*, Howard Wasserman brings the tools of legal analysis to the game of baseball. His thorough and persuasive treatment provides not only authoritative grounding for the rule but also a set of criteria for identifying situations in which “limiting rules” are appropriate throughout sport more generally.

Although his focus is elsewhere, the analysis also bears on the more frequently invoked law-baseball comparison, namely the metaphorical portrayal of the judge as an umpire. On this view, most prominently associated with Chief Justice Roberts’ opening statement at his confirmation hearing, neither umpires nor judges “make the rules; they apply them,”<sup>1</sup> and the judge’s job is to “call balls and strikes.”<sup>2</sup> The metaphor thus invokes a conception of law as contained entirely within the linguistic content of “the rules,” and of the proper judicial role as entailing a mechanistic process of matching facts against those rules.

The standard critique of this view emphasizes two points. One is that the metaphor obscures judges’ role in making and refining the content of law. Umpires play no part in the process of changing the rules of baseball. The separation of powers in government, in contrast, is not so complete, and judges play an integral role in the refinement and development of the law.<sup>3</sup> The second is that it invites its audience to regard the law as considerably more determinate than is realistic. The rules of baseball represent a nearly complete<sup>4</sup> set of authoritative pronouncements. Both the nature of the game, in which umpires’ calls relate largely to matters such as where the ball was

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<sup>1</sup> Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be C.J. of the United States: Hearing on S. 109–158 before the S. Comm. on the Judiciary, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., of Md., Nominee to be C.J. of the United States), <https://www.judiciary.senate.gov/imo/media/doc/GPO-CHRG-ROBERTS.pdf>.

<sup>2</sup> *Id.* at 185.

<sup>3</sup> There is, of course, considerable disagreement over the extent and nature of this role. But even those associated with a limited conception of the judicial role tend to acknowledge that judges necessarily make law to some degree.

<sup>4</sup> See J.S. Russell, *Are Rules All an Umpire Has to Work With?*, 26 J. PHIL. SPORT 27, 27 (1999).

relative to a real or imaginary line, and the sheer number of past games<sup>5</sup> result in a world in which effectively no situation remains uncovered by a rule. The reality in law is otherwise.

A less-frequent critique is that the metaphor misconceives the nature of umpiring, portraying it as too mechanistic. Wasserman's analysis provides two bases for building out this critique. First, he illustrates that umpires do not just "call balls and strikes" or otherwise simply apply bright-line rules.<sup>6</sup> The infield fly rule requires judgments of the sort that cannot be reduced to a precise verbal formulation. One involves determining whether a situation involves "a fair fly ball" rather than a line drive or attempted bunt. Another concerns whether the ball "can be caught by an infielder with ordinary effort." Neither standard can workably be articulated more precisely.<sup>7</sup>

Second, Wasserman uncovers the unarticulated criteria umpires draw on in making these calls. His conversations with baseball personnel revealed that umpires "reduce the Rule to two considerations not mentioned in the text—whether the ball has sufficient arc and whether the fielder gets 'comfortably underneath' the ball."<sup>8</sup> These provide a way for umpires to draw on the purpose of the rule—"protecting baserunners from an unfair double play and keeping the defense from obtaining an unfair advantage"<sup>9</sup>—and to account for important contextual features such as player ability. An infield fly in the major leagues differs not only from one in a high-school or little-league game but also from what would have counted in the majors decades ago because today's infielders have greater average range.

Wasserman further uncovers different schools of thought regarding the process of implementing the rule. While two umpiring instructors he spoke to agree that umpires must avoid invoking the rule too quickly, one "teaches that the call should come when the ball is at the apex of its flight," while the other "argues that whether a ball is playable with ordinary effort is indicated not by the flight of the ball, but by the action or inaction of the fielders," such that it is necessary to wait to see what sort of fielding effort is required.<sup>10</sup>

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<sup>5</sup> Depending on whether one counts the National Association, as of this writing, there have been either 217,082 or 218,168 major league baseball games played. See BASEBALL REFERENCE, <https://www.baseball-reference.com/leagues/>.

<sup>6</sup> And even bright-line calls such as balls and strikes are subject to adjustment by umpires. See Mitch Berman, *On Interpretivism and Formalism in Sports Officiating: From General to Particular Jurisprudence*, 38 J. PHIL. SPORT 177, 177 (2011).

<sup>7</sup> One could perhaps imagine a formula for distinguishing fly balls from line drives that took into account factors such as arc, velocity, and spin, but while such a rule would be precise, it would also be beyond the ability of an umpire to calculate within the short period of time available to do so.

<sup>8</sup> HOWARD WASSERMAN, *INFIELD FLY RULE IS IN EFFECT: THE HISTORY AND STRATEGY OF BASEBALL'S MOST (IN) FAMOUS RULE 24* (2018).

<sup>9</sup> *Id.* at 25.

<sup>10</sup> *Id.* at 27.

All of this underscores that umpiring, like judging, requires resort to inputs and considerations that the rules do not, and cannot, fully specify. Umpires and judges alike draw on accumulated wisdom, including a large base of experience with specific situations coupled with a refined sense of the pertinent values. They must access a reservoir of ineffable, tacit knowledge formed and conditioned by past experience. The resulting judgments are, in an important sense, aesthetic.<sup>11</sup>

Recognition that there is more to the judge-umpire comparison than meets the eye does not resuscitate the metaphor. The problem of scope remains. The sort of judgments that permeate the law are required only in narrow corners of baseball. As I have argued, better sports metaphors lie elsewhere.<sup>12</sup>

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<sup>11</sup> Wasserman consistently references the aesthetic considerations that underlie the infield fly rule. I have written about the aesthetic aspect of judging in Chad M. Oldfather, *Aesthetic Judging*, 52 U.C. DAVIS L. REV. 981, 981 (2018).

<sup>12</sup> *See id.*