

Volume 13

Number 5 *Micro-Symposium: Infield Fly Rule Is in Effect: The History and Strategy of Baseball's Most (In)Famous Rule*

Article 14

Spring 2019

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Online ISSN: 2643-7759

Recommended Citation

Howard M. Wasserman, *Keeping the Infield Fly Rule in Effect*, 13 FIU L. Rev. 965 (2019).

Available at: <https://ecollections.law.fiu.edu/lawreview/vol13/iss5/14>

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KEEPING THE INFIELD FLY RULE IN EFFECT

Howard M. Wasserman*

I am honored that the editors of *FIU Law Review* chose to publish this inaugural micro-symposium on my new book, *Infield Fly Rule Is in Effect: The History and Strategy of Baseball's Most (In)Famous Rule*. And I am flattered that so many authors took the time to read my work and to respond. Uniting these nine authors and essays is a shared love of baseball and baseball's rules, as well as disagreement with the details of my defense of the Infield Fly Rule, if not with the idea of defending the Rule.

In this response (for which I have more words than they did), I want to identify some themes common to the contributions.

I. THE INFIELD FLY RULE IS NECESSARY

Richard Friedman supports the Infield Fly Rule on grounds of path dependence—we have had the Rule for more than a century, so the burden is on critics to show that a “rather substantial change to the way the game is played is necessary.”¹ I addressed path dependence in the book, observing that the cost of getting everyone—hitters, runners, fielders, managers, and umpires—to adjust their in-game conduct exceeds any benefits gained from eliminating the rule.² Path dependence is strong in baseball, a “backward-looking, tradition-bound” sport that is slow to change. Asked about the wisdom of repealing the rule, umpire instructor Brent Rice cited nostalgia and the Rule's deep-seated place in baseball history—path dependence—as the strongest reason to retain it.³

This makes Judge Andrew Guilford's position so striking, as the strongest (and perhaps sole) academic voice against the Rule and thus my sharpest interlocutor. He and I have had numerous exchanges via email and on the pages of the *Pennsylvania Law Review*.⁴ I appreciate his insights and his arguments, even if we are at the point of agreeing to disagree. He sees the

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¹ Richard D. Friedman, *Just Say No to the Cheap Double Play*, 13 *FIU L. REV.* 931 (2019).

² HOWARD M. WASSERMAN, *INFIELD FLY RULE IS IN EFFECT: THE HISTORY AND STRATEGY OF BASEBALL'S MOST (IN)FAMOUS RULE* 51 (2018).

³ *Id.* at 25.

⁴ Compare 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), with *Just a Bit Aside: Perverse Incentives, Cost-Benefit Imbalances, and the Infield Fly Rule*, 164 *U. PENN. L. REV. ONLINE* 145 (2016).

double plays that become possible without the Infield Fly Rule as an injection of excitement and strategy into an evolving game that has become too slow and boring with the increase in strikeouts, walks, home runs, and the loss of activity on the basepaths.⁵ Without saying so, Judge Guilford believes he has cut through baseball's path dependence, arguing that baseball benefits from the cat-and-mouse game among pitchers, fielders, and baserunners as the ball hovers in the air.⁶ He would free the players to be as creative and deceptive as they wish and see what results.

This debate may rest on an unanswerable question about the level of excitement that they play would create. Judge Guilford “yearns for the excitement of fielders and runners interacting while an infield fly hovers above,”⁷ while Friedman believes any double play that a repeal enables would be boring in its ease.⁸ There is no way to test the question empirically, because baseball is nowhere played without the Infield Fly Rule. The study that forms Chapter 5, examining every infield-fly call for eight Major League seasons, reveals an overwhelming majority of balls hit on the infield and in the shallow outfield on the left side; had infielders been free to intentionally not catch these easily playable fair fly balls, they likely could have turned many simple double plays by making short, quick throws to force-out trapped baserunners.⁹ Those eight seasons also saw one double play and one triple play, both easily turned, when the umpire erroneously failed to invoke the Rule.¹⁰

Richard Hershberger plumbs the historical record to identify a different rationale for the Infield Fly Rule—the difficulty in the late 19th century of judging when a fielder caught the ball, when he muffed it, and when he completed the catch and subsequently dropped the ball. Confusion over what constituted a catch and the difficulty for umpires in making that determination implicated the baserunner's dilemma and perverse incentives that I identify as the reasons for the Rule. The Rule eliminates this problem by making the catch irrelevant—the batter is out regardless of whether the ball is caught.¹¹ Were the Rule repealed, Hershberger argues, the confusion over what constitutes a catch in these situations would be revived.¹² In legal terms, the Infield Fly Rule imposes an irrebuttable presumption that a fair fly ball in an infield fly situation has been caught (even if, in fact, it is not); this

⁵ Andrew J. Guilford, *Another Side to the Infield Fly Rule*, 13 FIU L. REV. 939 (2019).

⁶ *See id.* at 940.

⁷ *Id.*

⁸ Friedman, *supra* note 1, at 932.

⁹ *See* WASSERMAN, *supra* note 2, at 159–71.

¹⁰ *Id.* at 169.

¹¹ Richard Hershberger, *The Prehistory of the Infield Fly Rule*, 13 FIU L. REV. 943, 944 (2019).

¹² *Id.* at 945.

relieves players and umpires of the difficulties of proving or deciding that fact.

Umpires have added a layer onto this presumption of a catch by applying a presumption of infield fly—on a close play, umpires invoke the Rule, declare the batter out, and allow the runners to remain (or to run at their own risk, with no force-out in effect).¹³ This presumption furthers the Rule's offense-protection purposes. An erroneous non-invocation produces the same adverse results for the offense as not having the Rule at all,¹⁴ so invoking on the uncertain play protects the offense. That presumption also furthers Hershberger's distinct purpose of relieving umpires of the difficult task of identifying a catch—by imposing the catch-as-a-matter-of-law in any close situation, it takes that decision away from the umpires.

II. COMPLEXITY AND CONTROVERSY

Several contributors focus on the Rule's complexity and the controversy that complexity engenders.¹⁵ Judge Guilford, Rob Neyer, and Chad Oldfather identify the complicated and subjective judgments the call demands from umpires—who is an infielder, whether a fly ball is playable by an infielder with ordinary effort, and whether the ball has sufficient arc to be a fly ball rather than a line drive. They point to the unarticulated criteria that umpires employ to extrapolate on the textual criteria and further the purpose of the rule in the face of the text. And they point to the competing schools of thought among umpires as to when to invoke—at the apex of the ball's flight or when the ball is on its downward trajectory—to show uncertainty about how to implement the Rule.

I doubt the Infield Fly Rule is especially complex or that it requires greater subjectivity than other baseball rules. It does not seem more difficult to determine whether a batted ball is playable with ordinary effort than to determine whether an infielder intentionally dropped a fly ball or whether a batter or runner unduly and intentionally interfered with the defense attempting to make a play.

These contributors diverge on what we learn from this complexity and controversy. Oldfather uses it to show the problems with Chief Justice John Roberts' infamous judge-as-umpire metaphor. Oldfather argues that the metaphor misperceives the nature of judging and the nature of umpiring, treating both as mechanistic, rather than as requiring a broad range of inputs

¹³ WASSERMAN, *supra* note 2, at 28–29.

¹⁴ *Id.* at 29.

¹⁵ See Guilford, *supra* note 5, at 939–41; Chad M. Oldfather, *Umpires, Judges, and the Aesthetics of the Infield Fly*, 13 FIU L. REV. 957, 957–58 (2019); Rob Neyer, *Teach the Controversy*, 13 FIU L. REV. 949, 949–50 (2019).

and considerations that most rules cannot specify.¹⁶ Neyer argues that whatever controversy the Rule produces is a feature rather than a bug, a welcome injection of chaos and the occasional kerfuffle in a sport that seeks to remove judgment and uncertainty from the proceedings.¹⁷ Judge Guilford prefers that the chaos and kerfuffle come from the interaction of players, not from an umpire's arbitrary decision that freezes the players in place.¹⁸

III. CHANGING THE RULE

Several contributors agree that infielders should not remain free to seek the double play on the intentional non-catch and that some limiting rule should cover this situation. But they disagree about whether the longstanding iteration of the Infield Fly Rule is the best approach and what a better rule might look like.

Friedman does not commit to a new rule, but previews future work on the subject. Neyer, Friedman, and Rob Nelson share a criticism of the current Rule—it provides the defense a windfall of an out when the infielder fails to catch the ball. All argue that a better rule should prevent the defense from getting a force-out double play on multiple baserunners, while requiring the defense to earn its one out in the usual manner.¹⁹

Nelson proposes what he calls the “Enfield Fly Rule,”²⁰ while Neyer describes an early version of Nelson’s proposal.²¹ This would track the current Infield Fly Rule—same base/out situations, same fly ball playable by an infielder with ordinary effort, same umpire declaration. It thus would not eliminate all controversy, as the umpire still must read a situation to determine who is an infielder, whether the ball has sufficient arc to be a fly ball, and whether the ball is playable by an infielder with ordinary effort.

The difference is consequence. Under Nelson’s early proposal (as Neyer presents it), the fly ball would be deemed a foul ball and treated as such; an out if caught (with the runners free to retouch and try to advance), a foul-strike if not caught, with the batter’s turn continuing and the baserunners remaining in place.²² The current version that Nelson describes in this issue goes further. If the ball is uncaught in fair territory, it is a dead ball and a “do-over,” with the batter returning to hit with the same count (in other words,

¹⁶ Oldfather, *supra* note 15, at 957.

¹⁷ Neyer, *supra* note 15, at 949–50.

¹⁸ Guilford, *supra* note 5, at 940.

¹⁹ Friedman, *supra* note 1, at 933; Neyer, *supra* note 15, at 949–50; Rob Nelson, *The Enfield Fly Rule*, 13 FIU L. REV. 947, 947–48 (2019).

²⁰ Nelson, *supra* note 19, at 947.

²¹ Neyer, *supra* note 15, at 949.

²² *Id.*

the uncaught ball would not count even as a foul strike); it would be as if the play never occurred. Nelson argues that this new rule eliminates all chicanery, eliminates the embarrassment for all players confused by the rule, and eliminates heat on umpires for invoking (or not invoking) the rule if the ball is not caught.²³

This is a fascinating proposal, one I wish I knew about or had thought of while writing the book and considering alternative approaches. It achieves both goals—prevents the unwanted double play by eliminating the perverse incentive for the infielder to intentionally not catch the ball, without providing the defense the windfall of an out on an unintentional drop. While Neyer finds no procedural or practical holes in Nelson’s idea,²⁴ I want to suggest two.

First, this rule would be unprecedented. The rules of baseball recognize no situation in which a ball that otherwise lands uncaught in fair territory is deemed foul by rule. And they certainly do not recognize “do-overs” or treat plays as if they never occurred.²⁵ While uniqueness is not disqualifying, a common objection to the Infield Fly Rule is that it is unusual within baseball and all sports, treating a common situation like no other.²⁶ One goal in my book was to address the uniqueness critique, by showing that baseball and other sports apply this type of rule to defined comparable situations. Declaring the uncaught ball foul or that it never occurred, rather than declaring the batter out, would treat this situation like no other in baseball.

By contrast, in numerous situations a batter is deemed out by rule despite a fair batted ball not being caught. Most involve some act of interference by the batter, baserunner, or one of their teammates that prevents the fielder from catching the fair ball.²⁷ Baseball has two situations in which a batter is deemed out despite the ball not being caught even where no interference occurs—an intentionally dropped fair fly ball²⁸ and an uncaught third strike with a runner on at least first base.²⁹ These rules are, respectively, the distant cousin and identical twin to the Infield Fly Rule, founded on similar concerns for preventing the defense from gaining an unfair advantage of multiple force-outs on baserunners by intentionally not catching a playable

²³ Nelson, *supra* note 19, at 948.

²⁴ Neyer, *supra* note 15, at 949.

²⁵ The closest would be an umpire declaring “no game” if a game is called before it has become a regulation game. Official Baseball Rules § 7.01(e) (2018). But the statistics earned during that called game still count, *id.* § 9.03(e)(1), so the game is not treated as if it never happened.

²⁶ WASSERMAN, *supra* note 2, at 87.

²⁷ Official Baseball Rules §§ 5.09(a)(7), (8), (13) (2018); *id.* § 5.09(b)(3).

²⁸ *Id.* § 5.09(a)(12); WASSERMAN, *supra* note 2, at 44–45, 84–85.

²⁹ Official Baseball Rules § 5.09(a)(3) (2018); *id.* § 5.05(a)(2); WASSERMAN, *supra* note 2, at 88–94.

ball. It would make no sense to have an infield fly deemed a foul ball or a never-occurring play while the batter is deemed out in the other, analogous situations. Neyer and Nelson likely would respond that the ball should be deemed foul or a non-play do-over in all three situations.

Second, there is a question of who the Nelson or Neyer rule benefits. The current Infield Fly Rule benefits the defense by giving it one undeserved out on an unintentional non-catch, rather than forcing the pitcher to continue facing the same batter. That is the windfall to which Neyer, Nelson, and Friedman object.

But the current rule also benefits the offense by allowing the runners to advance on that unintentional non-catch. The New York Mets scored a run on an uncaught infield fly in 2010. A team scored the winning run on an infield fly in a 2015 Japanese League game, when the runner on third raced home and the catcher neglected to tag him, as he must when the batter is declared out and the force play removed. The offense gained these advantages because the infielders forgot the effect of the Infield Fly Rule and made incorrect moves.³⁰ At the same time, the offense bears the same burden of remembering the effect of the Rule and the same risks of running into additional outs if they make the incorrect move on the uncaught ball.³¹

Consider what has become the paradigm problematic infield-fly invocation, the play that triggered my interest in this project. In the 2012 National League Wildcard Game between the St. Louis Cardinals and Atlanta Braves, the umpire invoked the Rule on a ball hit well into left field that fell to the ground following unintentional miscommunication between the shortstop and left fielder, allowing the two baserunners to advance even as the batter was declared out.³² At the end of that play, the Braves had second-and-third/two out; under Nelson's Infield Fly Rule, the batter would have resumed hitting with first-and-second/one out. The question is which situation is more beneficial to a batting team—having two runners in scoring position with two out or having two runners on base but only one in scoring position with one out. Using the metric of run expectancy, the latter situation is approximately .3 runs more favorable until the end of that inning; the batting team can be expected to score .9224 runs from the latter, as opposed to .5804 runs from the former. In other words, Nelson's rule leaves the offense in a slightly better position, but with no chance to gain greater advantage on one play.

The purpose of the Infield Fly Rule is to remove the defense's opportunity to gain an extraordinarily inequitable cost-benefit advantage of

³⁰ WASSERMAN, *supra* note 2, at 39–44

³¹ *Id.*

³² *Id.* at 7–9, 31–34; Guilford, *supra* note 5, at 940–41.

multiple force-outs on multiple baserunners. The current Rule replaces that with an even exchange—defense gets one out, offense maintains multiple baserunners. It also leaves the offense room to take advantage of genuine defensive miscues and the defense room to take advantage of offensive confusion, enabling the cat-and-mouse excitement that Judge Guilford craves.³³ It also leaves room for controversial or erroneous non-invocations that produce double and triple plays, arguments, fan anger, and umpire criticism.³⁴ The Nelson/Neyer rules eliminate both.³⁵

Note that we are debating the effect on an insignificant number of plays—in eight seasons, infielders failed to catch the ball on 30 out of 1900 fly balls on which the rule was invoked, 27 of those non-catches unintentional.³⁶ And only a handful of those 27 plays produced action among the baserunners. The question is whether it is better to eliminate even those small bits of gamesmanship or to allow the rare case to play itself out between the teams.

Peter Oh attempts to redraft an Infield Fly Rule from a different angle. He recognizes the logical relationship among the infield fly, intentional drop, and uncaught third strike rules and attempts to devise a single rule to cover all three rules and their distinct situations. His solution: a batter is out if a fair or live ball could be intentionally dropped by an infielder with ordinary effort in order to attempt a double play with less than two outs.³⁷

I question whether one unifying rule covering the three game situations is necessary or beneficial. I also fear Oh's proposed rule is over-inclusive. The third element of a limiting rule is that the game's ordinary rules and strategies preclude the opposing team from avoiding that inequitable cost-benefit disadvantage.³⁸ Oh's rule would reach situations in which the double play might involve the batter and only one baserunner, a situation in which an unfair double play is not a realistic concern. A batter can—and is expected to—run on the hit, so there is no way he should be part of a double play on a fly ball if he makes the expected play and runs hard to first base. The Infield Fly Rule is concerned with a double play involving multiple baserunners, who, unlike the batter, are unable to run on the batted ball (lest they be thrown out at the prior base) but must wait to see if the ball is caught (by which time it will be too late to beat the throws).

Oh's rule also eliminates the single-out uncaught fly ball. With a runner on first only, an infielder allows a fly ball to fall to the ground untouched,

³³ WASSERMAN, *supra* note 2, at 78–79.

³⁴ *Id.* at 34–39.

³⁵ Neyer, *supra* note 15, at 949–50.

³⁶ WASSERMAN, *supra* note 2, at 169–70.

³⁷ Peter B. Oh, *De-Limiting Rules*, 13 FIU L. REV. 951, 952 (2019).

³⁸ WASSERMAN, *supra* note 2, at 11–12, 55.

then gets a force-out at second on a fast baserunner while allowing a slower batter to reach first.³⁹ The National League adopted what became the Infield Fly Rule in 1894 in response to this move by Hall-of-Fame infielder John Montgomery Ward.⁴⁰ But as they tweaked the Rule, rulemakers recognized that the problematic double play involved multiple baserunners, not a batter who should be hustling to first base. Baseball thus left this play legal, occasionally attempted, and often confusing when it is attempted.⁴¹

IV. ANOTHER LIMITING RULE

Spencer Weber Waller offers a new example of a non-baseball limiting rule—rules in soccer and basketball against “flopping,” falling to the ground (often in a dramatic and exaggerated manner) pretending to have been injured or to have been fouled by the opponent and intending to fool the official into calling a foul. The UK Football Association in 2017 and the National Basketball Association in 2012 implemented anti-flopping rules; the NBA punished the practice through increasing fines, while UK Football imposed a two-match suspension based on post-match review of the play.⁴²

I appreciate Waller’s proposal and regret not thinking of this example while writing the book. Waller is correct that flopping produces a game situation that, under the framework I devise, demands a limiting rule:

- A flopping player acts contrary to ordinary athletic expectations by falling to the ground in dramatic fashion when he was not, in fact, injured or fouled;
- A flopping player gains an extraordinary benefit from the play. In soccer, he may get a free kick or penalty kick or may gain extra time on the clock; he also may fool the referee into giving a yellow or red card to the opposing player who did nothing wrong. In basketball, the flopping player draws a foul on the opposing player and team and may get to shoot free throws. These benefits are greater than what the player would have gotten by not falling on the ground (which is to say, nothing);
- The opposing team cannot counter the flop. The opposing team did not do anything wrong but still is called for a foul. The only way to avoid the opponent’s flop is to stay farther away from the flopping player so

³⁹ WASSERMAN, *supra* note 2, at 16–17, 45–46; Guilford & Mallord, *supra* note 4, at 287.

⁴⁰ WASSERMAN, *supra* note 2, at 16–17.

⁴¹ *Id.* at 45.

⁴² Spencer Weber Waller, *The Puzzle of the Infield Fly Rule*, 13 FIU L. REV. 961, 963 (2019).

the referee cannot be fooled into believing there was any contact. But that solution gives the opponent greater freedom to move and to score—precisely what he hopes for; and

- A limiting rule must remove the perverse incentive to flop, either by outlawing flopping or eliminating the in-game benefits of flopping.

The anti-flopping rules from the UK Football Association and the NBA outlaw and sanction the unwanted conduct. But they do so through post-game fines and suspensions, rather than in-game consequences. If that qualifies as a limiting rule, it is a different type.

Post-game punishment may not eliminate the in-the-moment perverse incentive to flop; flopping still provides in-game benefits and the distant risk of an ex post penalty may not provide sufficient disincentive. A player may be willing to incur the post-game sanctions (especially if only a \$5,000 fine on a player making \$10 million per year) in exchange for the immediate in-game benefits of free throws or a penalty kick that help his team win the game.⁴³ The true limiting rules I identify in the book—the Infield Fly Rule, the uncaught third strike rule,⁴⁴ the zero-tolerance false-start rule in track,⁴⁵ and the clock-run-off rule in American football⁴⁶—deter conduct by eliminating the in-game benefits of the unwanted play.

A true limiting rule to halt flopping would sanction the flop immediately and as part of the game. It might trigger a yellow or red card on the flopping soccer player or a technical foul on the flopping team and free throws for the opponent in basketball—immediate consequences that not only deny the player the benefit of the flop but also impose an immediate in-game burden on his team. Unfortunately, it is difficult-to-impossible for a referee to identify a flop in the moment and with the naked eye; these anti-flopping rules rely on post-game review so officials have time to watch and re-watch a play on video, including in slow motion, to decide whether something was a flop. The only way to enforce an anti-flopping rule with an in-game limiting rule would require further use of replay, which triggers different controversies.⁴⁷

⁴³ And one can imagine fans crowd-funding the money to pay that fine as a way to thank the player who helped their team to victory. Cf. Dan Markel,²⁷¹ Michael McCann, & Howard M. Wasserman, *Catalyzing Fans*, 6 HARV. J. SPORTS & ENT. L. 1, 9 (2015).

⁴⁴ WASSERMAN, *supra* note 2, at 88–94.

⁴⁵ *Id.* at 143–47.

⁴⁶ *Id.* at 127–28.

⁴⁷ See Mitchell N. Berman, *Replay*, 99 CALIF. L. REV. 1683, 1686 (2011); Steve P. Calandrillo & Joseph Davison, *Standards of Review in Law and Sports: How Instant Replay's Asymmetric Burdens Subvert Accuracy and Justice*, 8 HARV. J. SPORTS & ENT. L. 1, 3 (2017).

V. CONCLUSION

Infield Fly Rule Is in Effect was a six-year labor of love, enabled by the broad range of legal scholarship that, as Friedman argues, should include the study of sport as a legal system and the study of sports rules as a body of laws that govern significant human activities.⁴⁸ I am grateful that this collection of authors took the time to read and comment on my book. Even if they do not share my conclusions, my analysis, or my love for the Infield Fly Rule, they do share my love for baseball. I am thrilled that we could have this conversation on these pages.

⁴⁸ Friedman, *supra* note 1, at 931.