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# TAKING POP-UPS SERIOUSLY: THE JURISPRUDENCE OF THE INFIELDFLY RULE

NEIL B. COHEN\*  
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In 1975, the University of Pennsylvania published a remarkable item. Rather than being deemed an article, note, or comment, it was classified as an “Aside.” The item was of course, *The Common Law Origins of the Infield Fly Rule*.<sup>1</sup> This piece of legal scholarship was remarkable in numerous ways. First, it was published anonymously and the author’s identity was not known publicly for decades.<sup>2</sup> Second, it was genuinely funny, perhaps one of the funniest pieces of true scholarship in a field dominated mostly by turgid prose and ineffective attempts at humor by way of cutesy titles or bad puns. Third, it was short and to the point<sup>3</sup> in a field in which a reader new to law reviews would assume that authors are paid by the word or footnote. Fourth, the article was learned and actually about something—how baseball’s infield fly rule<sup>4</sup> is consistent with, and an example of, the common law processes of rule creation and legal reasoning in the Anglo-American tradition.

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\* Jeffrey D. Forchelli Professor of Law, Brooklyn Law School. Professor Cohen gratefully acknowledges the support of a Brooklyn Law School Summer Research Stipend in the preparation of this article. This article is an outgrowth of a paper presented by the authors at the symposium “Batter Up! From the Baseball Field to the Courthouse: Contemporary Issues Facing Baseball Practitioners” sponsored by the Benjamin N. Cardozo School of Law of Yeshiva University.

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

2. The author is in fact Will Stevens, a fact discovered by Professor Cohen when giving the annual Hughie Jennings Memorial Lecture at the University of Maryland School of Law several years ago. After delivery of the paper, in which the *Common Law Origins* was praised and the anonymity of its author was bemoaned, Mr. Stevens approached Cohen and indicated that he was the hitherto secret author. Later, this secret was revealed in print, see Roger S. Clark, *Steven Spielberg’s “Amistad” and Other Things I have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery*, 30 RUTGERS L.J. 371, 372 n.1 (1999).

3. *Common Law Origins* was 6 ½ pages long and contained 48 footnotes, two of which were to the word “the” in the Oxford English Dictionary. See *Common Law Origins*, supra note 1, at 1474 nn.1, 4.

4. An infield fly is a fair fly ball which can be caught by an infielder with ordinary effort, when at least first and second base are occupied and there are less than two out. MAJOR LEAGUE BASEBALL, 1998 OFFICIAL RULES OF MAJOR LEAGUE BASEBALL 27 (1997) [hereinafter OFFICIAL RULES]. The umpire shall declare “Infield Fly” and the batter is automatically out. *Id.* at 27–28. If the infielder intentionally drops a fair ball, the ball remains in play. *Id.* Base runners may advance at their own risk. *Id.* at 28.

Most importantly for our purposes, *Common Law Origins* was the launching point of the Law and Baseball movement.<sup>5</sup> Legal scholars simply cannot keep their hands off the infield fly rule—either substantively or as a metaphor.<sup>6</sup> An eminent antitrust scholar quickly responded to *Common Law Origins*, arguing that the infield fly rule was in fact the product of law and economics concerns about efficiency (and potentially other more humanistic concerns) and that *Common Law Origins* was fatally flawed in portraying the infield fly rule as inevitable or the product of a scientific legal regime.<sup>7</sup> Metaphorically,<sup>8</sup> the infield fly rule also has been used to analyze legal problems in tax,<sup>9</sup> evidence,<sup>10</sup> labor law,<sup>11</sup> constitutional law,<sup>12</sup> e-commerce,<sup>13</sup> and the law of prostitution,<sup>14</sup> as well as topics in areas as far a field as linguistics.<sup>15</sup> It has been utilized to analyze

5. Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L.J. 227 (1994).

6. The known legal commentary on the infield fly rule through 1995 has been collected in SPENCER WEBER WALLER ET AL., *BASEBALL AND THE AMERICAN LEGAL MIND* 4–33 (1995).

7. See John J. Flynn, *Further Aside, A Comment on "The Common Law Origins of the Infield Fly Rule,"* 4 J. CONTEMP. L. 241 (1978).

8. See Michael J. Yelnosky, *If You Write It, (S)he Will Come: Judicial Opinions, Metaphors, Baseball, and "the Sex Stuff"*, 28 CONN. L. REV. 813 (1996). For the view that metaphor is the central organizing principle of law and cognition, see Steven L. Winter, *The "Power" Thing*, 82 VA. L. REV. 721, 739, 744 (1996). For how this relates to baseball, see Steven L. Winter, *"Bull Durham" and the Uses of Theory*, 42 STAN. L. REV. 639 (1990).

9. Mark W. Cochran, *The Infield Fly Rule and the Internal Revenue Code: An Even Further Aside*, 29 WM. & MARY L. REV. 567 (1988).

10. Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*, 5 FED. SENT. REP. 96 (1992).

11. R. Jake Locklear, *Arbitration in Olympic Disputes: Should Arbitrators Review the Field of Play Decisions or Officials?*, 4 TEX. REV. ENT. & SPORTS L. 199 (2003).

12. Alan Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261 (1995).

13. David Beckman, *E-mail Rules to Live By*, 83 A.B.A. J. 78 (1997).

14. Clyde DeWitt, *The World's Oldest Profession*, at [http://www.avnonline.com/index.php?Primary\\_Navigation=Editorial&Action=View\\_Article&Content\\_ID=105802](http://www.avnonline.com/index.php?Primary_Navigation=Editorial&Action=View_Article&Content_ID=105802) (last visited Nov. 21, 2004). Mr. DeWitt stated:

In the first place, prostitution is illegal only where the legislature says it is illegal. It is not illegal everywhere. Like the infield fly rule, rules against prostitution were put in place to accomplish some objective that the drafters thought was worthwhile. The laws against prostitution are more complex than the relatively straightforward infield fly rule ("If there are runners on first and second or first, second, and third with less than two outs and the ball is popped up in the infield where an infielder with reasonable effort can catch the ball, the batter is automatically out."). And they are more debatable (the argument against the infield fly rule is that an infielder intentionally dropping a pop-up in an effort to make a double play would transform a mundane pop-up into a very exciting play, and create interesting new strategies).

*Id.*

15. Consider the following excerpt from the definition of "linguistic coordination systems" in *The Dictionary of Critical Sociology*:

In postmodern semiotics, acceptable communication is dependent on the language in use. Precise sense making cannot occur from outside the signifying sphere (la langue) in

problems in cases ranging from the law of sexual harassment<sup>16</sup> to the law governing compromise and settlement.<sup>17</sup> Indeed, the infield fly rule has even been cited as a possible topic of political protest<sup>18</sup> and has been cited in religious sermons.<sup>19</sup> *Common Law Origins* has been widely cited in articles dealing with both baseball and such diverse other subjects as legal theory,<sup>20</sup> legal history,<sup>21</sup> bankruptcy,<sup>22</sup> criminal law,<sup>23</sup> civil rights,<sup>24</sup> constitutional law,<sup>25</sup> and legal citation.<sup>26</sup> This modest Aside has further

operation. To illustrate, in order to explain baseball's "infield fly rule" it is essential to rely upon baseball terminology. Without knowledge of the language of the sport, it is not possible to explain the infield fly rule.

Robert E. Mazur, *Dictionary of Critical Sociology*, at <http://www.public.iastate.edu/~rmazur/dictionary/1.html> (last visited Nov. 21, 2004).

16. See, e.g., *Mann v. Lima*, 290 F. Supp. 2d 190 (D.R.I. 2003).

17. See, e.g., *North County Contractors Ass'n v. Touchstone Ins. Servs.*, 27 Cal. App. 4th 1085 (Ct. App. 1994).

18. Johan Goldberg, *It's Not the Pervert's Problem, It's Ours: Punish Bad Acts, Not Thought Crimes*, NAT'L REV. ONLINE, July 25, 2001, at <http://www.nationalreview.com/goldberg/goldberg072501.shtml> (last visited Nov. 21, 2004). Mr. Goldberg opined:

Thankfully the Soviet Union is gone but, alas, American and European liberal intellectuals still like to refer to America's "political prisoners." America has no political prisoners. It imprisons criminals, some of whom, incidentally, have politics liberals like or admire. Mumia Abu-Jamal, for example, is on death row because he murdered a cop, not because he wrote a provocative essay questioning federalism or the infield-fly rule. And yet in America, and around the world, he's hailed as a "political prisoner."

*Id.*

19. Scott Hoezee, *Luke 10:25-37 "The Gospel Thing"*, at <http://www.calvincrc.org/sermons/topics/justice/justice5.html> (last visited Nov. 21, 2004):

Maybe it's rather like someone who devotes himself to learning every last rule of baseball: there is finally only one reason to pursue such a goal and that is gaining the ability to make judgments on what is fair and what is foul in an actual game. Understanding the infield fly rule or what constitutes a major league balk is totally boring if it is just a theory. You need to see a game before you can use what you know. That's why people who know the rules the best tend to be the same people who watch the most baseball!"

*Id.*

20. See Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 535 (1999); Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 263, 263 (1989); Yablon, *supra* note 5 at 238.

21. See Clark, *supra* note 2, at 372; David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 466 (1983).

22. Karen Gross, *Taking Community Interests into Account in Bankruptcy: An Essay*, 72 WASH. U. L.Q. 1031, 1046 (1994); Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 CONN. L. REV. 913, 917 (1996).

23. See Berger, *supra* note 10.

24. Jeffrey P. Ferrier, Comment, *Title IX Leaves Some Athletes Asking "Can We Play Too?"*, 44 CATH. U. L. REV. 841, 842 (1995); Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239, 242 (1998).

25. Chen, *supra* note 12, at 283; Aside, *Don't Cry Over Filled Milk: The Neglected Footnote Three to Carolene Products*, 136 U. PA. L. REV. 1553, 1558 (1988). Bravo to the Penn law review to have the courage to return to the field of humorous asides after the unapproachable success of

inspired sub-movements examining the legal implications and metaphors arising from other baseball rules such as the now infamous “pine tar” rule.<sup>27</sup> In a very real sense, Mr. Stevens’ work has both created and dominated its field.

For all its greatness, though, *Common Law Origins* is a creature of its time. Written with reference only to common law reasoning, it bears a striking resemblance to the legal process school’s conception of the proper development of law through a process of politically neutral reasoned elaboration.<sup>28</sup> Even in 1975, the concept of the legal process school as the appropriate jurisprudential tool to view law was under heavy attack. Moreover, *Common Law Origins* appears to have deliberately chosen not to address earlier jurisprudential movements such as legal positivism, legal realism, and natural law which would have offered quite different explorations for the evolution and significance of the infield fly rule. In addition, *Common Law Origins* was published in 1975 at the very beginning of the flowering of what is now often referred to as post-modern jurisprudence with its many different approaches to challenging legal orthodoxy. Such challenges can be found in an array of sources ranging from law and economics, critical legal studies, feminist jurisprudence, the cutting edge work of Michel Foucault, the growing internationalization of legal studies, and the growing cultural significance of Vince McMahon, the creator of both the World Wrestling Federation and the short-lived XFL.

We propose to go beyond the common law origins of the infield fly rule and do what the author chose not to do: namely, explore the different spaces for an infield fly rule from the point of view of the great jurisprudential movements of the last hundred years. In so doing we conclude (i) that post-modern jurisprudence strongly suggests that the infield fly rule was far more socially constructed and historically

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*Common Law Origins.*

26. See Arthur Austin, *Footnote Skulduggery and Other Bad Habits*, 44 U. MIAMI L. REV. 1009, 1019 (1990); Mary I. Coombs, *Lowering One’s Cites: A (Sort of) Review of the University of Chicago Manual of Legal Citation*, 76 VA. L. REV. 1099, 1101 (1990); David E.B. Smith, *Just When You Thought It Was Safe to go Back into the Bluebook: Notes on the Fifteenth Edition*, 67 CHI.-KENT L. REV. 275, 276 (1991).

27. See Christopher H. Clancy & Jonathan A. Weiss, *A Pine Tar Gloss on Quasi-Legal Images*, 5 CARDOZO L. REV. 411 (1984); Jared Tobin Finkelstein, *Commentary*, *In Re Brett: The Sticky Problem of Statutory Construction*, 52 FORDHAM L. REV. 430, 435 (1983); Donald J. Rapson, *A Home-Run Application of Established Principles of Statutory Construction: UCC Analyses*, 5 CARDOZO L. REV. 441 (1984).

28. See HENRY M. HART JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Anthony J. Sebok, *Reading The Legal Process*, 94 MICH. L. REV. 1571, 1573 (1996) (book review).

contingent than previously acknowledged, and (ii) that it is much more difficult to be clever, funny, and insightful about law and baseball than it appears.

### I. THE NATURE OF THE BEAST

We tend to think of the infield fly rule as inevitable, in that the evolution of the game would necessarily have led to the adoption of the rule to address the issue that is its subject. As *Common Law Origins* demonstrates, though, the rule was not inevitable—it evolved through conscious choices.<sup>29</sup> There were, indeed, forks in the road that led to the rule. As Yogi Berra advised, “[w]hen you come to a fork in the road, take it.”<sup>30</sup> The baseball legal system followed that advice and ultimately led us to the present-day infield fly rule. The infield fly rule is now such a part of the core of the game that one way to separate true fans from mere dilettantes is by their knowledge of the rule.<sup>31</sup>

The infield-fly rule itself is quite simple:

An INFIELD FLY is a fair fly ball (not including a line drive nor an attempted bunt) which can be caught by an infielder with ordinary effort, when first and second, or first, second and third bases are occupied, before two are out. The pitcher, catcher and any outfielder who stations himself in the infield on the play shall be considered infielders for the purpose of this rule.

When it seems apparent that a batted ball will be an Infield Fly, the umpire shall immediately declare “Infield Fly” for the benefit of the runners. If the ball is near the baselines, the umpire shall declare “Infield Fly, if Fair.”

The ball is alive and runners may advance at the risk of the ball being caught, or retouch and advance after the ball is touched, the same as on any fly ball.<sup>32</sup>

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29. See *Common Law Origins*, *supra* note 1, at 1476–81.

30. YOGI BERRA & DAVID KAPLAN, WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT: INSPIRATION AND WISDOM FROM ONE OF BASEBALL'S GREATEST HEROES (2001).

31. Cf. DINER (Warner Brothers 1982) (Baltimore Colts trivia quiz which must be passed by a fiancé before she will be allowed to marry one of the principal characters). For more information, see The Internet Movie Database, *Diner* (1982), at <http://www.imdb.com/title/tt0083833> (last visited Nov. 21, 2004).

32. OFFICIAL RULES, *supra* note 4, at 27–28.

As explained by Ralph Nelson, Major League Baseball's Vice President for umpiring:

The Infield Fly Rule was instituted to protect the offense from a possibly "unfair" double play. If there were runners on first and second (or bases loaded) and less than 2 out, runners would normally hold their base on a pop-up to the infield since the ball would, in all likelihood, be caught. Without the Infield Fly Rule, an infielder could drop an easy pop-up (or let it drop untouched) and turn a double play, since the runners would then be forced. The rules makers didn't think this was fair and instituted this rule.<sup>33</sup>

At its core, the infield fly rule is a rule against a form of strategic play that results in a deviation from the normal principle that the offensive team benefits from always seeking to hit the ball in such a way as to maximize the chance of a base hit and that the defensive team benefits from always seeking to field batted balls. Yet, it would be misleading to suggest that the game does not tolerate deviations from that norm. Consider the sacrifice bunt (on offense) or the intentional walk (on defense). These practices (both overrated, suggests modern sabermetrics<sup>34</sup>) are neither condemned as bad sportsmanship nor prohibited.

Why is the intentionally uncaught infield fly different? At a basic level, there is one important difference. A sacrifice bunt or an intentional walk involves a trade-off. In the case of a sacrifice bunt, the offensive team trades an out for the advancement of base runners. In the case of an intentional walk, the defensive team allows an additional base runner, but gains an inferior batter at the plate, the possibility of a double play, or both. Thus, in each of these situations, the team exercising the strategy gains a benefit, but incurs a cost in order to obtain it. While sabermetrics can assess whether the benefit outweighs the cost,<sup>35</sup> the benefit clearly is not without cost or risk. Dropping an infield fly with runners on first and

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33. Ralph Nelson, *Ask the Umpire*, at [http://www.mlb.com/NASApp/mlb/mlb/news/mlb\\_news\\_story.jsp?article\\_id=mlb\\_20010622\\_umpireqa\\_cols&team\\_id=mlb](http://www.mlb.com/NASApp/mlb/mlb/news/mlb_news_story.jsp?article_id=mlb_20010622_umpireqa_cols&team_id=mlb) (last visited Nov. 21, 2004).

34. See, e.g., *Are All Hits Equal?*, at <http://64.21.65.46/rhoids2000/inningStateMatrix.htm> (last visited Nov. 21, 2004) (analyzing when sacrifice bunt produces better outcome than having batter seek base hit).

35. David Grabiner, *The Sabermetric Manifesto*, at <http://www.baseball1.com/bb-data/grabiner/manifesto.html> (last visited Nov. 21, 2004). Sabermetrics was popularized in the ground breaking analysis of baseball decision making and statistical measures pioneered by Bill James. See generally BILL JAMES, *THE NEW HISTORICAL BASEBALL ABSTRACT* (2001); BILL JAMES, *BILL JAMES BASEBALL ABSTRACT* (1983). Its origins, however, extend back at least a half-century to Branch Rickey. See Branch Rickey, *Goodbye to Some Old Baseball Ideas*, LIFE, Aug. 2, 1954, at 78.

second bases (and perhaps third base as well) with fewer than two outs is different, though. The defensive team would receive a benefit (an easy double play as the runners must hold their bases to see if the ball will be caught) at no cost.

Why should such a creative strategy be banned? The answer depends, of course, on one's perspective on legal rules and rulemaking.

## II. NATURAL LAW AND THE INFIELD FLY

Most versions of natural law philosophy posit the existence of universal laws founded on some conception of moral precepts. The dominant view of natural law has traced the moral foundations of law to some notion of religious truth and divine revelation.<sup>36</sup> Grounding the infield fly rule in the religious-based view of natural law creates a number of analytical difficulties. The Jewish Torah, the New Testament, the Koran, the Bhavad Gita, and virtually all the scriptural works of the major religions, with the exception of the Book of the Mormon, predate the invention of baseball by centuries or millennia. None discuss baseball, let alone the infield fly rule. Games and play are not a frequent topic except by way of prohibition on certain days deemed too holy for such frivolous activity.<sup>37</sup>

Lacking formal training in comparative religion makes it both difficult and presumptuous for us to reach firm conclusions. Nonetheless, the Bible is a fertile source for analysis of the meaning and nature of law.<sup>38</sup> The Old Testament uses the phrase "commandments," "statutes," and "laws"<sup>39</sup> to distinguish among the types and sources of law. The commentary to this section identifies "commandments" as laws given by God that enforce fundamental moral precepts.<sup>40</sup> "Statutes" are divine laws that are a direct command but do not have an immediately moral basis, with the biblical injunction against eating the flesh of swine given as an example.<sup>41</sup> Finally, "laws" are interpreted as the customs and practices developed by man and human society that cannot be directly traced to a divine source.<sup>42</sup>

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36. Steven A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WISC. L. REV. 1431, 1540.

37. See, e.g., *Leviticus* 23:3 (Sabbath is day of rest); *Numbers* 15:32-35 (punishment of Sabbath-breaker).

38. See Geoffrey P. Miller, *Contracts of Genesis*, 22 J. LEGAL STUD. 15 (1993).

39. See, e.g., Genesis XXVI, 2, THE SONCINO EDITION OF THE PENTATEUCH AND HAFTORAHS 95 & n.5 (J.H. Hertz ed., 2d ed. 1960).

40. *Id.*

41. *Id.*

42. *Id.*



Against this background, the infield fly rule cannot be deemed a commandment by any stretch of the imagination. It appears to be neither divinely inspired nor based upon a fundamental moral precept. The rule could only be deemed a statute if an observer wishes to view the commissioner's office, the rules committee, and the owners as divinely inspired. This would be quite a stretch.<sup>43</sup> While the infield fly rule may be a "law" within the meaning of the old testament commentators, this view roots its origin within human society rather than divine origin; hardly a robust conclusion or endorsement for a legal philosopher steeped in the natural law tradition—although one quite pleasing to a legal positivist or a legal realist.

Perhaps the non-religious branch of natural law, often referred to as "natural rights,"<sup>44</sup> can do better with the infield fly rule. There is a long tradition including Aristotle and key enlightenment figures and continuing through modern notions of fundamental rights that conceives of law as originating in the recurring and eternal conceptions of human experience. Questions of law remain inextricably intertwined with morality and visions of what represents the "good." How then does the infield fly rule promote the Aristotelian notion of the "good,"<sup>45</sup> the enlightenment notion of "inalienable rights,"<sup>46</sup> or Dworkin's notion of "fundamental rights"?<sup>47</sup>

The infield fly rule certainly is not immoral on its face. It promotes notions of fair play and decency and deters a certain limited type of opportunism. Far more empirical work remains to be done in order to determine whether equivalents of the infield fly rule exist in other sports and in other cultures in order to ascertain the kind of universality that suggests it rises to the level of customary natural law. To the extent that legal commentators have identified infield fly type rules in a wide variety of legal fields,<sup>48</sup> or advocated the need for such rules,<sup>49</sup> perhaps it is indeed fair to suggest that non-religious natural lawyers would be quite

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43. This is not a reference to Hall of Famer Willie (Stretch) McCovey. For a brief biography of Mr. McCovey, see National Baseball Hall of Fame, *Hall of Famer Biographies, Willie McCovey*, at [http://www.baseballhalloffame.org/hofers\\_and\\_honorees/hofer\\_bios/mccovey\\_willie.htm](http://www.baseballhalloffame.org/hofers_and_honorees/hofer_bios/mccovey_willie.htm) (last visited Nov. 21, 2004).

44. See George Anastaplo, *The Natural Right Component of American Law*, 23 LEGAL STUD. F. 535 (1999).

45. See ARISTOTLE, NICOMACHEAN ETHICS, Book I (David Ross et al. eds., Oxford University Press 1998).

46. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

47. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

48. See *supra* notes 7–24.

49. See Berger, *supra* note 10.

comfortable with the infield fly rule as a secondary moral-based rule contributing to a just natural order.

### III. LEGAL POSITIVISM: IT'S A RULE, YOU GOTTA PROBLEM WITH THAT?

The quest to find the moral center<sup>50</sup> of the infield fly rule in order to determine its status as a law is an anathema to a legal positivist. A positivist in the Austinian tradition finds law as an emanation of the will of the sovereign, with more modern positivists seeing law as emerging from whatever process that the society recognizes as the source of law.<sup>51</sup> Under the Holmesian view of positivism, law is prediction. Take the view of “bad man” and try to predict the consequence of a particular strand of social behavior.<sup>52</sup> Under most modern positivist views the nature of law, a purported rule is law if it meets the rule of recognition for a society whether it is a just or unjust law.<sup>53</sup> Positivism thus permits, and indeed requires, the observer and critic to engage the moral question separate from the question of whether a particular rule qualifies as law.

Positivism rejects searching for the source of the infield fly outside of human institutions. Like all law, the infield fly rule is made, not deduced from either a “brooding omnipresence” of logical deduction or divine revelation.<sup>54</sup> Thus, a positivist would have no trouble finding the infield fly rule to be a “law” of baseball.<sup>55</sup> It flows from the will of the sovereign<sup>56</sup> and meets the rule of recognition for how baseball law is promulgated. To ascertain what such a law means, most legal positivists would use the tools of analytical philosophy to carefully parse the words chosen by the drafters and the context in which they appear.<sup>57</sup> For most legal positivists,

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50. The actual, rather than the moral, center of an infield fly, indeed any major league baseball, is composed of compressed cork and rubber. A minor league baseball's center is made up of only compressed cork. See LAWRENCE P. FALLON & JAMES A. SHERWOOD, PERFORMANCE COMPARISON OF THE 1999 AND 2000 MAJOR LEAGUE BASEBALLS (2000).

51. ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998).

52. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

53. See SEBOK, *supra* note 51, at 270–71.

54. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 102–03 (1945) (opinion by Frankfurter, J.) (discussing the demise of the *Swift v. Tyson* doctrine of general federal common law).

55. This core insight of positivism was, of course, intuitively obvious even under the common law legal process vision that animated the *Common Law Origins*. See *Common Law Origins*, *supra* note 1, at 1474 (“The infield fly rule is neither a rule of law nor one of equity, it is a rule of baseball.”).

56. A strong argument historically would assign the commissioner the role of the sovereign for these purposes, although more recent events suggest an oligarchy of owners more closely fits this role.

57. See SEBOK, *supra* note 51, at 156–57; see also Anthony J. Sebok, *Finding Wittgenstein at the Core of the Rule of Recognition*, 52 SMU L. REV. 75, 84–86 (1999).

such an approach is necessary because few follow the actual game of baseball.

Well, it's a rule—so what? Here legal positivism runs out of gas like a out-of-shape pitcher rounding third base headed for home.<sup>58</sup> Legal positivism functions best as a theory of law rather than theory of judging.<sup>59</sup> Moreover, it cannot help one judge the quality of a rule except by reference to the normative standards of the observer. Thus, any given positivist may favor or oppose the current version of the infield fly rule,<sup>60</sup> but positivism itself does not give one the tools to identify the better rule.

#### IV. LEGAL REALISM AND TYRANNY OF THE GAME

No analysis of twentieth century jurisprudence can be complete without a serious discussion of legal realism.<sup>61</sup> No jurisprudential movement has as distinguished a pedigree, such a profound impact, so many post-modern heirs, or the ability to plausibly claim that we are all adherents now.<sup>62</sup> Grounded in the proto-realism and positivism of Oliver Wendell Holmes, legal realism makes common cause with the positivists in rejecting an extra-human source of law or an organic connection between law and morality.

Realism's unique claim is to examine the seemingly neutral rules of legal doctrine for the social policies and forces that are the unconscious or disingenuous drivers of legal policy.<sup>63</sup> The majority of the legal realists focused their attention on the so-called "private" law of contracts, torts, and property to uncover the "public" nature of legal rules, the power interests being served and the disguise of conscious policy choices masked by common law decisions.<sup>64</sup> For example, in the torts field, scholars like Leon Green traced the development of the demise of absolute liability for

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58. For those positivists not following the game, please see either author for an explanation of this metaphor. For an explanation of the centrality of metaphor in legal thought, see *supra* note 8.

59. *But see* SEBOK, *supra* note 51 (acknowledging consensus view but arguing for theory of adjudication along legal process lines based on positivist principles).

60. *See* OFFICIAL RULES, *supra* note 4, at 27.

61. For a serious discussion of legal realism, see LAURA KALMAN, *LEGAL REALISM AT YALE 1927–1960* (1986); WILLIAM TWINING, *KARL LLEWELYN AND THE REALIST MOVEMENT* (1973). Those expecting a serious discussion of this important jurisprudential school in this article will, of course, be disappointed, but clearly have not been paying attention.

62. *Cf.* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *TEX. L. REV.* 267, 267 (1997) (noting the popular cliché "we are all realists now").

63. TWINING, *supra* note 61, at 79–80.

64. A smaller wing of realists applied these same techniques and insights to the field of government regulation. *See* Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 *CASE W. RES. L. REV.* 283, 290 (2001).

trespass involving interference with air rights over property to the rise and need for commercial aviation.<sup>65</sup> Similarly, Green organized his casebook on torts around cases on railroads, automobiles, telegraphs, etc., rather than around misleading and indeterminate legal concepts such as duty or proximate cause.<sup>66</sup>

The realists were thus more interested in the social sciences and the insights they reveal about public policy choices than the legal rules which obscure the choices being made by judges in a common law system.<sup>67</sup> The realist movement ultimately lost much of its influence during the years of World War II as natural law reasoning proved a more satisfying counter to the rise of the Fascist powers, and legal process theories grounded in positivism gained influence after the war.<sup>68</sup> However, the realists can claim as their heirs both the modern day law and society movement, incorporating the need for social science analyses of legal rules, and the critical legal studies movement, incorporating the rule skepticism of the realists.<sup>69</sup>

What then are the hidden (or not so hidden) power interests served by the seemingly neutral infield fly rule? What can social science reveal about the rule where legal doctrine is indeterminate and easily manipulable by result oriented judges (or umpires)? Who knows what evil lurks in the hearts of men?<sup>70</sup>

Such discretion subtly shifts power from the players to the umpires and, in so doing, to the team owners. Judges (and umpires) are selected by systems that favor interests of property over labor and create doctrine to mask the exercise of this power. A middle aged, primarily white, and all male,<sup>71</sup> umpire judiciary is further entrenched over the athletes and the

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65. See LEON A. GREEN, *THE LITIGATION PROCESS IN TORT LAW* (1965).

66. See LEON A. GREEN ET AL., *CASES ON THE LAW OF TORTS* (2d ed., 1977). Professor Waller, as a first-year law student using the final edition of the book in 1979, thus remains part of the distinct minority of American law students never to have read the famous *Palsgraf* opinion since proximate cause is a mere fiction, and true tort liability depends on duty which in turn depends on public policy concerns which in turn depends on social science data outside the legal field.

67. JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

68. SEBOK, *supra* note 51, at 116–17.

69. See SCHLEGEL, *supra* note 67.

70. The Shadow knows. See *The Shadow Knows Home Page*, at <http://members.iquest.net/~drivers/shadow.html> (last visited Nov. 21, 2004).

71. Consider Pam Postema, by all accounts the most successful female umpire in baseball history. She was an umpire in the minors from 1977–88, major league spring training 1988–89, and the Hall of Fame Game (Yankees v. Braves) in 1988. In 1989 her Triple-A contract was cancelled. She filed an unsuccessful federal sexual discrimination lawsuit. See *Postema v. Nat'l League of Prof'l Baseball Clubs*, 998 F.2d 60 (2d Cir. 1993); see also PAM POSTEMA, *YOU'VE GOT TO HAVE BALLS TO MAKE IT IN THIS LEAGUE* (1992). There has been at least one recent female umpire in Class A minors.

fans who are considerably more diverse than the umpires who rule over them.

Oddly enough, the shift of power has the opposite effect in terms of income distribution, empowering the relatively poorer umpires at the expense of the vastly wealthier players (or owners). According to the realists, only social science will reveal the better public policy and the true interests served. Are the inequalities of large versus small market teams exacerbated by the discretion exercised under the guise of the rule? Is the rule a mere symbol of a pastoral national past time designed to distract fans from the realization that the game has irrevocably become the “product” of unregulable multinational corporations?<sup>72</sup> Or to a hard-core skeptic realist, is application of the infield fly rule merely a product of whatever the umpire had for breakfast that morning?<sup>73</sup>

#### V. THE INTERNATIONAL FLY RULE

The growing internationalization of legal practice and legal education counsel against a parochial American view of our topic. Like law, major league baseball is rapidly internationalizing through the incorporation of players from around the world,<sup>74</sup> the existence of Canadian professional teams,<sup>75</sup> international exhibitions, pre-season, regular season, and winter baseball outside of the United States,<sup>76</sup> the wide spread popularity of organized baseball in numerous countries,<sup>77</sup> and the promotion of the game through the international media and the Internet.

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See Steve Rosenbloom, *Can't Mask Her Love of the Game*, CHI. TRIB., May 4, 2001, at 4-1.

72. See THURMAN ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) (making the same argument about role of antitrust law in mid-20th century America).

73. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 176 (1992). See generally JEROME FRANK, *LAW AND THE MODERN MIND* (1970).

74. Naoki Chiba, *Pacific Professional Baseball Leagues and Migratory Patterns and Trends*, 28 J. SPORTS & SOC. ISSUES 193 (2004); George Vass, *The Wide World of Baseball: Foreign-born Players are Filling Major League Rosters, Showing the True Measures of Global Talent in the American Pastime*, BASEBALL DIG., Feb. 2003.

75. With the transfer of the Montreal Expos to the Washington, D.C. area, the Toronto Blue Jays are the only Major League Baseball team in Canada. See David Sheinin, *Play Ball!; Move to Washington Could Make Expos More Competitive*, WASH. POST, Sept. 30, 2004, at D1.

76. See Eric Enders, *Timeline of International Baseball, 1847-Present*, at <http://www.ericenders.com/internationalbb.htm> (last visited Nov. 21, 2004).

77. See, e.g., J.L. Arbena, *The Later Evolution of Sport in Latin America: The North American Influence*, 18 INT'L J. HIST. SPORT 43 (2001) (discussing growth of baseball in Latin America); ROBERT WHITING, *YOU GOTTA HAVE WA* (1989) (discussing growth of baseball in Japan). To make matters even more peculiar, in the years prior to their transfer, the Montreal Expos played a portion of their “home” games in Puerto Rico.

The tools of international and comparative law enable an additional perspective that can enrich our understanding of the infield fly. But is there an international law of infield flies? Certainly not, if we limit ourselves to the classic law of nations. To the best of our knowledge, no nation has such a law, although we are willing to travel extensively in order to verify this point.

Nor are there any known treaties or conventions explicitly dealing with the infield fly rule or other aspects of baseball. Despite a passion for harmonization and mixed public/private law making in virtually all areas of law, the World Trade Organization, the United Nations, the Hague Conference on Private International Law, the International Institute for the Unification of Private Law (“Unidroit”), the International Chamber of Commerce, and all significant transnational organizations have seemingly ignored baseball, let alone the refined understanding of the game represented by the infield fly rule. From Professor Cohen’s perspective of having been involved in several such ventures in the commercial law area, this is an incontestable blessing. From Professor Waller’s perspective, a Convention on Baseball in the Americas would be beneficial but would undoubtedly be undercut by the unwillingness of the United States to ratify whatever emerged from such negotiations.

Yet, there are signs that international law is working its way to the infield fly rule. First, the United Nations recently promulgated a convention prepared by the United Nations Commission on International Trade Law (“UNCITRAL”) on the “assignment of receivables”<sup>78</sup> which, for the first time, provides coherent legal rules for international trade in “receivables.” What, we ask, is more receivable, and for a longer time, than an infield fly? Second, Unidroit has recently distributed a “Preliminary Draft Protocol on Matters Specific to Space Assets” for its Convention on International Interests in Mobile Equipment.<sup>79</sup> Aren’t pop-ups the ultimate space assets?

Finally, there remains the question of customary law, the second great source of international law. Customary international law consists of those virtually universal norms that nations (or other actors in the international sphere) follow out of a sense of obligation.<sup>80</sup> The existence of infield fly

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78. United Nations Convention on the Assignment of Receivables in International Trade, Dec. 12, 2001, 41 I.L.M. 776.

79. UNIDROIT Convention on International Interests in Mobile Equipment, Nov. 16, 2001, available at <http://www.unidroit.org/english/workprogramme/study072/study072j/72j-13rev-e.pdf> (last visited Nov. 21, 2004).

80. Positivists should stop reading here since the concept of recognizing law as emanating from custom, rather than recognized rules from an authorized human institution, is profoundly disturbing.

rules, their equivalents in other baseball cultures, the universality of such rules, and the reason why such rules are obeyed poses a fascinating research agenda that the authors invite their deans, interested alums, and foundations to support.

## VI. LAW AND ECONOMICS

“Law and economics,” or the economic analysis of decisions that law makes, is, of course, all about efficiency.<sup>81</sup> How ironic that our least efficient pastime<sup>82</sup> should be subject to such analysis. Yet, the question of an efficient infield fly rule is a legitimate issue for debate.

Determining what an efficient infield fly rule (or non-rule) would look like is no easy task, however. Efficiency, at root, is about maximization<sup>83</sup>—but what is to be maximized? Some casually refer to the quantity to be maximized as “wealth,” but this is simplistic. For one thing, even fungible and countable wealth does not all have equal value to its possessor. Bill Gates’s nine-hundredth million dollars presumably means less to him than his first million dollars.<sup>84</sup> In baseball terms, an additional run scored by the Cleveland Indians in the ninth inning of an interleague game in which it is already ahead of the Chicago Cubs<sup>85</sup> by a score of 19-3 is likely not valued nearly as much as the team’s first four runs (or, perhaps, first 10 runs in light of the fallibility of bullpens and the propensity of baseballs to leave Wrigley Field). Moreover, not all things of value come in easily countable form, requiring some difficult translations to a common denominator such as money. Thus, economists often refer to that which is to be maximized as “utility”—a metric, not always rigorously defined or articulated, representing the marginal value of all valued things in the context of the problem at hand.<sup>86</sup>

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This makes the average positivist deeply suspicious of the field of international law. This combined with the lack of positivist attention to the law of baseball makes the authors deeply suspicious of positivism.

81. See RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 12–17 (5th ed. 1998); Flynn, *supra* note 7, at 242–43.

82. It is frequently observed that baseball is the only major sport played without a clock. Moreover, the length of the game has increased dramatically over the past thirty years. See Allen Barra, *Want to Speed Up Baseball? Take Away the Home Run*, SALON MAG., at <http://www.salon.com/news/sports/col/barra/2002/04/11/baseballtime> (last visited Nov. 21, 2004).

83. POSNER, *supra* note 81, at 12.

84. *Id.* at 500–02.

85. Teams chosen for the purpose of one co-author tweaking the other. See WALLER ET AL., *supra* note 6, at 503.

86. POSNER, *supra* note 81, at 13.

What are the components of utility which are sought to be maximized by a rule concerning infield flies? In identifying candidates for this position, we must recall the zero-sum nature of most components of baseball—what is good for the team on offense is bad for the team on defense, and vice versa. Again, with this aspect of baseball in mind, we must ask what is to be maximized. It is not runs, for while the offense seeks to maximize its runs, during a pop-up the defense is seeking to minimize those rather than maximize its own. Similarly, it cannot be outs that are the precious commodity. They are precious for the defense but generally poison to the offense. At bottom, the resource that is sought to be maximized must be victory. There is only one of those per game, and each team seeks it. Yet, even that conclusion might be short-sighted. A team that wins a game by use of a tactic that is reviled by other teams could conceivably be on the receiving side of practices in other games that would leave the winner of this game in a net loss position. Thus, the ultimate subject of maximization must not be a single victory but, rather, victories (*plural*).<sup>87</sup>

The calculus of efficiency for a victories-maximizing infield fly rule is daunting, especially in light of the fact that most rules seem symmetrical in that the net benefit to the offense and defense would seem to add to zero in many cases. Perhaps this analysis need not even occur, however. Coase taught us that the parties will bring about an efficient allocation themselves without regard to a rule, if only we are in that economists' perfect world of no transaction costs.<sup>88</sup> (This must also be the world of massless ropes and frictionless pulleys that inhabited the authors' college physics problem sets.)<sup>89</sup> Of course, for Coase's theorem to work, we would need a free market in the allocation of costs and benefits from dropped pop-ups, a prospect unlikely to be publicly endorsed by the baseball powers that be. Perhaps an alternate baseball universe allowing such reallocation of strategic benefits could be developed and observed—or would a thought experiment suffice?<sup>90</sup> (By way of contrast, it has

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87. Even then it should be noted that a victory for a first-place team with a large lead may have less utility than a victory for a team in a close race.

88. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

89. The authors would cite to their freshman physics course books, except that they sold them to pay for their sophomore year's books.

90. A March 2003 search of the combined law review data base reveals that over 1000 law review articles have resorted to this sort of arm-chair theorizing rather than doing any actual empirical investigation in the real world.



already been noted that, in the [relatively] free market for players, Coase's theorem does appear to work.)<sup>91</sup>

Any bargaining model, however, necessarily runs into the reality of agency costs<sup>92</sup> (as distinguished from free-agency costs).<sup>93</sup> After all, the interests of the separate parts of a team—batters, runners, pitchers, fielders, coaches, the manager, ownership—are hardly congruent, and may not be the same as the single-minded team interest in victories. Yet the team can only bargain through its agents, setting the possibility of new inefficiencies.<sup>94</sup>

Even if the hypothetical bargaining that we imagine yields a prediction as to what would happen if pop-ups could be the subject of such bargaining, this prediction leads us to an arguably efficient answer, but does not provide any moral insights into how the costs of this efficiency should be allocated. In other words, we might be maximizing efficiency, but not optimizing it.<sup>95</sup>

Among the possible further lines of inquiry for our economic analysis of pop-ups is the question of whether any rules that are identified should only be default rules—that is, are they mandatory and unchangeable or should they be changeable by agreement of the teams?<sup>96</sup> As an alternative, perhaps each home team could choose its view of an efficient infield fly rule and mandate it for the game, sort of a “ground rules”<sup>97</sup> approach.

## VII. FEMINIST LEGAL THEORY

In recent years, one branch of feminist legal theory has expressed disapproval of methods of legal analysis that assume that competing

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91. See Another Liberal Pundit, *April 23, 2002*, at [http://liberalpundit.blogspot.com/2002\\_04\\_21\\_liberalpundit\\_archive.html](http://liberalpundit.blogspot.com/2002_04_21_liberalpundit_archive.html) (last visited Nov. 21, 2004) (“But guess what? The Coase Theorem applies to major league baseball! As long as trades can include a cash component, even without free agency, players will end up on the teams for which they provide the best return. Instead of paying money to the player, the teams will pay money to each other.”).

92. POSNER, *supra* note 81, at 427–28.

93. See *Flood v. Kuhn*, 407 U.S. 258 (1972); *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass’n*, 532 F.2d 615 (8th Cir. 1976).

94. POSNER, *supra* note 81, at 83.

95. See Neil B. Cohen, *Conceptualizing Proof and Calculating Probabilities: A Response to Professor Kaye*, 73 CORNELL L. REV. 78, 95 (1987).

96. Cf. UCC § 1-302 (2002) (providing that most rules of the Uniform Commercial Code may be changed by agreement of the parties).

97. See Major League Baseball, *Ballpark Ground Rules*, at [http://mlb.mlb.com/NASApp/mlb/mlb/official\\_info/umpires/ground-rules.jsp](http://mlb.mlb.com/NASApp/mlb/mlb/official_info/umpires/ground-rules.jsp) (last visited Nov. 21, 2004) (listing the requirements for ground rule doubles for each major league stadium).

parties must necessarily act in competition with each other.<sup>98</sup> Eileen Scallen has encapsulated the question as follows:

The power of games is that they generally have definite outcomes—one side wins and one side loses . . . . The uncertainty and unpredictability of the outcome of the game creates tension and drama; who will win? In the clarity of the outcome—whether the light of the victory or the darkness of the loss—it becomes harder, however, to care about the perennial question: Does it matter how you play the game?<sup>99</sup>

This school of thought posits that models emphasizing cooperation rather than competition should be given greater prominence in our analyses of legal rulemaking. As stated by Adam Arms, “The cooperative aspects of team sports are left out of legal discourse, the emphasis typically placed on ‘winning at all costs rather than fair play and rules.’”<sup>100</sup>

What would happen if such analyses based on cooperation rather than competition were applied to study of pop-ups and the crafting of an cooperatively-based infield fly rule?

Several preliminary questions would require resolution. For example, when would the requisite cooperation take place? The hang time of a typical infield fly is approximately four seconds<sup>101</sup>—this is precious little time for cooperation to take seed and germinate. Perhaps the cooperation would take place in advance, behind a Rawlsian veil of ignorance<sup>102</sup> in which the teams would not know whether they would be the “poppers” or the “poppees.” (Of course, such non-contextual cooperation demands less selflessness than cooperation in the context of a particular team’s pop-up.) It is possible that such advance non-contextual cooperation might yield a

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98. See, e.g., JUDITH A. BAER, *OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE* (1999); MARTHA CHAMALLIS, *INTRODUCTION TO FEMINIST LEGAL THEORY* (1999); *FEMINIST LEGAL THEORY* (Frances E. Olsen ed., 1995).

99. Eileen A. Scallen, *The Big Game: Metaphor and Education in the Simpson Trial*, 6 *HASTINGS WOMEN’S L.J.* 289, 289 (1995).

100. Adam Arms, *Metaphor, Women, and Law*, 10 *HASTINGS WOMEN’S L.J.* 257, 274 (1999) (quoting Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 *WIS. WOMEN’S L.J.* 225, 243 (1995)).

101. Author’s observation of Jim Thome’s pop-ups during Thome’s time as a member of the Cleveland Indians. The observation may be conservative, as exemplified by the following physics question posted on the “Kinematic Equations and Problem-Solving” page of the Glenbrook South (Illinois) High School Physics webpage: “A baseball is popped straight up into the air and has a hang-time of 6.25 s. Determine the height to which the ball rises before it reaches its peak. (Hint: the time to rise to the peak is one-half the total hang-time.)” *Lesson 6: Kinematic Equations and Problem Solving*, at <http://www.glenbrook.k12.il.us/gbssci/phys/Class/1DKin/U1L6d.html> (last visited Nov. 21, 2004).

102. See JOHN RAWLS, *A THEORY OF JUSTICE* 136 (1971).

result consistent with economic models that emphasize *ex ante* efficiency rather than efficient outcomes to each situation.<sup>103</sup>

The authors query whether such congruence of outcomes would suggest that there is an essential, and hitherto unexplored, link between this aspect of feminist legal theory and law and economics world of efficiency, and suggest that baseball analysis might be stretched beyond its limits to answer this query. Knowing the results of cooperation might also enable us to settle our Coasian bets as to the parties' allocation of the benefits of an infield fly rule. Would a rule crafted in the context of cooperation be different than a rule designed to maximize (or optimize) efficiency? If so, this might well have a profound implication for both of these schools of jurisprudence.

### VIII. CRITICAL LEGAL STUDIES

No study of the jurisprudence of the infield fly rule would be complete without analyzing it from the context of the critical legal studies movement.<sup>104</sup> That movement, with its strong belief that legal rules are the product of power rather than, say, logic, fairness, or economic efficiency,<sup>105</sup> could certainly cast the infield fly rule conundrum in a different light. But it is not obvious exactly what that light is. Just who is the sovereign that imposed the infield fly rule? What does it have to gain from the rule? Of course, at one level the very teams that must play by the infield fly rule are, in aggregate form, the sovereign that imposes it. The teams collectively create the governing structure that makes the rules. Perhaps, as Pogo once said, "we have met the enemy and he is us."<sup>106</sup> Of course, this governed-as-governors analysis might prove too much; after all, the same analysis could be applied to democratic decision making.

In addition, it must be remembered that baseball's collective decision making might not be the product of a pure one-team, one-vote process. After all, the wealthier teams (whether in cash or in muscle) seem to have many ways to influence the outcome of baseball decisions. How else does one explain the development of an entire system that many believe is effectively devoted to the care and feeding of large market teams?

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103. See, e.g., POSNER, *supra* note 81, at 28.

104. See, e.g., MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 106–27 (1995); Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 *YALE L.J.* 46 (1984).

105. MINDA, *supra* note 104, at 106.

106. See *Walt Kelly*, at <http://www.bpib.com/kelly.htm> (last visited Nov. 21, 2004) (biography of Walt Kelly, creator of cartoon strip Pogo).

Certainly, critical legal studies can cast the infield fly rule in a new and perhaps more sinister light.

Indeed, it is possible to reconceptualize the infield fly rule as an example of the hegemony of power-pitching teams over finesse-pitching teams. Power pitchers tend to allow a disproportionate number of base runners, especially through walks, but they also tend to generate more pop-ups than ground balls. Finesse pitchers, on the other hand, tend to allow fewer base runners and retire more batters on ground balls than on pop-ups. Whether such hegemonic behavior benefits only the strong over the weak, or results in greater baseball wealth for all through some form of trickle-down baseball economics, is left for further analysis.<sup>107</sup>

#### IX. POST-STRUCTURALISM AND THE DISCOURSE OF THE GAME

The premises and methodology of this section derive in substantial part from the writings of Michel Foucault, particularly in his work of uncovering the archeology and genealogy of the growth of power through the creation of the scientific and professional disciplines and specialized discourses.<sup>108</sup> While the teachings of Foucault have been extensively

107. Perhaps further questions should be directed to Jim Walsh, the Reference Services Librarian at the Mercer University law library, who, on his web-published resume, lists his interests as follows:

Areas of law—legal research, technology and law, U.S. constitutional law, intellectual property, administrative law, appellate practice, energy law and *critical legal studies*. Other interests—playing with my kids, running, film, American Studies, *baseball*, Linux, geocaching, and building Lego Mindstorm robots.

*Jim Walsh: Reference Services Librarian, Law Library, at <http://www.law.mercer.edu/resources/staffdata.cfm?staffid=282> (last visited Nov. 21, 2004) (emphasis added).*

Alternatively, another source for further elucidation could be Alexander M. Sanders, Jr., former Chief Judge of the South Carolina Court of Appeals, who presented a program described as follows to the International Association of Defense Counsel:

“Mrs. Robinson’s Case,” a dramatic performance of a hypothetical case, decided in the Supreme Court of Newgarth, a mythical appellate court. IADC volunteers will act as the judges, a group as wildly diverse as the Serengeti migration. As usual, they are engaged in the crude and brutal business of sitting in judgment on their fellow human beings. The opinions of the judges illustrate the eternal problems of humankind. A number of vastly different and conflicting schools of jurisprudence will be illustrated, including original intent, legal realism, law and economics, law and literature, *law and baseball*, *critical legal studies*, and feminist legal theory.

Joan Fullam Irick, *President’s Page: IADC Explores Tomorrow’s Issues*, at <http://www.iadclaw.org/StaticContent/pdfs/PresidentsPage042003.pdf> (last visited Nov. 21, 2004) (emphasis added).

108. “What it [genealogy] really does is to entertain the claims to attention of local, discontinuous, disqualified, illegitimate knowledges against the claims of a unitary body of theory which would filter, hierarchise and order them in the name of some true knowledge . . .” MICHAEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977* 83 (Colin Gordon ed., 1980). For more on Foucault’s views on discourse, truth, and power, see *id.* at 82–87, 117, 126–33, 233; MICHAEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE OF*

applied in legal scholarship, they have not to our knowledge been applied to analyzes of the legal structures of baseball, and definitely not the infield fly rule.<sup>109</sup>

Foucault was suspicious of dialectical reasoning for the discourses and voices that it excluded.<sup>110</sup> He did not entirely share the fascination of many Marxist and neo-Marxist scholars of his generation on the power of the state and focused instead on the many forms of non-state disciplinary power and discourse that shaped the world and imprisoned us from imagining new social structures and power relationships.<sup>111</sup>

What then to make of the infield fly rule from this perspective, which was just beginning to make its mark as Will Stevens was completing his baseball masterpiece? Understanding of the infield fly rule is probably the single defining aspect of baseball that distinguishes a baseball insider from an outsider. To master this rule is to be part of the discipline of baseball.<sup>112</sup> And yet, once in this select group you are subject to the discipline of baseball. Box scores rule your life and, in extreme cases, fantasy baseball becomes more interesting than the real thing.<sup>113</sup> For you, time does begin on opening day<sup>114</sup> and life frequently imitates the World Series.<sup>115</sup> You probably prefer natural grass to artificial surfaces, perhaps in your living room as well. The designated hitter troubles you almost as much as poverty and injustice. If from Chicago, you probably prefer day baseball to night games.

Foucault would have us look at who is excluded by this rite of passage represented by the mastery of the infield fly rule. The rule serves to exclude those who are simply too young or too amateurish to understand it. The rule exists in most little leagues,<sup>116</sup> high school baseball,<sup>117</sup> most

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LANGUAGE (Alan Sheridan trans., 1972).

109. Cf. ROLAND BARTHES, MYTHOLOGIES 15–25 (Annette Lavers trans., 1988) (discussing cultural and semiotic significance of professional wrestling in 1950s France).

110. See generally ALAN HUNT & GARY WICKHAM, FOUCAULT AND THE LAW: TOWARDS A SOCIOLOGY OF GOVERNANCE (1994).

111. *Id.* at 17–20.

112. A recent Google search for “infield fly rule” revealed 4,830 matches (search conducted Feb. 29, 2004).

113. Only a devotee of rotisserie league baseball, or its many equivalents, can understand the pressure when a pitcher on your “fantasy” faces your real life favorite team including a key slugger from your “fantasy” team. One ends up constructing elaborate arguments seeking to morally justify rooting for the pitcher on the opposing team to win the game by a 2-1 score with the losing team scoring only by a home run by the slugger on your fantasy team.

114. THOMAS BOSWELL, WHY TIME BEGINS ON OPENING DAY (1984).

115. THOMAS BOSWELL, HOW LIFE IMITATES THE WORLD SERIES (1982).

116. See, e.g., *Albany Little League Local Rules*, at <http://www.albanylittleleague.org/rulesour.htm> (last visited Nov. 21, 2004) (listing rules for little league games in Albany, California); *North Regina Little League Rule Book*, at <http://www.nrlittleleague.com/content/morerules.asp> (last

softball leagues,<sup>118</sup> as well as Major League Baseball. It serves as an intellectual marker of who is ready for the game.<sup>119</sup> The rule is also *perceived* to exclude women, or at least to mark them as unworthy and incapable of understanding the nuances of the game.<sup>120</sup>

In addition to “who” is excluded by such discourse, Foucault would have us consider “what” is excluded. In understanding the minutia of the game, you become a slave to the discourse. Rules that are socially and historically contingent<sup>121</sup> and contestable begin to look permanent, inevitable, and essential to civilized society. Radical reinvention and reimagination of the game becomes virtually impossible. The discourse of the game empowers the status quo and channels dissent into meaningless gestures (Disco Demolition Night?) that only reinforce the channels dug by the way we understand “baseball.” Or perhaps, Foucault is best understood as yet another dead white male European philosopher who can only be applied to the American national past time by tenured academicians with too much time on their hands.

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visited Nov. 21, 2004) (listing rules for little league games in Regina, Saskatchewan, Canada); *Northwest Washington Little League Rules*, at [http://www.nwlldc.org/nwll\\_rules.html](http://www.nwlldc.org/nwll_rules.html) (last visited Nov. 21, 2004) (listing rules for little league games in Washington, D.C.).

117. See Jason Frakes, *Infield Fly Grounded PSJ's Rally*, May 16, 2000, available through <http://www.newsherald.com> (last visited Nov. 21, 2001).

118. See *Edinburgh Softball League Local Rules*, at [http://www.softball.org.uk/teams\\_esl\\_rules.html](http://www.softball.org.uk/teams_esl_rules.html) (last visited Nov. 21, 2004).

119. In contrast, the infield fly rule normally is not part of T-Ball, the version of baseball for the youngest players. See *Baseball/Softball/T-Ball Rules*, at [http://www.kidsports.org/rules\\_policies/generalrules\\_baseball.htm](http://www.kidsports.org/rules_policies/generalrules_baseball.htm) (last visited Nov. 21, 2004); cf. *JUGS Pitching Machine Leagues*, at <http://www.thejugscompany.com/coaches/pitchingleague.cfm> (last visited Nov. 21, 2004) (commercial web site for company manufacturing pitching machine for leagues with young players recommending no infield fly rule).

120. The columnist and (alleged) humorist Lewis Grizzard explained the differences between the sexes as follows:

Women, [he explained, as if anyone could explain women,] have absolutely no idea, no comprehension of the infield fly rule. The infield fly rule is one of the reasons that the planet keeps turning. If you didn't have the infield fly rule and you hit a pop-up, the runners on first and second wouldn't know whether to run or not, and the infielder could screw around and not catch it on purpose . . . it would be chaos! When I try to explain the infield fly rule to women, they look up at me and say, The what?

Paul Greenberg, *A Collection of Valentines*, at <http://www.townhall.com/columnists/paulgreenberg/printpg20010221.shtml> (last visited Nov. 21, 2001).

121. The infield fly rule did not exist prior to the 1890s although organized baseball had been in existence for three decades. See *Baseball Almanac Rule Change Timeline*, at <http://www.baseball-almanac.com/ruleschg.shtml> (time line of rule changes in baseball) (last visited Nov. 21, 2004).

## X. ANARCHY/XFL APPROACH

Critical legal studies has a distant cousin in the jurisprudence of anarchy.<sup>122</sup> In the early twenty-first century, athletic jurisprudence has spawned an anarchic strand. This strand of legal nihilism has been popularized most particularly by its leading practitioner, Vince McMahon, under the rubric “smashmouth” sports.<sup>123</sup> Under this view, sports becomes sports entertainment. Old sports can be seen in a new, and perhaps unadulterated light, by the repeal of rules that are designed to eliminate the purest and rawest forms of competition in the interests of effete ideals such as grace, fairness, and the prevention of injury. In the XFL,<sup>124</sup> for example, the major rule change (other than allowing cameras to go where no camera had gone before)<sup>125</sup> was the elimination of football’s rough equivalent of the infield fly rule—the fair catch rule. Elimination of this anticompetitive rule would, it was hoped, stoke the competitive fires of the opposing teams, yielding a “truer” game.

Was this attempt to commercialize anarchy successful? We may never know—or at least not until we solve the conundrum about the tree falling in the forest that no one hears.<sup>126</sup> After all, the XFL was a resounding failure.<sup>127</sup> Would elimination of the infield fly rule yield the commercial benefits sought by the XFL experiment? Even on the XFL’s own terms, the answer would appear to be no. Unlike football’s fair catch rule, elimination of infield fly rule would not significantly increase the chances of injury or of the sight of blood—the apparent desiderata of the XFL. Perhaps, though, if the repeal of the infield fly rule were accompanied by the repeal of equally antique baseball rules against interference by members of the offensive team with the defense’s attempts to field batted balls,<sup>128</sup> the repeal of the infield fly rule could lead to new strategic

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122. Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 864–69 (1992) (discussing jurisprudence of doubt).

123. *XFL Unveils Smashmouth Names*, at [http://www.canoe.ca/FootballXFL/aug24\\_xfl.html](http://www.canoe.ca/FootballXFL/aug24_xfl.html) (last visited Nov. 21, 2004).

124. This term is not really an abbreviation inasmuch as it has no fully-spelled antecedent. The “X”, however, is designed to remind the reader of “extreme.”

125. Walt Belcher, *Xtreme Measures*, TAMPA TRIB., Feb. 2, 2001, available at 2001 WL 5492785.

126. This cliché of undergraduate philosophy classes has been cited in 37 law review articles contained in the combined law review Lexis database as of March 2003.

127. Gregg Easterbrook, *The Real Reason the XFL Folded*, SLATE MAG., Dec. 31, 2001, at <http://slate.msn.com/id/2060282> (last visited Nov. 21, 2004).

128. Offensive interference is defined as:

an act by the team at bat which interferes with, obstructs, impedes, hinders or confuses any fielder attempting to make a play. If the umpire declares the batter, batter–runner, or a runner out for interference, all other runners shall return to the last base that was in the judgment of

frontiers. Perhaps, even, baseball would move from its monomaniacal obsession with the zone defense<sup>129</sup> to a man-on-man model wherein one defender's responsibility might be to "take out" the runner on second base.

Ultimately, such anarchic baseball might be seen as a return to the game's roots. After all, originally a player was "put out" by being struck with the ball thrown by a fielder.<sup>130</sup> Are these roots purer, or simply more primitive? (Or are these two qualities synonymous?)<sup>131</sup>

In any event, determining the infield fly rule through a jurisprudence of anarchy has some advantages—complexity and subtlety are not likely to be the hallmarks of such a rule. Accordingly, the rule might be more easily understood by casual baseball fans than, say, the scoring rule that determines whether a relief pitcher is entitled to be credited with a save.<sup>132</sup> Accessibility of a society's rules could be said to be an important step in establishing their legitimacy. On the other hand, the rule, apart from the context, might not be outcome-determinative inasmuch as it might depend on the size and strength (and willingness to engage in fisticuffs) of the players on the field at the time.

One variation of this anarchic approach to rule making would be to take the power to make the rules away from the normal rulemakers. In the early 1950s, for example, St. Louis Browns owner Bill Veeck removed certain strategic decisions from the purview of the manager. Veeck gave all fans entering the park (a paltry number, to be sure) signs on which were printed directions such as "steal," "hit-and-run," and "intentional walk," and the fans were polled at appropriate moments. Under Veeck's orders, the manager was required to follow the dictates of the fans.<sup>133</sup> Of course, applying such fan-centric rulemaking principles to the infield fly rule could likely result in a decided home field advantage.

the umpire, legally touched at the time of the interference, unless otherwise provided by these rules.

In the event the batter-runner has not reached first base, all runners shall return to the base last occupied at the time of the pitch."

OFFICIAL RULES, *supra* note 4, at 29.

129. Baseball defenders take to their zone positions with such regularity that the occasional deviation from standard "zones" is considered quite newsworthy. Consider, for example, the "Williams Shift" (also known as the Boudreau Shift) utilized by the Cleveland Indians (then managed by Lou Boudreau) in the late 1940s when facing Ted Williams. For unknown reasons this shift most recently was employed against the lesser known Brian Daubach of the Chicago White Sox in a spring training game.

130. See *Baseball Almanac Rule Change Timeline*, *supra* note 121.

131. See THOMAS HOBBS, *LEVIATHAN* (Herbert W. Schneider ed., 1958) (1651).

132. OFFICIAL RULES, *supra* note 4, at 189 (Rule 10.20).

133. See BILL VEECK, *VEECK AS IN WRECK* 219–21 (1962).



Another XFL-inspired critique of the infield fly rule emerges from the anti-intellectual branch of XFL philosophy. For example, one commentator compiling a list of “Vince McMahon Inspired Keys to Better Baseball,” led his list as follows:

Maybe if the game were more exciting, more people would be interested. I think we should change baseball rules using Vince McMahon's XFL model. McMahon started up the XFL in hopes of making it more exciting and less predictable. He took some stupid NFL rules and made them sane. He took some sane NFL rules and made them stupid. Maybe that's what baseball needs, too: interchanging sanity and stupidity. I think I can help with that. Here are my McMahon-inspired XLB rule changes:

Rule Change #1: No Infield fly rule. Are you tired of trying to figure out the infield fly rule? How many outs are there? How many are on base and which bases are they on? Is the trajectory of the airborne baseball great enough to warrant calling the infield fly rule? You need degrees in math AND physics to determine a ruling on some of them. My rule change makes it very simple: No infield fly. You hit a pop-up to an infielder, you're suspended for the season for wasting our time. We don't have time for intelligence here. This is a game of skill and brute force. I don't want to have to bring the chess club into the dugout for a rules debate. Don't waste our time--either hit the baseball hard or don't hit it at all. This rule is so easy, even the nacho vender can figure it out.<sup>134</sup>

#### CONCLUSION

*Common Law Origins* accomplished what few other law review articles have achieved—a paradigm shift that created a movement. It has freed countless lawyers and baseball fans to think about baseball through the lens of law and vice-versa.<sup>135</sup> Moreover, it created our opportunity to consider the infield fly rule from a wealth of jurisprudential perspectives that reveal as much about the authors as they do about the rules of baseball and legal philosophy, and ultimately to show that pop-ups should be taken seriously

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134. Mark Wentz, *Vince McMahon Inspired Keys to Better Baseball*, at <http://www.wentzmania.com/baseball0223.html> (last visited Nov. 21, 2004).

135. See generally WALLER ET AL., *supra* note 6.