
A STEP ASIDE

TIME TO DROP THE INFIELD FLY RULE AND END A COMMON LAW ANOMALY

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I¹ begin² with a hypothetical.³ It's⁴ the seventh game of the World Series at Wrigley Field, Mariners vs. Cubs.⁵ The Mariners lead one to zero in the bottom of the ninth, but the Cubs are threatening with no outs and the bases loaded. From the hopeful Chicago crowd there rises a lusty yell,⁶ for the team's star batter is advancing to the bat. The pitcher throws a nasty

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¹ "I is for Me, Not a hard-hitting man, But an outstanding all-time Incurable fan." OGDEN NASH, *Line-Up for Yesterday: An ABC of Baseball Immortals*, reprinted in *VERSUS* 67, 68 (1949). Here, actually, we. See *supra* note [†].

² Baseball games begin with a ceremonial first pitch, often resulting in embarrassment for the honored guest. See, e.g., Andy Nesbitt, *UPDATE: 50 Cent Fires back at Ridicule over His "Worst" Pitch*, FOX SPORTS, <http://www.foxsports.com/buzzer/story/50-cent-worst-first-pitch-new-york-mets-game-052714> [<http://perma.cc/F6M3-88TY>] (showing 50 Cent's wildly inaccurate pitch and his response on Instagram, "I'm a hustler not a damn ball player. LMAO").

³ See FED. R. EVID. 703 advisory committee's note to 1972 proposed rules.

⁴ A contraction. See *Contraction*, OXFORD ENGLISH DICTIONARY (2d ed. 1989). The rule of grumpy schoolmarm against using contractions is, like the Infield Fly Rule, an outdated prohibition not appropriate for the fast times of the twenty-first century. See Andrew J. Guilford, *Legal Writing: A Contract Between the Reader and Writer*, CAL. BAR J., Nov. 2010, <http://www.calbarjournal.com/November2010/TopHeadlines/TH4.aspx> [<http://perma.cc/JWY2-NWCE>].

⁵ Yes, the Chicago Cubs. This is a hypothetical. Besides, there is some support. See *BACK TO THE FUTURE PART II* (Universal Pictures 1989) (depicting Marty McFly, a time traveler, discovering that the Cubs beat Miami in the 2015 World Series).

⁶ See Ernest L. Thayer, *Casey at the Bat: A Ballad of the Republic Sung in the Year 1888*, DAILY EXAMINER, June 3, 1888, at 4 (describing mighty Casey's epic strikeout and using the word "lusty" in a nineteenth century way).

rising fastball,⁷ and the batter barely makes contact. It's a high pop-up to the second baseman, who backpedals onto the right field grass. He⁸ settles under the ball and shields his eyes from the blazing sun. What happens next at this key moment in Cubs history, with fans everywhere on the edge of their seats in anticipation? As all baseball fans know, an old⁹ man¹⁰ in a blue¹¹

⁷ The rising fastball is a feared pitch that only the most elite pitchers are capable of throwing. It is also a myth. See A. Terry Bahill & William J. Karnavas, *The Perceptual Illusion of Baseball's Rising Fastball and Breaking Curveball*, 19 J. EXPERIMENTAL PSYCHOL. 3, 3 (1993). But this detail doesn't deter play-by-play announcers, nor our hypothetical.

⁸ Over twelve years beginning in 1943, women played professional baseball in the All-American Girls Baseball League, memorialized in the movie, *A League of Their Own*. A LEAGUE OF THEIR OWN (Columbia Pictures 1992). But today, young women are pushed away from baseball to softball. As one writer puts it, "Diamonds are a girl's best friend, . . . unless they are baseball diamonds." John Walters, *Baseball Can't Truly Be America's Pastime Until It Lets Women Play*, NEWSWEEK (July 1, 2014), www.newsweek.com/2014/07/11/pitch-attitude-256853.html [http://perma.cc/NGR6-LF93]. And so it is that old-fashioned notions continue to dominate our National Pastime.

⁹ The oldest umpire in Major League Baseball history was Bill Klem, called the "Old Arbitrator." Frank Fitzpatrick, *Klem, the Old Arbitrator, Was Father of Umpiring*, PHILLY.COM (Sept. 2, 1999), http://articles.philly.com/1999-09-02/sports/25487317_1_umpire-bill-klem-nickname [http://perma.cc/4W5T-QH7K] ("Klem was, in fact, an egomaniacal ex-ballplayer who tossed out 30 players and managers in his first six weeks on the job and was as responsible as anyone for the construction of his own legend."). Klem worked his last game in 1941 at age 67, about 40 years older than today's average player. David W. Anderson, *Bill Klem, SOC'Y FOR AM. BASEBALL RES.*, http://sabr.org/bioproj/person/31461b94 [http://perma.cc/F5U5-N76B] (last visited Sept. 19, 2015); see also Joey Nowak, *Rangers Youngest in MLB; Giants Most Senior*, MLB.COM (Apr. 7, 2015) http://m.mlb.com/news/article/116788292/rangers-youngest-in-mlb-giants-most-senior [http://perma.cc/J7SF-5F42] ("The Major League average age is 29 years and 54 days."). Players who wanted to agitate Klem would call him "Catfish," perhaps "because he had rather prominent lips." LAWRENCE RITTER, *THE GLORY OF THEIR TIMES: THE STORY OF THE EARLY DAYS OF BASEBALL TOLD BY THE MEN WHO PLAYED IT* 175 (2010). Former player Chief Meyers said of Klem, "All you had to do was call him Catfish and out of the game you'd go." *Id.*

¹⁰ While in theory "[w]omen have had a shot at professional umpiring . . . since 1972," a look at the numbers shows that this shot has been illusory. Michelle Tsai, *Women in Black: Why Doesn't Baseball Have More Female Umpires*, SLATE (Mar. 30, 2007, 4:27 PM), www.slate.com/articles/news_and_politics/explainer/2007/03/women_in_black.html [http://perma.cc/E48N-ZFDL]. In 1972, Bernice Gera became the first female professional umpire when she called one game at the Class-A level. She promptly resigned. *Id.* More recently, Ria Cortesio was dropped by the minor leagues after becoming the first woman in almost two decades to call a major league exhibition game. Ben Walker, *Only Female Ump in Pro Baseball Released*, USA TODAY (October 31, 2007), http://usatoday30.usatoday.com/sports/baseball/2007-10-31-3758765916_x.htm [http://perma.cc/S8HW-64LD]. One player said of her, "She's pretty tolerant, I would say, for a woman umpire." *Waiting for the Call: Ria Cortesio Hoping to Become Major Leagues' First Female Umpire*, BILLINGS GAZETTE (Sept. 14, 2005), http://billingsgazette.com/sports/waiting-for-the-call-ria-cortesio-hoping-to-become-major/article_4645d271-aa39-5adf-bcdd-3a364d376c75.html [http://perma.cc/9NSA-VQITW]. Another gently lifted her out of his path so he could charge the mound. *Id.* Yet again, old-fashioned notions dominate our National Pastime. See *supra* note 8.

¹¹ Blue wool suits became the official attire of major league umpires in 1882, and remained so until 1968. Paul Lukas, *Uni Eye for the Ump Guy*, ESPN: PAGE 2, http://sports.espn.go.com/espn/page2/story?page=lukas/050519&num=0 [http://perma.cc/EMF2-6VH3] (last updated May 19, 2005). Such formal attire was thought to give umpires an air of authority. Indeed, the earliest

coat will run out, arms waving, and the play is over. The Cubs are charged with an automatic out and the bases remain loaded. This is the result of the Infield Fly Rule,¹² an outdated rule of baseball whose time must end.

The development of the Infield Fly Rule was explored forty years ago in an Aside, *The Common Law Origins of the Infield Fly Rule*, in the *University of Pennsylvania Law Review*.¹³ The Aside describes how the Infield Fly Rule developed by accretion—like the common law—at a time when people hoped to preserve a kinder, gentler America.¹⁴ It describes how people considered it uncivil for an infielder to purposely drop a ball to turn a double play on runners taught not to advance until the ball is caught.¹⁵ The result was that the audacious, risky possibilities of infield flies were eliminated by protectionist rulemaking. This antiquated rule, reflecting the gentility of ages past, has no place in the rude coarseness of the twenty-first century, an

umpires “were usually well-dressed lawyers, doctors, or merchants,” who were known even to wear long tails and top hats to emphasize their respectability. *Id.* Today’s umpires wear an array of less refined options, including blue or black polos, long-sleeved shirts, sports-jackets, or windbreakers. But umpires are still called “blues.” See Scott Kendrick, *Umpires*, ABOUT SPORTS, <http://baseball.about.com/od/thebasics/p/umpires2.htm> [<http://perma.cc/Z73T-SNRW>] (last visited Sept. 19, 2015).

¹² OFFICIAL BASEBALL RULES § 5.09(a)(5) (Office of the Comm’r of Baseball 2015). The Rules define an Infield Fly as follows:

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. If the hit becomes a foul ball, it is treated the same as any foul.

If a declared Infield Fly is allowed to fall untouched to the ground, and bounces foul before passing first or third base, it is a foul ball. If a declared Infield Fly falls untouched to the ground outside the baseline, and bounces fair before passing first or third base, it is an Infield Fly.

Id. at 144-45. Under Rule 5.09(a)(5), the batter is out when an infield fly is declared.

¹³ Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975) [hereinafter *Aside*]. The Aside was written by University of Pennsylvania Law School student William S. Stevens, and had such an effect on legal scholarship that the *New York Times* published a tribute to Stevens upon his death, describing the Aside as “one of the most celebrated and imitated analyses in American legal history.” William Grimes, *William S. Stevens, 60, Dies; Wrote Infield Fly Note*, N.Y. TIMES (Dec. 11, 2008), <http://www.nytimes.com/2008/12/12/us/12stevens.html> [<http://perma.cc/ZD46-UQBY>]. We are pleased to bestow further honor by imitation.

¹⁴ Aside, *supra* note 13, at 1477.

¹⁵ *Id.*

era that embraces both risk and subterfuge. Baseball rulemakers should correct this error of common law accretion by dropping the Infield Fly Rule.

The case for abolishing the Infield Fly Rule is simple: *any* play is better than the umpire waving his arms and declaring a play dead.¹⁶ But the benefits would far exceed the mere reduction of umpire interference with the action. The game would be energized by the introduction of new risks. Think of the excitement if there were no Infield Fly Rule in the hypothetical World Series game. Depending on how the fielders and runners played (or misplayed) the pop-up, the tying run might score. There might be a single out or a double play. Or, especially since the Cubs are involved,¹⁷ errant runners might even give us that most exciting of baseball events: *the triple play*.¹⁸

The strategic scenarios are fascinating. Imagine the second baseman trying to keep one eye on the runners and one on the ball while making a snap decision to catch or not to catch. He considers letting the ball drop so he can attempt a double or even triple play: he could throw to the catcher, who would then throw to third, who might even get a third out by throwing to second. But there are risks. If the runner at third base charges home while the ball is in the air, a dropped ball would allow him to score the tying run. On the other hand, if that runner is sufficiently convincing in faking to the plate, the fielder might be induced into the misplay of catching the ball with no prospects for more than one out on the play.

Likewise, fielders might engage in feints and other deceptions with the ball in the air to induce the runners to make mistakes that might produce

¹⁶ In all sports, more officiating means less fun. *See, e.g.*, Nick Canepa, *Too Many Penalties Ruining the NFL*, SAN DIEGO UNION-TRIBUNE (Aug. 26, 2014), <http://www.utsandiego.com/news/2014/aug/26/nick-canepa-nfl-penalties> [<http://perma.cc/TN9E-MKUL>]; *see also* Bill Klem, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/bullpen/Bill_Klem [<http://perma.cc/Q2NH-DLCV>] (last updated Nov. 14, 2012) (quoting Bill Klem as stating, “The best umpired game is the game in which the fans cannot recall the umpires who worked it”). Wise trial judges also think they do their best job when folks cannot recall who “call[ed] the balls and strikes” of a trial. *Accord Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

¹⁷ Many attribute the Cubs’ lasting ineptitude to William “Billy Goat” Sianis, a local tavern owner who was denied admission to Game 4 of the 1945 World Series because he brought his goat, Murphy. Fred Bowen, *For Cubs, a Swing at the Billy Goat Curse*, WASH. POST (July 17, 2008), www.washingtonpost.com/wp-dyn/content/article/2008/07/16/AR2008071602638.html [<http://perma.cc/4TAE-UEUJ>]. Sianis reportedly stood outside the park and yelled, “The Cubs ain’t gonna win no more!” *Id.* In the seventy years since that incident, the Cubs haven’t been back to the World Series. *Id.*

¹⁸ This is not without precedent, as the Cubs have hit into thirty triple plays over the years, most recently on September 14, 2014. *Triple Plays*, BASEBALL ALMANAC, http://www.baseball-almanac.com/feats/triple_plays.shtml [<http://perma.cc/BD8W-Q3BA>] (last visited Sept. 19, 2015).

the elusive triple play.¹⁹ For instance, by slamming his fist into his glove at just the right time, a fielder might trick a runner facing the other way into believing a catch was made, causing the runner to scramble back to his base.²⁰ The fielder could then let the ball drop and easily throw the runner out. Or in another example of trickery, the fielder closest to the pop-up could back away from it as though to let the ball drop, while another fielder swoops in at the last second to make the catch. Such plays in the World Series hypothetical would no doubt dominate conversation in Chicago through the winter and into eternity as the legend of Chicago's curse²¹ continued to grow and blow through the Windy City.²²

¹⁹ There is one deceptive move that should remain prohibited, but for reasons of administration, not fairness. A fielder may not pretend to catch the ball by letting it touch his glove then dropping it. OFFICIAL BASEBALL RULES § 5.09(a)(1) (Office of the Comm'r of Baseball 2015) ("In establishing the validity of the catch, the fielder shall hold the ball long enough to prove that he has complete control of the ball and that his release of the ball is voluntary and intentional. If the fielder has made the catch and drops the ball while in the act of making a throw following the catch, the ball shall be adjudged to have been caught."). Whether the ball's contact with the glove amounted to a catch would be far too subjective a call. The Dodgers may have gotten away with such a play in Game 4 of the 1978 World Series, when shortstop Bill Russell dropped Lou Piniella's line drive with runners on first and second and one out in the sixth inning, up 3-1. Telephone Interview with Reggie Jackson, Former Professional Baseball Player (May 15, 2015). Russell got the easy force out at second, but when he threw to first to complete the double play, the ball struck runner Reggie Jackson and rolled away, allowing a runner to score. *Id.* True to form, Dodgers Manager Tommy Lasorda argued frenziedly to the umpire that Jackson interfered with the throw. *Id.* Jackson says he thought Russell caught the ball, so he momentarily froze in the base path, facing second base, only to see Russell's throw coming right at his midsection. *Id.* Naturally, he flinched. *Id.* The umpire called neither interference nor an intentional drop, and the Yankees went on to win the game. *Id.* Dodgers fans continue to complain that Jackson interfered, but they might take a closer look at Rule 5.09(a)(1), and Russell's drop.

²⁰ Under Official Baseball Rule 5.09(b)(5), a runner is out who "fails to retouch his base after a fair or foul ball is legally caught before he, or his base, is tagged by a fielder." OFFICIAL BASEBALL RULES § 5.09(b)(5) (Office of the Comm'r of Baseball 2015). The runner's return to the base is commonly called "tagging up." *Id.* § 5.09(b)(5) cmt.

²¹ See *supra* note 17. Curses such as the Curse of the Billy Goat have long been a part of baseball lore. For example, the famous "Curse of the Bambino" began haunting the Boston Red Sox on a winter day in 1920 when they traded Babe Ruth to the Yankees for cash. DAN SHAUGHNESSY, THE CURSE OF THE BAMBINO 1-2 (1990). Ruth had led the Red Sox to three World Championships, but owner Harry Frazee promised more: "With this money the Boston club can now go into the market and buy other players and have a stronger and better team in all respects . . ." *Id.* Eighty-six years passed before the Red Sox won their next World Series. Tyler Kepner, *Red Sox Erase 86 Years of Futility in 4 Games*, N.Y. TIMES (Oct. 28, 2004), <http://www.nytimes.com/2004/10/28/sports/baseball/red-sox-erase-86-years-offutility-in-4-games.html> [<http://perma.cc/DDB6-PRSF>].

Sometimes curses are seemingly the only explanation for a team's bad fortune. Such was the case with the then-California Angels, who in the 1990s, after years of futility, postseason collapses, and off-field tragedies, determined that they were cursed by their stadium's berth upon a Native American burial ground. See Chris Suellentrop, *The Anaheim Angels: The Worst Team You've Never Heard Of*, SLATE (Oct. 18, 2002), www.slate.com/articles/news_and_politics/assessment/2002/10/the_anaheim_angels.html [<http://perma.cc/Z6VJ-GYWC>] (noting that historians have found "no

If the benefits of abandoning the Infield Fly Rule are so clear, why do baseball fans, players, and rulemakers cling to it? Even now, students of the game may be cogitating to the conclusion that, with the lifting of the Infield Fly Rule, the result of an infield fly will almost always be a double play. And lifelong exposure to the rule, whose very purpose is “[t]o prevent the defense from making a double play by subterfuge . . . rather than by skill and speed,”²³ may have conditioned such students of the game to find unfairness in the likely double play. Indeed, the common law principle that one should not benefit from one’s own iniquity²⁴ likely pervades the psyche of many Americans, especially those who love their National Pastime.²⁵

But today we live in a different world—a world where subterfuge can be applauded as clever rather than condemned as devious. And in fact, baseball

evidence” supporting the local legend of the team’s berth, but nothing to show it isn’t true, either). The Angels now face a new curse dubbed “the Curse of the Moreno Mistake.” Dana Parsons, *Angels Cursed by Moreno’s Mistake*, L.A. TIMES (Oct. 10, 2008), <http://articles.latimes.com/2008/oct/10/local/me-parsons10> [<http://perma.cc/8EZ4-Z4KR>]. This curse was borne of owner Arte Moreno’s decision to rename the team to “The Los Angeles Angels of Anaheim,” despite the team’s home in Anaheim, not Los Angeles. *Id.* Aside from creating a self-contradicting and nonsensical team name that made many loyal Angels fans cry foul, Moreno’s mistake has resulted in a string of underperforming big-name acquisitions and disappointing postseasons. See Sam Miller, *The Resource Curse*, ESPN (May 28, 2013), http://espn.go.com/mlb/story/_/id/9318221/los-angeles-dodgers-angels-spend-money-big-name-veterans-lose-espn-magazine [<http://perma.cc/C77X-HJWN>].

²² Chicago’s well-known nickname may have come not from unusually gusty weather conditions, but rather from baseball. Well, at least in part. The first recorded references to Chicago as the “Windy City” appear in Cincinnati newspapers in the 1870s. See Nathan Bierma, *Where Did It Come From?* CHI. TRIB. (Dec. 7, 2004), http://articles.chicagotribune.com/2004-12-07/features/0412070313_1_windy-city-dana-chicago-press [<http://perma.cc/89DW-EESU>]. The term was likely intended to connote the blustery air of superiority identified with the era’s proud Chicagoans. *Id.* It came at the same time as a budding rivalry between the two cities manifested in the battles between the White Stockings of Chicago and the Red Stockings of Cincinnati. See CHRISTOPHER DEVINE, HARRY WRIGHT: THE FATHER OF PROFESSIONAL BASE BALL 79-83 (2003).

²³ Aside, *supra* note 13, at 1477.

²⁴ See *Riggs v. Palmer*, 115 N.Y. 506 (1889) (refusing to allow a grandson who poisoned his grandfather to inherit his estate). Although faking a catch is not as egregious a subterfuge as murdering one’s grandfather, some might think benefiting from either course of conduct violates the maxim that “No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.” *Id.* at 511.

²⁵ Some say football has surpassed baseball as the National Pastime. See, e.g., Ben McGrath, *The Twilight of Baseball*, NEW YORKER (Aug. 28, 2014), <http://www.newyorker.com/culture/cultural-comment/twilight-baseball> [<http://perma.cc/KV52-9FW6>] (observing that “[o]n television nowadays, the World Series can hardly compete with Browns versus Jaguars, Week Seven.”). Others disagree. See Allen Barra, *Sorry, NFL: Baseball is Still America’s Pastime*, ATLANTIC (Oct. 20, 2015) <http://www.theatlantic.com/entertainment/archive/2013/10/sorry-nfl-baseball-is-still-americas-pastime/280985> [<http://perma.cc/VB68-85PG>] (describing how baseball’s relevance isn’t measured merely by TV ratings, but also by cultural indicators, like movies and books, which show baseball’s continuing influence). By making the game more exciting, abolishing the Infield Fly Rule would help baseball remain the National Pastime.

players have always had a bag of tricks filled with deception, risk, and even purposely dropped balls. Consider the hidden ball trick, where a player with the ball pretends to throw it to another, while in fact keeping the ball surreptitiously to tag out the unwitting nearby runner when he steps off his base.²⁶ Or a shortstop dancing behind a runner while feinting toward second base as the pitcher looks for a pick-off. Or a pitcher who fakes a pick-off to third base then spins to catch another runner too far off first.²⁷ Or an outfielder letting a deep foul fly ball drop so a runner at third won't score an easy tag-up.²⁸ How about an infielder dropping a slow batter's pop-up when a fast runner is at first base so he can force the fast runner out at second?²⁹ Even the basic change-up pitch is all about deception. In sum, deception and purposely dropped balls are valued parts of baseball. So why not let an infielder drop a popup as he sees fit, unencumbered by the Infield Fly Rule?

Furthermore, it would actually advance fairness to penalize a pop-up hitter with a double play. Fans find it perfectly acceptable to penalize a hitter who hits a ground ball sufficiently hard to cause a double play.³⁰ So why protect a hitter who barely ticks the bottom of the ball and produces a

²⁶ See Mike Bertha, *April Fools! Here Are 10 Times Someone Fell for the Hidden-Ball Trick*, MLB.COM: CUT4, <http://m.mlb.com/cutfour/2015/04/01/115665866/april-fools-here-are-10-times-someone-fell-for-the-hidden-ball-trick> [<http://perma.cc/33W6-HTXV>] (last visited Sept. 19, 2015).

²⁷ This play was banned in 2013, but not for reasons of gentility, protectionism, and fairness. Rather, the play universally annoyed fans, who either wrongly declared it a balk or loudly derided the pitcher for wasting their time with the largely ineffective maneuver. Tyler Kepner, *Rule Change Eliminates a Fake Pickoff*, N.Y. TIMES (Jan. 26, 2013), www.nytimes.com/ref/sports/baseball/baseball-rule-change-eliminates-a-fake-pickoff-by-pitcher.html [<http://perma.cc/JK7T-77VV>].

²⁸ Compare *Holliday's Heads-up Play*, MLB.COM VIDEO (Apr. 28, 2014), <http://m.mlb.com/video/topic/21753540/v32458527> [<http://perma.cc/X4H5-YF8V>] (allowing a deep foul ball to drop to prevent a runner on third base from tagging up and scoring the potential winning run in the 12th inning), with Marcia C. Smith, *Emotional Andre Ethier Suffers Another Dodger Defeat*, ORANGE COUNTY REG. (Oct. 15, 2015) <http://www.ocregister.com/articles/ethier-687811-game-dodgers.html> [<http://perma.cc/V83P-HNJJ>] (discussing Ethier's decision to catch a deep foul ball and allow a runner to score the tying run in Game 5 of the National League Division Series).

²⁹ See *Aside*, *supra* note 13, at 1477 (describing how, by using this play, one infielder successfully replaced a fast runner with one who had the "speed of an ice wagon" (quoting BALT. SUN, May 24, 1893, at 6, col. 2)). Famed Dodgers shortstop Maury Wills, whose achievements and intelligence should place him in the Hall of Fame, made this play regularly. Telephone interview with Maury Wills, former Major League Baseball Shortstop (May 28, 2015). See also *Hall of Fame Background*, MAURYWILLS.COM, <http://www.maurywills.com/mw/HallOfFame.aspx> [<http://perma.cc/N3A2-WF5Y>] (last visited Sept. 19, 2015).

³⁰ One blogger concluded that each bases-loaded double play costs the hitting team over 1.6 runs, on average. John Walsh, *The Worst Thing a Batter Can Do*, HARDBALL TIMES (Mar. 20, 2009), <http://www.hardballtimes.com/the-worst-thing-a-batter-can-do> [<http://perma.cc/R744-BCVB>]. He further noted that many of those players with the highest rates of hitting into ground-ball double plays were also above-average hitters, and some were in the Hall of Fame. *Id.* Could it be that poorer hitters are bailed out by the Infield Fly Rule?

pop-up, perhaps the lamest of all hit balls? And why not reward the pitcher whose rising fastball³¹ was intended to produce such lame hits?

As noted in Stevens's *Aside*, the rules of sports, like a society's laws, must reflect cultural values. These rules are meant to ensure proper conduct, and it is society that determines what is proper.³² Unlike in olden days, proper conduct in today's America is governed not by rigidity and gentility, but by autonomy, risk taking, and shamelessness. The evolution of these norms is reflected in other entertainment media like music,³³ television,³⁴ cinema,³⁵ and theater.³⁶ And to accommodate these changing values, decency laws have evolved.³⁷

Similarly, it is time to recognize that the common law development of the Infield Fly Rule has produced a perversion of protectionism based on outdated values.

So what can be done? Baseball rulemakers should drop the anomalous, unjust, boring Infield Fly Rule. Throughout Anglo-American jurisprudence, enlightened legislatures have abolished outdated common-law rules, like sovereign immunity. There was a time when sovereign immunity reigned and exempted the government and its agents from liability. Like the Infield Fly Rule, sovereign immunity has a long history in the United States even

³¹ Cf. *supra* note 7.

³² See *Aside*, *supra* note 13, at 1479.

³³ Compare THE BEACH BOYS, *California Girls*, on SUMMER DAYS (AND SUMMER NIGHTS!!) (Capitol Records 1990) (1965) (noting that although "East Coast girls are hip," he wishes "they all could be California girls," who "all get so tanned"), with KATY PERRY, *California Gurls* (feat. Snoop Dogg), on TEENAGE DREAM (Capitol Records 2010) (describing how when it comes to sex on the beach, California girls "don't mind sand in [their] stilettos").

³⁴ Compare *Leave It to Beaver: Beaver and Henry* (ABC television broadcast June 18, 1958) (in the episode "Beaver and Henry," Beaver dealt with a difficult moral quandary after he touched a baby bunny in his garden and realized that the mother bunny might then reject her offspring), with *Glee: The First Time* (ABC television broadcast Nov. 8, 2011) (in the episode "The First Time," two teenagers solved the difficult quandary of how they might have their first sexual encounters after their acting abilities were challenged due to their virginity).

³⁵ Compare GONE WITH THE WIND (Metro-Goldwyn-Mayer Inc. 1939) (receiving a special dispensation to say "Frankly, my dear, I don't give a damn"), with THE WOLF OF WALL STREET (Paramount Pictures 2013) (dropping at least 506 f-bombs in 180 minutes).

³⁶ Compare COLE PORTER, *Anything Goes*, in THE COMPLETE LYRICS OF COLE PORTER 171 (Robert Kimball ed., 1983) ("In olden days, a glimpse of stocking / Was looked on as something shocking."), with HASA DIGA EEBOWAI, THE BOOK OF MORMON 48 (2011) (these lyrics have been determined to be too shocking to print in a legal journal—editorial standards haven't changed as much as those governing theater).

³⁷ Back around 1930, Robert Gordon Duncan became the first person convicted of broadcast indecency under the Radio Act of 1927. THEODORE DREISER, POLITICAL WRITINGS 127 (Jude Davies ed., 2011). Duncan's now innocuous crime was to refer to someone as "damned" and use the expression "by God" irreverently. *Duncan v. United States*, 48 F.2d. 128, 134 (9th Cir. 1931). The Ninth Circuit Court of Appeals affirmed his conviction. See *id.* at 132-33 (describing his language as "extremely abusive and objectionable").

though “its justification in this country is unclear.”³⁸ Indeed, “[t]he principle of sovereign immunity is derived from English law, which assumed that the King can do no wrong.”³⁹ As everyone knows, Americans today make no such assumptions about their leaders.⁴⁰ It therefore follows that legislatures over the last several decades have taken action against the doctrine of sovereign immunity.⁴¹ Baseball rulemakers should do the same against the Infield Fly Rule.

True, it’s not easy for baseball purists to accept change.⁴² Like the law, baseball is backward-looking.⁴³ While jurists wrestle with concepts like *stare decisis*, legislative intent, and originalism, baseball rulemakers wrestle with aging fans staunchly dedicated to tradition.⁴⁴ But the time has come, particularly because in a real sense, abolishing the Infield Fly Rule would *further* traditional values of baseball. These values include baseball’s embrace of deception,⁴⁵ and most notably baseball’s celebration of risk. When baseball creates risky scenarios, it imitates a fundamental part of life.⁴⁶ In no other team sport is individual risk and reward, success and failure, more in the spotlight than when a batter faces a pitcher. Abolishing the Infield Fly Rule would shine a similar spotlight upon an infielder contemplating a pop fly

³⁸ Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001).

³⁹ *Id.*

⁴⁰ See, e.g., Gov. Bobby Jindal, *Louisiana Governor: ISIS Threat Reveals Obama’s Failure as Commander in Chief*, FOX NEWS (Feb. 23, 2015), www.foxnews.com/opinion/2015/02/23/louisiana-governor-isis-threat-reveals-obama-failure-as-commander-in-chief.html [<http://perma.cc/6VBC-Z9LF>] (pointing out many things that President Obama purportedly did wrong).

⁴¹ See, e.g., Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended in various sections of 28 U.S.C.).

⁴² In 2008, Major League Baseball finally added limited instant replay to aid with a narrow set of important calls. Jack Curry, *Baseball to Use Replay Review on Homers*, N.Y. TIMES (Aug. 27, 2008), <http://www.nytimes.com/2008/08/27/sports/baseball/27replay.html?pagewanted=print> [<http://perma.cc/8PZL-Y3PL>]. Before that, the last major rule change occurred in 1974, when the ball was permitted to be covered with cowhide because of a shortage of horses. PAUL DICKSON, THE DICKSON BASEBALL DICTIONARY 435 (3d ed. 2009).

⁴³ Compare *Aside*, *supra* note 13, with Shyamkrishna Balganeshe & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1296-97 (2015).

⁴⁴ Whether baseball has sufficiently adapted to modern culture is frequently debated. See, e.g., McGrath, *supra* note 25 (calling baseball fans “geriatric,” and noting—in a *New Yorker* article—that the question “‘Is baseball in trouble?’ is one of those questions—like ‘Is football too violent?’ or ‘Is golf too boring?’—that is both everlasting and newly inescapable”). Of course, whether the *New Yorker* is sufficiently adapted to modern culture is also frequently debated. Cf., e.g., Mary Norris, *The Curse of the Diaeresis*, NEW YORKER (Apr. 26, 2012), <http://www.newyorker.com/culture/culture-desk/the-curse-of-the-diaeresis> [<http://perma.cc/P2PR-JAMY>] (explaining unpersuasively why the *New Yorker* spells “cooperate” with two little dots above the second “o”).

⁴⁵ See *supra* notes 26–30 and accompanying text.

⁴⁶ Andrew J. Guilford, *Game of Risk*, CAL. L. BUS., Nov. 19, 2001, at 22.

creeping at a petty pace, in a stadium full of sound and fury, while runners strut and fret upon the diamond stage.⁴⁷

In sum, the Infield Fly Rule, like many rules developed in our distant common-law past, is based on outdated notions of decency, and as a result denies us the excitement and pleasure of a game imbued with risk and subterfuge. Just as we are about to watch a young athlete take on a challenge of wit and skill in a split second of immense pressure, an old guy in a blue coat runs out waving his arms and bringing a halt to all the fun. Even if there were some justification for protecting weak pop-up hitters (which there is not), such protectionism should not come at the price of the fans' fun. Baseball rulemakers must drop the Infield Fly Rule.

(Oh, and while they're at it, they should make the ground rule double a *triple*,⁴⁸ which would result in outfielders actually trying to catch the ball on a hop at the top of the fence and hold the batter to a double, rather than risklessly watching the ball bounce into the stands, often turning a triple into an automatic double, by fiat. Stay tuned.)

⁴⁷ Cf. WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 5. At its best, baseball's imitation of life, of the human condition, can be called art.

⁴⁸ Currently, automatic triples are awarded when a fielder deliberately touches a ball in play with his hat. OFFICIAL BASEBALL RULES § 5.06(b)(3)(E) (Office of the Comm'r of Baseball 2015). But fans may freely use their hats. See Rick Chandler, *Dude Catches Foul Ball in Hat While Holding Baby (Shock Slowly Turns to Applause)*, SPORTSGRID (May 3, 2013), <http://www.sportsgrid.com/mlb/dude-catches-foul-ball-in-hat-while-holding-baby-shock-slowly-turns-to-applause> [<http://perma.cc/6RTV-VBGA>] (some article titles cannot be improved upon by the ever-obligatory parentheticals inserted by law review editors).