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OPENING REMARKS

FUNDING LEGAL SCHOLARSHIP

Matthew T. Bodie[†]

How do we fund legal scholarship? That is, what resources go toward the production of scholarship by the legal academy,[1] and how are those resources allocated? These questions have always been important, but they take on a new urgency as law schools suffer substantial hits to their enrollments and downward market pressure on the price of tuition. As budgets shrink across the country, will legal scholarship be impacted? And if so, how? In order to understand better the impacts of shrinking resources on law professor research, we need to understand how that research is funded, and then think about how it could be restructured to increase productivity in the face of financial difficulties.

This essay endeavors to provide a brief overview of the traditional model of funding for legal scholarship, discuss two alternative

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[1] For purposes of this article, I am limiting my definition of "legal scholarship" as scholarship produced by law professors. Excellent legal scholarship is produced by judges, practicing attorneys, students, and professors-in-training who fall into any of the prior groups. But this article is limited to law professors, as it endeavors to determine exactly how the research produced by those professors is funded. As for "scholarship," the article will adopt a broad definition that includes any published research on the theory, doctrine, or practice of law, whether it be an academic book, a hornbook, a law review article, or an interdisciplinary or other-disciplinary piece that focuses on law in some respect. Legal scholarship is original research that attempts to contribute to our understandings of legal doctrine, human behavior in the context of law, or other aspects of our legal system.

models (grant funding and sales) that play a small role today, and then discuss potential changes to funding streams that would better support the production of legal scholarship.

THE TRADITIONAL MODEL

The traditional model for funding legal scholarship relies primarily on salary and other expenses provided almost entirely by law schools themselves. To take publication costs first, law schools fund the law reviews where the bulk of legal scholarship is published. Law reviews do receive revenues from subscribers (generally the libraries of other law schools) and from Westlaw, LexisNexis, and Hein Online for electronic rights. But my anecdotal understanding is that most law reviews still need additional funding from the school to actually publish the volumes and to provide support staff. However, law reviews do receive a lot of "free" labor. Students are generally not paid to either produce or publish legal scholarship, although many students receive school credit (which they pay for) and some receive bagels.[2] Outside of law reviews, legal scholarship is published in bar journals,[3] which are funded by the affiliated bar, and by academic presses, which are likely closer to self-sustaining but also may receive university support.[4]

On the creation side, law schools pay their own professors to write scholarship. But this deserves a lengthier breakdown. Salary hinges on a professor fulfilling her job requirements, and those requirements are generally described as the tripartite combination of scholarship, teaching, and service. Most schools require a professor to write three or more articles to obtain tenure. However, after

[2] *See* Josh Blackman, *Posner Rips Harvard Law Review Editors for Lavish Lifestyles from Bluebook Profits*, Josh Blackman's Blog, Nov. 10, 2013, at: joshblackman.com/blog/2013/11/10/posner-rips-harvard-law-review-editors-for-lavish-lifestyles-from-bluebook-profits/.

[3] However, most law schools do not consider bar journal articles to count as scholarship.

[4] *See* Lynne Withey et al., *Sustaining Scholarly Publishing: New Business Models for University Presses*, Association of American University Presses, at: www.uvasci.org/wp-content/uploads/2011/03/aaupbusinessmodels2011.pdf ("The technological and cultural shifts of the last decade . . . challenge not just publishers' business models, but may even threaten many of the intellectual characteristics most valued by the scholarly enterprise itself: concentration, analysis, and deep expertise.").

that, the scholarship "requirement" is enforced much more loosely. Some schools may attribute the bulk of any merit-based salary increases to scholarly production. While I have no empirical data on the distribution of faculty salaries vis-à-vis scholarly production, my guess is that there is a wide range, both between the amount of merit raises awarded from year to year and the percentage of those awards that are based solely on scholarship. And my experience leads me to deduce that professors cannot be fired post-tenure for failing to produce any scholarship; I have never heard of it happening, and I have seen a sizeable number of professors who have not written for extended periods of time but continue to work.

Many schools have direct grants for scholarship. For example, summer research grants, which pay professors between $5,000 and $20,000 to produce an article over the summer, are an apparently direct payment for scholarship. A couple of provisos, however: (1) some schools have only lax enforcement mechanisms to ensure that an article was actually produced and published; and (2) the grant is limited to one piece, so any article after the first does not receive specific funding. In addition to summer research stipends, some schools provide bonuses for high-ranking journal placements, but these are generally less than four figures.

So how are law review articles funded? They are funded primarily by paying law professors' salaries and then hoping that the professors produce scholarship. Untenured professors can be fired for failing to publish, and tenured professors may get smaller raises than their colleagues for failing to publish. But in the main, the funding is indirect: the professor is paid a salary, and then the professor publishes as the professor desires. That same salary provides for the professor's teaching and service activities, as well. But there is a difference: the professor is terminable immediately if she fails or refuses to teach or serve on a committee at the dean's direction. Failure to publish, however, may get one fired in a few years as a junior professor, and will not get one fired at all as a tenured one.

Several commentators have suggested that a law review article is "worth" $100,000. Larry Cunningham has opined that a highly-placed law review article can be worth $100,000 to a law professor

in funding,[5] but his assumptions skew high. Cunningham argues that the article is not only worth $12,500 to $20,000 in summer grants, but also the 1%-3% raise that the professor receives for having written the article, which is then made a part of base pay for the rest of the person's career. Cunningham's math, however, not only assumes a relatively high summer grant, but also a high salary: $200,000 for a mid-career scholar, or $250,000 for a senior scholar. He admits that a junior scholar getting $100,000 and a 2% raise would only get about $35,000 from salary increases over a lifetime. And Cunningham also has to assume: (1) there are no salary freezes in effect the year of publication, and (2) the 2% raise is solely attributable to that one article. Richard Neumann focuses on the funding side, and argues that it costs law schools $100,000 to produce a law review article.[6] But his calculations seem even more problematic. His figure assumes a professor at a high-ranking school who spends 30-50% of her time producing one article per year. Thus, in his view, 30-50% of the person's salary and benefits go to that article. So if the prof produces three articles a year, they cost $33,333 apiece, and if she writes one article in five years, it's worth $500,000? You can see the difficulty. However, Neumann is right in one respect: some portion of a law professor's salary in theory goes to creating legal scholarship. But how to determine that portion is much less amenable to a particular figure.

Beyond paying professors to produce legal scholarship, schools also fund resources for the production of the scholarship. Schools pay their own students to act as research assistants, they pay for staff to facilitate professors' work (which includes scholarship), and they pay for libraries and data sets that are necessary to the research. Libraries also serve students and the public, but at least a substantial portion of their expenses are designed to facilitate research.

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[5] Larry Cunningham, *The Six Figure Law Review Article*, Concurring Opinions, May 25, 2010, at: www.concurringopinions.com/archives/2010/05/the-six-figure-law-review-article.html.

[6] Debra Cassens Weiss, *What Is the Cost of a Law Review Article by a Top Prof? Estimate Is $100K*, ABA Journal, April 21, 2011, at: www.abajournal.com/news/article/what_is_the_cost_of_a_law_review_article_by_a_top_prof_estimate_is_100k.

So how are we funding legal scholarship? As a general matter, schools are paying their own professors to research and write legal scholarship, they manage their own students in editing it, and they pay a publisher to publish it. Most law schools are funded primarily by student tuition, although state funds and alumni giving supplement to varying degrees. So students are funding at least a big chunk of legal scholarship. To the extent the federal government is funding legal education through IBR and federally-guaranteed loan programs, it too is also a source of funding for scholarship.

THE GRANT-FUNDING MODEL

Under the traditional law school model, scholarship is an expense that the school shoulders as part of its mission. In many academic disciplines, however, research is a revenue generator. The primary way in which schools generate income from their research is through grant-funding: a third party agrees to pay the school a certain amount of money in exchange for the production of a specified research project or agenda. So instead of the school paying for the research, the grant-funder pays the school to pay the professor for the research. In those disciplines where grant-funding is substantial, it is common to refer to the school's or division's research portfolio by a dollar amount, signifying the amount of grant-funding in play at any given time. And no wonder – the funding can be quite substantial. For example, a 2011 report on University of Texas-Austin found that the faculty generated $161 million in tuition revenue and $397 million in external research funding.[7]

The grant-funding model differs from the traditional legal scholarship model in several key respects. First, and most obviously, grant-funding is usually supplied by a non-profit or governmental agency that operates outside of the school. The NIH provides over $30 billion annually in medical research funding to over 300,000 researchers at more than 2,500 research institutions.[8] A myriad of other grant-

[7] Mark A. Musick, *An Analysis of Faculty Instructional and Grant-based Productivity at The University of Texas at Austin*, Nov. 2011, at: www.utexas.edu/news/attach/2011/campus/32385_faculty_productivity.pdf

[8] National Institutes of Health, *NIH Budget*, at: www.nih.gov/about/budget.htm.

funders exist, reaching out to a variety of different disciplines. Grant-funding also differs in how the money is provided to researchers. Here are a few of the salient differences between grant-funding and the traditional law school model:

- Grant-funders provide money not as salary to a particular person, but as an allocation for a particular project. Of course, part of any grant includes salary or salary reimbursement, but the grant is directed toward a project, not a person.
- Grants are generally awarded through a peer-review process, in which the researchers and the project are scrutinized to determine if the research is deserving of the award.
- Grants are limited in time, and may or may not offer an opportunity to renew.
- Universities generally take a big chunk of the grant as overhead, and may or may not have restrictions on how this overhead is allocated.
- Although grants do not generally have financial penalties for failure to produce the research, they may be structured to require deliverables. Some funders use contracts or "cooperative research agreements" to maintain even more control over the research and the disbursement of funds.

How does grant-funding affect the salaries of researchers? It's hard to say as a general matter, but in those fields with significant grant-funding, researchers are expected to get grant-funding. Faculty may even be expected to get almost their entire salary covered through grants. Tenure generally protects tenured researchers from being terminated for failing to obtain grants. However, grant success is a factor for tenure in many fields, and failure to get grants post-tenure may have a significant impact on salary. Grant-funding may also affect how much money a particular school is allocated from the university.

My assumption is that grant-funding in legal academia is relatively small but growing. As the academy becomes more interdisciplinary, it will be easier for law professors to hop onto projects with other researchers in grant-funding fields. It may also be the case that foundations and government agencies are looking for more legally-related research projects to fund. However, federal government funding is getting squeezed, making overall grant-funding dollars scarcer. So it seems unlikely that significant grant-funding sources for legal research will soon spring up on their own.

THE SALES MODEL

Under the sales model for supporting research, scholars act as individual entrepreneurs selling their research to publishers or other entities for personal payment. Much of the action between professors and publishers is in teaching materials, which do not count under the research rubric. However, professors sell their IP interests in academic books and treatises to publishers in exchange for advances and/or royalties. Purely academic books do not offer much remuneration. So even though a law professor might "sell" her book to an academic press, the relatively low return to the prof means that that book has been funded, in large part, by the professor's salary and thereby by the law school itself. However, treatises provide more compensation, at least as a general matter. One advantage of doctrinal publications is the broader audience, which includes not only libraries and fellow academics, but also students and practitioners. The money incentivizing the production of treatises is more substantial. And it flows directly to the author, rather than the author's institution like a grant.

A big benefit of the sales model, like the grant-funding model, is that third parties provide funding and support for the research. But the sales model is more business-oriented; rather than spending their funds for the public good, publishers buy materials that (they believe) will make the most money. And professors get the money directly, rather than funnelled through their home institution. To that extent, it is more responsive to demand in a traditional capitalistic way. The sales model of research is likely limited by the limited

market for doctrinal, generalized legal research itself. But at least some percentage of the research going on out there will find funding from publishers who are willing to bet on a market for the material.

MOVING FROM SCHOOL & SALARY FUNDING TO FIELD & GRANT FUNDING

Under the basic law school model, individual law schools fund scholarship. And to a large extent, law schools fund only their own faculty's scholarship. Yes, law schools do fund law reviews, which generally publish the work of outside scholars. But schools pay their own faculty's salaries, provide special financial incentives for research, and pay for research assistants and research travel. A professor's research is largely funded by her own institution.

A strength of this model is that it encourages schools to compete against each other based on academic reputation. Although the most prominent ranking system (the U.S. News and World Report Law School Rankings) does not directly assess research productivity, school reputation is a strong factor, and all of the top-ranked schools enjoy strong scholarly profiles. Schools regularly compete against each other in the entry-level and lateral markets to nab the best scholars for their faculties. In a world that rewards a school's graduates for the reputation of its faculty, it make sense for individual schools to use some portion of their funds to get the best scholars.

However, the school-funded system also has significant weaknesses. Paying for scholarly productivity through salary is a flawed mechanism. When professors can't be fired for a lack of scholarly productivity post-tenure, scholarship essentially becomes optional. And many, if not most, schools do not have the significant disparities between faculty salaries that could tangibly reward significant distinctions in production. Moreover, if salaries cannot go down, then merit raises get locked in, and a professor is paid for past productivity long into the future.

Law school funding also encourages an insularity to legal scholarship. The professor need really only please the dean in order to get the salary and other research funding that the school makes available.

Even assuming that the dean looks to outside markers such as placements and citation counts, a professor need not engage with her colleagues at the beginning of a project. The stereotypical law scholar sits amid books and Westlaw, working in solitary seclusion on a piece. Workshops, the star footnote, SSRN, and even blogs all encourage a scholarly conversation. But collaboration or peer input is not built as concretely into the beginning part of the process as it is in other disciplines through the grant-funding process, which puts articulation of goals and peer review at the front end of the process. And in this time of scarce law school resources, the inward focus can make professors look selfish when they are working or getting paid for scholarship. Since individual law professors control their own scholarly agendas, scholarship takes on an individualistic quality. Add in the fact that some kinds of scholarship (under the sales model) provide payments directly to the professor, and you can get the notion that a law school is just a bunch of independent contractors working under one roof. The professoriate has insulated itself – perhaps to better protect against outside influences, but at a significant cost.[9]

In order to better incentivize the production of legal scholarship with the money its spends, the legal academy should shift away from an individual-school, salary-based funding model to a field- and grant-funding model. The grant-funding model uses third parties (of some kind) to judge the value of a particular project, and these parties then offer funding for that project on an incremental basis. Such a

[9] *See, e.g.*, David Segal, *What They Don't Teach Law Students: Lawyering,* N.Y. Times, Nov. 19, 2011, at: www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html ("Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions, like the variety of property law in post-feudal England. Professors are rewarded for chin-stroking scholarship, like law review articles with titles like 'A Future Foretold: Neo-Aristotelian Praise of Postmodern Legal Theory.'"); Debra Cassens Weiss, *Law Prof Responds After Chief Justice Roberts Disses Legal Scholarship*, ABA Journal, July 7, 2011, at: www.abajournal.com/news/article/law_prof_responds_after_chief_justice_roberts_disses_legal_scholarship/ (quoting Chief Justice Roberts as saying at a conference: "Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.").

system has the following advantages over the school-funded, salary-based system:

- It takes at least some of the funding responsibility off of individual schools, thereby making that school's students shoulder less of the expense.
- It provides for more accountability for scholarly output over time.
- It provides some form of peer review and peer connection for projects at the beginning stages, rather than simply at the end.
- It can be structured to encourage collaboration and interdisciplinarity.

And here are some specific suggestions about ways of implementing the new model:

1. Do not pay professors to produce scholarship if they don't produce scholarship. If we can't expect all professors to write post-tenure, we at least shouldn't pay them for writing that they are not doing. There are a variety of ways of restructuring salaries to tie scholarship dollars to actual production, some of which I discuss below. Ideally, a school would cut back all salaries to some baseline "competent teaching & service" level, and then build up from there, each year, for superior teaching, committee work, and scholarship. Rather than maintaining the fiction that all legal academics produce scholarship, we should acknowledge that not all do and alter compensation accordingly. This change would free up funds to use for some of the reforms discussed below.

2. Individual schools should provide grants for scholarly production. Right now, most schools likely tie some portion of yearly salary increases to scholarship. Two problems: these increases are locked in over time, and the amount of merit pay available is often unrelated to the quality of scholarship produced. Moving towards a grant-based system would allow schools to reward specific production, but then not lock it in. If a school is pressed for funds, it could also restructure teaching and/or service packages so that productive

scholars have reduced course or service loads to "compensate" for that productivity. But the reduced loads would be year-to-year, rather than offered to all faculty or to a permanently blessed set of faculty.

3. Law reviews should pay authors for their works. Although it's a nice professional touch that law review authors provide their works for free, the incentives would work better throughout the system if the reviews paid at least some small amount to the authors. Under the current system, the prestige is seen as enough. But schools should care not only about the production of their own scholars, but also about the quality of articles published in their law reviews. If reviews paid, that would take off some of the pressure for individual schools to pay for placements. High-ranked schools could offer more money to supplement the payment in prestige that they provide.

4. AALS should provide grant funding for scholarship. An AALS fund which provided grants to schools and scholars for legal scholarship would provide a number of tangible benefits: it would incentivize scholarship with dollars, rather than just reputation; it would provide peer review at the beginning of the process, as well as connections and publicity for new projects; it would take some of the funding pressure off of individual schools; and it would give a concrete expression to AALS's mission to encourage the production of quality research. For those of you imagining an AALS secretariat with massive power to disburse funds to various schools, fear not: AALS president Dan Rodriguez has essentially called my idea politically unviable.[10] But AALS should do more to encourage a culture of grant-funding by starting a small grant-funding arm that provides seed money for a small set of scholarly projects.

5. AALS should advocate for more grant funding from interdisciplinary grant-funders. Individual legal scholars have a tougher row to hoe when applying to the NSF, NIH, or NEH, since they are not part of the traditional disciplines that get funding from these places. If AALS makes grant-funding a priority, it could work to make foun-

[10] Dan Rodriguez, *AALS Should Fund Scholarship?*, PrawfsBlawg, Feb. 24, 2014, at: prawfsblawg.blogs.com/prawfsblawg/2014/02/aals-should-fund-scholarship.html ("[T]he AALS grant idea is really a non-starter."). Of course, my response is: if you say so!

dations and government agencies more receptive to law school applications. AALS could also host a grant-funding resource center for law professors looking to understand and utilize grants.

6. The ABA should provide grant funding for scholarship. Are law professors spending too much time on Bulgarian evidentiary questions and not enough on common-law contract quandaries? The ABA could create a funding arm to provide grants for legal scholarship that deals more closely with doctrinal issues. Or ABA sections could each create small grant-funding programs for subject-specific scholarship. This may already be happening at some small level, in the form of awards or conference funding. But grant-funding would recognize a more tangible role for the bar in encouraging the production of legal scholarship.

There are solid arguments against these proposals. There's the scale issue: these reforms could range from being so small as to be meaningless, to so large as to be frightening in their power. The bigger the funder, the more power that funder would have to play politics or press an ideological or commercial agenda. At the very least, many of these reforms would impose a layer of bureaucracy on already busy law faculties, struggling to deal with their current responsibilities. Our current model is pretty independent and flexible. But the time has come for us to trade some of that independence for some outside review and accountability. Law schools will continue to care about the scholarship that their faculties produce and will compete on scholarly reputation. But legal academia as a whole has to think about how we fund legal scholarship and learn to do more with less.

THANKS FOR THE THANKS

AN APPRECIATION OF THE AUTHOR NOTE

Ross E. Davies[†]

Legal scholars' public expressions of gratitude – those thank-yous that fill law review author notes and law book prefaces – have inspired a good deal of legal scholarly commentary in recent years.[1] Much of that commentary deals with the theory that authors write those thank-yous with an eye more to the future than to the past. This work – "prospective thank-you theory" might be a good name – has numerous variations and complexities, and occasional hilarities. One thread involves the idea that some authors curry favor with great (or at least powerful or rich or famous) legal figures and institutions by thanking as many of them as possible for their support, no matter how slight their connections may be to an author's work. The result, such an author hopes, is that the thanked great ones will think kindly of him or her and bestow favors in the future.[2]

But is it true? Does this aspect of prospective thank-you theory match reality? I suspect that no one really knows, except perhaps the great ones themselves. First, only they know whether they are pleased by any particular expression of gratitude. Second, only they know whether any pleasure they do feel has a causal relationship to any favors they do bestow.

Discovering the truth might be both difficult and uncomfortable. Probing connections between gratitude expressed and help actually

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[1] The leading study is Professor Charles A. Sullivan's *The Under-Theorized Asterisk Footnote**, 93 GEORGETOWN L.J. 1093 (2005); *see also, e.g.,* Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 J. LEGAL EDUC. 65, 77-78 (2010); Ezra Rosser, *On Becoming "Professor": A Semi-Serious Look in the Mirror*, 36 FLA. STATE U. L. REV. 215, 215 (2009); Shane Tintle, *Citing the Elite: The Burden of Authorial Anxiety*, 57 DUKE L.J. 487 (2007); Arthur Austin, *Footnote* Skuldugerry** and Other Bad Habits****, 44 U. MIAMI L. REV. 1009, 1021-24 (1990).

[2] Some authors begin with accusations rather than thank-yous. *See* Sullivan, 93 GEORGETOWN L.J. at 1101-02 n.43 (discussing the phenomenon); *see also, e.g.,* STEPHEN PASTIS, THE CRASS MENAGERIE 5 (2008). This approach, and its consequences, might also be worthy of study.

given might be viewed by some as a search for the absence of connections, and such absences (if they existed and were discovered) might be viewed by some as evidence of something other than forthrightness on the part of authors who thanked for help barely (or not) given and great ones who failed to disclaim unearned credit. It all seems so ugly and messy. No one would want to be thanked in the author note of an article based on such research.

There may, however, be a sunnier side to the study of schmoozing via author note. Assume for a moment that author notes are read with the same kind of friendly skepticism that greets most name-dropping – that is, reasonable readers know better than to rely to their detriment on such puffery, and cannot complain (in court, at least) if they do so.[3] So, if no one is harmed by author-note puffery, why not live and let thank? And all the better if the thank-yous do in fact please at least some of the thanked people. It would mean that expansively grateful authors of author notes can make the world a happier place at no cost to anyone other than themselves.

But is it true? Do great legal figures appreciate the appreciation? Standing alone and apart from the question of what work was actually done, it seems like a harmless question that invites harmless answers, not messy or ugly ones. I suspect they would mostly be variations on Yes. And I even have a little bit of antique, but concrete, evidence.

In 1879, Benjamin R. Curtis, Jr. and George T. Curtis collaborated on a biography of former Supreme Court Justice Benjamin R. Curtis. In the preface to the book, Benjamin the younger wrote,

> From the Department of State and the Department of Justice, through the kindness of Secretary Evarts and Attorney-General Devens, I have received important information. To the Hon. Henry Stanbery, of Ohio, formerly Attorney-General of the United States, the author of the biography is also peculiarly indebted, as he likewise is to his and my father's friend, D.W. Middleton, Esq., the venerable and urbane Clerk of the Supreme Court of the United States.[4]

Curtis sent a copy of the book to Middleton, who replied by letter:

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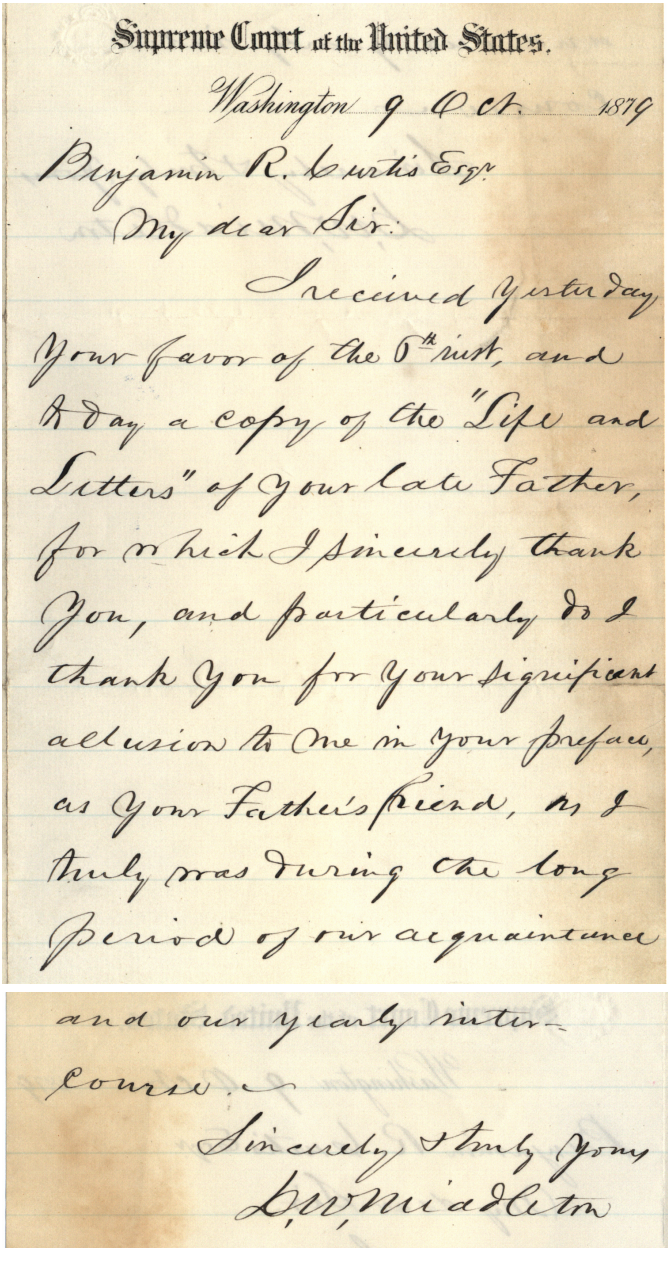
[3] *See, e.g., Alpine Bank v. Hubbell*, 555 F.3d 1097, 1106-07 (10th Cir. 2009); *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 245-46 (Wis. 2004).

[4] BENJAMIN R. CURTIS, 1 A MEMOIR OF BENJAMIN R. CURTIS, LL.D. vi (1879).



Supreme Court of the United States.

Washington 9 Oct. 1879

Benjamin R. Curtis Esqr.

My dear Sir:

I received yesterday your favor of the 6th inst, and a day a copy of the "Life and Letters" of your late Father, for which I sincerely thank you, and particularly do I thank you for your significant allusion to me in your preface, as your Father's friend, as I truly was during the long period of our acquaintance and our yearly inter-course.

Sincerely & truly Yours

D.W. Middleton

D.W. Middleton to Benjamin R. Curtis, Oct. 9, 1879. Collection of the author.

My dear Sir:

I received yesterday your favor of the 6th inst, and today a copy of the "Life and Letters" of your late Father, for which I sincerely thank you, and particularly do I thank you for your significant allusion to me in your preface, as your Father's friend, as I truly was during the long period of our acquaintance and our yearly intercourse.

In his day, Middleton was an important legal figure. Clerk of the Court was then, as it is now, a significant post, and his long and distinguished service in it made him "venerable" indeed.[5] When Morrison Waite came to Washington in 1874 to take up the post of Chief Justice, he was fêted at a series of dinners and events hosted by the elite of the Washington establishment. One of those hosts was Middleton.[6] And when Middleton died in 1880, the *Washington Post* reported:

> The name Daniel Wesley Middleton has been associated with the United States Supreme court for so many years that his death, which took place Tuesday night, becomes an event of widespread and regretful interest. . . . At the opening of the court yesterday Chief Justice Waite in feeling terms announced the death and adjourned the court out of respect. The justices all visited the house and requested the family to allow the funeral to take place from the court-room.[7]

For the funeral, the honorary pallbearers included Secretary of State William Evarts, Secretary of the Navy Richard Thompson, Solicitor General Samuel Phillips, and Senators David Davis and Matthew Carpenter. Waite later delivered a glowing eulogy at the Court.[8]

So, Middleton was a great legal figure, Curtis's thank-you to him was mere puffery (there being nothing in it about Middleton's help other than "vague generalities that no reasonable person would rely on as assertions of particular facts"[9]), and Middleton's pleasure and gratitude are obvious in his letter to Curtis. May author notes overflow with such kindness, and the hearts of those thanked, with joy!

[5] CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88 PART ONE at 80-83 (1971).
[6] CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88 PART TWO at 109-10 (1987).
[7] *Death of Mr. Middleton*, WASH. POST, Apr. 29, 1880, at 4.
[8] *Letter from Washington*, BALT. SUN, May 1, 1880, at 4; *Memorandum*, 100 U.S. ix (1880).
[9] *Alpine Bank*, 555 F.3d at 1106.

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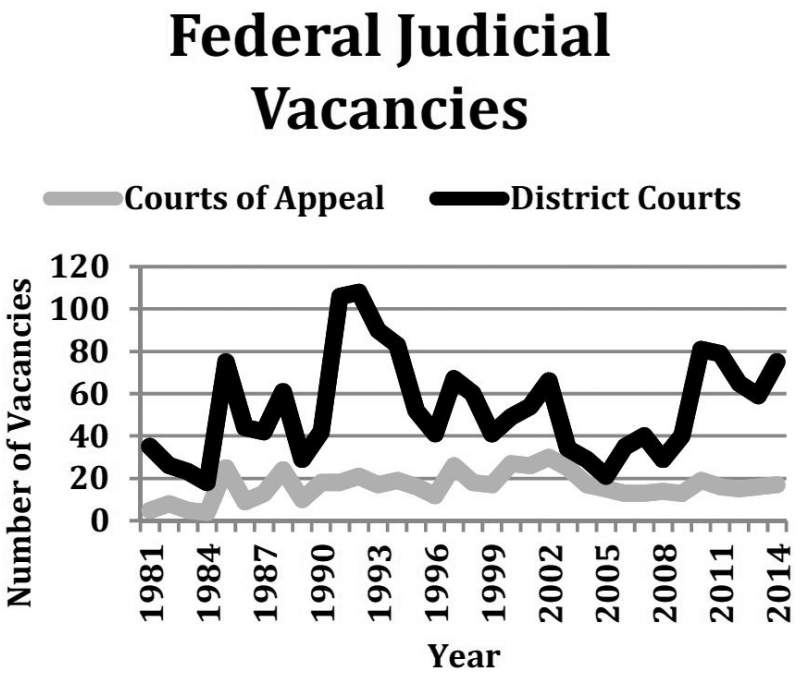

Journal of Legal Metrics

About the cover

Federal Judicial Vacancies

Graph by Adam Aft. Data from the *United States Courts Archive of Judicial Vacancies*, www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx. Data tabulated from January 1 summary each year, except due to the unavailability of data, February 1 data was used for 1994 and 2004 and March 1 data was used for 1996-97.

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AN EMPIRICAL ANALYSIS OF THE INFIELD FLY RULE

Howard M. Wasserman[†]

INTRODUCTION

Sporting events may be analogized to judicial proceedings, in that both are contests to determine a victor; it follows that the rules governing sporting events may be analogized to the rules that govern and define judicial proceedings, such as the Rules of Civil Procedure.[1] The recent trend in civil procedure scholarship has run toward the empirical.[2] So has the recent trend in the study of sports.[3] It thus makes sense to cast that same empirical eye on the scholarly field of law and baseball,[4] the "jurisprudence of sport," and sports rules as legal rules.[5]

No rule of sports law is riper for empirical study than baseball's most known and studied provision – the Infield Fly Rule ("IFR" or simply the "Rule"). Under the rule, when the batting team has run-

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[†] Professor of Law, FIU College of Law. This paper was presented at a faculty workshop at American University Washington College of Law in March 2014. Thanks to Eric Carpenter, Clem Comly, David Hoffman, Peter Oh, Alex Pearl, and Spencer Webber Waller for comments on early drafts. FIU College of Law students Brittany Dancel, Mark Erdman, Megan Gil, Sara Gordils, Daniel Horton, Alex Levia, and Ryan Maguire provided outstanding (if apparently enjoyable) research assistance on this project.

[1] Howard M. Wasserman, *The Economics of the Infield Fly Rule*, 2013 UTAH L. REV. 479, 483-84 (2013).

[2] David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1205-06 (2013).

[3] *See, e.g.*, Phil Birnbaum, *A Guide to Sabermetric Research*, SOCIETY FOR AMERICAN BASEBALL RESEARCH, sabr.org/sabermetrics (last visited Apr. 9, 2014); ADVANCED FOOTBALL ANALYTICS, www.advancedfootballanalytics.com (last visited May 11, 2014).

[4] Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L.J. 227, 233 (1994).

[5] Mitchell N. Berman, *"Let 'Em Play" A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325, 1328-29 (2011).

ners on first and second base or the bases are loaded with fewer than two outs, and the batter hits a fly ball in fair territory that an infielder can catch with "ordinary effort," the batter is called out. The rule prohibits the defense from getting a double play by intentionally failing to catch an easily catchable fair ball.[6]

Legal scholars have long been fascinated by this rule, what it tells us about law,[7] and what law tells us about it.[8] Others are less enamored, questioning its comprehensibility,[9] logic, wisdom, and necessity, both in particular applications[10] and as a general matter.[11] In a recent article, I defended the rule as a normative part of baseball's internal logic and structure, as an appropriate way to avoid overwhelming and inequitable cost-benefit disparities between teams on individual plays. The rule appropriately eliminates the incentive for the defense to intentionally act contrary to the game's ordinary practices and expectations to gain an extraordinary advantage and to impose extraordinary costs on the opposing side.[12]

But normative policy judgments may yield to, or at least be in-

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[6] Official Baseball R. 2.00 (Infield Fly), OFFICIAL BASEBALL RULES, mlb.mlb.com/mlb/downloads/y2014/official_baseball_rules.pdf (last visited May 11, 2014); *id.* (cmt.); Wasserman, *supra* note 1, at 491-92; *infra* Part I.

[7] Neil B. Cohen & Spencer Weber Waller, *Taking Pop-ups Seriously: The Jurisprudence of the Infield Fly Rule*, 82 WASH. U. L.Q. 453, 454 (2004); Anthony D'Amato, *The Contribution of the Infield Fly Rule to Western Civilization (and Vice Versa)*, 100 NW. U. L. REV. 189 (2006).

[8] Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975); *see also* Wasserman, *supra* note 1, at 487-89.

[9] As journalist John Dickerson put it in Slate, the "Catholic Church has no papal decree so complicated and misapplied as the infield fly rule." John Dickerson, *Wait, Am* I *That Baseball Dad?*, SLATE (June 19, 2013), www.slate.com/articles/sports/sports_nut/2013/06/baseball_parents_how_dads_stress_their_kids_out_during_little_league_games.html (last visited Apr. 9, 2014); *see also The Ability Timeline*, ESQUIRE, June/July 2014, at 103 (unsigned sidebar as part of Tom Junod, *Sports Are Not Only to be Played*, ESQUIRE, June/July 2014, at 102-03) (stating that 34 years old is the age at which a child is capable of understanding the infield fly rule).

[10] Kevin Kaduk, *Bad infield fly rule call mars Cardinals victory over Braves in NL wild card game*, YAHOO! SPORTS (Oct. 5, 2012), sports.yahoo.com/blogs/mlb-big-league-stew/bad-infield-fly-rule-call-mars-cardinals-victory-003924296 – mlb.html (last visited Apr. 9, 2014).

[11] Ebenezer Barnes, *Baseball Should Encourage Creative Thinking, Abolish Infield Fly Rule*, BLEACHER REPORT (Aug. 24, 2008), bleacherreport.com/articles/50636-baseball-should-encourage-creative-thinking-abolish-infield-fly-rule#articles/50636-baseball-should-encourage-creative-thinking-abolish-infield-fly-rule (last visited Apr. 9, 2014).

[12] Wasserman, *supra* note 1, at 493.

formed by, empirical analysis.[13] For our purposes, empirical analysis can show whether the risk of the double play – and the overwhelming cost-benefit advantage the defense gains from it – is sufficiently great to support the policy arguments justifying a special rule. Or perhaps the IFR is a century-old solution in search of a problem, resolving an injustice that is, if not non-existent, infrequent.

We can explore four empirical questions about the IFR. The first is frequency, considering how often batters come to the plate in infield fly situations (plays on which the rule could be applied) and how often easily catchable fair fly balls trigger the rule. Perhaps the IFR is unnecessary if the potential inequitable double play does not happen very often. The second question is the likelihood of the evil to be prevented – the likelihood of an inequitable double play and the incentive for the defense to seek it. In a counterfactual world without the IFR, would infielders have any incentive to intentionally fail to catch easily catchable fly balls in search of that double play and, if they did, how likely are they to succeed? The third question is the effect of the IFR, measured by the runs a batting team is statistically likely to lose if, absent the IFR, the defense could have turned double plays by intentionally failing to catch these easily catchable fly balls. The fourth question compares infield fly balls with a different baseball situation and rule – the dropped third strike – that raises similar policy and logical concerns.

This paper addresses all four empirical questions from a data set covering every plate appearance in an infield fly situation and every IFR call for Major League Baseball from 2010 to 2013. It looks at the frequency of IFR calls, the likelihood of double plays in the absence of the IFR, the practical effects of application of the rule, and the possible practical effects if the rule were repealed.

Ultimately, I doubt the debate over the merits of the IFR can be resolved quantitatively or empirically; as with debates over "judicial activism," resort to underlying normative or qualitative value judg-

[13] Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169, 188 (2002) ("[E]mpirical legal scholarship has a great deal to contribute to the understanding of law and legal institutions."); *see also* Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 114, 116-17 (2009).

ments in inevitable.[14] The normative conclusions one draws about the IFR by looking at the empirical record likely depend on where one starts – both supporters and critics of the rule will find confirmation and support in these statistics. Nor can we test the counterfactual, so as to genuinely know what might have happened in the games in our four-year sample played under different rules allowing for different strategies.

Nevertheless, these numbers remain interesting and worth examining, even if purely descriptive. They shed specific light on the realities of baseball's most unique play and on how its most famous (or infamous) rule operates as part of the fabric of the game.

I. A PRIMER ON THE INFIELD FLY RULE

Contrary to frequent complaints about its complexity,[15] the IFR can be stated in simple, comprehensible terms.

When the batting team has runners on first and second base or the bases are loaded with fewer than two outs and the batter hits a fly ball (but not a line drive or a bunt) in fair territory that an infielder can catch with "ordinary effort,"[16] the batter is out, regardless of whether the infielder catches the ball. The base runners are not forced to advance. If the ball is not caught, it is live and they can try to advance at their own risk; if the ball is caught and the runners have strayed too far, they can be thrown out at the previous bases.[17] The rule prevents the defense from getting what is regarded as a "cheap" double play. Rulemakers were concerned that infielders would intentionally fail to catch easily catchable pop flies, allow the ball to fall to the ground, then turn a double play on the base runners (at home and third, third and second, or home and second)

[14] *Cf.* Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 619 (2007) ("Even if some of the definitional dimensions of 'judicial activism' lend themselves to empirical work, value judgments persist.").

[15] *Supra* note 9.

[16] Official Baseball R. 2.00 (Ordinary Effort) ("[T]he effort that a fielder of average skill at a position in that league or classification of leagues should exhibit on a play, with due consideration given to the condition of the field and weather conditions."), OFFICIAL BASEBALL RULES, mlb.mlb.com/mlb/downloads/y2014/official_baseball_rules.pdf (last visited May 11, 2014).

[17] Official Baseball R. 2.00 (Infield Fly); *id.* cmt.; Wasserman, *supra* note 1, at 490-92.

trapped and unable to beat the throws to the next bases.[18] The IFR instead gives the defense one out on the batter – the same out as if the fielder catches the fly ball – and allows the base runners to remain in place.

In *The Economics of the Infield Fly Rule*, I defended the IFR as a matter of baseball's internal structure and logic, as a way to ensure relatively equitable cost-benefit exchanges between teams on given plays and game situations. The IFR is what I call a "limiting rule," a situation-specific rule that prohibits one side from exploiting holes or gaps in the game's default rules to gain an extraordinarily imbalanced competitive advantage.

In summary, four features mark a game situation as sufficiently imbalanced and inequitable as to warrant a limiting rule. And the infield fly situation possesses all four features.

First, absent the limiting rule, the infield fly produces a uniquely and extraordinarily inequitable cost-benefit disparity. Without the IFR, an infielder could get two outs on a play by intentionally letting the ball fall to the ground untouched and throwing the runners out at the bases, perhaps ending the inning (if there already was one out) and certainly dampening a rally (by removing two runners from the bases). This means a dramatic cost-benefit advantage for one side only – overwhelming benefits for the defense (two outs, one less runner on base, perhaps the end of the inning) with no offsetting costs, which the offense experiences as overwhelming costs with no offsetting benefits. With the IFR, by contrast, the defense gets only one out – either under the rule or because the infielder catches the ball – with the runners likely remaining in place.

Second, the defense exercises nearly complete control over the infield fly play and the offense is powerless to counter it. A ball subject to the IFR is, by definition, an easy play for an average Major League infielder. But that means it is just as easy for an average Major League infielder not to catch that ball. The fielder controls whether and how to catch this easily playable ball and to prepare himself to make a play; he has time to settle under the ball, wait for

[18] Wasserman, *supra* note 1, at 496.

it to come down, decide whether to catch it, and decide where to throw if he does not catch it. His teammates similarly have time to get to their positions to field any throws. By contrast, the base runners are trapped, entirely reactive, and arguably helpless. They are forced to run if the ball drops to the ground, but they will be thrown out if the ball is caught and they have strayed too far from their current bases. So they must remain on or near their current bases until the ball hits the ground, at which point they have too far to run to beat the throws.

Third, the overwhelming cost-benefit advantage arises because the defense intentionally fails to perform the athletic skills that fielders ordinarily try and are expected to perform. Here, that skill is catching an easily playable fair fly ball on or near the infield. Absent the IFR, this would become the only situation in all of baseball in which a team would be significantly better off not catching a batted ball in fair territory than catching it.

Finally, absent the IFR, the overwhelming cost-benefit advantage incentivizes infielders to intentionally fail to perform those athletic skills most (if not all) times the game situation arises. The incentive – getting two outs instead of one on a play – makes it worthwhile for the defense to eschew the simple catch and instead to seek out the inequitable double play by intentionally not performing the expected athletic skill in the expected manner.[19]

Like all limiting rules, the IFR imposes a particular outcome on the play, thereby eliminating the defense's opportunity and incentive to act contrary to athletic expectations. The batter is out regardless of whether the ball is caught and the runners are not forced to advance. Thus the outcome of the play – one out and the runners likely remaining in place – is the same whether the infielder catches the ball or not. This removes any incentive for the infielder to intentionally fail to catch it, since he gains no additional benefits beyond that one out.[20] On the other hand, perverse incentives remain without the IFR – if a double play is possible under the rules, infielders

[19] *Id.* at 493-96.
[20] *Id.* at 496-97

may regularly seek those overwhelming cost-benefit advantages by intentionally failing to catch that easily catchable fly ball.

That, at least, was the policy judgment when the rule was introduced and modified between 1894 and 1904 and that continues to justify modern retention of the rule. The empirical questions explored in this paper go to whether those overwhelming cost-benefit imbalances and perverse incentives would, in fact, arise absent the rule. The goal is to decide whether the normative policy judgments underlying the IFR are practically founded.

II. METHODOLOGY

Designing a study of the IFR is not an easy or obvious task. Major League Baseball does not officially track infield fly calls, so there was no single source for this information. Instead, I followed three steps to find, identify, and chart all the plays on which the rule was put into effect.

Step one was to review narrative play-by-play reports for every game in the four-season period from 2010 to 2013,[21] as reported on a number of web sites.[22] This revealed every time the infield fly situation (runners on first and second base or bases loaded with fewer than two outs) arose; the number of times a batter came to the plate in each of the four possible infield fly situations (runners on first and second base with no outs; runners on first and second base with one out; bases loaded with no outs; and bases loaded with one out); and the number of fly balls caught by an infielder in those four situations. In collecting these numbers, I counted plate appearances in which there was an infield fly situation at the beginning and end of that plate appearance, but not if the situation changed during the appearance. For example, imagine a player came to the plate with runners on first and second base and one out (an infield fly situation), but the second pitch thrown to him was a wild pitch allowing

[21] This was done with the help of a group of enthusiastic research assistants, who jumped at the opportunity to do "legal" research that involved reading about and watching baseball games. They tell me it made for great job-interview fodder.

[22] *See* www.baseball-reference.com (last visited Apr. 10, 2014); www.retrosheet.org (last visited Apr. 10, 2014).

both runners to advance. The batter remained at the plate and there remained only one out, but runners now were on second and third base; this no longer was an infield fly situation and was not counted as such in the study. This portion of the study produced raw numbers on how often players batted in infield fly situations and provided a broad set of potential IFR calls. Unfortunately, these narrative play-by-play reports generally do not indicate whether the IFR actually was applied on any particular play.

At step two, I cross-referenced all the fly balls identified in step one against detailed coded reports of every game, maintained by the web site RetroSheet.[23] These reports record, in coded form, whether a fly ball was hit, the position of the player who caught it, and whether the IFR was invoked on the play. Comparing these reports with the data from step one provided an initial count of IFR calls, broken down by each of the four situations for each of the four seasons.

Step three entailed watching video, through Major League Baseball's web site,[24] of every play identified in the first two steps as a fly ball caught by an infielder in an infield fly situation, whether or not RetroSheet flagged it as an IFR call. This revealed two things.

First, and importantly, this completed the count of IFR calls. On a significant number of plays, RetroSheet did not record IFR as having been invoked, but the video clearly showed it was, either because the umpire can be seen signaling IFR (raising his right arm while the ball still is in the air) or because the announcer reported the rule was in effect. I counted a play as an IFR call if the video made clear the rule was applied, regardless of how coded reports identified the play. In addition, the videos revealed approximately fifty plays on which IFR either was not invoked or it was impossible to tell from the video (the announcers did not say anything and the umpire was not visible on the play), but on which it looked as if the fair fly ball was catchable by an infielder with ordinary effort. Importantly, this suggests that, to the extent the figures discussed below

[23] *Play-by-play Data Files (Event Files)*, RETROSHEET, www.retrosheet.org/game.htm (last visited Apr. 10, 2014).

[24] *See, e.g.*, *October 30, 2013*, MLB.COM MEDIA CENTER, mlb.mlb.com/mediacenter/index.jsp?c_id=mlb#date=10/30/2013 (World Series Game 6) (last visited May 11, 2014).

are inaccurate, they almost certainly under-report the IFR; the rule may have been invoked slightly more often than this study suggests.

Second, the videos showed where on the field the ball was caught or where it fell to the ground on every play on which the IFR was called or should have been called.

I augmented this self-created study with information gathered from two advanced statistics databases. The first looked at "run expectancy," which calculates how many runs, on average, a team is likely to score from a given base-out situation (for example, runners on first and second base with one out) until the end of that inning. The second looked at the frequency of strikeouts in all four infield fly situations.

Having gathered these numbers, I explore four empirical questions about the IFR. The first is frequency – how often do infield fly situations arise and how often is the IFR applied? The second is likelihood of the evil to be prevented – how likely is a double play if, absent the IFR, an infielder could intentionally fail to catch an easily catchable fair fly ball? I measure likelihood by tracking the location of every IFR call, relying on an inference from location of the ball on which IFR is invoked to likelihood of the double play without the rule. The third question is the practical effect of the IFR (or of repealing the IFR), measured by what might change in a game absent the rule; that is, what might happen in a baseball world in which infielders are able to act on the perverse incentives inherent in the infield fly situation? Unfortunately, there is no place where baseball is played without the IFR to use as a control. Instead, I use these numbers to speculate about how the games might have played out differently – recognizing, of course, that there is no way to test that hypothetical or to truly know what might have happened in baseball games played under different rules allowing for different strategies. The fourth question is how IFR frequency and effect compares to the frequency and effect of a different baseball play governed by a limiting rule – the dropped third strike – that raises similar policy and logical concerns.

III. FREQUENCY OF INFIELD FLIES

The easiest empirical question is the frequency of infield fly situations and of IFR calls. That numerical question provides the starting point for the analysis. If the game situation in which infield fly would be called – and thus the perverse incentive and risk of the extreme cost-benefit disparity the rule seeks to prevent – does not arise very often, perhaps the limiting rule is unnecessary and normatively unwarranted.

TABLE 1: TOTAL INFIELD FLY RULE CALLS, 2010-2013

Infield Fly	2010			2011			2012			2013			Totals		
	PA	IFR	%	PA	IFR	%	PA	IFR	%	PA	IFR	%	PA	IFR	%
1st & 2d-0	2658	65	2.4	2373	58	2.4	2403	52	2.2	2464	51	2.1	9,898	226	2.3
1st & 2d-1	4566	132	2.9	4532	106	2.3	4275	106	2.5	4399	115	2.6	17772	459	2.6
Bases Loaded-0	721	21	2.9	662	24	3.6	637	19	3	620	17	2.7	2640	81	3.1
Bases Loaded-1	1771	42	2.4	1677	59	3.5	1534	57	3.7	1602	51	3.2	6584	209	3.2
Totals	9716	260	2.7	9244	247	2.7	8849	234	2.6	9085	234	2.6	36894	975	2.6

Table 1 shows all IFR calls for each year (regular season and post-season) from 2010 to 2013. Each large column captures a season, while each row covers one of the four infield fly situations. Within each season, the first column shows the number of plate appearances, the second shows the number of IFR calls, and the third shows IFR calls as a percentage of plate appearances. The main column on the far right shows totals for each game situation over those four seasons. The lower right-hand box shows total plate appearances, IFR calls, and percentage for the full sample.

The IFR was definitely invoked 975 times in slightly fewer than 37,000 plate appearances. This is an average of approximately 243 calls per season on approximately 9,200 situational plate appearanc-

es per season. And it represents 2.6% of plate appearances in all infield fly situations.[25]

The 2010 season represents the high-water mark for both IFR calls and plate appearances, with 260 calls in more than 9,700 plate appearances.

Breaking it down by game situation, the greatest number of plate appearances and IFR calls in each season (and overall) involved runners on first and second base with one out – this arose around twice as often as runners on first and second base with no outs. There also were more plate appearances with runners on first and second base (regardless of number of outs) than with the bases loaded (regardless of number of outs), producing more than twice as many IFR calls. By contrast, the percentage of IFR calls per plate appearance was slightly higher with the bases loaded, even though the raw numbers were lower. Over the full study period, the percentage of IFR calls with bases loaded was 3.2 % with one out and 3.1 % with no outs. This includes the highest mark of the study – in 2012, IFR was called in 3.7% of plate appearances with the bases loaded and one out.

Another point of interest involves plate appearances with runners on first and second base and no outs compared with plate appearances with bases loaded and one out – the situations that alternate for second-highest frequency of IFR calls. Overall, there were just seventeen more IFR calls in the former situation than in the latter (226 to 209), but in 1/3 more plate appearances. In other words, batters come to the plate more frequently with runners on first and second base and no outs than with the bases loaded and one out, but fly balls triggering the IFR were hit in the same raw numbers. A likely explanation is that the former is a common sacrifice bunt situation, meaning the batter does not try to hit the ball far and is thus less likely to hit a fly ball resulting in an IFR call.[26]

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[25] Prior to the study and with no statistical sense of how often the infield fly situation even arose, I guessed that IFR would be called in about 5 % of applicable plate appearances, which would have meant just under 2000 IFR calls in four seasons.

[26] The IFR does not apply if the batter pops up an attempted bunt. Official Baseball R. 2.00 (Infield Fly), OFFICIAL BASEBALL RULES, mlb.mlb.com/mlb/downloads/y2014/official_

To the extent these numbers are off, they undercount application of the IFR. Table 1 does not include approximately fifty plays over the four seasons in which neither coded game reports nor video show the rule being applied, but the rule appears to have been warranted – the ball was hit higher than a line drive, the infielder was settled under the ball and waiting for it to come down, and he easily caught the ball or was in a position to easily catch it. In other words, the infielder had sufficient control over the play that, if the rules permitted, he could have intentionally allowed the ball to fall to the ground, then picked it up to begin the double play the IFR was designed to prevent. Table 1 also does not include one fly ball, from July 2013, in which IFR was not called and a double play resulted, although the video again suggests a call was warranted.

Finally, Table 1 does not include approximately 500 fly balls on which video suggests IFR was properly not invoked. These include bunts, line drives, foul balls, and balls that were not playable with ordinary effort, usually because the infielder had to catch the ball on the run – all plays to which the rule, by its terms and its logic, does not and should not apply.[27] Note that I attempted to take a strict approach in coding plays, only counting a play as "should have been called" if IFR was clearly appropriate; if it was close, I accepted the non-call as correct.

The unanswerable question is what policy norms flow from these numbers. The conclusion one draws likely depends on one's *ex ante* normative preferences about the IFR before looking at the rule's frequency.

Someone who already considers the rule unwise or unnecessary will find confirmation in these numbers. Even accepting that there is a risk of an undesirable inequitable double play on an intentionally uncaught fair fly ball, that problematic play occurred fewer than 1,000 times in four seasons, fewer than 250 times per season, and less than 3% of the times it might have. This renders any harm *de*

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baseball_rules.pdf (last visited May 11, 2014); Wasserman, *supra* note 1, at 505-06.

[27] *See* Official Baseball R. 2.00 (Infield Fly), OFFICIAL BASEBALL RULES, mlb.mlb.com/mlb/downloads/y2014/official_baseball_rules.pdf (last visited May 11, 2014); Wasserman, *supra* note 1, at 491, 502-07.

minimis; the "injustice," if it is one, simply does not occur frequently enough to justify a special rule. An additional 200 double plays each year from infielders intentionally not catching fly balls is not intolerable within the game's structure. Infrequency also means the rule likely does not affect the outcome of many innings, games, or overall seasons. Finally, even without the IFR, infielders may not be tempted by the cost-benefit incentive; they may prefer the simple act of catching an easily catchable fly ball for one out to attempting the riskier, even if more rewarding, play of not catching that ball in search of two outs.[28] Fielders caught (or at least attempted to catch) the easily playable ball on all but one of the plays in this study.

On the other hand, someone who accepts the IFR as a matter of baseball's internal structure and logic (as I concededly do[29]) can argue that 1,000 unwanted, significantly imbalanced outcomes in four seasons are still too many, thereby justifying a limiting rule. It is enough that the cost-benefit disparity can and should be avoided in those 3% of cases and that the IFR achieves that goal. Baseball is a better game without plays that potentially produce overwhelming cost-benefit disparities, especially when the imbalance results from players intentionally acting contrary to ordinary athletic expectations and failing to perform athletic skills as expected. Rulemakers thus should retain a rule that succeeds in maintaining cost-benefit equity, even if the cost-benefit disparity it remedies is rare.

IV. LIKELIHOOD OF THE EVIL: DOUBLE PLAYS AND PERVERSE INCENTIVES

The second empirical question examines the link between the likelihood of the evil the rule is designed to remedy and the limiting rule – whether, absent the IFR, an intentionally uncaught fly ball will produce the feared double play and the consequent overwhelming cost-benefit disparity. This involves two distinct but related questions: First, how likely is the double play if the rules

[28] *See* Wasserman, *supra* note 1, at 513-14.
[29] *See id.* at 481.

allowed the defense to attempt it? And second, would the infielder have the incentive to intentionally not catch the ball in search of the double play and, if so, how often? Neither sub-question is empirically answerable, as both require speculating as to what would have happened in the same game played under different rules that allowed for different strategies and different player skills.

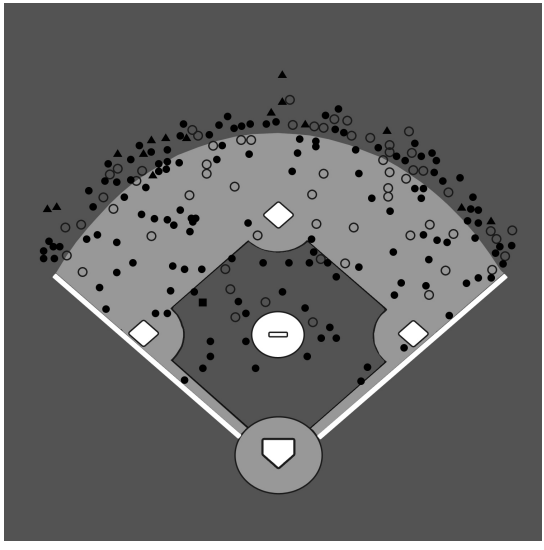
Instead, I adopt a rough empirical proxy: where on the field a fly ball is hit as an indicator of likelihood of the double play in the absence of the IFR.[30] A general inference seems possible. The closer to the infield or to the first target base (the base the infielder will throw to first when he picks the uncaught ball off the ground) a ball is hit, the closer to their bases the runners must remain, the shorter and quicker the throws for the double play, and thus the more likely the double play. And the more likely the double play, the greater an infielder's incentive to intentionally fail to catch the easily catchable fly ball in search of that double play.

Figures 1 through 4 below show the location of every ball on which IFR was invoked in our four-season sample, as well as the fifty plays in which it could (or should) have been applied. We thus have location information on approximately 1,025 batted balls. Each mark reflects the spot on the field where the ball was caught by an infielder, where it touched the fielder's glove, or where it hit the ground untouched (twelve balls either were dropped or fell to the ground untouched). For each season, Figure (a) shows plays with runners on first and second base and Figure (b) shows plays with the bases loaded.

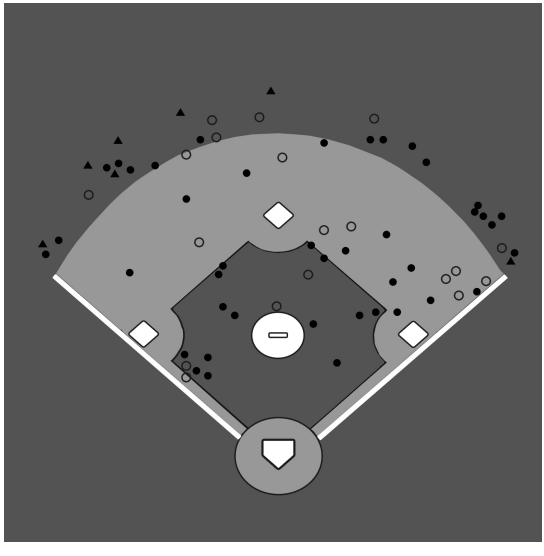
[30] I use this measure knowing that baseball's rules expressly reject location on the field as a relevant consideration for whether the IFR should be invoked. Official Baseball R. 2.00 (Infield Fly) cmt, OFFICIAL BASEBALL RULES, mlb.mlb.com/mlb/downloads/y2014/official_baseball_rules.pdf (last visited May 11, 2014).

FIGURE 1: 2010

1(A) RUNNERS ON FIRST AND SECOND BASE



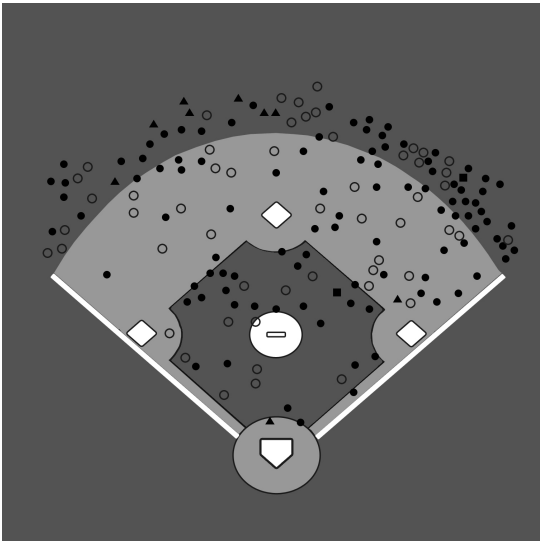
1(B) BASES LOADED



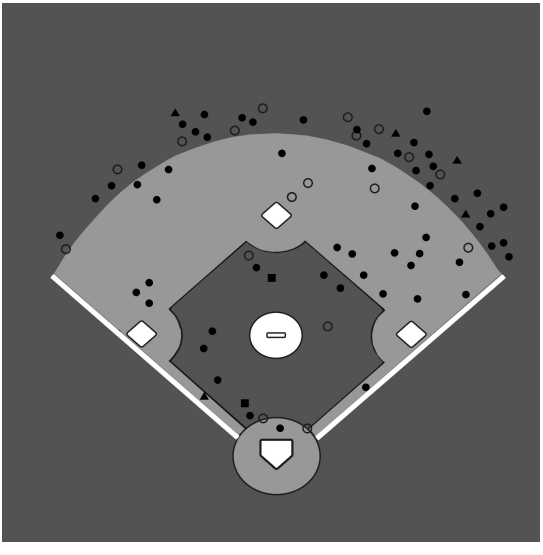
(○) Ball hit with no outs
(●) Ball hit with one out
(□) Ball not caught; Infield Fly invoked
(‣) Ball caught; unclear if Infield Fly was applied

FIGURE 2: 2011

2(A) RUNNERS ON FIRST AND SECOND BASE



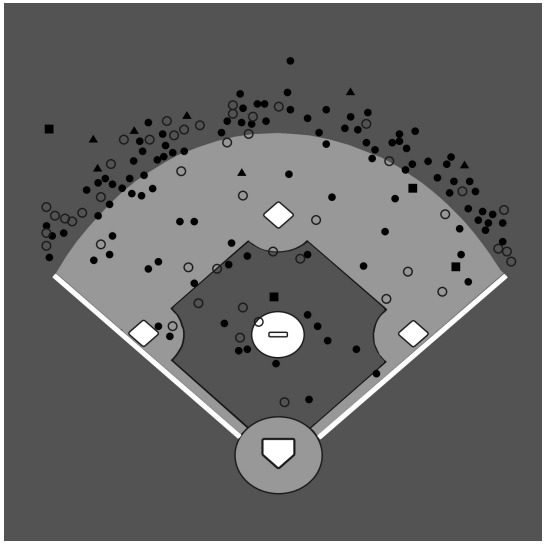
2(B) BASES LOADED



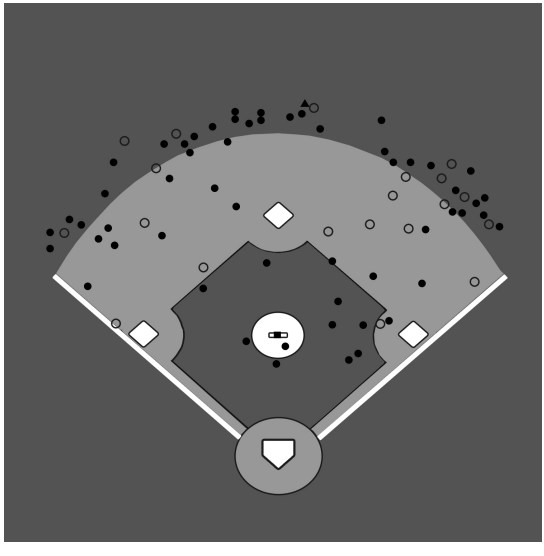
(○) Ball hit with no outs
(●) Ball hit with one out
(□) Ball not caught; Infield Fly invoked
(‣) Ball caught; unclear if Infield Fly was applied

FIGURE 3: 2012

3(A) RUNNERS ON FIRST AND SECOND BASE



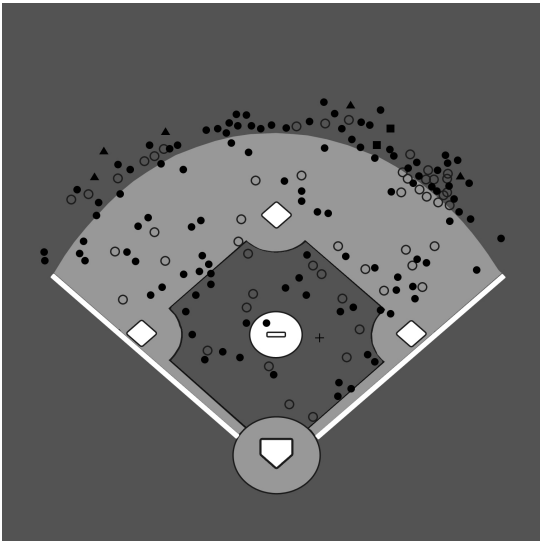
3(B) BASES LOADED



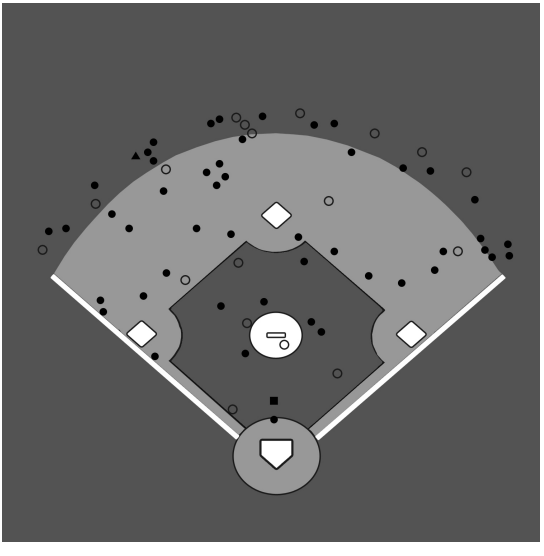
(○) Ball hit with no outs
(●) Ball hit with one out
(□) Ball not caught; Infield Fly invoked
(‣) Ball caught; unclear if Infield Fly was applied

FIGURE 4: 2013

4(A) RUNNERS ON FIRST AND SECOND BASE



4(B) BASES LOADED



(○) Ball hit with no outs
(●) Ball hit with one out
(□) Ball not caught; Infield Fly invoked
(‣) Ball caught; unclear if Infield Fly was applied

There is a fairly wide distribution of balls across left, center, and right fields and the infield grass, infield dirt, and outfield grass, with balls bunched in different areas. The distributions are fairly consistent across the four seasons, with a few small outliers. Figures 3a and 3b show that 2012 had fewer balls hit on the infield dirt. Figure 2a shows that in 2011 there were more balls hit into the shallow outfield on the right side than the shallow outfield on the left side. And Figures 4a and 4b show very few balls hit along the right-field foul line behind first base in 2013.

Looking at actual plays under current rules leaves much unknown about a hypothetical non-IFR world. Under current rules, infielders always want to catch the ball; they are trained by practice and repetition and the rules give them no incentive to do otherwise. This explains why all but twelve balls in our sample were caught, whether or not IFR was in effect.

We also cannot test the counterfactual of whether a double play would have resulted had infielders intentionally failed to catch any of these balls. We do not know how the ball might have bounced when it hit the ground and we do not know what the base runners would have done knowing there was a chance the ball might not be caught. Except for one, the failure to catch the ball was never intentional or strategic, so we do not regularly see infielders deliberately put themselves in position to play the ball off the ground and we do not see runners regularly look to advance to the next base. Similarly, we do not know how cleanly the infielder would have fielded the ball off the ground or whether the defense would have made two accurate throws – although we do know that infielders commit errors less than 2% of the time, suggesting a bad throw is not likely.[31]

We also do not know how good infielders might become at this play and at the new, heretofore unnecessary, skill of intentionally not catching fly balls. Infielders always want to catch the ball under baseball's current rules and have developed that talent rather than mastering the opposite. But that would change without the IFR. Infielders and teams would practice these plays, getting better and

[31] Wasserman, *supra* note 1, at 516 & n.141.

more skillful at (paradoxically) failing to catch a batted ball, by positioning themselves so the ball drops in an advantageous way and they can pick it off the ground, covering the bases, and making the necessary throws. A successful double play becomes more likely as infielders adjust to that new system, whereas current rules remove any incentive to practice or perfect this play and the necessary skills. An infielder also is more likely to turn a successful double play on a ball he intentionally does not catch and is able to control than on a ball that he tries, but fails, to catch.

Of course, changing the rules also may change what the base runners do – perhaps they run immediately, risking that the infielder will not catch the ball and trying to beat the throws to the next bases. This, in turn, would prompt infielders to practice (and master) disguising their intent – waiting until the last instant to decide whether to catch the ball or let it fall to the ground and hoping to fool the runners or make them guess wrong.[32] Importantly, absent the IFR, infielders retain first-move advantage; the infielder decides whether to catch the ball and the runners always must react, for fear of leaving too soon and being doubled off if the ball is caught. Thus, under both the current and counterfactual rules, the defense always controls the play.[33]

Fortunately, we need not rely solely on counterfactuals. Our sample includes one play that illustrates the purpose and necessity of the IFR – it features an intentional failure to catch an easily catchable ball, no IFR call, and a resulting double play. It thus illustrates the precise evils that baseball's rulemakers targeted when they created the IFR and the reason they have retained it for more than 110 years.

The play occurred in a July 2013 game between the Minnesota Twins and the Anaheim Angels; it is marked by the single plus sign (+) to the right of the pitcher's mound in Figure 4a.

With runners on first and second base and no outs in the top of the ninth inning and trailing 1-0, a Twins player hit a low, looping pop fly to the right of the pitcher's mound. The pitcher moved to-

[32] *Id.* at 513-14.
[33] *Id.* at 495.

ward the easily catchable ball then stopped, intentionally letting the ball fall at his feet. He picked it up and threw out the batter running to first base and the first baseman completed the double play by throwing out the runner trying to advance from first to second base.

The pitcher easily could have caught this ball, but he clearly made no effort to do so and knew precisely what he was doing by not catching it.[34] It is true that the defense did not turn the double play the IFR is designed to prevent, which generally involves multiple base runners and not the batter. But because the ball was not hit very high in the air and fell to the ground near first base, and because the batter did not run hard to first base (likely expecting either the ball to be caught or to be called out on the IFR), the easiest initial throw was to first base.[35] In any event, the defense had multiple ways to gain a double play on this play. Both runners were standing one or two steps off their bases when the ball landed, with little chance of beating any throws. Had the batter run hard to first (as he is ordinarily expected to do), the pitcher simply could have turned and thrown to third base to start the third-base-to-second-base double play on the forced runners. The point is that the pitcher had every incentive to do exactly what he did in search of the overwhelming cost-benefit advantage of gaining two outs on the play, even if he initially threw to the "wrong" base.[36]

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[34] The umpire later justified not invoking IFR because the pitcher was not "comfortably underneath" the ball waiting for it to come down, although he acknowledged that the ball did have enough arc to fall within the rule. The video seems to confirm the arc. But it also shows that the pitcher intentionally did not run underneath the ball, precisely so it would drop at his feet, placing him in a better position to field it off the ground and throw it.

[35] Howard Wasserman, *Rage against the Infield Fly Rule*, PRAWFSBLAWG (Jul. 26, 2013, 9:13 AM), prawfsblawg.blogs.com/prawfsblawg/2013/07/rage-against-the-infield-fly-rule.html; Matthew Pouliot, *Isn't this why we have an infield-fly rule?*, HARDBALL TALK (Jul. 24, 2013, 8:01 PM), hardballtalk.nbcsports.com/2013/07/24/isnt-this-why-we-have-an-infield-fly-rule. Video of the play can be found at mlb.mlb.com/shared/flash/mediaplayer/v4.4/R10/MP4.jsp?calendar_event_id=14-348251-2013-07-24&content_id=&media_id=&view_key=&media_type=video&source=MLB&sponsor=MLB&clickOrigin=&affiliateId=&team=mlb (last visited May 11, 2014) (go to the 2:55:44 mark).

[36] Of course, even had IFR been invoked on the play a double play remained possible. Perhaps one of the base runners would unthinkingly have run upon seeing the ball fall to the ground, forgetting that infield fly had been called, and the pitcher could have thrown him out for the double play (with the automatic out on the batter, it would have been a tag

That double play knocked the Twins out of a potential rally late in a one-run game they ultimately lost by that score. While the outcome of the game would not necessarily have been different, having two outs and a runner on third base (the situation the Twins faced after the play) was disadvantageous to the offense and advantageous for the defense. And it was decidedly different from having one out and runners on first and second base (the situation the Twins would have faced had the umpire applied the IFR).

As with the raw quantity of IFR calls, the evidence of location is illustrative and interesting, but does not necessarily answer the policy question without resort to normative value judgments. Figures 1 through 4 function like Rorschach Tests – one can see different things in them, again likely influenced by *ex ante* preferences as to the IFR. Nevertheless, the inferential move from location to likelihood and incentive allows for some educated guesses about what might have happened on these 1,025 plays absent the IFR as a limiting rule.

The balls most likely to produce double plays are those hit on the infield grass and dirt, which represent a majority of the batted balls in our overall study and in most individual years; once these balls fall to the ground, the defense has two short throws to get the two lead runners on force outs. Double plays also are likely on balls hit just on the edge of the outfield grass, especially to the middle and left sides of the field; the initial throw to get the lead runner at third base remains short and relatively easy. This covers that large swath from the right of second base (just behind where a second baseman stands) all the way to the left-field foul line.

The double play becomes less likely on balls hit deeper into the outfield and on balls on the outfield grass near the right-field line and behind first base. We see roughly twenty such balls in each season in our sample, except 2013 (depicted in Figures 4a and 4b), which saw fewer than ten balls in that area of the field. Fewer than ten of the "should-have-been-called" plays (marked as triangles (‣))

play on the runner, since he was not forced to run). But limiting rules are not designed to protect base runners from themselves – the runners bear the risk of unwise base-running decisions caused by not knowing the rules or by allowing themselves to be fooled by the defense. Wasserman *supra* note 1, at 497-98.

traveled to that area of the field in four years. Again, the further into the outfield or the further to the right side of the field the ball lands, the longer the throw to get the lead runner and the more difficult it will be to make the second throw to complete the double play. And the less likely the double play, the less incentive an infielder has to intentionally not catch the fair fly ball – if the defense gets only one out either way, the easier play is simply to catch the ball. Much may depend on the specifics of the play – the speed of the runners, the strength of the infielder's arm, how able the infielder is to set himself to play the ball off the ground and to make the first throw with his momentum moving forward.

Balls hit to the short outfield grass with the bases loaded (Figure (b) for each season) present an interesting strategic quandary for the defense, depending on whether there are no outs or one out and whether the ball is hit to the left or right side of the field. With one out, expect the defense to try for a double play that will end the inning, especially on balls hit to the left side of the field; the throws to get the runners at third and second base remain relatively short.

With no outs, however, that third-base-to-second base double play does not end the inning, meaning the lead runner scores from third base. To get the lead runner, the infielder would have to throw home, perhaps too long a throw to get the out or to allow for a second throw to complete the double play (at third or at second base, assuming the batter runs hard to first base). Again, the incentive to not catch the ball disappears; the infielder should and will catch the easy ball for the single out and have the runners remain in place. Alternatively, the defense might go for the third-to-second double play anyway, allowing the runner to score from third in exchange for two outs on the play. The wisdom of this strategy depends on the game situation – the score and the inning – and the importance of the single run.[37]

[37] For example, with a four-run lead in the fifth inning, the infielder may go for the third-to-second double play and allow the runner to score, but with a one-run lead in the ninth inning, he will take the sure one out on the fly ball and keep the runners in place. Of course, defenses regularly look at score and time in the game when choosing whether to accept additional outs in exchange for allowing a runner to score or whether to attempt the

Figures 1 through 4 appear to validate one common criticism of the IFR – over-inclusiveness, not only as written,[38] but also as applied. Accepting the inference from location to likelihood of the double play, IFR was invoked on at least some balls in our sample when there was no realistic possibility of a double play and thus no real incentive for the infielder to intentionally fail to catch the ball in pursuit of that double play. Although the rule is designed to eliminate the incentive for infielders to intentionally fail to perform the expected athletic skills in an attempt to reap overwhelming benefits and impose overwhelming costs, it arguably is applied even where that incentive is absent.

The most notorious example of this – and the play that triggered both criticism of the IFR and scholarly interest in defending it[39] – occurred in the 2012 National League Wild Card game on a ball hit well into left field (marked as a square all alone in medium left field in Figure 3a, where the ball fell to the ground untouched). The batter was called out on the IFR even though the ball was hit so far into the outfield that the runners advanced easily when the ball landed on the ground. A double play on the base runners would have been difficult given the depth of the hit, making it unlikely that the infielder ever would have intentionally failed to catch the ball.[40]

This play and the one from July 2013 illustrate the competing ends of the IFR's over-inclusiveness. Even if the inequitable double play is unlikely or impossible on some plays to which IFR may ap-

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play that keeps the runner from scoring. Dan Agonistes, *Playing the Infield In*, DAN AGONISTES (Dec. 7, 2005, 11:47 PM), danagonistes.blogspot.com/2005/12/playing-infield-in.html.

[38] Wasserman, *supra* note 1, at 512-13.

[39] *Id.* at 480-81; Howard Wasserman, *The Return of the Infield Fly Rule*, CONCURRING OPINIONS (Oct. 6 2012), www.concurringopinions.com/archives/2012/10/the-return-of-the-infield-fly-rule.html.

[40] Kaduk, *supra* note 10; *Infield Fly Rule Controversy: Braves vs. Cardinals Wild Card Game Includes Disputed Call*, HUFFINGTON POST (posted Oct. 5, 2012; updated Oct. 6, 2012), www.huffingtonpost.com/2012/10/05/infield-fly-rule-braves-cardinals-wild-card_n_1944240.html (includes video). Ironically, the runners advanced because the infielder tried to catch the ball; thus, he was not in a position to play the ball quickly once it fell to the ground (due to unintentional confusion between the infielder and his teammate in left field). An intentional failure to catch, for which the fielder was prepared and set and in position to play the ball, might have played out differently.

ply, it is possible, and even highly likely, on others. The numbers support this. Fewer than 100 balls in our four-year sample (namely those deeper in the outfield and on the right side of the outfield behind first base) are highly unlikely to produce double plays, as opposed to more than 900 balls (on the infield grass or dirt or in the shallow outfield on the left side) where a double play is more likely. While the incentive to intentionally not catch the ball is absent in the first set of plays, it remains present in the second set.

Whether such over-inclusiveness is a problem is again not an empirical question, but a value question – whether 900 potential inequitable double plays each year without the IFR outweigh 100 IFR-imposed automatic outs each year on plays where the rule's targeted evil is absent. The answer again depends on the normative preferences one brings to the discussion. For a supporter of the rule, these figures demonstrate that the need to prevent a potential overwhelming cost-benefit disparity arises nine times as often as unnecessary IFR calls. Moreover, because the infielder virtually always catches the ball, the IFR-imposed automatic out typically does not change anything about the play's outcome – the batter will be out and the runners likely remain in place either way. In addition, over-inclusiveness will vary across seasons – consider the smaller number of balls hit on the outfield grass behind first base (on which a double play is unlikely) in 2013.

This can be framed in the familiar distinction between Type I errors ("false positives," in which a rule applies when it should not, erroneously halting desirable behavior) and Type II errors ("false negatives," in which a rule does not apply when it should, erroneously permitting undesirable behavior).[41] Rulemakers often must accept more of one type of error than the other, and the choice between them reflects a policy preference. The costs of Type II errors tend to be more noticeable and tangible, often causing rulemakers to favor rules allowing Type I errors in the interest of limiting Type

[41] *See* Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1000 (2006); Engstrom, *supra* note 2, at 683 n.220; Alan A. Fisher and Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1586, 1669 (1983).

II errors.[42] Other times,[43] rulemakers specifically target Type I errors, even at the risk of additional Type II errors.[44]

For our purposes, a Type I error occurs when IFR is invoked on a play on which a double play from an infielder intentionally failing to catch the ball is unlikely, so there is no incentive to intentionally not catch the ball (as in the 2012 NL Wild Card Game). A Type II error occurs when IFR is not called when the inequitable double play is highly likely, thereby allowing the defense to gain an overwhelming cost-benefit advantage when the infielder intentionally fails to catch the ball (as with the July 2013 non-catch). Given the location and distribution of batted balls shown in Figures 1 through 4 – and using location as proxy for likelihood and incentive – it appears that not having the IFR would produce significantly more Type II errors than having the IFR produces Type I errors.

Moreover, measuring the error cost of a purportedly over-inclusive rule and choosing between the two types of errors must account for "categories of practices so rarely beneficial that it makes sense to prohibit the whole category even with knowledge that this will condemn some beneficial instances."[45] An over-inclusive rule – one that bans all of some conduct – becomes problematic only when it somehow prohibits significant beneficial instances of the targeted conduct in addition to the problematic instances the rule is designed to prohibit.[46] Stated differently, a rule preventing even rare unwanted conduct is worthwhile, so long as it does not erroneously prohibit desirable conduct. The question is whether baseball loses something by always disincentivizing infielders from intentionally failing to catch an easily catchable ball in search of the extraordinary cost-benefit advantage, even when the circumstances of the play already remove any incentive to actually do so.

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[42] *See* Engstrom, *supra* note 2, at 683 n.220; Fisher & Lande, *supra* note 41, at 1671.

[43] Consider, for example, the recent heightening of federal civil pleading standards. Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic v. Twombly, 550 U.S. 544 (2007).

[44] Ronald J. Allen & Alan E. Guy, Conley *as a Special Case of* Twombly *and* Iqbal*: Exploring the Intersection of Evidence and Procedure and the Nature of Rules*, 115 PENN. ST. L. REV. 1, 7 (2010).

[45] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 10 (1984).

[46] Wasserman, *supra* note 1, at 512-13.

As a policy matter, the best answer is no. There are no beneficial instances of infielders intentionally failing (or declining) to catch easily catchable fair fly balls and no instances in which the game benefits from or should encourage infielders to intentionally fail (or decline) to catch easily catchable fair fly balls. The rule's only possible cost is not allowing infielders the athletic freedom to avail themselves of every strategic option, even ones involving intentional failure to perform expected athletic skills in the expected manner, thereby eliminating one cat-and-mouse game between the teams. But rulemakers must balance that freedom against overwhelming situational cost-benefit disparities on the more-frequent plays in which the double play is likely. And the continued existence of the IFR shows how rulemakers made that qualitative, rather than quantitative, choice.[47] Baseball rightly chooses to live with the small number of Type I errors under an overbroad IFR because those errors impose no additional costs to the players or to the game.

Additional concerns sometimes arise from costs associated with a rule's enforcement – what Fisher and Lande call Type III errors.[48] For the IFR, this may include umpires having difficulty identifying the plays that actually warrant application of the rule. It also may include player, manager, and fan controversy and anger resulting from a particular erroneous or disputed application – perhaps the IFR is not costless if fans respond to a particular call by hurling debris on the field and delaying the game for ten minutes.[49] But our sample does not reveal excessive enforcement costs. It shows fewer than fifty plays in four years where the IFR should have been invoked but was not or may not have been (marked as triangles (‣) in Figures 1 through 4), and only one play where the defense manufactured a double play by intentionally failing to catch such a ball. Because infielders are trained and incentivized by the IFR to catch the

[47] *Id.* at 493. Historically, the rule also was justified in terms of sportsmanship, although that has largely disappeared in the modern game. *Id.* at 492-93; Aside, *supra* note 8, at 1478-79.

[48] Fisher & Lande, *supra* note 41, at 1586.

[49] This was the response to the IFR call in the 2012 National Wild Card Game. Kaduk, *supra* note 10.

ball, the result of virtually every play is the same, meaning erroneous failure to call IFR imposes no enforcement costs.

Video does show that a handful of IFR calls arguably should not have been made under the rule as written, usually because the catch demanded more than "ordinary effort." But many of those difficult balls were hit on the infield, close to the target bases, such that base runners had to stay close to their bases and would not have been able to get to the next base safely if the ball had fallen to the ground. Of the eleven IFR calls in our sample that were unintentionally not caught (marked as squares (□) in Figures 1 through 4), runners advanced on only two; this suggests that runners still might be doubled off on an infield fly ball, even where the infielder's failure to catch the ball is unintentional. Thus, over-calling the IFR still maintains a useful cost-benefit balance, by preventing the defense from gaining extraordinary benefits (and imposing on the offense extraordinary costs) through its unintentional miscues.

Finally, to the extent the IFR's over-inclusiveness is the real concern, the solution is a more narrowly tailored rule – a rule that prevents an infielder from seeking a double play on the July 2013 play, but not the play from the 2012 NL Wild Card or other balls hit into the outfield or to the right side. In other words, the solution is a narrower rule that will not cause Type I errors, rather than eliminating the IFR altogether, which would produce a flood of Type II errors.

The problem is how to draft such a rule. One obvious alternative would expressly define an infield fly in relation to the likelihood of a double play; that is, the IFR applies when the umpire determines that a double play is a possible or plausible or likely (or some other standard) result if the infielder fails to catch the ball. In other words, the touchstone is not whether the ball is catchable with ordinary effort, but whether the defense likely can turn a double play on an uncaught ball and thus has an incentive to intentionally fail to catch it.

But, as I argued previously, such a rule is impossible to administer, raising the very Type III problems about which Fisher and Lande warned. Umpires cannot determine the likelihood of a double play while the ball is still in the air and before it has hit the

ground or the runners have run.[50] For the same reasons we cannot look at the plays in Figures 1 through 4 and do more than speculate whether a double play would have resulted had any ball not been caught, umpires cannot watch any of those plays as they happen and do more than guess what might happen if the infielder does not catch the ball and the runners are forced to advance. Umpires likely would begin to use location as a pure proxy for the likelihood of a double play – IFR applies to balls in the infield but not to balls off the infield – something the current rule expressly (and rightly) eschews.[51] While location functions well as a proxy absent any alternative empirical measure, the correlation between location and double play is not so definitive (given the unknowns) as to make it an effective alternative rule.

V. PRACTICAL EFFECTS OF THE INFIELD FLY RULE

Knowing the frequency and location of balls on which IFR was invoked and having some vague sense of the likelihood of a double play had infielders intentionally not caught those balls, the next question is the practical effect of the IFR and the possible effect of the rule's absence on innings and games.

The obvious way to answer this question would be to compare baseball played under the IFR with baseball played without the rule, seeing whether and how often easily playable fair fly balls are intentionally not caught to trigger double plays. Unfortunately, no such control group exists – the IFR is part of organized baseball at all levels, including Little League[52] and overseas.[53] Instead, we must con-

[50] Wasserman, *supra* note 1, at 514-15 & n.132.

[51] *Supra* note 30.

[52] *See Infield Fly? Easy!*, LITTLE LEAGUE ONLINE, www.littleleague.org/learn/rules/ruleinterpretations/0709ruleinterpretationsept07.htm (last visited Apr. 11, 2014). There perhaps is some merit to the argument that, whatever the IFR's merits in professional baseball, it has no place in Little League, because there are very few balls that are presumptively catchable with "ordinary effort" by eleven-year olds. But the IFR accounts for that, by defining the rule to account for the "league or classification of leagues" involved. Official Baseball R. 2.00 (Ordinary Effort), OFFICIAL BASEBALL RULES, mlb.mlb.com/mlb/downloads/y2014/official_baseball_rules.pdf (last visited May 11, 2014).

[53] *See Infield Fly Controversy Mars Tension Filled Baseball Grudge Match*, ROCKET NEWS 24 (July

sider the games in this study from a counterfactual perspective, imagining how they might have played out without the IFR and with players free to act on perverse incentives in search of overwhelming cost-benefit advantages. Once again, it remains an untestable counterfactual, but still one that serves a useful descriptive purpose.

Recall how the IFR is designed to work. Rulemakers were concerned that infielders would intentionally fail to catch easily catchable fly balls, then turn double plays on trapped base runners (likely the two lead runners), although not on the batter, who should reach first base safely before the ball falls to the ground.[54] Because the batter is out under the IFR, the base runners are not forced to advance even if the ball is not caught; the defense gets one out on the play and the runners likely remain at the same bases. Because this is the same outcome as if the infielder catches the ball, the infielder has no incentive to intentionally not catch it. Without the IFR, on the other hand, infielders would have an incentive to intentionally not catch the ball in order to turn the double play on many of these plays; if successful, the defense gets more outs on the play, leaving fewer runners on base.[55]

Comparing those two possible outcomes, the circumstances of subsequent plate appearances (the batters following the infield fly) become significantly less favorable to the offense and more favorable to the defense in the latter case – the offense has more outs, fewer base runners, fewer base runners in scoring position, and therefore a smaller likelihood of scoring runs in the inning. And if the fly ball is hit when there is already one out, that double play ends the inning, preempting subsequent plate appearances and the runs they may have produced.

For simplicity sake, I make three assumptions, reflecting the most common results on these plays. First, with the IFR, the batter is out (either on the call or the catch) and the runners remain where they are; the next batter comes to the plate in the same base-runner

16, 2012), en.rocketnews24.com/2012/07/16/infield-fly-controversy-mars-tension-filled-baseball-grudge-match.

[54] Wasserman, *supra* note 1, at 492, 494-95.

[55] *Id.* at 493-94.

situation, but with one additional out. Second, absent the IFR, the defense would turn a double play on the lead runners every time. While not true in all cases, it reflects a probable result on a substantial majority of IFR calls in our study.[56] It also simplifies the analysis. Assuming that double play, the next batter comes to the plate with one more out in the inning, one less runner on base, and one less runner in scoring position. Third, if the double play on the uncaught fly ball occurs when there already is one out, the inning ends and the next batter does not appear at the plate at all in that inning.

Consider an example. A batter comes to the plate with runners on first and second base and no outs (an infield fly situation) and hits a fly ball that is catchable by the shortstop on the infield dirt with ordinary effort. If the IFR is invoked (or the ball is caught, because that is what the IFR incentivizes the infielder to do), the next batter also comes to the plate with runners still on first and second base, only there now is one out. On the other hand, without the IFR, if the infielder follows his incentive to intentionally not catch the fly ball and turns the double play on the two lead base runners, the next batter comes to the plate with a runner on first base only and two outs in the inning.

By measuring the differences for those subsequent batters with and without the IFR, we can quantify the cost to the offense and benefit to the defense of eliminating the IFR.

One measure of that effect is the sabermetric of "run expectancy," which calculates how many runs, on average, a team is likely to score in an inning from a particular base-out situation until the end of that inning.[57]

[56] *See supra* Part IV.

[57] *Run Expectancy Matrix*, BASEBALL PROSPECTUS, www.baseballprospectus.com/glossary/index.php?mode=viewstat&stat=576 (last visited Apr. 11, 2014).

TABLE 2: RUN EXPECTANCY, 2010-2013[58]

Run Expectancy	2010			2011			2012			2013		
	IFR	No IFR	Diff	IFR	No IFR	Diff	IFR	No IFR	Diff	IFR	No IFR	Diff
1st & 2d-0	0.9032	0.2251	0.6781	0.8936	0.2174	0.6762	0.9025	0.2214	0.6811	0.8815	0.2064	0.6751
1st & 2d-1	0.4506	0.4939	-0.0433	0.4344	0.4807	-0.0463	0.4391	0.4886	-0.0495	0.42	0.4672	-0.0472
Bases Loaded-0	1.5514	0.4506	1.1008	1.5344	0.4344	1.1	1.5367	0.4391	1.0976	1.5265	0.42	1.1065
Bases Loaded-1	0.7211	0.4939	0.2272	0.6922	0.4807	0.2115	0.7012	0.4886	0.2126	0.6809	0.4672	0.2137

Table 2 shows run expectancies for the batter following an easily catchable fair fly ball to an infielder in an infield fly situation. For each season, the first column shows run expectancy with the IFR, where the next batter comes to the plate with the same base-runner situation but with one more out. The second column shows run expectancy without the IFR; assuming the double play, that batter comes to the plate with one less base runner and one more out. The third column shows the difference between those two run expectancies, which reflects the cost to the offense and benefit to the defense of repealing the IFR.

Over the four seasons, run expectancy for the subsequent batter is generally higher, often dramatically so, with the IFR. When the infield fly occurs with no outs, eliminating the IFR and allowing the double play would cost the offense more than one full run with bases loaded and at least 0.67 runs with runners on first and second base. Consider bases loaded with no outs in 2013. With the batter out under current rules (either because IFR is invoked or because the infielder catches the ball), the next batter hits with the bases loaded and one out – the offense has a run expectancy of 1.5265. Absent the IFR (and assuming a double play on the lead runners),

[58] *Custom Statistic Report: Run Expectations*, BASEBALL PROSPECTUS, www.baseballprospectus.com/sortable/index.php?cid=1408077 (last visited Apr. 11, 2014), (running searches for run expectancy for every infield-fly situation by year).

the next batter hits with runners on first and second base with two outs – the offense has a run expectancy of 0.42. The difference between those figures – 1.1065 runs – is the cost to the batting team if the defense can turn that double play (absent the IFR), rather than taking the lone out with the IFR.

Measuring the run-expectancy effect of a non-IFR double play with one out is slightly trickier, because the double play ends the inning and the offense's turn at bat, so the next batter does not come to the plate in that inning. For this situation (indicated by underlined numbers in Table 2), I measured run expectancy for the next batter leading off the following inning, hitting with no one on base and no one out. Following an uncaught-fly-ball double play with the bases loaded, we find only a slight cost to the offense – approximately 0.2 runs lost in each season. And an uncaught-fly-ball double play with runners on first and second base actually produces a statistical benefit – the run expectancy is marginally higher (almost .05 runs in each season) for a batter hitting first in an inning than for a batter hitting with runners on first and second base and two outs (the situation after the single out under the IFR). Statistics aside, of course, it is hard to believe that an offensive team would prefer an inning-ending double play to having a batter hit with runners on base and two outs. Moreover, if the double play comes in the final inning of the game, that next batter never gets the opportunity to hit.

Lastly, recall the July 2013 play, discussed in Part IV, in which the defense actually turned a double play by failing to catch an easily catchable fly ball and the umpire inexplicably failed to invoke IFR.[59] How did that intentional non-catch affect run expectancy? Had IFR been invoked on that play, the batting team would have had runners on first and second base with one out – a run expectancy of 0.8815 in 2013. Following the double play, the batting team actually had a runner on third base with two outs (following the unusual first-to-second double play) – a run expectancy of 0.3527 in 2013.[60] In other words, failing to invoke IFR and allowing the defense to get the

[59] *Supra* Part IV.

[60] *Custom Statistic Report: Run Expectations*, BASEBALL PROSPECTUS, www.baseballprospectus.com/sortable/index.php?cid=1408077 (last visited Apr. 11, 2014).

double play by failing to catch the easily playable fly ball cost the offense more than half a run on that play, a significant benefit to the defense and significant cost to the offense.

A second measure examines what actually happened subsequent to each IFR call in the study, calculating the runs that might have been lost if, absent the IFR, the defense turned double plays on the 975 IFR calls in our sample.

TABLE 3: RUNS LOST, 2010-2013

Runs Scored	2010			2011			2012			2013			Totals		
	IFR	Runs	Affect	IFR	Runs	Affect	IFR	Runs	Affect	IFR	Runs	Affect	IFR	Runs	Affect
1st & 2d-0	65	27	8	58	17	3	52	25	5	51	25	7	226	94	23
1st & 2d-1	132	25	4	106	21	4	106	27	9	115	20	6	459	93	23
Bases Loaded-0	21	10	2	24	12	4	19	13	6	17	11	3	81	46	15
Baes Loaded-1	42	14	5	59	15	7	57	18	6	51	20	5	209	67	23
Totals	260	76	19	247	65	18	234	83	26	234	76	21	975	300	84

In Table 3, for each infield fly situation for each season, the first column shows the number of IFR calls (numbers imported from the same column in Table 1), the second column shows how often runs were scored in the same inning subsequent to an IFR call, and the third column shows how often the outcome of the game would have been "affected" by those lost runs. I define a game as having been affected where runs scored subsequent to an IFR call provide the ultimate margin of victory in the game. This includes games in which, absent the post-IFR runs, the winning team loses the game or the game becomes tied; it does not include games in which subtracting those runs simply widens the margin of victory for the same team (that is, the winning team wins by fewer runs or the losing team loses by more runs).

A double play on the infield fly eliminates some or all of the base runners that scored those later runs. If the double play occurs with no one out, at least some of those runners do not score, since at least one runner is no longer on base. If the double play occurs with one out and ends the inning (and the team's opportunity to score), none of those runners score, at least not in that inning. To the extent runs would have been lost and now-unscored runs represent the margin of victory, it suggests that repealing the IFR does affect game outcomes.

Teams scored runs following 300 of 975 IFR calls (not including the fifty should-have-been called plays), representing 30.8% of calls in the sample. This includes runs following 160 of 668 calls with one out (whether with runners on first and second base or bases loaded), eliminating all subsequent runs in the inning. Eighty-four IFR calls affected the outcome, in that the winning team would have lost or tied absent the post-IFR runs, including forty-six of the one-out calls (meaning no post-IFR runs would have scored in that inning).

Simply subtracting runs from the final score is an admittedly imprecise measure of the rule's effect. Again, we are assuming that each of those 975 infield flies would have produced a double play, which does not necessarily account for location[61] or for the occasional, if rare, throwing error. And even allowing for a double play on every uncaught infield fly ball absent the IFR, it is impossible to say with certainty whether that would or would not "affect" game outcomes. We simply do not know how a game would have played out under different rules and what changes in score or outcome would result.

Some post-double play runs still might have scored, since some runners remain on base. For example, following a non-IFR double play with bases loaded and no outs, the next batter hits with runners on first and second base and two outs; some of those remaining runners may have scored if the inning otherwise played out the same way, meaning the team does not lose all the runs it actually scored in the inning. And even if the double play with one out ends the in-

[61] *See supra* Part IV.

ning, depriving the offense of the runs in that inning, the team might have scored those same runs later in the game. More importantly, if subtracting post-infield fly runs only results in a tie game, we do not know how the rest of the game would have proceeded or who ultimately would have won.

Altering game situations also may alter subsequent plate appearances, subsequent innings, and the rest of the game, as players and teams take different approaches and strategies in changed circumstances. For example, the batting team in our counterfactual universe may have gotten base hits where they did not in the actual game, producing different scoring opportunities. Or teams might have used different pitchers or different batters, producing different opportunities and results.

Conversely, perhaps I am defining effect on outcome too narrowly – eliminating the IFR, and allowing for more uncaught-fly double plays, might affect even games in which simply subtracting runs alters the margin of victory but not the victor. Imagine Team A actually won a game 8-4, with three runs scoring subsequent to an IFR call in the fifth inning. Simply subtracting those three runs makes the final score 5-4, with Team A still winning, not a game in which I defined the IFR as "affecting" the outcome. But this now is a closer game, one that perhaps plays differently in the final four innings, as both teams employ different strategies (who pitches, who bats, and how to approach each play) that may yield more runs by one team or the other. And those additional runs might fundamentally alter the game's outcome, including the winner.

Finally, even accepting that the outcome of those eighty-four games (especially the forty-six games with inning-ending infield fly double plays precluding all the runners from scoring in that inning) might have been different without the IFR, we still do not know which outcome is correct or preferable. And the question remains whether an effect on twenty games per year – spread among all infield fly situations over all games over the course of a season – is significant enough to justify a limiting rule. As with the raw numbers of IFR calls, the answer depends on underlying *ex ante* normative preferences about the IFR itself.

VI. DROPPED THIRD STRIKE: A BASEBALL COMPARATOR

A different way to measure the empirical necessity of the IFR is to compare it quantitatively with the one baseball play that is truly analogous in terms of cost-benefit disparity and to the one baseball rule grounded in the same policy rationales as the IFR – the dropped third strike.

It is axiomatic to baseball that "three strikes you're out."[62] In fact, however, it is more complicated. A batter is not out on strikes, and becomes a runner free to run to first, if the catcher does not catch the third strike;[63] he is out only if the defense either tags him or throws him out on the bases. But a batter is out on strikes, and cannot run to first base, if the "third strike is not caught by the catcher" when "first base is occupied before two are out."[64]

The dropped third strike rule applies whenever at least first base is occupied with fewer than two outs, where the batter running forces at least one base runner to advance; this covers all four IFR situations.[65] But the rule does not apply if the ball is dropped whenever first base is unoccupied, because the batter running to first does not force the other base runners along. The rule also does not apply when there are two outs, because the defense gets the same result – one out to end the inning – whether the catcher catches the third strike or drops it to get the out on one of the runners.

The rule governing the uncaught third strike is a limiting rule, grounded in the same cost-benefit logic as the IFR. Absent the rule, a catcher could intentionally drop a third strike, allowing the batter

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[62] JACK NORWORTH & ALBERT VON TILZER, TAKE ME OUT TO THE BALL GAME (York Music Co. 1908).

[63] Official Baseball R. 6.09(b) OFFICIAL BASEBALL RULES, mlb.mlb.com/mlb/downloads/y2014/official_baseball_rules.pdf (last visited May 11, 2014).

[64] Official Baseball R. 6.05(c), OFFICIAL BASEBALL RULES, mlb.mlb.com/mlb/downloads/y2014/official_baseball_rules.pdf (last visited May 11, 2014).

[65] It also applies in four other game situations – (1) runner on first base with no outs; (2) runner on first base with one out; (3) runners on first and third base with no outs; (4) and runners on first and third base with one out. For purposes of comparing this rule to the IFR, we can ignore these four situations, because IFR would not apply in any of them.

to run and forcing the base runners to advance. The defense now can get a fairly easy double play (and perhaps even a triple play) on two base runners or on base runners and the batter – all because the catcher intentionally fails to catch the ball.[66] Like the IFR, the dropped third strike rule eliminates the opportunity (and thus the incentive) for the defense to gain an overwhelming benefit and to impose an overwhelming cost on the offense by intentionally failing to perform the expected athletic skills in the expected manner. And like the IFR, it does so by imposing an outcome on the play – one out on the strikeout, runners can remain in place – that would follow from the catcher performing the expected athletic skill and catching the ball for the strikeout.[67]

The dropped third strike rule is logically problematic for IFR critics, since the rules are cut from the same normative policy cloth – both seek to prevent the defense from gaining an extraordinary and inequitable cost-benefit advantage by intentionally failing to catch easily catchable balls, as fielders ordinarily want and are expected to do. If the IFR is an unwarranted limit on clever strategic play that should be eliminated, then the dropped third strike rule is a similarly unwarranted limit on clever strategic play that also should be eliminated.[68]

Unless, of course, empirical evidence demonstrates salient differences between the plays or the limiting rules, such that it makes sense to retain one rule while eliminating the other.

[66] Wasserman, *supra* note 1, 498-99.
[67] *Id.* at 499-500.
[68] *Id.* at 500.

TABLE 4:
STRIKEOUTS IN INFIELD FLY SITUATIONS, 2010-2013[69]

Strikeouts	2010			2011			2012			2013			Totals		
	PA	K	%	PA	K	%	PA	K	%	PA	K	%	PA	K	%
1st & 2d-0	2658	418	15.7	2373	370	15.6	2403	402	16.7	2464	421	17.1	9,898	1611	16.3
1st & 2d-1	4566	866	19	4532	792	17.5	4275	817	19.1	4399	823	18.7	17772	3298	18.6
Bases Loaded-0	721	109	15.1	662	122	18.4	637	100	15.7	620	110	17.7	2640	441	16.7
Bases Loaded-1	1771	330	18.6	1677	291	17.4	1534	257	16.8	1602	301	18.8	6584	1179	17.9
Totals	9716	1723	17.7	9244	1575	17	8849	1576	17.8	9085	1655	18.2	36894	6529	17.7

Table 4 shows strikeouts in each of the four infield fly situations for each year (regular season and post-season) from 2010 to 2013. For each season and situation, the first column shows the number of plate appearances (numbers drawn from the same columns in Table 1), the second column shows the number of strikeouts, and the third column shows strikeouts as a percentage of plate appearances. The large column on the far right shows total figures for each game situation over those four seasons. The lower right-hand box shows total plate appearances, strikeouts, and strikeout-to-plate appearance percentage for the full study.

Table 4 shows that strikeouts occur with substantially greater frequency than infield fly balls. There were 6,529 strikeouts in fewer than 37,000 plate appearances in four seasons, more than six times the 1,025 fly balls on which the IFR was or should have been called. This represents 17.7% of situational plate appearances, compared to less than 3% for infield fly balls. In the most common situation of runners on first and second base with one out, there were 3,298 strikeouts, representing more than 18% of plate appearances,

[69] *See Team Batting Split Finder*, BASEBALL-REFERENCE.COM, bbref.com/play-index/split_finder.cgi?type=b&class=team (last visited Apr. 11, 2014) (running searches for strikeouts in every infield-fly situation by year).

more than seven times the 459 IFR calls in the same situation. We see similarly wide disparities between strikeouts and infield flies in all four overlapping game situations.

Again, that still leaves the question of what normative conclusions to draw from the numbers. Does the large disparity between strikeouts and infield fly balls – both in raw numbers and as a percentage of plate appearances – undermine the validity or necessity of the IFR? One might suggest (contrary to my previous normative argument[70]) that the numerical gap shows that the dropped third strike rule is necessary even while the IFR is not. The feared inequitable double play from an intentionally dropped third strike would occur so much more frequently, both as a percentage of total plate appearances and relative to the same harm resulting from dropped infield flies. The frequency of strikeouts highlights the relative infrequency of infield flies, thus demonstrating the *de minimis* nature of any cost-benefit disparity from that small number of additional inequitable double plays. An inequitable cost-benefit exchange arising 17% of the time might be worth a limiting rule, even if an inequitable exchange arising less than 3% of the time is not.

The dropped-third-strike double play seems particularly obvious and likely compared with the double play on an intentionally uncaught infield fly ball, given the many uncertainties about those plays.[71] The double play on a dropped third strike is simple (assuming no throwing errors) if the drop is truly intentional and controlled – the catcher knocks the ball down at his feet, then easily picks it up and throws to any base to start the double play on one or more of the base runners[72] who remain trapped at their bases[73]

[70] Wasserman, *supra* note 1, at 501.

[71] *Supra* Part IV.

[72] The double play is at its absolute easiest with the bases loaded, as the catcher can pick up the ball laying at his feet and step on home plate for the first out before throwing to any base to complete the double play. Wasserman, *supra* note 1, at 498. A triple play is possible, even likely, if the bases are loaded with no outs. *Id.*

[73] The one hope for the offense is that the runners were moving on the pitch, which would take away the double play. Of course, knowing the runners are already running, the catcher would catch the third strike for the strikeout, and try to complete the double play by throwing out the stealing base runner.

and/or on the batter. There is no uncertainty and no need for judgment calls, as with the IFR; no judgment is necessary to know that there are two strikes on the batter, a force is in effect on one or more base runners, and the catcher did not catch the third strike.

On the other hand, that one rule gets invoked more frequently than another does not tell us anything about the validity or necessity of either rule, including the less-frequently invoked one. The IFR and the dropped third strike rule are not mutually exclusive or in competition with one another; they apply to similar game situations and are designed to prevent similar harms, although they cover distinct events. In fact, we might combine Tables 1 and 4 to argue that the two rules together prevent the defense from ever creating an overwhelming cost-benefit disparity in infield fly situations by intentionally failing to perform expected athletic skills in the expected manner; they together cover a significant number of plays – approximately 7,500 over four seasons, representing 20% of all situational plate appearances.

Ultimately, this again draws us back to qualitative questions lacking a quantitative answer. After all, one could minimize the effect of dropped third strikes and that limiting rule; even if substantially more frequent than IFR calls, they still represent only 17% of all plate appearances in these game situations, nowhere near a majority. The debate returns to when a (purportedly) overwhelmingly inequitable outcome warrants a limiting rule, especially when the limiting rule otherwise imposes no costs. That remains a normative question, regardless of whether that outcome occurs on many plays, few plays, or even one play.

CONCLUSION

Sabermetrics famously entails using advanced statistics and statistical methodology to better evaluate player performance and value.[74] While the statistics and analysis here are not advanced, this paper reflects a similar effort to employ statistical analysis to evalu-

[74] MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME 82 (2003); Birnbaum, *supra* note 3.

ate the rules baseball imposes on itself. If law can be studied empirically, so can the law of baseball.

Ultimately, the numbers and figures in this study are inconclusive. Or, more precisely, they are conclusive, but only to the extent they are consistent with whatever *ex ante* normative policy preference a person holds and wants to bring to the discussion of the IFR. The debate, and one's position in the debate, remains qualitative rather than quantitative, and any effort to measure the latter inevitably runs into the former. Nevertheless, these numbers offer a descriptive picture of how the IFR operates as an integral, longstanding, and continuing part of the game of baseball.

SUPREME COURT SLUGGERS

JAMES IREDELL

Ross E. Davies[†]

The Supreme Court existed for about a dozen years before John Marshall became Chief Justice in 1801. Until recently, in some instances quite recently, scholars tended to neglect those early years and the judges who served on the Court during them.[1] That is why *Supreme Court Sluggers* cards of the early Court are good vehicles for saluting – if only partially and imperfectly – some great baseball players who also were neglected until recently (and who suffered treatment worse than neglect in their playing days).[2] *Sluggers* cards of the original pre-Marshall Court – Chief Justice John

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[1] *See generally* Scott Douglas Gerber, *Introduction*, in SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL (1998) (noting the relative inattention to the pre-Marshall Court). Much of the neglect has taken the form of attribution of developments at the Court to the Marshall era even when they in fact preceded or at least began before it. *Compare, e.g.,* Bernard Schwartz, *A Presidential Strikeout, Federalism, RFRA, Standing, and Stealth Court*, 33 TULSA L.J. 77, 87 (1997) (citation omitted) (erroneously reporting: "In fact, from the Court's first opinions in 1792, the Justices have followed the practice of issuing opinions to explain their decisions – at first by the English custom of having the Justices deliver individual opinions seriatim, followed until John Marshall established the practice of opinions of the Court stating the rationale behind decisions."), *with* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC 110-11 (1995) (accurately reporting: "Before [Oliver] Ellsworth became Chief Justice [in 1796], the Court had not developed a firm tradition regarding the use of either seriatim or majority opinions. . . . After Ellsworth became Chief Justice, a clear pattern emerged in which he would personally deliver short opinions of the Court, infrequently supplemented by dissenting or concurring opinions."). Things have been changing, though, and for the better. In addition to the work of Gerber and Casto, see, for example, THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 (1985-2007) (8 vols.) (Maeva Marcus et al., eds.); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, Part One (1985).

[2] *See, e.g.,* ROBERT PETERSON, ONLY THE BALL WAS WHITE ch. 2 (1970); SOL WHITE, SOL WHITE'S OFFICIAL BASE BALL GUIDE 81-87 (1907); *see generally, e.g.,* LAWRENCE D. HOGAN, THE FORGOTTEN HISTORY OF AFRICAN AMERICAN BASEBALL (2014); LESLIE A. HEAPHY, THE NEGRO LEAGUES, 1869-1960 (2003).

Jay and Justices John Rutledge, William Cushing, James Wilson, John Blair, and James Iredell[3] – will be based on negro league stars who were denied (for most of their careers, at least) opportunities to play in the major leagues due to race discrimination.[4]

James Iredell

The first *Sluggers* card of a member of the founding-era Court – the card featured in this little article – portrays Justice Iredell in the batting stance of longtime Homestead Grays first baseman Walter "Buck" Leonard. (The nickname came courtesy of a young sibling who tried to call him "Buddy" but pronounced it "Bucky," and it stuck for life as "Buck."[5]) On the statistical side, the Iredell card reflects another similarity between the early Justices and the players on whom their portraits are modeled: the sources of job performance

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[3] *Members of the Supreme Court of the United States*, SUPREME COUT OF THE UNITED STATES, www.supremecourt.gov/about/members.aspx (vis. July 11, 2014).

[4] *See* G. EDWARD WHITE, CREATING THE NATIONAL PASTIME 127 (1996).

[5] BUCK LEONARD WITH JAMES A. RILEY, BUCK LEONARD: THE BLACK LOU GEHRIG 4 (1995); *see also* BRAD SNYDER, BEYOND THE SHADOW OF THE SENATORS 17 & n.108 (2003).

data are fragmentary (as well as being sometimes hard to parse), at least compared to those for modern Justices and major leaguers.

II.
JUSTICE JAMES IREDELL, ILLUSTRATED

John Sargent painted the full-color portrait of our slugging Justice,[6] which is reproduced in black-and-white on page 174, next to a well-known picture of Leonard taken by renowned photographer Robert H. McNeill (see page 175).[7] Basing the Iredell portrait on a traditional trading card of Leonard was not an option, because U.S. trading card manufacturers did not produce cards of active negro league players. The companies eventually produced cards of the few players who made it to the major leagues after Jackie Robinson broke the color line in 1947. Later, they also produced commemorative cards of some players' negro league careers. But that was all.[8] Some negro leaguers, including Leonard, spent winters playing on Central American and Caribbean teams, and appeared in Cuban card sets, but we have not found a Leonard card among them.[9]

Why Leonard for Iredell? Because:

- With all due respect for other great baseball players such as Luke Appling, Rick Ferrell, Mark Grace, Catfish Hunter, and Gaylord Perry,[10] Leonard was, and remains, the best ever to hail from North Carolina. His long and successful professional

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[6] John A. Sargent III, *Supreme Court Justice James Iredell* (2013) (oil on canvas). *See John A. Sargent III*, www.johnasargent.com (vis. July 6, 2014); *Sluggers Home*, GREEN BAG, www.greenbag.org/sluggers/sluggers_home.html (vis. July 6, 2014).

[7] *See* Patricia Sullivan, *Robert McNeill Dies at Age 87; D.C. Photographer of Black Life*, WASH. POST, May 29, 2005.

[8] *See Baseball Trading Cards of Negro League Players in Major Leagues (c. 1950's-1960's)*, CENTER FOR NEGRO LEAGUE BASEBALL RESEARCH, www.cnlbr.org/Gallery/Souvenirs/tabid/86/mid/434/ProjectId/154/wildRC/0/Default.aspx (vis. July 13, 2014).

[9] *See* Ralph Berger, *Buck Leonard*, SABR BIOPROJECT, sabr.org/bioproj/person/231446fd (vis. July 12, 2014). For a nice collection of those cards, see *American Negro League Players in Cuban Baseball Cards*, www.cubanball.com/nlcards.html (vis. July 13, 2014).

[10] *See Players by birthplace: North Carolina Baseball Stats and Info*, BASEBALL-REFERENCE.COM, www.baseball-reference.com/bio/NC_born.shtml (vis. July 11, 2014).

career – 23 years of sometimes year-round play in various countries and leagues, as well as barnstorming and exhibition games, from 1933 to 1956 – included 17 seasons, 10 Negro National League titles, and 3 Negro World Series titles with the Homestead Grays of Pittsburgh, PA and Washington, DC.[11] Iredell, who served from 1790 to 1799, enjoys much the same standing among Supreme Court Justices from North Carolina. But he only has to compete with Alfred Moore,[12] a Justice whose tenure was so short (less than four years, from April 1800 to January 1804) and contributions so slight that he was in the running for the title of "Most Insignificant Justice" on both sides of the dueling studies by Professors David Currie and Frank Easterbrook.[13]

- In addition, Leonard was a great player not just compared to others from North Carolina or to others from his era, but compared to just about anyone. He was one of the first non-white players elected to the Baseball Hall of Fame, after Ted Williams's famous Hall acceptance speech prompted (or at least heralded) racial reforms there.[14] And Leonard has ap-

[11] For the complete, and beautifully told, history of Leonard's team, read Brad Snyder's *Beyond the Shadow of the Senators: The Untold Story of the Homestead Grays and the Integration of Baseball* (2003).

[12] *Members of the Supreme Court of the United States*, SUPREME COUT OF THE UNITED STATES, www.supremecourt.gov/about/members.aspx (vis. July 11, 2014).

[13] David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 479 (1983) ("In closing this preliminary report I cannot be restrained from making special mention of several other Justices who deserve a high place in the ranks of the insignificant. Prominent among them despite his relatively brief service is Alfred Moore of North Carolina . . . , whom I dismissed in a study of the pre-Marshall era as one who 'belong[ed] essentially to the Marshall period' and in articles about the Marshall Court as a holdover from earlier days.") (citations omitted); Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481, 485-86 (1983) ("On an ex ante approach we might award the honors to Alfred Moore by acclamation. Justice Moore, who delivered one brief opinion during his four placid terms, showed every promise of setting a standard of passive irrelevance for centuries to come; only his resignation prevented him from fulfilling his pledge.") (citations omitted).

[14] *See* BUCK O'NEIL WITH STEVE WULF AND DAVID CONRADS, I WAS RIGHT ON TIME 140 (1996):

> It was Ted Williams. On the day he was inducted into the Hall of Fame in 1966, he said, "I hope that some day Satchel Paige and Josh Gibson will be voted into the Hall of Fame as symbols of the great Negro-league players who are not here only because they weren't given the chance."

> peared on a number of lists of all-time great baseball players.[15] Indeed, his standing in the baseball pantheon is undoubtedly higher than Iredell's is in the judicial equivalent. Iredell does not have a bad reputation. Rather, he was rated merely "Average," in one oft-cited poll of scholars,[16] and he failed to make any of the lists of great Justices in a collection of studies of greatness at the Court,[17] though he was rated by one respectable authority as one of the "most impressive" of the Justices of the pre-Marshall Court.[18]

Relatively speaking, then, it is probably more of an honor to Iredell to have his *Sluggers* portrait based on Leonard than it is an honor to Leonard to be the basis for the Iredell portrait.

People who know more about Iredell and Leonard might well come up with other, more interesting connections and comparisons.

Iredell the *Slugger* is standing against a backdrop different from the one in the photograph of Leonard because it seemed appropriate to portray Iredell at Greenlee Field in Pittsburgh, where Leonard's Homestead Grays often played their rivals, the Pittsburgh Crawfords. Those games were interesting not only a from a competitive standpoint, but also technologically (for example, some of the earliest night games played under electric lights) and legally (for example, at least one clever challenge to Sunday blue laws).[19]

> That got the ball rolling as far as the Hall of Fame was concerned. Satchel was the first one to get in, naturally, in 1971, and after him came Gibson and [Buck] Leonard.

See also Berger, *Buck Leonard*, SABR BIOPROJECT, sabr.org/bioproj/person/231446fd.

[15] *See, e.g.,* THE NEW BILL JAMES HISTORICAL ABSTRACT 359, 365 (2001; pbk. ed. 2003) (ranking Leonard at #65, and noting *The Sporting News*'s ranking of Leonard at #47); *see also* THE ESPN BASEBALL ENCYCLOPEDIA 1721-22 (5th ed. 2008) (Gary Gillette and Pete Palmer, eds.) (listing Leonard as one of the twelve "Titans" of the negro leagues).

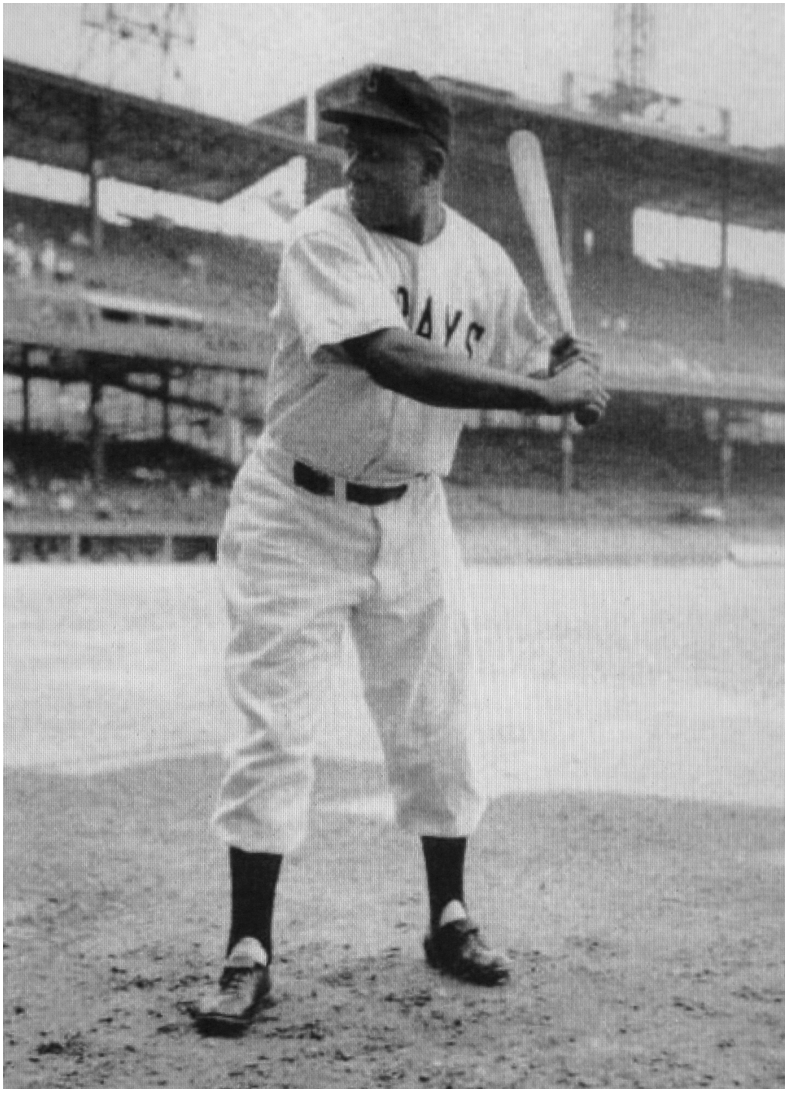
[16] *See* WILLIAM D. BADER AND ROY M. MERSKY, THE FIRST ONE HUNDRED EIGHT JUSTICES 27 (2004).

[17] *See* GREAT JUSTICES OF THE U.S. SUPREME COURT 14-19, 24-28 (1994, 2d prtg.) (William D. Pederson and Norman W. Provizer, eds.).

[18] CURRIE, *supra* n.1 at 57; *see also* WILLIS P. WHICHARD, JUSTICE JAMES IREDELL ch. 9-22 (2000).

[19] *See generally* Geri Strecker, *The Rise and Fall of Greenlee Field*, 2 BLACK BALL 37 (Fall 2009).

James Iredell by John A. Sargent (courtesy of the artist).



Buck Leonard by Robert H. McNeill
(courtesy of the heirs of Robert H. McNeill).

Like Justice Samuel Alito's *Sluggers* portrait, Iredell's features a baseball bat with a unique logo that might prompt you to re-read one of the Justice's opinions. On Iredell's bat, the logo is a citation to *Ware v. Hylton*, a 1796 case in which the Justice did not vote because he had been a member of the circuit court panel whose decision the Supreme Court was reviewing.[20] The report of *Ware*, however, indicates that in the Supreme Court Iredell was on the bench and actively engaged in the oral argument. In addition, the report includes his reading in the Supreme Court of his circuit court dissent.[21] The Supreme Court reversed the circuit court in *Ware*.

III.
JUSTICE JAMES IREDELL, QUANTIFIED

Statistics by themselves can never fully portray the accomplishments of anyone, including a ballplayer or a judge, or the quality of anyone's work.[22] But they are especially ineffective when the per-

[20] 3 U.S. 199, 256 n.* (1796); *see also* CURRIE, *supra* n.1 at 37.
[21] 3 U.S. at 209 n.*, 256-80.
[22] *See, e.g.,* THE NEW BILL JAMES HISTORICAL ABSTRACT at 338-39 (listing cautions); William M. Landes, Lawrence Lessig, and Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 271-76 (1998) (same); *see also*

son subject to statistical study is as inconveniently situated as both Iredell and Leonard were. They worked in contexts where records of their work were: (a) incomplete and otherwise inaccurate from the start due to faulty – sometimes downright negligent – contemporary record-keeping, and (b) further eroded and sometimes polluted by the passage of time and the imperfections of human memory. And statistics are, of course, only as accurate as the records on which they are based.

Late in life, Leonard – by then enjoying a well-deserved baseball celebrity – good-naturedly recognized this reality:

> At a baseball exhibit in the Smithsonian's Museum of American History, a youngster asked Buck Leonard how many home runs he hit in his long baseball career. Leonard, still lean and graceful in his seventies, gave a brief smile. "Well," he said, "in the Negro leagues we didn't always keep very good records."[23]

Iredell, who died mid-career and in his prime (at age 48 in 1799) never had a chance to reflect on his version of this problem. But he surely would have said much the same about the Court's records in his time. As a leading modern expert observed, in a critique of reports of decisions of the Supreme Court during the period when Iredell served,

> The dispute, in short, concerns not *whether* but *to what extent* [reporter of decisions Alexander J.] Dallas' three volumes of Supreme Court *Reports* [covering its sittings from 1791 to 1800] are incomplete. . . . Delay, expense, omission and inaccuracy: these were among the hallmarks of Dallas' work.[24]

RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 71 (1990) ("Citations are thus an imperfect proxy for reputation, and reputation itself an imperfect proxy for quality.").

[23] Matthew Schudel, *September Nonfiction*, WASH. POST BOOK WORLD, Sept. 11, 1983, at 6; *see also, e.g.,* Gary Ashwill, *About*, NEGRO LEAGUES DATABASE, www.seamheads.com/NegroLgs/about.php (vis. July 13, 12014) ("Box scores and game accounts for Negro league and independent black teams in the U.S. have been drawn from dozens of disparate and sometimes very hard-to-find sources. Negro league statistics are thus almost never complete, and it's highly unlikely we will ever achieve comprehensive coverage in every season."), and *Negro League Data Sources*, www.baseball-reference.com/about/nlb.shtml (vis. July 10, 2014) (same); WHITE, *supra* n.4 at 133-34.

[24] Craig Joyce, *The Rise of the Supreme Court Reporter*, 83 MICH. L. REV. 1291, 1303, 1305 (1985); *id*. at 1304 ("As to accuracy, the verdict on Dallas' *Reports* is less certain."); *see also,*

Nevertheless, statistics are a place to start, and we have done the best we can for Iredell.

The biggest news about the numbers on the back of the Iredell *Sluggers* card (and the spreadsheets that back them up) is that we have abandoned the sophisticated and comprehensive processes for gathering and sorting judicial statistics that Adam Aft and Craig Rust developed, and which they describe in earlier articles about the *Sluggers*.[25] The problem is not with their system. It has worked just fine. The problem is that the database on which their system relied, Washington University's superb "Supreme Court Database," does not cover the years during which Iredell served on the Court.[26] This difficulty is compounded by the fact that the obvious fallback – searching in standard databases of judicial decisions – is not always a reliable method for gathering accurate data about which judges participate in which decisions, and how they participate. Moreover, it is a problem that becomes more severe as a study deals with increasingly ancient cases. Obviously, the cases in which Iredell participated are all old. We anticipated this problem, and commented on it at some length, in another article on the *Sluggers* project.[27] There really is only one solution: get the books containing reports of cases in which the Justice might have participated, and page through them, from cover to cover.

That has been done, as best we could manage it, for Iredell. We used these volumes:

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e.g., JAMES HAW, JOHN & EDWARD RUTLEDGE OF SOUTH CAROLINA vii (1997) (discussing "a paucity of personal papers" of the subjects of his book).

[25] *See, e.g.*, Ross E. Davies, Craig D. Rust and Adam Aft, *Supreme Court Sluggers: Introducing the Scalia, Fortas, and Goldberg/Miller Trading Cards*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 155, 166-70 (2012); Ross E. Davies, Craig D. Rust and Adam Aft, *Supreme Court Sluggers: John Paul Stevens is No Stephen J. Field*, 13 GREEN BAG 2D 463, 475-80 (2010); Ross E. Davies and Craig D. Rust, *Supreme Court Sluggers: Behind the Numbers*, 13 GREEN BAG 2D 213, 219-26 (2010).

[26] *Collection Status*, THE SUPREME COURT DATABASE, scdb.wustl.edu/about.php?s=2 (vis. July 14, 2014) ("As we indicate below, the Database now traces back to the 1946 term.").

[27] *See* Ross E. Davies, Craig D. Rust and Adam Aft, *Justices at Work, or Not: New Supreme Court Statistics and Old Impediments to Making Them Accurate*, 14 GREEN BAG 2D 217 (2011).

United States (Dallas) Reports, vol. 1-4 (1790-1799)

Federal Cases, vol. 1-30 (1894-97) (West Publishing Co.)

Gentlemen of the Grand Jury: The Surviving Grand Jury Charges from Colonial, State, and Lower Federal Courts before 1801, vol. 1-2 (2012) (Stanton D. Krauss, ed.)

Supreme Court of the United States 1789-1980: An Index to Opinions Arranged by Justice, vol. 1-2 (1983) (Linda A. Blandford and Patricia Russell Evans, eds.)

Documentary History of the Supreme Court of the United States, vol. 1-8 (1985-2007) (Maeva Marcus et al., eds.)

The Papers of James Iredell, vol. 1-2 (1976) (Don Higginbotham, ed.) and vol. 3 (2003) (Donna Kelly and Lang Baradell, eds.)

Griffith J. McRee, *Life and Correspondence of James Iredell*, vol. 1-2 (1857-58)

If you know of any others that ought to be studied for the next edition of his card, please email editors@greenbag.org.

Poking around in the work of an old-time Justice prompted a few changes in our statistical categories to take account of duties that used to be a big part of the work of the Justices. Jury charges ("JC") and separate (seriatim, mostly) opinions ("SO") have been added. Unanimous opinions ("UO") and citations by name in West's "Federal" reporters ("CN") have been removed from the back of the card to make room for the two new categories, but they will still be tracked in the spreadsheets available on the *Supreme Court Sluggers* website.[28]

CN trends – which are an attempt to quantify how prominent a Justice has been, by tracking the number of times he or she has been cited by name in federal court opinions[29] – will continue to appear on some cards, while "CC" trends – a subset of CN limited to citations by name in U.S. Supreme Court opinions – will appear on others,

[28] *See Sluggers Home*, GREEN BAG, www.greenbag.org/sluggers/sluggers_home.html.
[29] Davies & Rust, *supra* note 25 at 223.

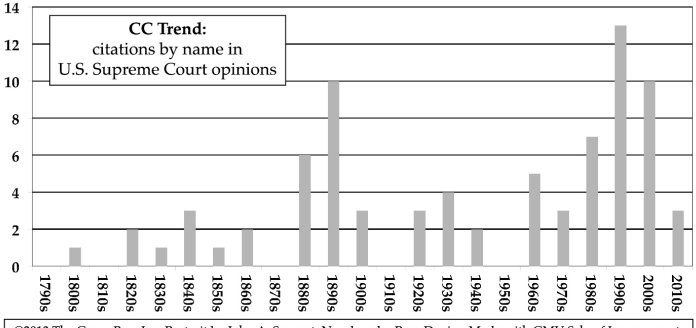
[1]The Numbers (as of March 15, 2013)

Court	Term	TO	MO	PO	SO	CO	DO	OO	IC	JC	PC	JO
[2]N.C.	1778	1	0	0	0	0	0	0	0	1	0	0
U.S. Cir.	1790	0	0	0	0	0	0	0	0	0	0	0
U.S. Cir.	1791	2	0	0	1	0	0	0	0	1	1	4
U.S. Cir.	1792	3	0	0	1	0	0	0	0	2	0	1
U.S. Cir.	1793	5	0	0	3	0	1	0	0	1	1	2
U.S. Cir.	1794	1	0	0	0	0	0	0	0	1	0	0
U.S. Cir.	1795	5	2	0	0	0	0	0	0	3	0	0
U.S. Cir.	1796	3	0	0	1	0	0	0	0	2	1	0
U.S. Cir.	1797	7	1	0	4	0	0	0	0	2	2	0
U.S. Cir.	1798	2	1	0	0	0	0	0	0	1	0	0
U.S. Cir.	1799	3	2	0	0	0	0	0	0	1	1	0
Totals		**31**	**6**	**0**	**10**	**0**	**1**	**0**	**0**	**14**	**6**	**7**
Avg.		**3**	**1**	**0**	**1**	**0**	**0**	**0**	**0**	**1**	**1**	**1**
[2]S. Ct.	1790	0	0	0	0	0	0	0	0	0	0	0
S. Ct.	1791	1	0	0	1	0	0	0	0	0	0	0
S. Ct.	1792	1	0	0	1	0	0	0	0	0	0	0
S. Ct.	1793	2	0	0	0	0	2	0	0	0	0	0
S. Ct.	1794	0	0	0	0	0	0	0	0	0	0	0
S. Ct.	1795	3	0	0	3	0	0	0	0	0	1	2
S. Ct.	1796	3	0	0	2	1	0	0	0	0	4	7
S. Ct.	1797	1	0	0	1	0	0	0	0	0	3	2
S. Ct.	1798	2	0	0	1	0	1	0	0	0	1	0
S. Ct.	1799	1	0	0	0	1	0	0	0	0	0	1
Totals		**14**	**0**	**0**	**9**	**2**	**3**	**0**	**0**	**0**	**9**	**12**
Avg.		**2**	**0**	**0**	**1**	**0**	**0**	**0**	**0**	**0**	**1**	**1**
Career Totals		**46**	**6**	**0**	**19**	**2**	**4**	**0**	**0**	**15**	**15**	**19**
Career Avg.		**5**	**1**	**0**	**2**	**0**	**0**	**0**	**0**	**2**	**2**	**2**

James Iredell
Associate Justice
May 12, 1790 to
Oct. 20, 1799

[redacted]

[1]Stats backup at www.greenbag.org. Please send corrections to editors@greenbag.org. **TO**=total written opinions (MO+PO+SO+CO+DO+OO+IC+JC); **MO**=majority; **PO**=plurality; **SO**=separate; **CO**=concur; **DO**=dissent; **OO**=order; **IC**=in-chambers; **JC**=jury charge; **PC**=per curiam; **JO**=joined.
[2]Partial Term - not used in averages.



and debuts on the Iredell card. It is hard to know what to make of Iredell's CC numbers without other Justices' to compare them to. But we expect to have at least some of the data for comparisons – and for the rest of the statistics on the back of the forthcoming Jay, Rutledge, Cushing, Wilson, and Blair *Sluggers* cards – soon. For the

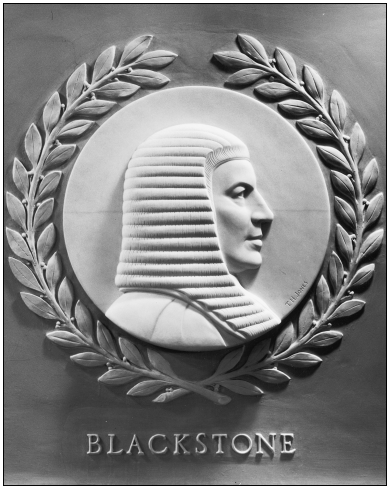
citation by name statistics ("CN" and "CC") we used Westlaw's "all-cases" database, which seems pretty good for that particular bit of research, notwithstanding the comments above about standard databases.

Finally, and purely coincidentally, our first founding-era *Slugger* is also our first with a reported history of service on a non-federal court. And so the Iredell card includes one rather sparsely populated line of state court statistics. Future cards both ancient (Cushing, for example) and modern (Justice Sandra Day O'Connor, for example) will have much more.

# # #

CHAPTER ONE

A JOURNAL OF LAW BOOKS



William Blackstone

SUMMER 2014

Chapter One

Robert C. Berring, Editor

Table of Contents

Chapter One operates on the same terms as the *Journal of Law*. Please write to us *Chapter One* at rberring@law.berkeley.edu, and visit us at www.journaloflaw.us. ISSN 2157-9067 (print) and 2157-9075 (online). Image of William Blackstone courtesy of the Architect of the United States Capitol. It is one of the 23 marble relief portraits over the doors of the chamber of the House of Representatives. As the Architect explains, the portraits "depict historical figures noted for their work in establishing the principles that underlie American law. They were installed when the chamber was remodeled in 1949-1950. . . . The subjects of the reliefs were chosen by scholars from the University of Pennsylvania and the Columbia Historical Society of Washington, D.C., in consultation with authoritative staff members of the Library of Congress. The selection was approved by a special committee of five Members of the House of Representatives and the Architect of the Capitol." *See* www.aoc.gov/capitol-hill/relief-portrait-plaques-lawgivers/sir-william-blackstone.

THE ULTIMATE OLDIE BUT GOODIE

WILLIAM BLACKSTONE'S *COMMENTARIES ON THE LAW OF ENGLAND*

Robert C. Berring[†]

There is no denying the success of the book; and so far there has been little question about its influence, especially in the United States. But what was great about this urbane account of the common law system?[1]

While serving as Deputy Director of the Harvard Law Library in 1978, I was asked by Dean Albert Sacks to take on a special project. A wealthy alumnus was on the verge of making a substantial gift, but he would do so only if someone tracked the changes made by William Blackstone to his *Commentaries on the Laws of England* in the editions published during his life. I was given a research assistant and a chance to impress the Dean. No more incentive was needed.

As with most American lawyers, Blackstone's *Commentaries* was familiar to me. Familiar in the same manner as Joyce's *Ulysses* or Proust's *Remembrance of Things Past*: books that I knew were important and which I had never seriously attempted to read. Discovery awaited me.

[†] Walter Perry Johnson Professor of Law, Berkeley Law School, Boalt Hall. Thanks to Roxanne Livingston for making the excerpt readable.

[1] Milsom, "The Nature of Blackstone's Achievement," 1 Oxford Journal of Law 2 (1980). Appropriately enough, this article is a printing of Professor Milsom's delivery of the annual Blackstone Lecture at Pembroke College.

As a logical beginning to the project I read the first edition of the *Commentaries*. To my surprise the text was not just readable, it was fun. Once I had mastered the art of reading the f's as s's and plowing through the alternative spellings (Blackstone's spelling anticipated Twitter that way) I enjoyed it. In a sense this is as it should be. The *Commentaries* are the record of lectures that Blackstone gave to the landed gentleman students at Oxford. The students were not to be specialists, they were to be landowners, gentlemen, and nobility, all of whom would need some expertise in the law to handle matters once back home. While knowledge of the law might be beyond the ken of the common person, those with privilege bore special responsibility. Understanding the basics of the legal system was part and parcel of civic duty. As Blackstone put it:

> But those upon whom nature and fortune has bestowed more abilities and greater leisure cannot be so easily excused. These advantages are not given them not for the benefit of themselves only, but also of the public: and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowledge of the law.[2]

Blackstone was a popularizer. The lectures were not part of the accepted academic program. Roman Civil Law was the proper object of scholarly endeavor. The Common Law of England was beneath academic study. Such a division between the law as viewed by legal scholars and the law as practiced in real life is not unfamiliar to the 21st-century observer. In the real world of 18th-century England, Common Law governed day-to-day life. Much like the difference between the articles that appear in the *Harvard Law Review* and the operation of the local courts today, the divide between theory and practice was wide and deep. Blackstone's genius lay in planting the Common Law in an academic setting. Since his lectures were offered as a voluntary option for students, they had to earn their way on the merits. The lectures had to attract attendees by quality and they did so.

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[2] 1 Blackstone *Commentaries on the Law of England* 7 (1765).

Much has been written about how the *Commentaries* came to have such influence in the United States.[3] The most important point is that the *Commentaries* not only supplied answers to legal questions, it also created a basic structure for how to think about legal issues. Blackstone created categories and put the great messy cake of the English Common Law into a comprehensible system. He taught his readers how to conceptualize legal questions. Bringing order out of chaos, putting a structure in place that allows one to think about questions in an orderly manner is pivotal to the law. Categorization is destiny. Once we begin to think of questions in a certain structural form, it is very hard to escape it. What begins as a useful paradigm for explaining phenomena morphs into a dogmatic reality. The *Commentaries* began as a noble attempt to make the Common Law comprehensible, as time passed it became an oracle: not a summary of the law but the law itself. United States lawyers still deal with the world in the terms introduced by the *Commentaries*.

For lawyers in the newly developing United States, the *Commentaries* were a godsend. In the days before the West Publishing Company, Westlaw, and Lexis, legal materials in the United States were difficult to come by. The *Commentaries*, usually in an abridged or American edition, was the only source of law for many lawyers. As Daniel Boorstin puts it:

> For generations of American lawyers, from Kent to Lincoln, the Commentaries were at once law school and law library. In view of the scarcity of law books in the early years of the Republic, and the limitations of life on the frontier, it is not surprising that Blackstone's convenient work became the bible of American lawyers.[4]

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[3] Boorstin, *The Mysterious Science of the Law* (Harvard U. Press 1941), remains my favorite book on the importance of Blackstone. It is dated but remains a literate, incisive treatment of the *Commentaries*' place in intellectual history. Professor Wilfrid Prest's *William Blackstone: Law and Letters in the 18th Century* is the definitive biography. A volume of essays on Blackstone is currently being compiled by Professor Prest, with publication scheduled for fall, 2014.

[4] Boorstin, pp. 1-2.

Soon the *Commentaries* morphed into the equivalent of a primary source. As Professor Jessie Allen of the University of Pittsburgh Law School points out in her introductory essay (pages 195-205 below), it is a primary source that is chock full of contradictions and even a few howlers, but once an authority is crowned, it is crowned.

Ergo you should consider giving the *Commentaries* a try. To tempt you to sample the pleasures of the *Commentaries*, we have transcribed the first ten pages of Chapter One. Working from the text of the first edition, the 18th-century printing convention of using f's in place of initial s's has been converted to the modern form. (It is not hard to accomplish said conversion in one's head, but we want to make it as inviting as possible). Observe the rhythm of the text and the acuity of the observations. It still reads well. Do not be discouraged by the obsequious first paragraph, such opening statements of humility were de rigeur at the time. The text grows fascinating quickly. We consciously stuck to the first edition. Many American lawyers used American editions produced by Judge Cooley or by St. George Tucker and there are numerous appealing variants, but we decided to honor the rule of "in for a dime, in for a dollar." This is the straight stuff.

To put the *Commentaries* into perspective, Professor Allen has written an introduction for us. She knows whereof she speaks. Since 2008 she has blogged about the *Commentaries* in *Blackstone Weekly*, writing insightful reflections as she works through the first edition. If you are at all interested in the *Commentaries*, check this blog.[5] In her introduction, Professor Allen points out the frequency with which the *Commentaries* continue to be cited by United States courts. She sketches out both the glory and the internal contradictions in the *Commentaries*. Analyzing a work like this one after much of what was new and exciting when it first appeared has now become commonplace, is no easy task. With a felicitous style, Professor Allen pulls off the trick. Her short piece provides valuable insight into the very soul of the *Commentaries*.

[5] blackstoneweekly.wordpress.com/about/.

If the reader is encouraged to read more, the choices of where to turn are many. If one wishes the straight stuff, the University of Chicago Press produced a wonderful facsimile of the first edition that is still in print in paperback. The inimitable HeinOnline has a fine facsimile of the first edition. The Yale Law Library's Avalon Project provides a more readable version. In any form it is a good read, much more artful than the typical opinion from the Supreme Court of the United States. There are many abridgements and edited editions, a raft of them designed especially for the United States market. There is even a humorous edition.[6] The range of choices is bountiful. In any case, give it a try. If you enjoy literature written in the grand old style you will be in for a treat. In any case, you will learn some law as well as some very odd English history. Besides, after you read it, then you can tell colleagues that you did. ❶

[6] Catherine Spicer Ellis compiled a definitive list of the editions of the Commentaries in her 1938 work *The William Blackstone Collection in the Yale Law Library: A Bibliographic Catalog*, Yale Law Library Publications, No. 6. Ms. Ellis records the holdings of the massive Yale collection of the editions of the *Commentaries*, and she sought out those Yale did not possess. The book is written in a graceful style and deserves its fame among bibliographers.

INTRODUCTION

LAW AND ARTIFICE IN BLACKSTONE'S *COMMENTARIES*

Jessie Allen[†]

Looking out the window of a moving train brings a special kind of delight. It has something to do with the way obvious disorder appears orderly, almost planned. All of the chaos and decay of daily life is there, but the speed, the station stops, the chosen destination, organize the landscape. Running past the back yards, everything – from the rusted cars to the kids on swings to the bubble tags and winter vines spreading across empty brick warehouses – appears knit together in the continuity of the passage. The joy that I experience from this train-transected world has something in common with William Blackstone's joyful vision of the common law. Blackstone's *Commentaries* presents an unapologetically inconsistent legal system, variously rooted in morality, habit, political expediency, and, above all, ingenious human creation. It's a glorious conglomeration barely held together by its ostensible consonance with liberal rights, evanescently organized by the force of Blackstone's own intelligence whipping by. If you like trains, read Blackstone.

Of course there are other reasons. You might read the *Commentaries* to see why the justices of the twenty-first-century United States Supreme Court are citing Blackstone's eighteenth-century treatise

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now as frequently as ever. That is quite frequently indeed – in about one of every 12 decisions.[1] It might not be a bad idea for the rest of us to know something about the text the Court treats as legal gospel – the "preeminent legal authority" of the American founders.[2] If the Court reads Blackstone devoutly, much can be gained by reading his work critically. As Duncan Kennedy showed, Blackstone's apologetic project offers a marvelously transparent example of how the Anglo-American legal system pulls doctrinal wool over political ideology.[3] You might also read the *Commentaries* out of simple curiosity. Although most American lawyers know *of* Blackstone, very few these days know what is actually in his encyclopedic work. As a result, references to the *Commentaries* stir vague feelings of anxiety in legal readers who wonder if they ought to be better acquainted with this foundational text. Read Blackstone's *Commentaries*, and relax!

But most of all, read Blackstone for the ride – the ride through a legal landscape that mixes natural law with deliberate legal fiction, legal faith with political skepticism. The *Commentaries* occasionally pauses to identify authority for law variously in transcendent reason, immutable nature, ancient origins, sovereign power, and proven social benefits. Mostly, though, the work flaunts the legal system's artifice and pliability, and insists that legitimate, and legitimately good, results can be achieved without resorting to blind faith, natural necessity, or scientific proof.

PROPERTY AND POSITIVISM

Blackstone is often categorized as a natural law thinker, but reading the *Commentaries* troubles that description. *Volume I* begins by identifying certain "absolute" rights as the foundation of English law. These rights are "such as would belong to . . . persons merely in a state of nature, and which every man is intitled to enjoy whether out

[1] Jessie Allen, Reading Blackstone in the Twenty-First Century and the Twenty-First Century Through Blackstone, in *Re-interpreting Blackstone's Commentaries*, ed. Wilfrid Prest (Hart forthcoming 2014).

[2] *District of Columbia* v. *Heller* 554 U.S. 570, 593-94 (2008).

[3] Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 *Buffalo L. Rev.* 209 (1979).

of society or in it."[4] That certainly sounds like natural law – and like the modern concept of universal human rights. Within a few pages, though, the picture gets more complicated. Whereas the rights of security and liberty are "inherent by nature in every individual" and "strictly natural," the origin of property rights is more equivocal. Blackstone is only willing to say that "private property is probably founded in nature."[5] This hedging is particularly odd given Blackstone's identification with an absolutist view of private property.[6]

And speaking of property, you might be surprised by what Blackstone includes in those foundational rights – and what he does not. On the plus side, count income transfers from rich to poor. Blackstone explains that the absolute right of security that protects a man's life and limb "also furnishes him with every thing necessary for their support." Accordingly, "there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life, from the more opulent part of the community by means of the several statutes enacted for the relief of the poor."[7] Whoa! This kind of welfare entitlement is just the sort of 'affirmative' right that is today excluded from liberal rights theory in general and, in particular, from the rights guaranteed by the U.S. Constitution. On the minus side, according to Blackstone, private property does not necessarily include any right to inherit property from one's ancestors or to pass property on to anyone after death. So while Blackstone calls property a "primary" right, and ranks it with the natural rights of life (security) and liberty, he apparently believes that even the most basic structures of property rights are open to change.

Nor is property the only issue. The *Commentaries* are surprisingly full of explicit rejections of the natural law idea that unjust law is not really law at all. For instance, here is Blackstone on the hereditary right of kings:

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[4] *Commentaries*, I, 119.

[5] *Id.* at 134.

[6] See, e.g., William N. Eskridge, Jr., Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling between Facts and Norms, 57 *St. Louis L. Rev.* 865, 880 (2013).

[7] *Commentaries*, I, 127.

> I therefore rather chuse to consider this great political measure, upon the solid footing of authority, than to reason in its favour from its justice, moderation, and expedience: because that might imply a right of dissenting or revolting from it, in case we should think it unjust, oppressive, or inexpedient.[8]

Can't get much more positivist than that!

I suspect that Blackstone's positivist strain has sometimes been overlooked because we tend to view him in opposition to his famous contemporary critic, the arch-positivist Jeremy Bentham. Bentham's attack on Blackstone was so frontal (among other things, he called the *Commentaries* "vicious,"[9]) that it is hard to see the two on the same side of any jurisprudential question. But the *Commentaries* is a checkerboard of natural law and positivist perspectives. Indeed, Bentham criticized Blackstone's logical inconsistency as much as his reliance on natural rights.

BLACKSTONE, RIGHTS AND INHERITANCE

Certainly the legal rights Blackstone views as "entirely derived from society" are not mere technicalities.[10] Blackstone calls the legal doctrine of descent for purposes of inheritance "a point of the highest importance . . . indeed the principal object of the laws of real property in England," but in his view there is nothing natural about it[11]: The right of inheritance "is certainly a wise and effectual, but clearly a political, establishment."[12] Moreover, sounding practically post-modern, Blackstone critiques the assumption that a legal right as central and longstanding as inheritance must be somehow

[8] *Id.*, 205.

[9] "Correct, elegant, unembarrassed, ornamented, the *style* is such, as could scarce fail to recommend a work still more vicious in point of *matter* to the multitude of readers." Jeremy Bentham, *The Fragment on Government* 116 (1776).

[10] *Commentaries*, I, 134.

[11] *Commentaries*, II, 201.

[12] *Id.* at 11.

"natural," observing that "we often mistake for nature what we find established by long and inveterate custom."[13]

It is not just natural *law* that Blackstone rejects as the basis for a right to inherit property – but also natural fact. Surely a natural explanation for the law of descent would be an easy sell. Blackstone wrote a century before Darwin and Mendel, but he wrote in a world well acquainted, indeed, obsessed, with family connections and deep knowledge of how traits were passed down through generations. The English of Blackstone's time were experienced breeders – of horses, roses, pigeons, and, on the other side of the Atlantic, slaves. And the doctrine of descent is the core structure, not only for inheritance but for all possible property acquisitions, in a system where purchases are figured as aberrant – mutations "whereby the legal course of descents is broken and altered."[14] If there ever was a legal culture ripe for a natural explanation of inheritance rules, it would seem to be eighteenth-century Britain.

Yet Blackstone largely rejects biological relation as a justification for the laws of descent. Of course the legal structure of inheritance "depends not a little on the nature of kindred," or, "consanguinity," defined as "the connexion or relation of persons descended from the same stock or common ancestor."[15] But Blackstone points out that kinship for the purposes of inheritance is calculated differently in different cultures – comparing the English system to Hebrew, Greek, Roman, and Danish law. What's more, he conjectures that the idea of blood relations as a basis for inheritance might be the *effect*, rather than the cause, of our practice of giving property to surviving family members. Perhaps, he suggests, the social practice of family inheritance is due less to kinship than to proximity and expedience. After all, "[a] man's children or nearest relations are usually about him on his death-bed" and so are likely to be the next occupants.[16] Indeed, Blackstone points out, proximity and expedience could ground a right of inheritance for servants, and apparently

[13] *Id.*
[14] *Id.* at 201.
[15] Id. at 202.
[16] *Id.* at 11.

did so in another highly regarded culture: "For we find the old patriarch Abraham expressly declaring, that 'since God had given him no seed, his steward Eliezer, one born in his house, was his heir."[17]

There are also indications that Blackstone finds the existing English laws of inheritance neither ideal nor disinterested. Over and over he points out the anomaly of excluding half-brothers from lines of inheritance. He even suggests wryly that the basic preference for male heirs might have a tinge of self interest: "sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred."[18] Wait, did Blackstone just say that the laws of inheritance favor men because men make the laws?

BLACKSTONE BACK STORY: POLITICS AND POETRY

Not that Blackstone was a flaming radical or champion of women's rights. He was a Tory barrister, academic, judge, and member of parliament who thought that the combination of monarchy and British common law was far more likely than democratic revolution to bring about a good society. The first volume of the *Commentaries* was published just a decade before the Declaration of Independence, and Blackstone (who voted to maintain the Stamp Act[19]) took a dim view of the whole American project, noting, for example, that the "American plantations" were obtained in part by "driving out the natives (with what natural justice I shall not at present enquire)."[20] For Blackstone, constitutional monarchy was the ideal form of government, steering between a "slavish and dreadful" sovereignty based on the "wild and absurd" doctrine of kings' divine right and a democratically elected government, which might look good on paper, but which "in practice will be ever productive of tumult, contention, and anarchy."[21]

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[17] *Id.* at 12, citing *Genesis* 15.3.
[18] *Id.* at 213.
[19] Albert Alschuler, Rediscovering Blackstone, 145 *Penn. L. Rev* 1, 15 (1996).
[20] *Commentaries* I, 105.
[21] *Id.* at 211.

Blackstone's faith in the ability of conservative English law and politics to both protect individual rights and promote social mobility may have been based in part on his own experience. Sir William Blackstone was not born on an aristocratic estate, but in London. His father was a shopkeeper who sold silk wholesale and also stocked notions – thread, lace, belts – for his retail customers.[22] Blackstone's mother was a member of the landed gentry, but her family's estate apparently had been purchased just two years before her birth.[23] Given this background, the young Blackstone likely would not have perceived English class divisions as discrete and impermeable. Indeed, Wilfrid Prest points out that Blackstone's parents' union "exemplifies the complex web of overlapping interactions between commercial, landed, and professional worlds" that characterized the society in which Blackstone grew up.[24] In that environment, through a combination of good luck, family support, hard work, and extraordinary talent, this child of London's merchant class obtained a gentleman's Oxford education, became a "sir," knew George III as his patron, and sat as a judge on the King's Bench. No wonder, then, that Blackstone looked favorably on the hierarchical structures through which he rose, and considered rank necessary "in order to reward such as are eminent for their services to the public."[25]

Along with his appreciation of hierarchy, Blackstone's affinity for legal fictions is generally put down to his conservative politics, but I wonder if it may have something to do with another aspect of his character. Before he was a lawyer, Blackstone was a poet. As a twelve-year-old he composed a poem in honor of one of his teachers, and while still at Oxford he published a book of poetry. A poem in that volume describes a wistful parting from "the gay queen of fancy and of art," in order to enter the "dry" and "discordant" practice of law. But its author did not forsake literary appreciation or production. The young lawyer Blackstone produced a set of critical notes on Shakespeare's plays, a project to which he returned at the

[22] Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century* 15 (Oxford 2008).
[23] Id. at 16.
[24] Id. at 17.
[25] *Commentaries*, I, 153.

end of his life, and which was published in 1780, a few months after Blackstone died.[26] Kathryn Temple has suggested that Blackstone's poetry is linked to the *Commentaries* through the aesthetic and emotional quality of Blackstone's experience of law.[27] It seems to me that Blackstone's positive delight in the nicety of legal forms may be related to his experience of the role of form in verbal creation.[28] "The form is the electric current that the writer taps into," says Lewis Menand.[29] Doctrine is the form of common law, and legal fictions are the most elaborately formal of doctrines.

LEGAL ART, FICTION AND DECEPTION

Certainly, Blackstone has no fear of legal artifice. He never flinches from pointing out the many features of his beloved common law that have simply been made up. Consider, as an example, one of the great legal fictions of all time, the "*feudum* novum to hold *ut feudum antiquum*," a sort of pretend ancestral estate. As I understand it, the way this worked was that you bought your land and/or house yourself, but it was treated in law as if it had been in the family for generations and been passed down to you, "with all the qualities annexed of a feud derived from [your] ancestors."[30] A principal result of this scheme is that when you died, if you had neglected to will the place to someone and had no offspring, instead of being claimed by the state the land would be passed through a complicated network of "collateral" relations to some cousin many times removed on the (pretend) theory that it was going to a descendant of the same (pretend) ancestor who gave it to you. So when you bought a new estate to hold "*ut feudum antiquum*," part of what you

[26] Prest, *William Blackstone*, at 289-290.
[27] Kathryn Temple, What's Old is New Again: Blackstone's Theory of Happiness Comes to America, 55 *The Eighteenth Century* 155 (Spring 2014).
[28] I have argued elsewhere that for Blackstone, the "nicety" of common law is an alternative to the violence of natural rights. Jessie Allen, In Praise of Artifice, Blackstone Weekly, May 5, 2013. https://blackstoneweekly.wordpress.com/2013/05/05/in-praise-of-artifice/.
[29] Lewis Menand, A Critic at Large, "Practical Cat,"*The New Yorker* September 19, 2011 p. 76.
[30] *Commentaries* II, 221.

bought was fiction. Although everyone knew very well that you bought the place yourself, the law acted *as if* the property descended to you from ancient forbears and thus could be inherited by a cousin who was descended from the land's "first *imaginary* purchaser." [31]

You can really see how this stuff drove Bentham nuts. It is one thing to justify a rule of inheritance on the basis of history, as opposed to future utility. There's a certain common sense justice in giving a house to the relatives of the guy who acquired it in the first place. But according to Blackstone what the law is actually saying is that we are just going to *pretend* to do that.

What could be the point of inventing fake ancestral manors, when all we are *really* doing is deciding to let a wider group of descendants inherit the land? Why this cockamamie game of make believe in which we all agree to act as if the house you just bought was actually passed down to you from an ancestor so far back in the tangled branches of your family tree that his identity can no longer be discerned? Why would you do that?

Of course this kind of causal question is unanswerable. Still, it seems worth pointing out one effect of the formal, fictional, pretend approach to property law: In the midst of all this pretending, a certain materiality emerges. The only way to actualize a make-believe vision is to act it out, to embody it somehow. Truth has the privilege of transcending the physical, but fiction depends on form – it has to have a body – a performance, a telling, a writing – otherwise it doesn't exist. And in this way the fictional, formalized legal system Blackstone expounds makes a certain connection with material reality, and expresses a kind of affinity with the real property it creates and regulates. It is a law of blood and bodies, of clots of earth and particular words uttered or inscribed at particular times to turn inheritable estates into life interests and back again. In contrast, the critiques and alternatives to all this artifice – rational rules and calculations of economic costs and benefits, and later realist complaints about the fraudulence of doctrine – are quite disembodied. This leaves critics of Blackstonian formalism in a strange place, arguing

[31] *Id*.

for a more transparent approach to law that winds up obscuring the constructive, and constructed, quality of the legal system they propose. There's a different kind of pretending in utilitarian instrumentalism. With its relentless focus on social science and policy objectives, the modern realist approach tends to cover up the invented nature of legal institutions and the need for those institutions to carry out their goals through recognizably legal words and acts.

It reminds me of a *New York Times* article I read about a homeless girl from Brooklyn, who goes on a school field trip to the Mayor's residence, and is most impressed by how clean everything is.[32] The girl's reaction at first seemed to me to highlight how impossible it is to wrap one's head around the nature of political power when one is focused on the literal nitty gritty of extremely challenging life circumstances. Can't really think too much about the legitimacy and structure of the mayor's administration when you're so blown away by his housekeeping. But now it strikes me that the girl was on to something about power. What extraordinary levels of surveillance and control must be necessary to produce those pristine surfaces! The absence of dust is a sign of absolute dominion. What could be a better indication, in fact, of the Mayor's sovereignty than this ability to beat back entropy, to banish microscopic material, from the ceiling down to the cracks in the floorboards.

The legal fictions Blackstone chronicles and applauds are, like the immaculate surfaces in the Mayor's mansion, evidence of the power to make and remake the world as one desires it. The fiction of an ancestral estate may distract us from real political and economic motives. Justifying inheritance doctrine with a story about ancestral estates avoids the kind of social policy argument that might expose how inheritance keeps real property concentrated in a closed circle of private hands. Blackstone himself explains that the idea of transferring a pretend ancestral estate "was invented to let in the collateral relations of the grantee to the inheritance."[33]But every artifice that conceals also reveals, at least to the extent that we recognize it

[32] Andrea Elliott, A Future Resting on a Fragile Foundation, *New York Times* A1, Dec. 10, 2013.

[33] *Commentaries*, II, 221.

as artifice, as Blackstone certainly does. Legal fictions call attention to the fact of law's artificial construction and law's ability to invent as well as respond to the rights it regulates. The use of an elaborate fiction to shift the course of inherited property reveals that the law of inheritance is artificial – constructed – and can be altered, not only to accommodate some change 'out there' in the world, but to create one. By claiming an objective basis for legal rules, policy justifications obscure the fabricated aspect of the social structures that seem to call for legal change and the creative role of law in those structures in the first place. Legal fictions reveal the truth that law is a great fabrication, not some necessary reflection of the way things are – or should be.

As Blackstone observes, "we are apt to conceive at first view" that inheritance, "has nature on it's side." We are so accustomed to the meaning of what it is to "own" a house that we treat the parameters of ownership like some naturally determined object or event, a boulder, say, or a sunset. But recognizing legal fictions changes that view. You cannot understand the *feudum ut novumm* to hold *ut antiquum* without understanding that the law of property is as man made as the houses it governs. The obvious artifice reminds us that property itself is a legal invention – and that law not only regulates the world but makes it.

THE LAST STOP: CONCLUSION

Bentham was right that Blackstone is inconsistent. He combined a fundamental faith in absolute rights with a realistic appreciation of the way legal practitioners build and rebuild those rights. It is exactly the inconsistency of Blackstone's approach – his appeal to myriad sources and justifications and the combination of natural justice with legal artifice – that makes the *Commentaries* so compelling, so occasionally laughable, and so familiar. The antithesis of Bentham's vision of rational, transparent legal code, Blackstone's common law is a flawed, heterodox, pieced-together thing, a hurly burly of conflicting motives and methods – a law not larger than, but every bit as large, complex, and contradictory as life. ❶

COMMENTARIES ON THE LAWS OF ENGLAND

INTRODUCTION. SECTION THE FIRST. ON THE STUDY OF LAW.

William Blackstone[†]

MR. VICE-CHANCELLOR, AND GENTLEMEN OF THE UNIVERSITY,

THE general expectation of so numerous and respectable an audience, the novelty, and (I may add) the importance of the duty required from this chair, must unavoidably be productive of great diffidence and apprehensions in him who has the honour to be placed in it. He must be sensible how much will depend upon his conduct in the infancy of a study, which is now first adopted by public academical authority; which has generally been reputed (however unjustly) of a dry and unfruitful nature; and of which the theoretical, elementary parts have hitherto received a very moderate share of cultivation. He cannot but reflect that, if either his plan of instruction be crude and injudicious, or the execution of it lame and superficial, it will cast a damp upon the farther progress of this most useful and most rational branch of learning; and may defeat for a time the public-spirited design of our wise and munificent benefactor. And this he must more especially dread, when he feels by experience how unequal his abilities are (unassisted by preceding examples) to complete, in the manner he could wish, so extensive and arduous a task; since he freely confesses, that his former more private attempts have fallen very short of his own ideas of perfection.

[†] Read in Oxford at the opening of the Vincrian lectures; 25 Oct. 1758.

And yet the candour he has already experienced, and this last transcendent mark of regard, his present nomination by the free and unanimous suffrage of a great and learned university, (an honour to be ever remembered with the deepest and most affectionate gratitude) these testimonies of your public judgment must entirely supersede his own, and forbid him to believe himself totally insufficient for the labour at least of this employment. One thing he will venture to hope for and it certainly shall be his constant aim, by diligence and attention to atone for his other defects; esteeming, that the best return, which he can possibly make for your favourable opinion of his capacity, will be his unwearied endeavours in some little degree to deserve it.

THE science thus committed to his charge, to be cultivated, methodized, and explained in a course of academical lectures, is that of the laws and constitution of our own country: a species of knowlege, in which the gentlemen of England have been more remarkably deficient than those of all Europe besides. In most of the nations on the continent, where the civil or imperial law under different modifications is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed, till he has attended a course or two of lectures, both upon the institutes of Justinian and the local constitutions of his native soil, under the very eminent professors that abound in their several universities. And in the northern parts of our own island, where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent knowlege in that science, which is to be the guardian of his natural rights and the rule of his civil conduct.

NOR have the imperial laws been totally neglected even in the English nation. A general acquaintance with their decisions has ever been deservedly considered as no small accomplishment of a gentleman; and a fashion has prevailed, especially of late, to transport the growing hopes of this island to foreign universities, in Switzerland, Germany, and Holland; which, though infinitely inferior to our own in every other consideration, have been looked upon as better nurseries of the civil, or (which is nearly the same) of their

own municipal law. In the mean time it has been the peculiar lot of our admirable system of laws, to be neglected, and even unknown, by all but one practical profession; though built upon the soundest foundations, and approved by the experience of ages.

FAR be it from me to derogate from the study of the civil law, considered (apart from any binding authority) as a collection of written reason. No man is more thoroughly persuaded of the general excellence of it's rules, and the usual equity of it's decisions; nor is better convinced of it's use as well as ornament to the scholar, the divine, the statesman, and even the common lawyer. But we must not carry our veneration so far as to sacrifice our Alfred and Edward to the manes of Theodosius and Justinian: we must not prefer the edict of the praetor, or the rescript of the Roman emperor, to our own immemorial customs, or the sanctions of an English parliament; unless we can also prefer the despotic monarchy of Rome and Byzantium, for whose meridians the former were calculated, to the free constitution of Britain, which the latter are adapted to perpetuate.

WITHOUT detracting therefore from the real merit which abounds in the imperial law, I hope I may have leave to assert, that if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions. For I think it an undeniable position, that a competent knowlege of the laws of that society, in which we live, is the proper accomplishment of every gentleman and scholar; and highly useful, I had almost said essential, part of liberal and polite education. And in this I am warranted by the example of ancient Rome; where, as Cicero informs us, the very boys were obliged to learn the twelve tables by heart, as a carmen necessarium or indispensable lesson, to imprint on their tender minds an early knowlege of the laws and constitutions of their country.

BUT as the long and universal neglect of this study, with us in England, seems in some degree to call in question the truth of this evident position, it shall therefore be the business of this introductory discourse, in the first place to demonstrate the utility of some general acquintance with the municipal law of the land, by pointing out its particular uses in all considerable situations of life. Some con-

jectures will then be offered with regard to the causes of neglecting this useful study: to which will be subjoined a few reflexions on the peculiar propriety of reviving it in our own universities.

AND, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect a moment on the singular frame and polity of that land, which is governed by this system of laws. A land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution. This liberty, rightly understood, consists in the power of doing whatever the laws permit; which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest. As therefore every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least, with which he is immediately concerned; lest he incur the censure, as well as inconvenience, of living in society without knowing the obligations which it lays him under. And thus much may suffice for persons of inferior condition, who have neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move. But those, on whom nature and fortune have bestowed more abilities and greater leisure, cannot be so easily excused. These advantages are given them, not for the benefit of themselves only, but also of the public: and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowledge in the laws. To evince this more clearly, it may not be amiss to descend to a few particulars.

LET us therefore begin with our gentlemen of independent estates and fortune, the most useful as well as considerable body of men in the nation; whom even to suppose ignorant in this branch of learning is treated by Mr. Locke[d] as a strange absurdity. It is their landed property, with it's long and voluminous train of descents and conveyances, settlements, entail, and inject of legal knowledge. The thorough comprehension of these, in all their minute distinctions, is perhaps too laborious a task for any but a lawyer by profession: yet still the understanding of a few principles is some check and guard

upon a gentleman's inferior agents, and preserve him at least from very gross and notorious imposition.

AGAIN, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more with regard to their attestation. An ignorance in these must always be of dangerous consequence, to such as by choice or necessity compile their own testaments without any technical assistance. Those who have attended the courts of justice are the best witnesses of the confusion and distresses that are hereby occasioned in families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all: so that in the end his estate may often be vested quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

BUT to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they are frequently to decide, and that upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite; especially where the law and the fact, as it often happens, are intimately blended together. And the general incapacity, even of our best juries, to do this with any tolerable propriety has greatly debased their authority; and has unavoidably thrown more power into the hands of the judges, to direct, control, and even reverse their verdicts, than perhaps the constitution intended.

BUT it is not as a juror only that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow-subjects: it is principally with this order of men that the commission of the peace is filled. And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood; by punishing the dissolute and idle; by protecting the peaceable and industrious; and, above all, by healing

petty differences and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate should understand his business; and have not only the will, but the power also, (under which must be included the knowledge) of administering legal and effectual justice. Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of contempt from his inferiors, and of censure from those to whom he is accountable for his conduct.

YET farther; most gentlemen of considerable property, at some period or other in their lives, are ambitious of representing their country in parliament: and those, who are ambitious of receiving so high a trust, would also do well to remember it's nature and importance. They are not thus honourably distinguished from the rest of their fellow-subjects, merely that they may privilege their persons, their estates, or their domestics; that they may lift under party banners; may grant or with-hold supplies; may vote with or vote against a popular or unpopular administration; but upon considerations far more interesting and important. They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation, to propose, to adopt, and to cherish any solid and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law, who is utterly ignorant of the old ! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments !

INDEED it is really amazing, that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical: a long course of reading and study must form the divine, the physician, and the practical professor of the laws: but every man of superior fortune thinks himself born a legislator. Yet Tully was of

a different opinion: "It is necessary," says he, for a senator to be thoroughly acquainted with "the constitution"; and this, he declares, is a knowlege of the "most extensive nature; a matter of science, of diligence, of "reflexion; without which no senator can possibly be fit for his "office."

THE mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worth the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently it's symmetry has been destroyed, it's proportions distorted, and it's majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays (which have sometimes disgraced the English, as well as other, courts of justice) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament; "overladen (as Sir Edward Coke expresses it) with provisoes and additions, and many "times on a sudden penned or corrected by men of none or very "little judgment in law." This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. "But if, he subjoins, acts of parliament were "after the old fashion penned, by such only as perfectly knew "what the common law was before the making of any act of "parliament concerning that matter, as also how far former statutes had provided remedy for former mischiefs, and "defects discovered by experience; then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace, by "construction of law, between insensible and disagreeing words, "sentences, and provisoes, as they now do." And if this inconvenience was so heavily felt in the reign of queen Elizabeth, you may judge how the evil is increased in later times, when the statute

book is swelled to ten times a larger bulk; unless it should be found, that the penners of our modern statutes have proportionably better informed themselves in the knowlege of the common law. ❶

The Post

GOOD SCHOLARSHIP FROM THE INTERNET

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INTRODUCTION

Anna Ivey[†]

As *The Post* goes to press, we write with heavy hearts on hearing the news of Dan Markel's passing. Since its inception, *The Post* has been proud to feature pieces from *PrawfsBlawg*, Dan's brainchild and labor of love. A pioneer in legal blogging, he provided an example to all who followed, and he was a good friend to *The Post* and our mission. We owe a great debt to Dan's example, his scholarship, and his kindness. Our world, like that of all his friends, students, and colleagues, will be poorer without him. We say a prayer for Dan and those he left behind, and we mourn for his two young sons and the rest of his family. RIP

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[†] President, Ivey Consulting, Inc.

FROM: THE FACULTY LOUNGE

LAW PROFESSORS, LAW STUDENTS AND DEPRESSION . . .

A STORY OF COMING OUT

Brian S. Clarke[†]

PART 1

Back in January, CNN ran a piece[1] entitled "Why Are Lawyers Killing Themselves." In general, the piece focused on a spate of lawyer suicides in Kentucky and other states over the last several years. Most of the suicides (15 since 2010) in Kentucky were seemingly successful lawyers. One was a relatively young (37) and popular adjunct professor at NKU's Chase College of Law.

Outside of Kentucky, another prominent lawyer suicide was Mark Levy, the chair of Kilpatrick Stockton's Supreme Court and Appellate Litigation Practice in D.C. Mr. Levy was a top Supreme Court advocate, having argued 16 times before the Court and, in January 2009, won a 9-0 victory for DuPont in an important ERISA case (Kennedy v. Plan Administrator,[2] 555 U.S. 285 (2009)). However, in April 2009, as the economy tanked, Kilpatrick Stockton informed Mr. Levy that his services were no longer needed. So, Mr.

[†] Assistant Professor of Law, Charlotte School of Law. Originals at www.thefacultylounge.org/2014/03/law-professors-law-students-and-depression-a-story-of-coming-out-part-1.html (Mar. 31, 2014), www.thefacultylounge.org/2014/04/in-part-i-of-this-little-series-i-laid-out-some-of-the-statistics-regarding-the-scope-of-the-problem-of-depression-and-anxie.html (Apr. 2, 2014), and www.thefacultylounge.org/2014/04/the-coming-out-trilogy-part-3.html (Apr. 7, 2014) (all vis. July 28, 2014).

[1] www.cnn.com/2014/01/19/us/lawyer-suicides/.

[2] www.law.cornell.edu/supct/html/07-636.ZS.html.

Levy came to work on April 30, 2009, sat down at his desk, activated the "out of office" auto-reply feature on his email account and shot himself in the head. Chillingly, the "out of office" message Mr. Levy activated that morning was as follows: "*As of April 30, 2009, I can no longer be reached. If your message relates to a firm matter, please contact my secretary. If it concerns a personal matter, please contact my wife.*" (*See* Richard B. Schmitt, "A Death in the Office," ABA Journal, Nov. 2009, at 30-31[3]).

Here in North Carolina, one of the founders of King & Spalding's Charlotte office, who was profoundly successful; a prominent litigator in McGuireWood's Raleigh, N.C. office; and numerous quietly successful small town lawyers have committed suicide in recent years.

The common thread running through most of these suicides? Clinical Depression (a/k/a "major depressive disorder").

According to the American Psychiatric Association and numerous other sources, depression is the most likely trigger for suicide. Lawyers, as a group, are 3.6 times more likely to suffer from depression than the average person. Of 104 occupations, lawyers were the most likely to suffer depression. (Both of these statistics are from a Johns Hopkins University study to which I cannot find a link).

Further, according to a two-year study completed in 1997, suicide accounted for 10.8% of all deaths among lawyers in the United States and Canada and was the ***third leading cause of death***. Of more importance was the suicide rate among lawyers, which was 69.3 suicide deaths per 100,000 individuals, as compared to 10 to 14 suicide deaths per 100,000 individuals in the general population. In short, the rate of death by suicide for lawyers was nearly ***six times*** the suicide rate in the general population.

A quality of life survey by the North Carolina Bar Association in the early 1990s, revealed that almost 26% of respondents exhibited symptoms of clinical depression, and almost 12% said they contemplated suicide at least once a month. Studies in other states have found similar results. In recent years, several states have been averaging one lawyer suicide a month.

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[3] www.abajournal.com/magazine/article/a_death_in_the_office/.

What is worse is the state of our students. According to a study by Prof. Andy Benjamin[4] (U. Wash.), by the spring of their 1L year, 32% of law students are clinically depressed, despite being no more depressed than the general public (about 8%) when they entered law school. By graduation, this number had risen to 40%. While this percentage dropped to 17% two years after graduation, the rate of depression was still double that of the general public. (See http://www.lawyerswithdepression.com/law-school-depression/).

These statistics, which likely have not improved in recent years, are terrifying.

In the months since CNN ran its story, I have (unsuccessfully) tried to shake the feeling that we (as lawyers, law professors and the mentors of a generation of law students) missed out on a valuable opportunity to more fully address an issue that is critical to the legal profession. So, when the opportunity to post here came along, I decided to revisit this issue and to do so in a personal way.

I will admit to being a bit nervous about even raising this topic. (Given the nature of many anonymous internet commenters, I think most people would be hesitant to bare even a minute portion of their souls online and attempt to engage with a very serious subject, only to be subject to snarky or mean-spirited attacks.) Plus, mental illness and suicide are not comfortable subjects for most people. There remains a very real stigma attached to mental illness. Many people believe that suffering from clinical depression, anxiety disorder, bipolar disorder, or a host of other mental illnesses is a character flaw or a weakness. Having one of these diseases has been seen as something of which the sufferer should be ashamed. This attitude has been in place for too long for people to easily change their perceptions and opinions.

However, as lawyers and law professors, we must to do more. It is clear that our students need us to do more. When you are depressed, you feel so terribly alone. You feel different. You feel ashamed. You feel weak. You feel like you will never feel better and that you can never be the person you want to be.

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[4] www.law.fsu.edu/academic_programs/humanizing_lawschool/images/benjamin.pdf.

If 40% of our students feel this way, we must do more. They look up to us. They see us as role models and mentors. They see us as strong and successful and confident. They need to see that suffering from depression or anxiety or bipolar disorder will not curse them for all time and destroy their lives. These are treatable diseases, not character flaws. They need us to be brave and be honest.

A few law professors have publically "come out" (so to speak) about their struggles with mental illnesses: Prof. Elyn Saks at Southern Cal[5] (schizophrenia, via *The Center Cannot Hold: My Journey Through Madness*[6] (2007)); Prof. Lisa McElroy at Drexel[7] (anxiety disorder, via an article on Slate[8]); and Prof. James Jones at Louisville[9] (bipolar disorder, via an article in Journal of Legal Ed.[10]). They were all tenured when they did so.

And then there is me: an untenured, assistant professor with five kids, who left a generally successful practice career to teach at Charlotte School of Law. So, anonymous internet commentators be damned . . .

My name is Brian Clarke. I am a father, a husband, a lawyer and a law professor. And I suffer from major depressive disorder and generalized anxiety disorder.

So there you have it. While I have been "out" at Charlotte Law and have spoken publicly about my disease, this is the most wide-open forum in which I have come out.

In my next post, I will share my story (a piece of public soul baring that you should not miss!). In the third (and mercifully final) post in this little serial adventure, I will discuss the role my struggles with depression and anxiety have played (and continue to play) in the classroom.

[FYI, as this is a serious topic, I will moderate any comments to this post and delete anything I deem inappropriate or off topic.]

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[5] lawweb.usc.edu/contact/contactInfo.cfm?detailID=300.

[6] www.amazon.com/The-Center-Cannot-Hold-Journey/dp/1401309445.

[7] drexel.edu/law/faculty/fulltime_fac/lisa%20mcelroy/.

[8] www.slate.com/articles/health_and_science/medical_examiner/2013/07/living_with_anxiety_and_panic_attacks_academia_needs_to_accommodate_mental.html.

[9] www.law.louisville.edu/faculty/james_jones.

[10] papers.ssrn.com/sol3/papers.cfm?abstract_id=1087129.

PART 2

In Part I of this little series,[11] I laid out some of the statistics regarding the scope of the problem of depression and anxiety among lawyers and law students. Before I tell my story, I want to spend a little time talking about why these diseases are so prevalent among lawyers.

One of the more eloquent "whys" for the high incidence of depression among lawyers was contained in an opinion piece by Patrick Krill[12] (a lawyer, clinician and board-certified counselor) that accompanied the CNN article on lawyer suicides. As Patrick put it, "lawyers are both the guardians of your most precious liberties and the butts of your harshest jokes[; i]nhabiting the unique role of both hero and villain in our cultural imagination . . . ." Patrick explained that the high incidence of depression (and substance abuse, which is another huge problem) was due to a number of factors but that "the rampant, multidimensional stress of the profession is certainly a factor." Further, "there are also some personality traits common among lawyers – self-reliance, ambition, perfectionism and competitiveness – that aren't always consistent with healthy coping skills and the type of emotional elasticity necessary to endure the unrelenting pressures and unexpected disappointments that a career in the law can bring."

Patrick's discussion of this issue really stuck a cord with me. Practicing law is hard. The law part is not that hard (that was the fun part for me), but the business side of law is a bear. Finding clients, billing time, and collecting money, are just a few aspects of the business of law of which I was not a big fan. Keeping tasks and deadlines in dozens (or hundreds) of cases straight and getting everything done well and on time is a constant challenge. The fear of letting one of those balls drop can be terrifying, especially for the type A perfectionist who is always terrified of making a mistake or doing a less than perfect job. Forget work-life balance. Forget vacations. Every day out of the office is another day you are behind.

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[11] www.thefacultylounge.org/2014/03/law-professors-law-students-and-depression-a-story-of-coming-out-part-1.html.

[12] www.cnn.com/2014/01/20/opinion/krill-lawyers-suicide/.

Plus, as a lawyer (and especially as a litigator), no matter how good a job you do, sometimes you lose. That inevitable loss is made worse by the emotion that the lawyer often takes on from his or her client. Almost no client is excited to call her lawyer. Clients only call, of course, when they have problems. Those problems can range from the mild (for example, a traffic ticket) to the profound (like a capital murder charge). But whatever the problem, the client is counting on the lawyer to fix it. Every lawyer I know takes that expectation and responsibility very seriously. As much as you try not to get emotionally invested in your client's case or problem, you often do. When that happens, losing hurts. Letting your client down hurts. This pain leads to reliving the case and thinking about all of the things you could have done better. This then leads to increased vigilance in the next case. While this is not necessarily a bad thing, for some lawyers this leads to a constant fear of making mistakes, then a constant spike of stress hormones that, eventually, wear the lawyer down. The impact of this constant bombardment of stress hormones can be to trigger a change in brain chemistry that, over time, leads to major depression.

Depression is a subtle and insidious disease. By the time you are sick enough to recognize that you have a problem, your ability to engage in accurate self-evaluation is significantly impaired. It is a strange thing to know, deep down, that something is wrong with you but to not be able to recognize the massive changes in yourself. Helping yourself at that point is often impossible. Unfortunately, those suffering from depression become expert actors who are extremely adept at hiding their problems and building a façade of normalcy. Eventually, it takes all of your energy to maintain this façade. The façade becomes the only thing there is.

Depression is not a character flaw. It is not a weakness. It is not a moral failing. You cannot "just get over it." No amount of willpower, determination or intestinal fortitude will cure it. Depression is a disease caused (in very basic and general terms) by an imbalance and/or insufficiency of two neurotransmitters in the brain: serotonin and norepinephrine. In this way, it is biologically similar to diabetes, which is caused by the insufficiency of insulin in the body. As a dis-

ease, depression can be treated – and treated very effectively. But it takes time and it takes help – personal help and professional help.

And now we get to the personal part. Don't say I didn't warn you.

Though I likely had been depressed for a long while, I was diagnosed with severe clinical depression in late 2005. As another lawyer who helped me put it, suffering from depression is like being in the bottom of a dark hole with – as you perceive it from the bottom – no way out. The joy is sucked from everything. Quite often, you just want to end the suffering – not so much your own, but the perceived suffering of those around you. You have frequent thoughts that everyone would be better off if you were not around anymore, because, being in such misery yourself, you clearly bring only misery to those around you. When you are in the hole, suicide seems like the kindest think you can do for your family and friends, as ending your life would end their pain and misery.

While I do not remember all of the details of my decent into the hole, it was certainly rooted in trying to do it all – perfectly. After my second child was born, I was trying to be all things to all people at all times. Superstar lawyer. Superstar citizen. Superstar husband. Superstar father. Of course, this was impossible. The feeling that began to dominate my life was ***guilt***. A constant, crushing guilt. Guilt that I was not in the office enough because I was spending too much time with my family. Guilt that I was letting my family down because I was spending too much time at work. Guilt that I was letting my bosses down because I was not being the perfect lawyer to which they had become accustomed. Guilt. Guilt. Guilt. The deeper I sunk into the hole, the more energy I put into maintaining my façade of super-ness and the less energy was left for either my family or my clients. And the guiltier I felt. It was a brutal downward spiral. Eventually, it took every ounce of energy I had to maintain the façade and go through the motions of the day. The façade was all there was. Suicide seemed rational.

There were danger signs, of course, but neither I nor anyone around me recognized them for what they were. I burst into tears during a meeting with my bosses. I started taking the long way to

work in the morning and home in the evenings – often taking an hour or more to make the 5 mile trip. Eventually – after months of this – my wife asked me what was wrong and I responded, "I just don't know if I can do this anymore." She asked what "this" was. I said, "you know . . . life." And started bawling. The façade crumbled and I was utterly adrift. [I don't actually remember this conversation with my wife, but she does.]

After getting over the initial shock of my emotional collapse, my wife forced me to go to the doctor and get help. She took the initiative to find a doctor, make me an appointment and take me (which is good, because I was utterly incapable of doing any of those things). She called my firm and told them I needed FMLA leave. One of my colleagues put me in touch with the N.C. State Bar's Lawyer Assistance Program, as well as with Louis Allen (the Federal Public Defender for the M.D.N.C.) who had suffered from severe depression and recovered. With Louis's help, treatment from my doctor and the support and love of my family, I got better and better. I started taking medication and clawed my way to the top of the hole. But, for more than a year, I was sort of clinging to the edge of the hole about to plummet back down. So, I changed doctors and medications and did a lot of talk therapy. Eventually, more than 18 months later, I was finally back to some semblance of my "old self." I was happy again (mostly). I was a good father again (mostly). I was a good husband again (mostly). I enjoyed being a lawyer again (mostly). I enjoyed life again.

There have been a couple of relapses, where the hole tried to reclaim me. However, I never fell all the way back down. I will happily take medication for the rest of my life. And I will regularly see a therapist for the rest of my life. I will be forever vigilant regarding my mental state. Small prices to pay.

Had I not gotten help, I would not be writing this post because I would likely not be alive today. No amount of will power or determination could have helped me climb out of that hole. Only by treating my disease with medication and therapy was I able to recover, control my illness and get my life back.

Now, I don't write any of this to solicit sympathy or pity. I am

doing fine. I have five wonderful (if occasionally maddening) children and an amazing wife. I have a job that I love and am truly good at. I have the job that I was put on this earth to perform, which makes me incredibly lucky. I have wonderful students who will be outstanding lawyers. I have no complaints.

I write this because I know that when you are depressed you feel incredibly, profoundly alone. You feel that you are the only person on earth who has felt the way you do. You feel like no one out there in the world understands what you are dealing with. You feel like you will never feel "normal" again.

But you are **not** alone. You are not the only person to feel this way. There are lots of people who understand. I understand. I have been there. I got better. So can you.

So, please, if you are suffering from depression or anxiety (or both) get help. Tell your spouse. Tell your partner. Tell a colleague. **Ask for help.** Asking for help does not make you weak. It takes profound strength to ask for help. You can get better. You can get your life back.

Trust me when I say that life is so much better once you get out of – and away from – that dark hole. It is well worth the effort.

[While I'd hoped that I did not need this disclaimer regarding comments, apparently I do: *As this is a serious topic, I will moderate any comments to this post and delete anything I deem inappropriate or off topic.*]

PART 3

At long last, we have arrived at the third and final post of my "Coming Out Trilogy."

As promised, I want to focus this post on the role my struggles with depression and anxiety have played and continue to play in my interactions with my students, both in and out of the classroom.

My prior[13] posts[14] have covered the bleak statistics regarding depression and suicide rates among lawyers (nearly four times more

[13] www.thefacultylounge.org/2014/03/law-professors-law-students-and-depression-a-story-of-coming-out-part-1.html.

[14] www.thefacultylounge.org/2014/04/in-part-i-of-this-little-series-i-laid-out-some-of-the-statistics-regarding-the-scope-of-the-problem-of-depression-and-anxie.html.

likely to be depressed and six times more likely to commit suicide than the general public). Further, I also mentioned that many of our students are suffering from depression (32% by second semester first year and 40% by graduation). Although I have not found any specific data to support it, my guess is that an equal or (more likely) higher percentage of our students are also suffering from significant levels of anxiety.

In short, a third or more of our students are struggling with mental illnesses that are exacerbated (or triggered or caused or whatever word you most prefer) by the significant stresses of law school (and the various issues surrounding it, including – to be frank – the cost, debt loads, and job prospects).* According to the research,[15] if a person suffers a single incident of clinical depression, he has a 50% chance of experiencing another even if he takes anti-depressant medication. After 3 incidents, there is a 90% chance of recurrance.** [I, for example, had my first (undiagnosed) bout of clinical depression in college and my first bout of anxiety (diagnosed) my first year of law school.] So, there is a very good chance that the depressed law students of today will be the depressed lawyers of tomorrow.

Our students need help to better understand the challenges of the profession they are entering: the potential for dissatisfaction, disillusionment, mental illness (including depression, anxiety and substance abuse), burnout, and more. When I left practice and started teaching, I promised myself that I would be open and honest with my students about my struggles and about the realities of law practice.

Now, don't get me wrong. I love the Law and there were many, many aspects of practicing law that I loved (and at which I excelled). There were also aspects that I did not love (and tried my best to tolerate, sometimes less than successfully). I know, without reservation or qualification, that being a lawyer can be a highly rewarding career: emotionally, intellectually, and financially. If I was not honest with my students about the challenges of being a lawyer, however, I would be doing them a disservice.

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[15] www.psychologytoday.com/blog/evil-deeds/200809/is-depression-disease.

Further, in my view, knowledge is power. With knowledge of the challenges and some of their causes, I figure my students will be better equipped to meet and overcome them.

In raising these issues with my students my basic goals are as follows: **(1)** to help destroy – via openness, honesty, and shamelessness – the very real stigma associated with mental illness in general and depression and anxiety in particular; **(2)** to make sure my students know that if they are struggling with depression or anxiety, they are not alone (even if they feel that way) and that there is no reason in the world for these illnesses to hold them back in any way; **(3)** to offer myself as a resource for any among them that are struggling; **(4)** to educate them about the challenges of practicing law; **(5)** to get them thinking about why they are in law school and what they want their lives in the law to be like (or if they even want a life in the law); and **(6)** to get them thinking, critically and proactively, about the different career paths, options, settings, locales and such available to those with law degrees, all of which can have a significant impact on their personal well-being.

So, what do I do? I talk openly and honestly about my struggles and experiences and I do so ***in class*** (in first year Civil Procedure). (Thanks to this series of posts, I now know I am not the only law professor in America who does this. Nancy Rapoport[16] at UNLV does the same in her Contracts classes and there are, hopefully, others out there that do something similar.)

Of course, I do not do this on the first day of class. I am not ***that*** crazy.

On the first day of Civil Procedure, I spend about 20 minutes talking about the depth of my litigation experience, the fact that I have litigated or used in practice virtually every rule and theory we will study, the places I practiced and some of the companies I represented. In short, I establish my credibility. During the semester, I build my credibility with my students by being a highly competent and effective teacher with a deep knowledge of the subject matter and a willingness to do whatever I can to help them learn the mate-

[16] www.law.unlv.edu/faculty/nancy-rapoport.html.

rial. By the time we are two-thirds of the way through the semester, my students (generally speaking) respect me and, from what I understand, are a bit intimidated by me (which is at least partly due to the fact that I somewhat physically imposing at 6'1" and 250+ pounds).

Usually about two weeks before the end of the semester – when I see the strain of writing papers and the approach of final exams beginning to take a toll – I will put the civil procedure issue of the day on hold and tell my story. I don't prepare them for this in any way, I just start class by saying, "There is something that I need to talk to y'all about today." (Although if they start googling me after this I guess that cat will be out of the bag).

The story I tell is generally that which appears in Part 2[17] of this "Coming Out Trilogy," although it is often a bit more haphazard as it is still much easier to write about this subject than talk about it. I often get choked up at least once, usually when talking about suicide (though I have managed to avoid this once or twice). I have even cried in telling my story. There are usually at least a few people with freely flowing tears by the end and many stunned looks. [*Writing this, I realize that, to some degree, I set my students up and then, intentionally, shatter their perceptions of me. While I did not set out to do this and think that establishing my bona fides at the outset of the course is pedagogically important, I do believe that it makes the discussion of my mental illness and the challenges of practicing law more impactful in an "if that can happen to Prof. Clarke, it can happen to me" sort of way.*]

I then segue into some of the statistics cited in Part 1[18] of this series and talk about the scope of the problem with depression and anxiety in the legal profession. I explain that I know many of them are having a hard time handling the stress of law school given the workload, the competitiveness, their "Type A" personalities and perfectionist tendencies, and the like. I bluntly tell them that if they think being a 1L is hard, they ain't seen nothing yet.

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[17] www.thefacultylounge.org/2014/04/in-part-i-of-this-little-series-i-laid-out-some-of-the-statistics-regarding-the-scope-of-the-problem-of-depression-and-anxie.html.

[18] www.thefacultylounge.org/2014/03/law-professors-law-students-and-depression-a-story-of-coming-out-part-1.html.

I tell them about the challenges of practicing law including, among other things, taking on the emotional baggage of clients' problems; the inherent competiveness of the adversarial system; the joys of dealing with unreasonable and unprofessional opposing counsel; the fact that someone must lose in litigation; the impact losing may have on a client's life; the nature of the billable hour; the difficulty of billing 1,900+ hours a year; the unrealistic expectations many of them may have about being lawyers; the common narrative that "success" as a lawyer is dependent on having a "Big Law" job and making partner/member/shareholder and the profound unlikelihood of these happening; the lack of boundaries and the need to be "on the job" 24/7/365 (especially in a big firm); and so on.

I discuss a truth I have known for many years (and for which I now have empirical[19] support[20]), namely that making a lot of money is ultimately not the thing that, for most people or most lawyers, makes them happy in life or satisfied professionally. I caution them about the materialism that is common among lawyers and the dangers of measuring happiness by the make of your car or the size of your house (a point illustrated in an ABA Journal Online article[21] on April 5, 2014, wherein a young lawyer bemoans the fact that he drives a Chevrolet instead of a Mercedes or Audi and that he cannot buy a bigger house). I challenge them to think about why they came to law school and to identify what it is about the law that really turns them on (professionally). I encourage them to find a way to follow that passion, because they will be better lawyers and more satisfied, professionally and personally, if they do so. [*See* K. Sheldon & L. Krieger, *Service Job Lawyers Are Happier Than Money Job Lawyers, Despite Their Lower Income*, Journal of Positive Psychology, vol. 9, pp. 219-226[22] (2014).] I tell them that, for many lawyers (includ-

[19] www.tandfonline.com/doi/abs/10.1080/17439760.2014.888583?journalCode=rpos20#.U97n-lZhpz0.

[20] www.businessinsider.com/higher-pay-doesnt-make-lawyers-happy-2014-4.

[21] www.abajournal.com/news/article/us_has_1_trillion_in_student_debt_indebted_lawyer_has_chevy_lifestyle/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

[22] www.tandfonline.com/doi/abs/10.1080/17439760.2014.888583?journalCode=rpos20#.U9ZhYVZhpz0.

ing me), finding a balance between work and life is difficult thanks to, among other things, technology and that they must be cognizant of the dangers of always being plugged in. I talk to them about the importance of boundaries (a concept with which I still struggle).

While many of these issues are old hat to us as professors and lawyers, they come as a revelation to many students. Many still come to law school simply because they did not know what to do with their B.A. in history and have never contemplated what about the law (if anything) really interests them. [I encourage these folks to seriously reconsider whether they should be in law school]. Many have never thought that there were career paths other than one in a big law firm and many are convinced (by their peers, by popular culture, by the internet) that success as a lawyer means being a rich partner in a big firm, and nothing else. Many are shocked that they have only somewhat worse odds of winning the lottery than making equity partner/member/shareholder in a big law firm.

I answer questions and let the conversation go where the students lead it for about an hour. Then we wipe our eyes, blow our noses and get back to civ pro.

I have done this little song-and-dance at least ten times now and every time I do it, it has a *significant* impact. I have had many students (looking sort of shell shocked) tell me that they had no idea that anyone else had felt or thought the things they had felt and thought, but which I articulated during class. I have had students come see me a semester later or even years later and tell me that by talking about my issues, it gave them the strength to get help for their own depression or anxiety issues. I have had several students seek me out in times of crisis and ask me for help, which I have willingly provided (via moral support and referrals to various professional mental health resources). Many students have sought me out to talk about career paths and even whether they should stay in law school. The bottom line, however, is that every single student I have ever talked to about these issues has appreciated – above all else – my openness and honesty, not only about my illness, but about the challenges of being a lawyer. And not a single one thought less of me or lost any respect for me as a result. On the contrary,

my openness and honesty increased their respect for me as a person and as a teacher.

Beyond this in-class discussion and the one-on-one discussions that flow from it, I also participate in a number of student events each year dealing with mental health, career paths, work-life balance and the like. I am active with the Lawyer Effectiveness and Quality of Life Committee of the N.C. Bar Association. And I have both planned and spoken at continuing legal education conferences about these issues.

Now, not all law professors are as messed up or as gluttons for punishment as I am. However, each of us – regardless of background – can start a dialogue with students, either in or out of class, about the importance of mental health, the dark side of being a lawyer, and the need for students to make conscious, intentional and meaningful choices regarding their futures. These discussions are critical to the long term well-being of our students. As I said in my opening post, our students need us to be brave and be honest.

Thanks for reading this series of posts. Based on the emails I have received and the comments that you have posted, at least one of my goals for this series as already been accomplished: to generate open and honest discussion of these issues. I hope these conversations will continue. If sharing these posts will help facilitate discussions with your students or colleagues or friends, please use them.

Now I will go back to contemplating factual causation standards, the impact of judicial nominations on the ideology of the federal Courts of Appeals, and the origin and troublesome role of the assumption of truth rule in modern civil procedure.

[And I have a long weekend ahead of me building a new mobile chicken coop and preparing for the arrival of about 20,000 honeybees (two hives worth) on April 10. And I have about eight soccer games to attend this weekend. Work-life balance of a sort. At last.]

NOTES:

* As fleshed out in the comments to Part 2 of this series, I do not contend that either depression or anxiety are *purely* biological as a general proposition (although there are no doubt some cases that

are). Generally, both have biological[23] and environmental[24] aspects. It is the interaction of the biological [genetic predisposition, brain chemistry, etc.] and the environmental [high stress environment, insufficient coping skills, perfectionism, etc.] that gives rise to the disease (and yes, I am sticking with that term – if it is good enough for the CDC, it is good enough for me). Plenty of diseases (or illnesses, whatever) – smoking induced lung cancer, type II diabetes, stroke, and coronary artery disease to name just a few – also have both biological and environmental aspects. And, of course, I am a lawyer not a doctor or neurologist or psychologist.

** Antidepressant medication is certainly not a panacea. Effective treatment is inherently multifaceted and may include medication, therapy, lifestyle changes, job changes, meditation exercise, and the like. However, antidepressant medication (as well as benzodiazepines for those with anxiety) is often critical to recovery.

[Once again, as this is a serious topic, I will moderate any comments to this post and delete anything I deem inappropriate or off topic.] //

[23] www.psychologytoday.com/blog/evil-deeds/200809/is-depression-disease.

[24] www.psychologytoday.com/blog/evil-deeds/200809/is-depression-disease-part-2-the-great-debate.

FROM: SCOTUSBLOG

COMMENTARY: FROM THE BENCH TO THE PODIUM

Lyle Denniston[†]

In ways large and small, the idealized expectation that the Supreme Court will stay outside the political arena continues to diminish in a country with polarized partisanship and fragmented cultural values. One reason is that those on opposite sides of the divide increasingly seek to use the Court to advance their own agendas – and, increasingly, succeed at it.

Another reason, though, is that the Justices are moving regularly into the public realm, and taking their deep divisions with them. In short, they frequently move from the bench to the podium, and use public platforms to defend their judicial records – at times, to settle old scores or to stir up old wounds.

In some ways, this may be a welcome new form of transparency for an institution long known for its capacity to keep its own secrets. But it also may be an unhealthy turn toward public self-justification, a reluctance to let the judicial record speak for itself.

It is in this context that another breakthrough in public advocacy has come: retired Justice John Paul Stevens took the witness chair on Wednesday before the Senate Rules Committee – his first appearance before a Senate committee since his nomination hearings thirty-nine years ago, he noted. He was there to promote reform of campaign finance law.

[†] Lyle Denniston is a reporter for SCOTUSblog. Original at www.scotusblog.com/2014/05/commentary-from-the-bench-to-the-podium/ (May 1, 2014; vis. July 28, 2014).

There are many issues before the Court that are deeply controversial, but none is more vigorously debated in America's politics than the role that money plays in election campaigns. One side is certain that the Court is destroying democracy with recent rulings on that subject; the other side is equally certain that the Court is making democracy more open to all who want to participate.

The Court already had been drawn into that debate four years ago, when President Obama, in a State of the Union address, famously criticized the Court – to its face – for its ruling in the *Citizens United* case. And Justice Samuel A. Alito, Jr., in the audience, was offended enough to famously mutter a denial, and shake his head in disapproval.

But Justice Stevens is retired. Does that make a difference? The reality is that it probably does not. He is still very much identified with the Court; he clearly was not invited to testify merely as a revered elder statesman. He was a key part of the majority on the Court that for years prevailed in upholding sometimes rigorous campaign finance regulation – a majority that, in fact, no longer exists, replaced by a new majority deeply skeptical of restraints on campaign funding.

Stevens has not just stepped aside quietly into private life. He is, even at age ninety-four, an energetic public speaker and, notably, many of his speeches have been built on re-arguing positions he took on the Court, frequently on issues on which he had been on the losing end. He now has turned those thoughts into a book, *Six Amendments: How and Why We Should Change the Constitution*. It is no surprise that the amendments would, for the most part, rectify errors that he perceived when he was on the Court.

His prepared testimony before the Senate panel was distributed for him by the Court's staff. He no doubt had at least some help with it from a government-salaried law clerk. And they very likely did some work on it in the judicial chambers he still occupies. The remarks are clearly his own, but they have the patina of the high judicial office he held for nearly thirty-five years.

He crossed the street to become a part of a legislative hearing, dealing not with a safe topic such as the need to preserve judicial

independence or a review of the Court's annual budget, but rather focusing on a truly divisive policy issue that itself contributes importantly to continuing partisan division.

He opened his remarks by insisting that "campaign finance is not a partisan issue." But his proposal for the language of a constitutional amendment would overturn Court rulings that the Republican Party definitely has found do work to its advantage and the Democratic Party to its woe.

But, it could be said that, if a retired Justice needed some cover for taking his personal preferences out in public, he could find it in the recent podium appearances of some of the sitting Justices. Just last week, for example, Justices Ruth Bader Ginsburg and Antonin Scalia were together in Washington for a televised discussion at which they talked about cases before the Court this Term, and went over some of the differences in their approaches to the law.

There is hardly a popular broadcast talk show that has not had a sitting Justice, alone or on a panel, making the case for their own performance on the bench.

Within the Court building itself, some of this political theater now appears with some regularity as individual Justices increasingly announce orally their dissents, sometimes in impassioned tones. It is not enough, it seems, to dissent in writing; there is now a greater perceived need to let a public audience know how strongly the disappointment of losing can be felt.

There are other signs that the divisions inside the Court are apparently being taken personally, at least some of the time. Two years ago, there was a leak – almost certainly coming from inside the Court itself – about the switch in positions that Chief Justice John G. Roberts, Jr., had supposedly made in the health care decision. The leak was hardly an attempt at praise.

And one can find, with regularity, dissenting and concurring opinions that are as pointed in denunciation of the other side as an attack ad in a political campaign.

The press, of course, has some role in highlighting the perception that the Court has gone political. Seldom does a divided opinion emerge that a prominent news organization does not say what

the partisan line-up of the Justices was – that is, the political party responsible for putting each of them on the bench.

Some of these atmospherics perhaps can be exaggerated, but as they accumulate, they very likely contribute to the cynical notion that jurisprudence is deeply infused with politics of a decidedly partisan flavor. //

FROM: PRAWFSBLAWG

HARMON ON THE FRAGILITY OF KNOWLEDGE IN THE RILEY (CELLPHONE AND 4A) CASE

Rachel Harmon[†]

> Prof. Rachel Harmon from UVA[1] had an interesting post to the crimprof listserv that I thought warranted broader exposure, so with her permission I'm sharing it. (Rachel asked to also thank UVA law librarian Kent Olson for his help with the underlying research).
>
> [– Posted by Dan Markel]

In light of the likely significance of the Court's opinion in Riley v. California,[2] I may seem obsessed with the trivial, but I can't help but note the Court's odd support for one of its statements about policing, and the pathetic state of information about policing it reveals. On page 6, the Court states that "warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant." Though the proposition seems intuitively obvious, data on searches and seizures isn't easy to find, so I was curious about the Court's support.

[†] Rachel Harmon is Sullivan & Cromwell Professor of Law at the University of Virginia School of Law. Original at prawfsblawg.blogs.com/prawfsblawg/2014/06/harmon-on-the-fragility-of-knowledge-in-the-riley-cellphone-and-4a-case.html (June 27, 2014; vis. July 28, 2014).

[1] www.law.virginia.edu/lawweb/faculty.nsf/FHPbI/1170573.

[2] www.scotusblog.com/case-files/cases/riley-v-california/.

Chief Justice Roberts cited LaFave's Search and Seizure treatise, which struck me as an odd source for an empirical claim, so I looked it up. LaFave does indeed say, "While the myth persists that warrantless searches are the exception, the fact is that searches incident to arrest occur with the greatest frequency." But that sentence has appeared unchanged since the first edition of the treatise in 1978. And LaFave's support for the proposition is itself pathetic. It comes in a footnote which reads: "See T. Taylor, Two Studies in Constitutional Interpretation 48 (1969). 'Comparison of the total number of search warrants issued with the arrests made is equally illuminating. In 1966 the New York police obtained 3,897 warrants and made 171,288 arrests. It is reliably reported that in San Francisco in 1966 there were 29,084 serious crimes reported to the police, who during the same year obtained only 19 search warrants.' Model Code of Pre-Arraignment Procedure 493–94 (1975)."

Because I'm crazy, I pulled Taylor and the Model Code too.

Both sources suggest that they can't really prove the original point. Taylor says, "[M]ost law enforcement agencies have been exceedingly lax with their record-keeping in this field. But there a few offices where the records are full enough to be meaningful, and from these it is abundantly apparent that searches of persons and premises incident to an arrest outnumber manifold searches covered by warrants." He provides no further support for the claim.

The Model Code Commentary provides the numbers from 1966, but also makes it clear they are not to be taken too seriously. The New York data was apparently furnished directly to the Code's Reporters from the NYPD, and the San Francisco numbers came from a New York Times' reporter. (It was Fred Graham, the Supreme Court correspondent at the time and a lawyer.) According to a footnote to the Commentary, "Research efforts elsewhere foundered on the rocks of record-keeping failures. Law enforcement agencies do not commonly maintain statistical records pertaining to search warrants or searches and seizures generally."

So the Supreme Court cited a source, unchanged since 1978, which cites two sources from the late 1960s, both of which suggest that there is very little evidence for the

proposition because police record keeping is weak. I'm hardly one to criticize imperfect footnotes (since I've surely written many myself), but this one interests me. The Court is all too willing to make unsupported claims about policing, a problem I've noted before. See The Problem of Policing, 110 Mich. L. Rev. 761, 772-773 (2012). Moreover, for the Court, as well as scholars and policy-makers there is a serious problem in finding credible information about what police do. See Why Do We (Still) Lack Data on Policing?, 96 Marq. L. Rev. 1119 (2013). The Riley/Wurie citation nicely illustrates both problems, and it won't be the last to do so. //

JUDGES REVISING OPINIONS AFTER THEIR RELEASE

Peter W. Martin[†]

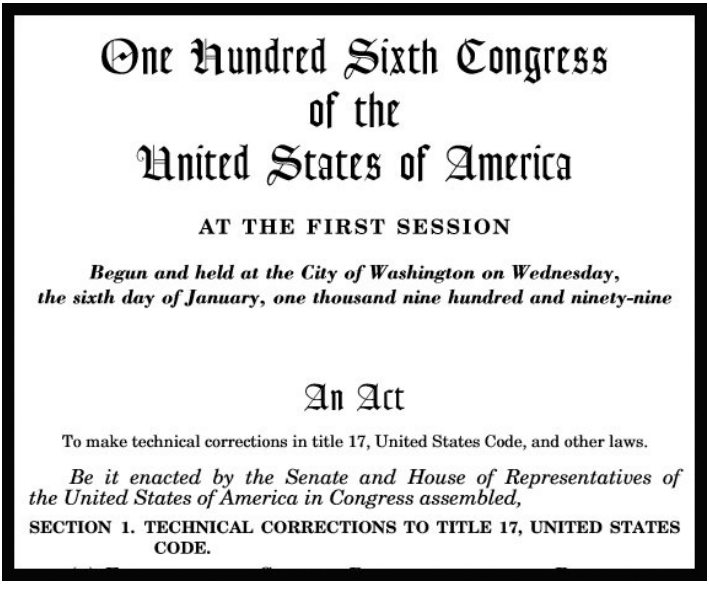
A. BACKGROUND: HOW LEGISLATURES AND AGENCIES HANDLE REVISION

1. Revision by Congress

When Congress enacts and the President signs a carelessly drafted piece of legislation it becomes the law. All must live with, puzzle over,[1] and, in some cases, find an ad hoc way to cite what Congress has done. Congress can clarify the situation or correct the error but only by employing the same formal process to amend that it previously used to enact. In October 1998, Congress passed two separate bills adding provisions to Title 17 of the U.S. Code, the Copyright Act. Both added a new section 512. Embarrassing? Perhaps. Did this pose a serious question of Congressional intent? No. Clearly, the second new 512 was not meant to overwrite the first; the two addressed very different topics. Did this pose a problem for those who wanted to cite either of the new sections? For sure, but one readily addressed either by appending a parenthetical to disambiguate a reference to 17 U.S.C. § 512 or by citing to the session law containing the pertinent 512. In time the error was resolved by a law making "technical corrections" to the Copyright Act. One of the two sections 512 was renumbered 513.

[†] Peter W. Martin is the Jane M.G. Foster Professor of Law, Emeritus, at Cornell University Law School. Original at citeblog.access-to-law.com/?p=157 (Apr. 29 & May 1 & 8, 2014; vis. July 28, 2014).

[1] scholar.google.com/scholar_case?case=18277205972058482123.



One Hundred Sixth Congress
of the
United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Wednesday, the sixth day of January, one thousand nine hundred and ninety-nine

An Act

To make technical corrections in title 17, United States Code, and other laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. TECHNICAL CORRECTIONS TO TITLE 17, UNITED STATES CODE.

During 2013 Congress passed four pieces of legislation that made "technical corrections" to scattered provisions of the U.S. Code. Unsurprisingly, tidying up drafting errors of this sort is not a high Congressional priority. For ten years there have been two slightly different versions of 5 U.S.C. § 3598;[2] for nearly eighteen, two completely different versions of 28 U.S.C. § 1932.[3] The Code contains cross-references to non-existent provisions[4] and myriad other typos. Some are humorous (as, for example, the definition of "non-governmental entities" that includes "organizations that provide products and services associated with … satellite imagines"[5]). The various compilers of Congress's work product do their best to note such glitches where they exist and, if possible, suggest that body's probable intention. They do not, however, view themselves as at liberty to make editorial corrections.

[2] uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5-section3598&num=0&edition=prelim.

[3] uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section1932&num=0&edition=prelim.

[4] www.law.cornell.edu/uscode/text/22/6213.

[5] www.law.cornell.edu/uscode/text/33/3507.

FEDERAL TRADE COMMISSION

16 CFR Part 312

RIN 3084–AB20

Children's Online Privacy Protection Rule

AGENCY: Federal Trade Commission.

ACTION: Correcting amendment.

SUMMARY: The Federal Trade Commission published final rule amendments to the Children's Online Privacy Protection Rule on January 17, 2013 to update the requirements set forth in the notice, parental consent, confidentiality and security, and safe harbor provisions. This document makes a technical correction in that final rule.

DATES: Effective on December 20, 2013.

2. Agency typos and omissions

Pretty much the same holds for regulations adopted by federal administrative agencies. When a final regulation contains inept language, a typo, or some other drafting error, the Office of the Federal Register publishes it "as is". The authoring agency must subsequently correct or otherwise revise by publishing an amendment, also in the *Federal Register*. Until the problem is caught and addressed through a formal amendment, the original version is "the law." In the meantime, all who must understand or apply it – agency personnel, the public, and courts – must interpret the puzzling language in light of the agency's most likely intent. The *Federal Register* is filled with regulatory filings making "correcting amendments." A search on that phrase limited to 2013 retrieves a total of eighty. For a pair of straightforward examples see 78 Fed. Reg. 76,986[6] (2013).

[6] www.gpo.gov/fdsys/pkg/FR-2013-12-20/pdf/2013-30293.pdf.

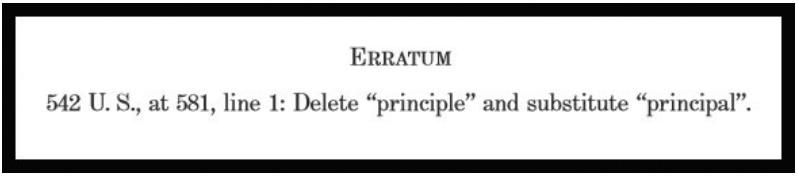
B. JUDICIAL OPINIONS – AN ALTOGETHER DIFFERENT STORY

With judicial opinions the situation is startlingly different. When judges release decisions containing similar bits of sloppiness, the process for correcting them is far less certain and, with some courts, far less transparent. What sets courts apart from other law enunciating bodies in the U.S. is their widespread practice of unannounced and unspecified revision well after the legal proceeding resulting in a decision binding on the parties has concluded. Several factors, some rooted in print era realities, are to blame.

To begin, most U.S. appellate courts began the last century with the functions of opinion writing and law reporting in separate hands.[7] Public officials, commonly called "reporters of decisions" cumulated the opinions issued by appellate courts and periodically published them in volumes, together with indices, annotations, and other editorial enhancements. Invariably, they engaged in copy editing and cite checking decision texts, as well, subject to such oversight as the judges cared to exercise. The existence of that separate office together with the long period stretching from opinion release to final publication in a bound volume induced judges to think of the opinions they filed in cases, distributed to the parties and interested others in "slip opinion" form, as drafts which they could still "correct" or otherwise improve. That mindset combined with the discursive nature of judicial texts, their attribution to individual authors, and judicial egos can produce a troubling and truly unnecessary level of post-release revision. At the extreme, judicial fiddling with the language of opinions doesn't even end with print publication. Dissenting in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), Justice Thomas wrote: "The principle 'ingredient' for 'energy in the executive' is 'unity.'" (The quoted fragments are from No. 70 of the *Federalist Papers*.[8]) That was June 2004. The sentence remained in that form in the preliminary print issued the following year and the final

[7] www.access-to-law.com/elaw/pwm/abandoning_law_rpts.pdf.
[8] www.constitution.org/fed/federa70.htm.

bound volume which appeared in 2006. Volume 550 of the *United States Reports*[9] published in 2010, however, contains an "erratum" notice that directs a change in that line of Thomas's dissent, namely the substitution of "principal" for "principle." Six years after the opinion was handed down, it is hard to understand who is to make that change and why – beyond salving the embarrassment of the author. None of the online services have altered the opinion.



ERRATUM

542 U. S., at 581, line 1: Delete "principle" and substitute "principal".

Judges, even those on the highest courts, make minor errors all the time. What they seem to have great difficulty doing is letting them lie. This seems particularly true of courts for which print still serves as the medium for final and official publication. The Kansas Judicial Branch web site[10] explains about the only version of opinions it furnishes the public:

Slip opinions are subject to motions for rehearing and petitions for review prior to issuance of the mandate. Before citing a slip opinion, determine that the opinion has become final. Slip opinions also are subject to modification orders and editorial corrections prior to publication in the official reporters. Consult the bound volumes of Kansas Reports and Kansas Court of Appeals Reports for the final, official texts of the opinions of the Kansas Supreme Court and the Kansas Court of Appeals. Attorneys are requested to call prompt attention to typographical or other formal errors; please notify Richard Ross, Reporter of Decisions ….

Since the path from slip opinion to final bound volume can stretch out for months, if not years,[11] the opportunity for revision is prolonged. Moreover, unless the court releases a conformed elec-

[9] www.supremecourt.gov/opinions/boundvolumes/550bv.pdf.
[10] www.kscourts.org/Cases-and-Opinions/opinions/.
[11] citeblog.access-to-law.com/?p=93.

tronic copy of that print volume, changes, large or small, are hard to detect. Interim versions, print or electronic, only compound the difficulty. For those who maintain case law databases and their users this can be a serious problem, one some of them finesse by not bothering to attempt to detect and make changes reflected in post-release versions.[12]

A shift to official electronic publication inescapably reduces the period for post-release revision since decisions need no longer be held for the accumulation of a full volume before final issuance. On the other hand, staffing and work flow patterns established during the print era can make it difficult to shift full editorial review, including cite, and quote checking to the period before a decision's initial release. Difficult, but not impossible – the Illinois Reporter of Decisions, Brian Ervin, who retired earlier this year,[13] appears to have achieved that goal when the state ceased publishing print law reports in 2011. Reviewing the Illinois Supreme Court's decisions of the past year using the CourtListener site in the manner described below, reveals not a single instance of post-release revision.

Procedures in some other states that have made the same shift specify a short period for possible revision, following which decisions become final. Decisions of the Oklahoma Supreme Court, for example, are not final until the chief justice has issued a mandate in the case and that does not occur until the period for a rehearing request has passed. Decisions are posted to the Oklahoma State Court Network[14] immediately upon filing, but they carry the notice: "THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL." Once the mandate has issued, a matter of weeks not months, that warning is removed and the final, official version is marked with the court's seal.[15] In New Mexico, another state in which official versions of appellate decisions are now digital, a similar short period for revision is embedded in court practice. Deci-

[12] verdict.justia.com/2014/01/20/citation-dna-whos-datas-daddy.
[13] archives.lincolndailynews.com/2014/Jan/07/News/news010714_sc.shtml.
[14] www.oscn.net/applications/oscn/start.asp.
[15] citeblog.access-to-law.com/?p=107.

sions are initially released in "slip opinion" form. "Once an opinion is selected for publication by the Court, it is assigned a vendor-neutral citation by the Chief Clerk …. [During the interim the] New Mexico Compilation Commission[16] provides editorial services such as proofreading, applying court-approved corrections and topic indices." As a result of that editorial process, most decisions receive minor revision. For a representative example, see this comparison of the slip and final versions[17] of a recent decision of the New Mexico Supreme Court (separated in time by less than a month). Once a decision can be cited, it is in final form.[18]

Typically, when legislatures and administrative agencies make revisions the changes are explicitly delineated. Most often they are expressed in a form directing the addition, deletion, or substitution of specified words to, from, or within the original text. Except in the case of post-publication errata notices, that is not the judicial norm. Even courts that are good about publicly releasing their revised decisions and designating them as "substitute"," changed", or "revised" (as many don't) rarely indicate the nature or importance of the change. So long as all versions are available in electronic form, however, the changes can be determined through a computer comparison of the document files. Such a comparison of the final bound version of *Davis v. Federal Election Commission*, 554 U.S. 724 (2008) with the slip version, for example, reveals that at page 735 the latter had erroneously referred to a "2004 Washington primary." The later version corrects that to "2004 Wisconsin primary" – simple error correction rather than significant change.

> The FEC's mootness argument also fails. This case closely resembles *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.-S. ___449 (2007). There, Wisconsin Right to Life (WRTL), a nonprofit, ideological advocacy corporation, wished to run radio and TV ads within 30 days of the 2004 ~~Washington~~Wisconsin primary, contrary to a restriction imposed by BCRA.

[16] www.nmcompcomm.us/nmcases/NMSCSlip.aspx.
[17] access-to-law.com/citation/blog_sources/Compare_NM_albuquerque_cab_co.pdf.
[18] www.nmcompcomm.us/nmcases/NMARYear.aspx?db=scv&y1=2014&y2=2014.

More disturbing, by far, are:

- the common failure to provide the same degree of public access to revised versions of decisions as to the versions originally filed, and
- the substitution of revised versions of decisions for those originally filed without flagging the switch.

Any jurisdiction which, like Kansas, still directs the public and legal profession to print for the final text of an opinion without making available a complete digital replica is guilty of the first. Less obviously this is true of courts which, like the U.S. Court of Appeals, leave distribution of their final, edited opinions to the commercial sector. Less conspicuous and, therefore, even more troubling are revisions that courts implement by substituting one digital file for another before final publication. A prior post[19] noted one example of this form of slight-of-hand at the web site of the Indiana Judicial Branch. But the Indiana Supreme Court hardly stands alone. Thanks to the meticulous record-keeping of the CourtListener online database[20] such substitutions can be detected.

Like other case law harvesters, CourtListener regularly and systematically examines court web sites for new decision files. Unlike others it calculates and displays digital fingerprints for the files it downloads and stores the original copies for public access. When a fresh version of a previously downloaded file is substituted at the court's site, its fingerprint reveals whether the content is at all different. If the fingerprint is not the same, CourtListener downloads and stores the second file. Importantly, it retains the earlier version as well. Consequently, a CourtListener retrieval of all decisions from a court, arrayed by filing date, will show revisions by substitution as multiple entries for a single case. Applied to the decisions of the U.S. Supreme Court during calendar 2011 this technique uncovers ten instances of covert revision. Happily, none involved major changes. The spelling of "Pittsburg, California" was corrected in

[19] citeblog.access-to-law.com/?p=107.
[20] www.courtlistener.com.

a majority opinion by Justice Scalia, "petitioner" was changed to "respondent" in a majority opinion by Justice Kennedy, "polite remainder" in a Scalia dissent became "polite reminder", and so on. The perpetually troublesome "principal/principle" pair was switched in a dissent by Justice Breyer.

Most post-release opinion revisions involve no more than the correction of citations and typos like these, but the lack of transparency or any clear process permits more. And history furnishes some disturbing examples of that opportunity being exploited. Judge Douglas Woodlock describes one involving the late Chief Justice Warren Berger in a recent issue of *Green Bag*.[21] Far more recent history includes the removal of a lengthy footnote from the majority opinion in *Skilling v. United States*, 561 U.S. 358 (2010). The slip opinion file now at the Court's web site[22] carries no notice of the revision beyond the indication in the "properties" field that it was modified over two weeks after the opinion's filing date. To see the original footnote 31 one must go to the CourtListener site[23] or a collection like that of Cornell's LII[24] built on the assumption that a slip opinion distributed by the Court on day of decision will not be changed prior to its appearance in a preliminary print.

C. SOME UNSOLICITED ADVICE DIRECTED AT PUBLIC OFFICIALS WHO BEAR RESPONSIBILITY FOR DISSEMINATING CASE LAW (REPORTERS, CLERKS, JUDGES)

1. Minimize or eliminate post-release revision

In this era of immediate electronic access and widespread redistribution, courts should strive to shift all editorial review to the period before release, as Illinois has done. Judges need to learn to live with their minor drafting errors. Finally, whatever revision occurs prior to final publication, none should occur thereafter. In the pre-

[21] www.greenbag.org/v17n1/v17n1_articles_woodlock.pdf.
[22] www.supremecourt.gov/opinions/09pdf/08-1394Reissue.pdf.
[23] www.courtlistener.com/scotus/LnU/skilling-v-united-states/.
[24] www.law.cornell.edu/supct/html/08-1394.ZO.html#31.

sent age issuance of errata notices years after publication is a pointless gesture.

2. If decisions are released in both preliminary and final versions, make them equally accessible

While the final versions of U.S. Supreme Court decisions are much too slow in appearing,[25] when they do appear they are released in both print and a conformed electronic file.[26] Most U.S. courts are like those of Kansas and fail to release the final versions of their decisions electronically. Furthermore, some that do, California[27] being an example, release them in a form and subject to licensing terms that severely limit their usefulness to individual legal professionals and online database providers.

3. Label all decision revisions, as such, and if the revision is ad hoc rather than the result of a systematic editorial process, explain the nature of the change

At least twice this year the Indiana Supreme Court released opinions that omitted the name of one of the attorneys. As soon as the omission was pointed out, it promptly issued "corrected" versions. In one case[28] (but not the other[29]) the revision bears the notation that it is a corrected file, with a date. In neither case is the nature of or reason for the change explained within the second version. As noted above, too many courts, including the nation's highest, make stealth revisions, substituting one opinion text for a prior one without even signaling the change.

[25] citeblog.access-to-law.com/?p=93.
[26] www.supremecourt.gov/opinions/boundvolumes.aspx.
[27] www.lexisnexis.com/clients/CACourts/.
[28] www.in.gov/judiciary/opinions/pdf/03051301ad.pdf.
[29] indianalawblog.com/archives/2014/03/ind_decisions_t_800.html.

4. If revision goes beyond simple error correction, vacate the prior decision and issue a new one (following whatever procedure that requires)

United States v. Hayes, No. 09-12024 (11th Cir. Dec. 16, 2010),[30] discussed in a prior post,[31] provides a useful illustration of this commendable practice. *United States v. Burrage*, No. 11-3602 (8th Cir. Apr. 4, 2014),[32] falls short, for while it explicitly vacates the same panel's decision of a month before, it fails to explain the basis for the substitution.

This entry was posted on Tuesday, April 29th, 2014 at 5:56 pm and is filed under Cases, Regulations, Statutes. You can follow any responses to this entry through the RSS 2.0 feed. You can leave a response, or trackback from your own site.

2 RESPONSES TO "JUDGES REVISING OPINIONS AFTER THEIR RELEASE"

1. Peter W. Martin says: May 1, 2014 at 5:23 pm As it turned out this post proved remarkably timely. It appeared on the very day the Supreme Court released its decision in EPA v. EME Homer City Generation, L. P., accompanied by a flawed Scalia dissent, and a day before the substitution of a revised slip opinion. Because of the widespread public attention to Scalia's error and the speedy correction this could hardly be characterized as a stealth substitution. http://www.businessinsider.com/supreme-court-corrects-justice-scalias-cringeworthy-blunder-in-epa-case-2014-4 On the other hand, there is nothing at the Court's website or in the revised slip opinion to indicate that it occurred.

2. Peter W. Martin says: May 8, 2014 at 1:44 pm Further evidence of Justice Scalia's eagerness to erase all trace of his screw up in the EPA case arrived in the LII's mail earlier this week. In an un-

[30] scholar.google.com/scholar_case?case=10305481334235109035.
[31] citeblog.access-to-law.com/?p=72.
[32] scholar.google.com/scholar_case?case=12205255164806251457.

precedented letter[33] the Court's Reporter of Decisions called upon the LII and the five other subscribers to its electronic bench opinion delivery service to enter changes in their "print and electronic versions" of the Scalia dissent. The Court's web site[34] declares the following about successive versions of decisions:

> The "slip" opinion is the second version of an opinion. It is sent to the printer later in the day on which the "bench" opinion is released by the Court. Each slip opinion has the same elements as the bench opinion–majority or plurality opinion, concurrences or dissents, and a prefatory syllabus – but may contain corrections not appearing in the bench opinion. The slip opinions collected here are those issued during October Term 2013 (October 07, 2013, through October 05, 2014). These opinions are posted on the Website within minutes after the bench opinions are issued and will remain posted until the opinions for the entire Term are published in the bound volumes of the United States Reports. For further information, see Column Header Definitions and the file entitled Information About Opinions.
>
> Caution: These electronic opinions may contain computer-generated errors or other deviations from the official printed slip opinion pamphlets. Moreover, a slip opinion is replaced within a few months by a paginated version of the case in the preliminary print, and–one year after the issuance of that print–by the final version of the case in a U. S. Reports bound volume. In case of discrepancies between the print and electronic versions of a slip opinion, the print version controls. In case of discrepancies between the slip opinion and any later official version of the opinion, the later version controls.

As the initial post explains the slip opinion version is itself subject to covert replacement by an altered file. That happened swiftly in the EPA case. Now it appears that even the transitory bench opinion is subject to after-the-fact revision. Let the historic record show it never happened. //

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[33] www.access-to-law.com/citation/blog_sources/SCOTUS_reporter_ltr.pdf.
[34] www.supremecourt.gov/opinions/slipopinions.aspx?Term=13.