

1999

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## Recommended Citation

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## LAW AND SPORTS OFFICIATING: A MISUNDERSTOOD AND JUSTLY NEGLECTED RELATIONSHIP

*Mark A. Graber\**

Ronald Dworkin insisted in *Taking Rights Seriously* that “[r]ules are applicable in an all-or-nothing fashion.”<sup>1</sup> “This all-or-nothing,” he continued,

is seen most plainly if we look at the way rules operate, not in law, but in some enterprise they dominate—a game, for example. In baseball, a rule provides that if the batter has had three strikes, he is out. An official cannot consistently acknowledge that this is an accurate statement of a baseball rule,<sup>2</sup> and decide that a batter who has had three strikes is not out.<sup>3</sup>

Although other themes of that work received some scholarly attention, Dworkin’s attempt to initiate a law and sports officiating movement fell flat. Interdisciplinary studies were the rage of the legal academy during the 1980s. Nevertheless, no law professor publicly maintained that lawyers could learn anything about the law from reading the collected works of Ron Luciano<sup>3</sup> or watching ESPN. When Dworkin revised his theory of law in 1986, he abandoned athletics altogether for the more ethereal pastures of law and literary interpretation.<sup>4</sup>

Dworkin did have one potential disciple during the late 1970s. As a young graduate student paying my way through school refereeing high school basketball, soccer and softball

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\* Associate Professor, Government, University of Maryland. Thanks to all members of the Georgetown/Maryland Constitutionalism Conference for helpful comments. I am also grateful for the accommodations at the Wilson Center in Washington, D.C., where this essay was finished.

1. Ronald Dworkin, *Taking Rights Seriously* 24 (Harvard U. Press, 1978).
2. *Id.*
3. See Ron Luciano and David Fisher, *The Fall of the Roman Umpire* (Bantam Books, 1986); Ron Luciano and David Fisher, *The Umpire Strikes Back* (Bantam Books, 1982).
4. See Ronald Dworkin, *Law's Empire* 45-86 (Harvard U. Press, 1986).

games, I frequently thought about the relationships between law and sports officiating. Driving to and from my various officiating assignments, I mentally outlined the seminal article on the subject. The first part would be a devastating analysis clearly demonstrating that the great constitutional theorist Ronald Dworkin knew nothing about sports officiating. Unfortunately, the second part always proved more difficult. I could never think of any aspect of refereeing relevant to the study of the law. The project was soon abandoned.

Several law review essays published during the early 1990s renewed my interest in law and sports officiating. John Hart Ely mentioned that he had often “thought about trying to elaborate the metaphor between constitutional interpretation and jazz improvisation.”<sup>5</sup> Ely failed to “writ[e] this up” only because “it was never clear what anyone was supposed to learn from it about either constitutional theory or jazz.”<sup>6</sup> Unbeknownst to Ely, Sanford Levinson and Jack Balkin were writing a serious paper on law and music. Both Levinson and Balkin admitted that they were not “member[s] of the musicological scholarly community to which one ordinarily looks for ‘authoritative’ pronouncements.”<sup>7</sup> Still, they asked readers to consider: “Why would one believe that one must be an ‘expert’ in an area in order to have interesting things to say?”<sup>8</sup> I was inspired by their article to rethink my reluctance to inaugurate a law and sports officiating movement. If lawyers could learn from musicians, why not sports officials? Besides, unlike Levinson and Balkin, I might be regarded as a “suitably certified expert[.]”<sup>9</sup> in both disciplines I would be writing about.

My original insight still seems correct. My experiences doing more than one thousand little league, college intramural, middle school, high school and (rarely) college varsity games will not teach law professors anything new about the law, or at least about the legal questions law professors have traditionally asked.

Nevertheless, an analysis of Dworkin’s ill-fated foray into law and sports officiating may cast some light on the problems

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5. John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 Va. L. Rev. 833, 837 n.10 (1991).

6. *Id.*

7. Sanford Levinson and J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. Pa. L. Rev. 1597, 1602 (1991).

8. *Id.* at 1602-03.

9. *Id.*

that more numerous legal forays into other non-legal fields confront. Law professors writing essays on law and any other subject on which they are not "suitably certified experts" have repeated and will continue to repeat Dworkin's most salient mistakes. Casual legal interlopers into other disciplines risk making bald assertions that serious scholars in the non-legal field recognize as flatly wrong, if not downright silly. Scholarly mechanisms for identifying error, weak in academic law to begin with, are particularly weak when law reviews consider the merits of non-legal scholarly assertions. Casual legal interlopers into other disciplines also tend to rely uncritically on legal models to describe non-legal phenomena. Legal writing frequently assumes that debates in other disciplines can be understood in terms of the categories that best describe legal debates. Relying exclusively on categories derived from the study of legal phenomena, law professors may miss the most interesting features of their interdisciplinary subject, features which generate entirely different models of interpretation, evaluation, and decision making.

Part I of this essay demonstrates that Dworkin fundamentally misconceives the practice of sports officiating. Games are rarely as rule-bound as *Taking Rights Seriously* maintains. Both youth and major league umpires frequently rely on the sort of first principles that Dworkin claims should and do characterize legal decision making. Part II suggests that Dworkin's failings are rooted in more general problems with interdisciplinary legal scholarship. To the best of my knowledge, Dworkin did not practice or study sports officiating before writing *Taking Rights Seriously*. Moreover, that work was probably not reviewed by a "suitably certified expert" in sports officiating. Relying on general intelligence alone, Dworkin failed to recognize that baseball umpires "interpret" the strike zone and other rules, relying on the general principle that teams should not gain "unfair advantages." *Taking Rights Seriously* also never considers seriously whether, in light of the fundamental differences between judging and sports officiating, any model of interpretation drawn from legal experience could well capture how a sports official makes decisions. Part III briefly documents similar mistakes in interdisciplinary legal works that touch on political science, using as an example recent writings by Cass Sunstein. Part IV concludes that while law professors do not have to be "suitably certified experts" to have "interesting things to say" about non-legal subjects, interdisciplinary legal scholarship requires more active

participation by “suitably certified experts.” Law professors are unlikely to do the best interdisciplinary scholarship, but they can avoid the most egregious of Dworkin’s errors.

### I. THE PHILOSOPHY OF SPORTS OFFICIATING

The rule that “if the batter has had three strikes, he is out” hardly demonstrates that baseball is more rule dominated than law. The constitution declares that government may not abridge the freedom of speech or impose cruel and unusual punishments. To paraphrase Dworkin on games, “[A] [judge] cannot consistently acknowledge that this is an accurate statement of a [constitutional] rule, and decide that [a law abridging the freedom of speech or imposing cruel and unusual punishments] is [constitutional].”<sup>10</sup> Little professional training would be necessary if all sports officials did was enforce the three-strike and similarly structured rules. My youngest daughter (age 9) could easily be trained to cry “yer out” every time a batter had three strikes or, for that matter, to rule against the government once an abridgment of free speech had been demonstrated. The difficult decision is determining when a pitch is a strike or when a government action has abridged the freedom of speech.

The point Dworkin was trying to make about the distinction between baseball rules and legal principles would have been clearer had he used as his example the definition of the strike zone. “The strike zone,” in professional baseball, is defined as “that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower limit is a line at the hollow beneath the knee cap.”<sup>11</sup> So understood, the strike zone seems to be a rule rather than a principle. The crucial feature of a rule is that its application consists solely of determining whether “the facts [the] rule stipulates” actually occurred in a particular instance.<sup>12</sup> Assuming the batter has made no effort to hit the ball, the home plate umpire calls a pitch a strike if and only if the ball at some point entered the area set out in the definition of the strike zone. This seems to require only the ability to get the facts right. Much skill and professional training are

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10. Dworkin, *Taking Rights Seriously* at 24 (cited in note 1).

11. *Official Rules of Major League Baseball* 34 (Triumph Books, 1997). The provision adds that “[t]he strike zone shall be determined from the batter’s stance as the batter is prepared to swing at a pitched ball.” *Id.*

12. Dworkin, *Taking Rights Seriously* at 24 (cited in note 1).

required to determine whether a sharply curving pitch thrown at over ninety miles an hour tipped the strike zone at some point. Still, the definition of the strike zone and similar provisions indicate that umpiring decisions are almost always limited to determining whether the facts justify application of a generally agreed upon standard.

Dworkin recognizes that legal rules play a substantial role in the law.<sup>13</sup> The argument in *Taking Rights Seriously* is simply that while virtually all sports norms take the form of rules, important legal norms take the form of principles. Unlike the definition of the strike zone, the First Amendment's declaration that "Congress shall make no law . . . abridging the freedom of speech" does not describe in any detail the set of facts that constitute an abridgement of speech rights. That constitutional norm would more closely resemble a sports rule if the Bill of Rights declared that "Congress shall make no law imposing a prior restraint on speech." The laws of baseball would more resemble constitutional norms if the strike zone was defined as "the area in which the average professional player ought to be able to hit the average professional pitch."

Rule dominated activities apparently differ from legal activities in the following related ways. First, disputes in rule dominated activities are almost entirely over facts. Since everyone shares a common understanding of the strike zone, controversy over pitches is necessarily limited to disagreements over whether a pitch entered the strike zone at some point. While some disputes in law are entirely over historical facts, others are about what rule governs a particular set of facts, whether, for example, the first amendment only prohibits prior restraints on speech. Second, all disputes in a rule dominated activity are resolvable once the relevant facts are established. When presented with an accurate slow motion replay of a particular pitch, all competent umpires should agree on the proper call. Disagreement in these cases merely demonstrates a stubborn refusal to admit error. When disputes in law are over the substance of rules, establishing the relevant facts rarely ends the controversy. Litigants who agree on the content and probable consequences of a speech may nevertheless debate whether the speech is protected by the constitution. Third, a person officiating a rule dominated activity need not know anything about how or why the game is played. An umpire who knew very little about base-

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13. Dworkin, *Taking Rights Seriously* at 25 (cited in note 1).

ball could do a professional job calling balls and strikes, as long as that person had excellent eyesight, memorized the definition of "strike," and had the courage not to flinch when the ball was pitched at high speeds. The good judge, however, must be immersed in the social practices of the society in order to determine the proper weight to be given to various legal and constitutional principles.

#### A. SPORTING RULES AND PRINCIPLES

The law of sports in books and in action belie Dworkin's untutored assertion that games are more rule dominated than constitutional law. High minded principles and technical rules exist side by side in the official rule books of most games as they do in legal codes and constitutions. Sports officials in practice apply provisions that seem to express principles in ways that Dworkin claims judges should and do apply apparent references to principles in legal codes. Indeed, sports officials often treat text that apparently expresses a rule in ways that Dworkin would have judges apply principles.

Rule domination varies by game. Baseball and swimming are fairly rule-dominated. The provisions governing how various strokes must be executed, for example, refer to specific placement of the swimmer's hands, feet and chest. "Both arms" of a swimmer in a butterfly race "must be brought forward over the water and pulled back simultaneously," and "[a]ll up and down movements of the legs and feet must be simultaneous."<sup>14</sup> Such central terms of baseball as "out" and "run" are also defined in ways suggesting that their application is a simple matter of laying the facts down next to the rule. Crucial "laws of soccer," however, use language far more suggestive of principles than rules. Law 11 states that "[a] player in an offside position is only penalised if . . . he [or she] is . . . interfering with play or interfering with an opponent or gaining an advantage by being in that position."<sup>15</sup> Law 5 declares that "[t]he referee . . . allows play to continue when the team against which an offense has been committed will benefit from such an advantage."<sup>16</sup> No fact specific definition of "interference" or "advantage" is provided. Many provisions in the basketball rule book similarly seem to evoke

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14. *Montgomery County Swim League: Handbook 1998* at 61.

15. Law 11, *1998 edition of the Laws of the Game*, (visited July 11, 1999) <<http://www.fifa.com/fifa/handbook/laws/index.laws.html>>.

16. Law 5, *Laws of the Games* (cited in note 15).

general principles. The National Basketball Association (NBA) defines a "flagrant foul" as "unnecessary and/or excessive contact committed by a player against an opponent."<sup>17</sup> This language echoes Article I, Section 8's declaration that "[t]he Congress shall have the Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," and the ban on "excessive bail" found in the Eighth Amendment, both of which Dworkin probably thinks set out legal principles rather than legal rules. The NBA also explicitly recognizes an "Elastic Power" vesting "[t]he officials" with "the power to make decisions on any point not specifically covered in the rules."<sup>18</sup>

The "elastic power" of basketball referees, the "advantage" provision in the laws of soccer, and other such declarations in the official laws of various sports do not seem mere shorthand for a more complex set of fact situations. The same or similar language that Dworkin claims evokes principles in law is often found in the rules of various games. Would the First Amendment have expressed a legal rule had the framers written, "Congress shall not . . . interfere with the freedom of speech"? Moreover, seeming references to principles in sports in practice function like principles rather than rules. Experienced referees dispute whether the advantage rule should be applied in an uncontested fact situation. Some referees I worked with would not call offsides unless an attempt was made to pass the ball to a player in an offsides position; others interpreted "interference" as requiring offsides to be called whenever a player in an offsides position was distracting a defender. Officials who knew very little about soccer had great difficulty calling the offsides rule. Their ability to recite that text from memory did little to dispel the havoc their poor calls created.

Referees and umpires also engage in interpretive-like behavior when applying what on their face seem to be clear rules. Good little league and adult softball league umpires frequently call pitches "strikes" that do not meet the rule book requirements. Most players in adult recreational softball teams want to swing the bat. By expanding the strike zone in certain situations, the umpire serves the real point of the game, which is to give players chances to get relive past athletic glories, real or (more

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17. *Official Rules of the National Basketball Association 1998-99* at 18 (The Sporting News, 1998).

18. *National Basketball Association Rules* at 11 (cited in note 17).



often) imagined. The strike zone is often expanded in youth games when the umpire believes that following the letter of the law would result in so many walks that the game would be neither fun nor educational. The strike zone may be a bit wider for the pitcher who, in an effort to be accurate, is not pitching as fast as possible than for the pitcher who throws every pitch at maximum speed, not caring where the ball winds up. The strike zone in both games is thus interpreted in light of the more general reasons why adults play recreational softball and children play little league baseball. Persons who do understand the point of these activities will make poor officials.

Major league umpires also do not engage in mere fact-finding when calling balls and strikes. Pitchers and hitters know that the strike zone in the National League is different than the strike zone in the American League.<sup>19</sup> The supervisors of officials in both the American and National League recognize that “[e]very umpire has their own strike zone,”<sup>20</sup> or their own way to “handle[ ] the strike zone.”<sup>21</sup> These different interpretations of the strike zone reflect different understandings of baseball, not different understandings of the precise location of those parts of the body set out in the definition of strike. The interpretable strike zone was particular evident when the broadcasters declared that one of the keys to game four of the World Series was whether the pitcher for the New York Yankees, Andy Pettitte, would get the outside strike. Agreement existed on the location of Pettitte’s crucial pitch. The question was whether that pitch would (or should) be called a strike.

Many fans do complain about major league variations in the strike zone. One frequently hears demands that umpires should stop relying on personal interpretations of “strike” and just obey the rules. “[I]t is the duty of an umpire to enforce that [strike] zone,” sports columnist Bill Lyon writes, “not to interpret it to suit his own particular notion and whim.”<sup>22</sup> Similar complaints

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19. See Tom Krasovic, *Padres find out firsthand AL strike zone*, San Diego Union-Tribune (Oct. 18, 1998), available in LEXIS, News Library; Bill Brubaker, *In Postseason, Calls Are Going Against Umpires; Inconsistent Strike Zone is Among Complaints*, Washington Post (Oct. 16, 1998), available in LEXIS, News Library.

20. Brubaker, Washington Post (cited in note 19).

21. Joseph Duarte, *Zoned Out; Ball; Strike inconsistency subjects umpires to major scrutiny*, Houston Chronicle (Oct. 20, 1998), available in LEXIS, News Library.

22. Bill Lyon, *It's time for the umpires to recognize rule on strike zone*, Fort Worth Star-Telegram (Oct. 12, 1998), available in LEXIS, News Library. See Gerry Callahan, *Moody Blues*, 89 Sports Illustrated 43, 44 (Oct. 19, 1998), available in LEXIS, News Library, (“[a]nother cause for frustration is the umpires’ belief that the strike zone is theirs

are made of judges. Lyon could have been paraphrasing Robert Bork's frequent insistence that "judges must consider themselves bound by law that is independent of their own views of the desirable."<sup>23</sup> A central point of Dworkinian theory is that such complaints are invalid, at least to the extent they deny that laws must be interpreted in light of some more general moral theory. *Taking Rights Seriously* never explains why Dworkin's interpretative stance is invalid with respect to the strike zone, but valid with respect to the First Amendment.

Law professors still sympathetic to Dworkin's account of sports officiating should grab their National Basketball Association rules and head off to the nearest professional basketball game. Most rules are not enforced fully. Players take extra steps in order to make fancy passes or shots; illegal contact takes place on virtually every rebound. Some rules are enforced differently for the stars than for journeymen players. Michael Jordan may be allowed an extra shove or step that Luc Longley is quickly penalized for. These deviations from the law in books are rooted in more basic understandings of how basketball should be played and officiated. As veteran referee Earl Strom noted upon retirement, his "philosophy of officiating . . . recognizes that pro basketball is bigger than the rule book and . . . officials need latitude to interpret the game." The point of refereeing, he declared, is to prevent "unfair advantage," not to call every rule book violation the referee sees.<sup>24</sup>

Indeed, at virtually all levels, from pee-wee ball to the professional or college game, "basketball" is not played by the rules. Referees ignore conduct that seems clearly to be within the letter of the prohibitions and may even penalize conduct that seems legal. My first mentor, Rocco Valvano, was fond of saying that a good referee is a little bit deaf and a little bit blind. Basketball, he observed, could be played only if the officials did not see everything or hear everything. Just as the surest way to upset a business is to follow all the rules to the letter, so the surest way for an official to ruin a game is to follow the rules religiously. The mark of a good official is not how well he sees the game or knows the rules, but his knowledge of when to "hear" the profanity mumbled by an angered coach or when to "see" the

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to interpret, as if it were an Impressionist painting").

23. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 5 (Simon & Schuster Inc., 1990).

24. Earl Strom, *How to Call 'Em Like A Pro*, 73 *Sports Illustrated* 124, 125 (Nov. 5, 1990), available in LEXIS, News Library.

shoving taking place on the high post.

Dworkin would certainly have been disabused of his notion that games are rule dominated had he ever sat in on one of the many meetings licensed officials are required to attend. Every local officiating board has an officer called the "interpreter." The interpreter of the high school basketball board in New Haven consistently spoke of "our Board's *philosophy*" (emphasis in original). Other occupants of that office used similar phrases to describe a referee's orientation to the rules. The central point of every meeting was that rules should be enforced so that neither team could gain an unfair advantage. Far more time was spent discussing and debating what constituted an unfair advantage than precise fact situations. Disputes existed between and within boards over how certain rules should be interpreted. Basketball officials in Long Island believed that teams gained an unfair advantage whenever an offensive player stayed in the three second lane for more than three seconds; basketball officials in Connecticut believed that teams gained an unfair advantage only when that offensive player had the ball or was seeking to gain the ball. The debates over the merits of strict versus loose construction of the laws of basketball that take place in the bars officials hang out in after games are much the same as the ones in the law reviews.

Dworkin was unaware of all these aspects of sports officiating when he wrote *Taking Rights Seriously*. Most games, from little league baseball to professional basketball, would neither be as fun nor as recreational if sports officials understood their responsibilities as enforcing rules rather than as preventing teams from gaining unfair advantages in ways not intended by the laws of the game. *Taking Rights Seriously* may have important things to say about how legal judges ought to make decisions. After publishing that work, Dworkin was invited to occupy numerous prestigious legal chairs and give many prestigious legal lectures. To the best of my knowledge, however, he was never asked to referee a major league (or even an amateur) sporting event.

## II. LAW, SPORTS OFFICIATING AND OTHER INTERDISCIPLINARY LEGAL STUDIES

The merits of Dworkin's theory of judging do not depend on his evaluation of sports officiating. Differences between the purpose of various games and national constitutions may warrant treating similar language as expressing a rule for one en-

deavor and a principle for the other. Whether "Congress shall make no law abridging the freedom of the speech" should be interpreted as stating a legal rule or legal principle does not intuitively depend on whether "a player in an offside position is only penalized if he or she is interfering with play" should be interpreted as a soccer rule or soccer principle. If the best understanding of the practice of law requires treating certain text as expressing a general principle, then legal practices should not be altered merely because the best understanding of some other practice might justify treating an analogous text as expressing a rule.

Specific orientations in one enterprise do not entail any specific orientation in the other. Some lawyer/sports officials may think ambiguous texts or practices should be regarded as expressing rules for games but principles for law. I tried to adhere to the rule book definition of "strike" because I believed having all umpires treat the relevant provision as a rule would best ensure that the pitch I called a strike in New Haven on Monday was also called a strike in Bridgeport on Monday and in New Haven on Thursday. Supreme Court decisions, however, being made as a group, will be relatively consistent even if each Justice interprets ambiguous text as expressing principles, as long as each Justice applies those principles consistently. Dworkinian forms of interpretation will mean that the United States Supreme Court in 1999 may not interpret the constitution in the way that text was interpreted in 1899 or in the way the Israeli Supreme Court in 1999 interprets identical text in the Israeli constitution. These inconsistencies strike me as less damaging to constitutionalism than inconsistencies from game to game in the strike zone are to the enterprise of baseball. Nevertheless, another lawyer/sports official might think that the game of baseball would be fairer and more interesting to spectators if some games were officiated by hitter's umpires and others by pitcher's umpires, but that rule of law considerations require that the meaning of the Eighth Amendment not vary over time. In short, theories about how a good umpire should interpret the strike zone will not help scholars predict or determine how a good Supreme Court Justice should interpret the First Amendment.

*Taking Rights Seriously* may demonstrate how lawyers sometimes gain valuable insights into the law even when they make erroneous comparisons with other professions. A scholar might develop insights into the ways in which lawyers counsel clients by comparing legal counseling to psychological counsel-

ing, even if the scholar's conception of psychological counseling is wrong. That a scholar who began with a correct model of psychological counseling would develop a better understanding of legal counseling than a scholar who worked from a faulty psychological model is not entirely clear. Inspired by *Persuasion and Healing*, I might write a path breaking essay demonstrating that much of legal counseling serves to boost morale, a thesis that might in no way depend on whether Jerome and Julia Frank are correct when they claim most psychotherapies function by bolstering morale.<sup>25</sup> For all we know, the inspiration for Dworkin's extraordinarily influential theory of legal judging may have been his wildly inaccurate characterization of sports officiating.

Still, Dworkin's foray into law and sports officiating offers cautionary lessons for law professors thinking about embarking on a similar expedition into other heavily charted fields. The most obvious lesson is that persons who write articles having only a casual acquaintance with their subject-matter are likely to make claims that are wrong, claims that no suitably certified expert in the field would take seriously. The more subtle lesson is that lawyers who write on interdisciplinary subjects will miss those unique features of their non-legal subject that might actually teach them something about the law, if all their work does is impose legal categories on non-legal subjects.

The probability of error is particularly high when law professors write on non-legal subjects. Their works are usually reviewed only by other law professors or law students. Not only was Dworkin not a "suitably certified expert" in sports officiating, but a good probability exists that no "suitably certified expert" in sports officiating read *Taking Rights Seriously* in manuscript, reviewed that book for a press, or subsequently commented on that work in a scholarly or popular forum. Given the law review preference for bold theses and the tendency for other academic disciplines to recognize shades of gray, the quality of the non-legal scholarship in an essay submitted to a law review may have little or even an inverse relationship to the probability of a publication offer.

Law professors without substantial expertise in their interdisciplinary subject are prone to write pieces which resemble the book report Linus writes in *You're a Good Man Charlie Brown*,

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25. Jerome David Frank and Julia B. Frank, *Persuasion and Healing: A Comparative Study of Psychotherapy* (Johns Hopkins U. Press, 3d ed. 1993).

a report which after a thoughtful analysis of *Robin Hood* merely concludes that "*Peter Rabbit* was like that too." Dworkin assumed that the model of law set out by legal positivists correctly described what a sports official did, and that the way judges understood legal rules could describe the way other authorities understood the rules of their activities. At no point in *Taking Rights Seriously* is there a hint that rules in some activities might be implemented and enforced in ways not captured by any extant model of legal behavior. As a result, Dworkin's belief that sports officials largely apply facts to preexisting rules is based on a failure to perceive fundamental differences in the way legal and sports norms are applied, differences that might have been obvious had Dworkin thought more seriously about the context in which sports norms are enforced.

Justices decide controversies according to law, while sports officials are better understood as declaring how various laws apply to particular instances. Many differences between legal judging and sports officiating reflect this difference between adjudicatory and declarative functions. Judges make decisions only when a legal disagreement exists and at least one party pays the expenses necessary to bring the controversy to court. If the parties to a contract agree that each has performed their contractual obligations, the legal system does not get involved. Sports officials are far more proactive. The umpire declares whether every pitch is a strike. The umpire must verbally and physically call a pitch a strike even if every player and every fan agrees that the pitch was a strike. Indeed, umpires sometimes call pitches strikes when every player and fan thinks the pitch a ball, a situation which generally does not occur in law. Legal judges would behave more like sports officials if every time one party to a bargain attempted to perform some contractual duty, a judge was always in place to rule "performed" or "unperformed." Sports officials would behave more like legal judges if, instead of standing behind home plate, the lead umpire had an office on the other side of town and only settled controversies between two teams when the aggrieved party was willing to hire a lawyer to present an appeal.

Consider, for example, if the Paula Jones lawsuit against President Clinton had been resolved by a sports officiating model of enforcing laws. First, an official would have been in the hotel room, thus avoiding most of the evidentiary problems both sides faced when trying to prove their version of the facts. Second, the official would have immediately ruled "legal" or

“harassment,” as well as instantly enforcing any penalty should harassment be found. This would have prevented all the uncertainties the actual Jones litigation caused, and enabled the political game to go on uninterrupted. Finally, and perhaps most important, Paula Jones would not have had to meet a very expensive “de facto counsel requirement” in order to have her day in court.<sup>26</sup> Rather, an umpire would always be in place to penalize any powerful person who sought to take legal advantage of a less powerful individual. Privacy (and expense) no doubt explain why judges do not hang around on every street corner (and in every hotel room), but had Dworkin done a serious comparison between legal judging and sports officiating he might have highlighted some of the costs a society pays for foregoing this more intrusive model of law enforcement.

This more serious study of how the rules of various games are enforced would also have revealed why sports officials make more fact decisions than legal judges—Supreme Court Justices, in particular. Most legal systems farm out controversial fact-finding to other legal actors. Appellate judges frequently concentrate on controversies over legal rules because controversies over fact are expected to be resolved by the trial judge or jury. Sports officiating does not exhibit this division of labor. Baseball umpires are expected to resolve all controversies that arise in a game. In this respect, their balance of decisions more reflects that of trial judges in cases without juries than Supreme Court Justices who frequently sit in cases where the facts are stipulated.

Dworkin was mistaken when he claimed “[r]ules are applicable in an all-or-nothing fashion.” Police officers do not attempt to resolve every crime. Studies suggest that police officers do not even pursue half the crimes they personally witness.<sup>27</sup> Prosecutors exhibit similar discretion, either failing to prosecute offenses or prosecuting a much lesser offense than the facts might warrant. If appellate judges tend to apply rules in an all-or-nothing fashion, the reason may well be that the legal system avoids problems that strict enforcement of the rules would bring by vesting the necessary discretion in non-judicial law enforcers.

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26. On the “de facto counsel” requirement, see Susan E. Lawrence, *The Poor in Court: The Legal Services Program and Supreme Court Decision Making* (Princeton U. Press, 1990).

27. See generally Albert J. Reiss, Jr., *The Police and the Public* (Yale U. Press, 1971); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *Yale L.J.* 543 (1960).

Sports officials, by comparison, combine the function of police officer, prosecutor, witness, jury, and judge, in a system where there is very little meaningful appeal. A good sports official must be "a little bit blind and a little bit deaf" for the same reason a good police officer should exhibit those virtues, but perhaps not a good Supreme Court Justice.

The virtue of interdisciplinary studies is closely related to the virtue of comparative studies. By recognizing how different societies and enterprises organize various activities, scholars may gain much needed perspectives on their own societies and activities. Lawyers may learn that the American legal system is not the only way to enforce laws, better appreciate the reasons why legal judges behave differently than sports officials, and even gain insights that may enable legal models to acquire some of the benefits of the sports officiating approach to rules. None of these advantages can be realized, however, if interdisciplinary studies follow the model set out in *Taking Rights Seriously* and merely slap legal categories on non-legal subjects.

### III. REPEATING DWORKIN'S MISTAKES

How pervasive Dworkin-like mistakes are in interdisciplinary legal scholarship is impossible for one person to assess. No one is a "suitably certified expert" in all the fields that law professors have invaded in recent years. The best I can do in most cases is report that friends who are suitably certified experts in various fields are rarely impressed by the quality of legal scholarship that trenches on their area of expertise, and comment a bit on a recent foray into my purported area of expertise, political science.

In the prestigious "Foreword" to the 1996 Harvard Law Review, Cass Sunstein distinguishes his approach to judicial review from that previously advocated by Alexander Bickel partly by asserting that "Bickel's belief in 'prudence' was based on a generalized fear of political backlash, and not on social scientific evidence."<sup>28</sup> Citing Gerald Rosenberg's *The Hollow Hope*, Sunstein proclaims "[w]e now know that it may be counterproductive for the Court to insist on social reform even if the Court is right."<sup>29</sup> Later in the essay, Sunstein cites Rosenberg for the

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28. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 8 n.8 (1996).

29. *Id.*



propositions that “[t]he Court may not produce social reform even when it seeks to do so,” and that the court “may instead activate forces of opposition and demobilize the political actors that it favors.”<sup>30</sup> Law professors may question whether “Bickel’s belief in ‘prudence’ was based on a generalized fear of political backlash” or on the political events Bickel personally witnessed during the 1950s and 1960s.<sup>31</sup> Political scientists, on the other hand, will recognize the extraordinarily primitive characterization of the social science evidence that Sunstein thinks supports his notion of judicial minimalism.

Sunstein is wrong to think that social science evidence of the sort Rosenberg presents was not available to Bickel. As Rosenberg acknowledges in his introduction, his model of the Constrained Court is “well-established” both “functional[ly] and historical[ly].”<sup>32</sup> To a good degree, *The Hollow Hope* compares the traditional social science understanding that the Supreme Court plays only a limited role in American politics<sup>33</sup> with the traditional legal view that the Court can create dramatic legal change, with traditional social science by and large emerging victorious. Rosenberg reports that his findings are treated with scepticism in law schools, but that the more common response among political scientists has been “what’s new.”<sup>34</sup>

Sunstein also relies on a substantially over-simplified version of the Rosenberg thesis. Rosenberg does believe that “the Court may not produce social reform even when it seeks to do so,”<sup>35</sup> but this weak claim standing alone would hardly justify the importance of *The Hollow Hope*. Much of the originality of that work lies in the various conditions Rosenberg claims explain and predict the (numerous) circumstances when litigation campaigns do not produce much social change and the (relatively rare) cir-

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30. Id. at 33.

31. For discussions of the political backlash to judicial decisions in cases concerning segregation and the rights of alleged Communists, see Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7 (1994); Walter F. Murphy, *Congress and the Court: A Case Study in the American Political Process* (U. of Chicago Press, 1962).

32. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 3 (U. of Chicago Press, 1991).

33. See, e.g., Robert G. McCloskey, *The American Supreme Court* (revised by Sanford Levinson) (U. of Chicago Press, 2d ed. 1994).

34. Gerald N. Rosenberg, *Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann*, 17 L. & Soc. Inquiry 761, 764, 776 (1992).

35. See Rosenberg, *The Hollow Hope* at 336 (cited in note 32) (noting “the mostly disappointing results of attempts to use the courts to produce significant social reform”).

cumstances when they do.<sup>36</sup> These conditions play no explicit role in Sunstein's analysis, have little to do with judicial minimalism in general, and often suggest different conclusions in particular cases than those Sunstein reaches. Rosenberg suggests that judicial decisions may create much social change if they can be implemented by private market forces.<sup>37</sup> This claim might justify broad judicial decisions protecting commercial advertising, but Sunstein advocates judicial minimalism in that area of constitutional law.<sup>38</sup> Sunstein supports judicial decisions expanding the rights of women, even though Rosenberg has a chapter claiming that such cases have done virtually nothing to improve gender equality.<sup>39</sup> Sunstein does not support judicial activism in welfare rights cases, even though some social scientists have found that judicial decisions protecting the poor have had a significant and beneficial impact.<sup>40</sup>

Finally, Sunstein betrays no awareness that Rosenberg's findings are controversial. *The Hollow Hope* is an extremely important work within political science, but not the last word. Some scholars claim that Rosenberg's data are wrong,<sup>41</sup> and others claim that litigation campaigns have had positive effects on social reform that Rosenberg missed.<sup>42</sup> My study of abortion found that backlash occurred whenever pro-choice forces won victories in any forum.<sup>43</sup> Hence, contrary to Sunstein's claim, backlash is not uniquely associated with litigation campaigns.<sup>44</sup> Rosenberg has responded to some of these criticisms, and the

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36. *Id.* at 35-36.

37. *Id.* at 195-201.

38. Sunstein, *Leaving Things Undecided* at 82-86 (cited in note 29).

39. Compare Sunstein, *Leaving Things Undecided* at 72-79 (cited in note 29) with Rosenberg, *The Hollow Hope* at 202-65 (cited in note 32).

40. Compare Cass R. Sunstein, *The Partial Constitution* 138-39 (Harvard U. Press, 1993) with Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 Ohio St. L.J. 731, 787-88 (1997) (citing numerous empirical studies of the impact of judicial decisions on the poor).

41. Roy B. Flemming, John Bohte, and B. Dan Wood, *One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947-92*, 41 Am. J. of Pol. Sci. 1224, 1229-30 (1997).

42. Michael W. McCann, *Rights at Work: Pay Equity and the Politics of Legal Mobilization* (U. of Chicago Press, 1994); R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (Brookings Institution, 1994); Mark A. Graber, *Rethinking Abortion: Equal Choice, the Constitution, and Reproductive Politics* (Princeton U. Press, 1996).

43. Graber, *Rethinking Abortion* at 125-26 (cited in note 42).

44. Do the backlash elections of 1874 (against Reconstruction), 1938 (against the New Deal), and 1966 (against the Great Society), indicate that reformers ought to avoid major legislation or constitutional amendments? Does the failure of the Populist movement demonstrate that progressives should not rely on mass movements to achieve social change?

debate goes on.<sup>45</sup> The important point is that the influence of judicial review on social reform is contested in political science and every political scientist knows that. No serious social scientist would base a theory of the judicial function on *The Hollow Hope* without incorporating the conditions of judicial efficacy set out in that work or without at least acknowledging some of the criticisms that have been made of Rosenberg's claims.

Sunstein has improved upon Dworkin in that he has at least read, perhaps too superficially, a major work in his non-legal field. Had "Leaving Things Undecided" simply reminded lawyers that legal victories do not necessarily produce social change, Sunstein would have correctly stated social science wisdom. Neither *The Hollow Hope* in particular nor the political science literature on judicial capacity in general, however, provide strong support for Sunstein's normative agenda. Significantly, conventional wisdom in social science also maintains that social change is hard to produce by any means, particularly in a society such as the United States where power is highly fragmented.<sup>46</sup> Witness the limited success of the War on Poverty, which was largely fought on non-legal terrains. Unfortunately, rather than engage seriously with this social science literature on implementation or judicial capacity, Sunstein pronounced as authoritative one social science work and simplified that work's findings to fit conclusions reached on non-social science grounds. The result, to paraphrase all the relevant phrases, is "usable political science,"<sup>47</sup> "law-office political science,"<sup>48</sup> or "political-science lite."<sup>49</sup>

#### IV. RETHINKING "LAW AND X" STUDIES

While the male leads in Gilbert and Sullivan's *The Gondoliers* originally claimed to be "against kings," they quickly emphasized that they meant to say only that they were "against bad kings." Similarly, when this essay inveighs against interdisciplinary legal scholarship, I mean only to inveigh against bad inter-

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45. The most recent development in the saga of Rosenberg versus his critics is David A. Schultz, ed., *Leveraging the Law: Using the Courts to Achieve Social Change* (Peter Lang, 1998).

46. The classic study here is Jeffrey L. Pressman and Aaron Wildavsky, *Implementation: How Great Expectations in Washington are Dashed in Oakland* (U. of California Press, 1973).

47. See Cass R. Sunstein, *The Idea of a Usable Past*, 95 Colum. L. Rev. 601 (1995).

48. See Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 122.

49. See Martin S. Flaherty, *History 'Lite' in Modern American Constitutionalism*, 95 Colum. L. Rev. 523 (1995).

disciplinary legal scholarship. Significant risks are associated with interdisciplinary scholarship of any sort, but boundary lines between disciplines are highly artificial and important questions will not be asked should all scholars stick too closely to the norms of their home field.

Still, reason exists for thinking that law professors who do interdisciplinary legal scholarship are particularly likely to do bad interdisciplinary legal scholarship. The refereeing process in law reviews is much less likely than the refereeing process in other academic journals to catch factual and conceptual mistakes. A law professor who submits an essay on law and anthropology to a law review is likely to have that essay reviewed by second and third year law students who may know nothing about anthropology. An anthropologist who submits an essay on law and anthropology to an anthropology journal is likely to have that essay reviewed either by other anthropologists recognized to know something about law or perhaps even by a law professor. More generally, different Ph.D. programs are likely to be more similar to each other than to J.D. programs. Ph.D. programs that train most of their students to become professors are likely to teach scholarly norms differently than J.D. programs that train most of their students to become practitioner/advocates. All things being equal, therefore, a professor with a Ph.D. in one discipline is more likely than a professor with a J.D. to be aware of what must be done to meet or approximate the professional standards of another discipline.

Nevertheless, Levinson and Balkin are right to maintain that one need not "be an 'expert' in an area in order to have interesting things to say."<sup>50</sup> Scholarly articles in one discipline frequently cite scholarship in another as providing important insights. Law professors have made numerous contributions to many non-legal fields, including Dworkin on political philosophy, David Rabban on the history of free speech,<sup>51</sup> and the numerous contributions of the Wisconsin Law School to law and society.<sup>52</sup> Still, as the example of Dworkin on sports officiating

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50. Levinson and Balkin, 139 U. Pa. L. Rev. at 1602-03 (cited in note 8).

51. David M. Rabban, *Free Speech in its Forgotten Years* (Cambridge U. Press, 1997).

52. See, e.g., Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95 (1974). Galanter is currently the John and Rylla Bosshard Professor of Law at the University of Wisconsin Law School. Levinson and Balkin are omitted from this list only because, having done graduate work in political science and philosophy, respectively, both qualify as "suitably qualified experts" in many of the non-legal fields in which they have produced important work. See

and Sunstein on political science suggest, merely being a very distinguished law professor does not guarantee that one will “have interesting things to say” about non-legal matters, except in the important sense that many people are interested in anything certain celebrity academics say. The important question for serious interdisciplinary scholarship is how much expertise one needs “in order to have interesting things to say.”

Martin Flaherty suggests one standard when he insists that if for understandable reasons law professors cannot do original research in their chosen non-legal field, they should at least be “reading one or two dozen of the acknowledged leading books” or articles on their subject matter.<sup>53</sup> Certainly Dworkin would have benefitted from better grounding in sports officiating and Sunstein from a fuller appreciation of the political science literature on judicial capacity and implementation. Still, the Flaherty standard needs supplementing. The best test of whether a person has “interesting things to say” on an academic subject is whether many experts on that subject agree that what is being said is interesting. Law professors contemplating serious interdisciplinary scholarship should take the steps necessary to begin a real engagement with leading members of the non-legal discipline. The American Political Science Association provides many conferences, journals and other sites for law professors to discover whether they have interesting things to say about political science. Other disciplines provide similar fora that are almost always open to academic lawyers. Those scholars who have actively participated in these fora have produced important interdisciplinary work. Law professors who do not usually write nonsense.

Ronald Dworkin’s work on sports officiating and the law demonstrates the need for a greater cross-fertilization between persons doing interdisciplinary studies than has been the case. Instead of inviting members of other fields to write for law reviews, law professors should consider first submitting their interdisciplinary work to journals in the other fields. Even if the work is rejected and eventually published in a law review, the comments will help law professors learn whether they have a sufficient understanding of the field to make their comments academically interesting. Those of us in non-legal fields should take

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Sanford Levinson, *Constitutional Faith* (Princeton U. Press, 1988); J.M. Balkin, *Cultural Software: A Theory of Ideology* (Yale U. Press, 1998).

53. Martin S. Flaherty, *The Practice of Faith*, 65 *Fordham L. Rev.* 1565, 1575 (1997).

advantage of invitations to publish in law reviews. While most non-legal academics have grave reservations about the quality of scholarship in law reviews, the blind review process also has flaws that may discourage bolder scholarship in favor of accurate descriptions of the insignificant. All participants to debates over legal matters will benefit from varying the types of journals they write for. Following the model established by *Law & Social Inquiry* and the *Law & Society Review*, constitutional theorists might consider organizing or reorganizing a journal for academic lawyers and scholars in other fields who take the concerns of the others seriously. Articles might be reviewed for accuracy and originality by both lawyers and non-lawyers. As the true founder of the "law and sports officiating movement," I would be called upon to validate any sports metaphor that a casual fan attempted to slip into serious constitutional theory.