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Postmodernism and Dworkin: The View From Half-Court

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Adam Winkler and Joshua Davis

Abstract

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Adam Winkler
Joshua Davis*

INTRODUCTION

The¹ most celebrated rule in all of basketball is the Half-Court rule. The most celebrated issue in recent legal scholarship is interpretive theory, particularly the perspectives offered by the foremost legal philosopher in America, Ronald Dworkin, and the postmodernist critical legal scholars. Each of the interpretive theories may be illuminated by considering how they would affect adjudication in basketball relating to the Half-Court rule. This Essay undertakes this task, first examining Dworkin's "interpretive turn," and then that of the postmodernists. For the sake of simplicity, it addresses these topics in reverse order.

In Part I of this Essay, we present the first part of our argument. In Part II, we present the next major aspect of our argument. In Part III, we include all the stuff that we thought of but which did not fit into the major parts of the argument presented in the first two parts. Finally, in the conclusion, we conclude our Essay.

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Special mention goes to Bruce Ackerman, whose *WE THE PEOPLE* (1991), neither we nor anyone we know has actually read, despite frequent claims to the contrary.

1. "The" is a word used to mark the noun that immediately follows as definite. Its use can be witnessed in many overly important, indulgent works of philosophical or legal scholarship. *See generally* JOHN RAWLS, *A THEORY OF JUSTICE* (1971); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). *But see* H.L.A. HART, *THE CONCEPT OF LAW* (1961) (egoistically and hubristically positivist).

PART I

A. *The Half-Court Rule*

Before engaging the interpretive theories of law provided by Dworkin and the postmodernists, it is essential that the reader have some notion of the Half-Court rule in basketball and how it gives rise to interpretive problems.² As this is the Air Jordan decade,³ it is safe to assume that just about everybody knows the intricacies of the Half-Court rule. For those who don't have an intimate familiarity with basketball theory or practice,⁴ some introduction is necessary however. When a team is in the "offensive position"⁵—i.e., with possession of the ball and looking to score a basket—it is limited in its movement by the body of rules⁶ which together are known as the Half-Court rule.⁷ (In addition, basketball has a whole host of other rules limiting offensiveness.)⁸ The Half-Court rule essentially forces the team in the offensive position to advance the ball quickly out of one half of

2. Cf. *United States v. Carolene Products Co.*, 304 U.S. 144, 153-53 n.4 (Why not? It's used as a source for everything else in law.).

3. See Nike Superstore, Chicago, Ill. (incredibly indulgent shrine to his Airness); Wheaties' Box Cover, Safeway Supermarkets, at aisle 7 (cereals, Pop Tarts®, dried pastas, and frozen halibut filets). *But see, id.* at aisle 2 (non-alcoholic beer, smokeless tobacco, margarine, Egg Beaters®, Equal™, and decaffeinated coffee).

4. Basketball practice is from 4-7 p.m., Monday, Wednesday, and Friday. It consists of drills.

5. Obviously, we are indebted to John Rawls, whose "original position" serves as the model for the "offensive position." See RAWLS, *supra* note 1.

However, it is important to note that the "offensive position" has no relevance to the "positions" discussed in RICHARD POSNER, *SEX AND REASON* (1992).

6. A rule is not to be confused with a norm which, as a rule, presumes presumptions with sufficient regularity as to render a rule—whether called a rule or a norm—a norm, albeit a norm of some regularity. Although the ruling norm regulating the standard of presumptions of rule-based regimes (i.e., regimes regulated by rules) presumes some irregularities, rules are the norm, while norms cannot regularly be ruled out. This rule of norms is stated with similar persuasiveness in Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1096 (1989) ("Rules are good because I'm ruling.").

7. See generally *The Official NBA Rules*, in *THE OFFICIAL NBA BASKETBALL ENCYCLOPEDIA* 363-391 (Zavier Hollander & Alex Sachare eds., 1989) [hereinafter *Official NBA Rules*, in case anyone would have been confused].

8. Hence the strict rules proscribing "unsportsman-like conduct" (i.e., roughly fouling a player intentionally, cursing at the referees, failing to pick up a player's fallen hanky). Cf. MARTHA STEWART, *COURTING SUCCESS: FATHOMABLE BEHAVIOR & A HOT GLUE GUN* (1989).

the court into the other, and, once successful, to keep the ball there until that team loses possession or scores. If the ball crosses back over the half-court line, the offensive team loses possession.

As is readily apparent, the key to the Half-Court rule is the determination of which court the ball is in at any given moment. One factor in making this determination is visual appearance: in which court does the ball look to be in?⁹ As with any legal code, however, there are more sophisticated guidelines governing important decisions, particularly if the answer might otherwise seem obvious. Common sense can rarely be trusted with providing proper answers to complex problems of interpretation. Basketball has three main rules to determine the location of the basketball:

Rule of Backcourt Contact:¹⁰ The ball is in the backcourt if it is in contact with either (i) the backcourt itself, or (ii) a player located in the backcourt.¹¹

Broken Plane Rule: The ball is considered in the frontcourt "once it has broken the plane of the midcourt [i.e., half-court] line, and not in player control."¹² The Broken Plane rule does not apply if a player has affirmative control of the basketball.

Rule of Prior Status: When the ball is not in contact with either a player or the court, it retains the same status as when it last touched a player or the court.¹³ The one exception is created by the Broken Plane rule: A ball that crosses the half-court line without any player having control over it is deemed to be in the frontcourt, even if the last player who touched it was in the backcourt, and even if the basketball itself last touched the backcourt.

9. The authors are grateful to the newspaper guy on Sixth Avenue for making this point. Actually, he said, "Kid, you look at that magazine every day and then you always put it back. When are you going to buy the thing?" But we understood what he meant.

10. The terminology is ours. Although the rules portrayed are real, their names have been changed to protect the innocent.

11. *Official NBA Rules*, *supra* note 7, § VI(c).

12. *Id.* § VI(f).

13. *Id.* § VI(d).

So, as you can see, figuring out the difficult question of "which half of the court is the ball in" is made simple by the Half-Court rule.

B. *The Interpretive Quagmire: An Example of the Half-Court Rule In Practice*

To highlight the interpretive problems posed by the Half-Court rule it will be useful to give an example of a case—a factual situation—that requires judicial resolution. Several years ago, there was an interesting case involving Minute Bowl, a 7'6" center on the Washington Bullets. It was the Big Game, the final game of the championship series, and the Bullets were leading the New York Knickerbockers by a single point with twenty seconds left to play.

The ball was inbounded to Bowl, who, as a rather tall center, had never before dribbled the ball in a professional game. Yet on that fateful day with the pressure on, Bowl began to dribble the ball towards half-court. On account of his height and inexperience, Bowl's effort was awkward as his arms flapped about wildly and the ball bounced this way and that. To some, it even seemed that the ball was dribbling Bowl. Just before crossing the half-court line Bowl stopped his forward motion, though apparently he tried to continue dribbling the ball. After the ball bounced in the Bullets' backcourt, it rose up, and at its apex, had crossed the plane of the half-court line, at which time Bowl's hand reached across the line and slapped it back to the surface of the backcourt. A referee blew his whistle immediately, signaling a violation of the Half-Court rule.

As a general matter, this example demonstrates how the interplay of the Half-Court rule's provisions makes the issue of Minute Bowl's *control* determinative. If Bowl did *not* have control, there was a half-court violation. According to the Broken Plane rule, once an uncontrolled ball crosses the plane of the half-court line, it is in the frontcourt. Thus, when Bowl, who was touching only the backcourt, extended his long arms across the line and batted the ball back across the half-court line into the backcourt, the ball went from the backcourt to the frontcourt and back to the backcourt again. The result was a violation, the Bullets lose possession and, indeed, the whole game.

Alternatively, if Bowl did have control, there was no violation and the whistle was blown in error. Under the rule of Prior Status, a ball not in contact with a player or the court retains the same status it had when last touched by a player or the court. In this case, the ball was last touched by Bowl when he was in the backcourt, and it last touched the backcourt half.

Although the ball then crossed the plane of the half-court line, that would not matter, for it retains its prior status of being in the backcourt. When Bowl reached across the line and hit the ball back across the half-court line, he remained in the backcourt (having not been in contact with the front-court). The resulting dribble was therefore from the backcourt to the backcourt and no violation took place.

The resolution of this situation may seem obvious enough to the reader. Nevertheless, it can be made substantially more complicated, and thus can serve as a foil for postmodernist and Dworkinian interpretation.

PART II

A. *The Postmodernist Perspective: An Exercise in Privileged Hermeneutic Strategies for a World of Closure*

The veneer of neutrality that pervades and overwhelms basketball adjudication is as dense as it is resilient. Referees—judges whose striped wardrobe is intended to give the appearance of constrained imprisonment¹⁴—will pay nothing more than lip-service to the idea of fairness and competitive equality.

The outcome of the dispute will obviously turn instead on the subjective values of the referees. No referee can make a decision without the infiltration of values into the interpretation of the "facts," rules, or precedents. Faith in neutral referees is a hoax¹⁵ perpetuated by a situated elite, for whose advantage the "neutrality" works. This is the "aspiration to objectivity," by which the normative ordering of our universe—our *nomos*¹⁶—is given direction and intentionality. By way of its systemic impact on our juridical framework, the aspiration of mechanical adjudication transforms our search for personal meaning through our shared "texts"—i.e., the corpus or canon of constitutive narratives of commonality.

14. For a discussion and analysis of the long cultural genealogy of symbolic body-scarring, see BERTRAND DE MORIEULLEQUEIER, *THE COMPLETE DETAILED THOROUGH SOCIO-CULTURAL HISTORIOGRAPHY OF CUTTING ONE'S FLESH FOR COMMUNICATIVE AND EXPRESSIVE REASONS* 87-784 (Mitchell Duneier trans., 1943).

15. Cf. PUBLIC ENEMY, *911 Is A Joke on FEAR OF A BLACK PLANET* (1991) (censored by Tipper Gore).

16. See Robert Cover, *The Supreme Court 1982 Term—Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (Who else?).

Just as certainly as Milla and Treubner were destined to toil together forever in Verge's evocative poem, the claim of neutral, objective judging is false and misleading. Every one of us, including judges, constructs our reality through our own subjective vision. Subjectivity is the lens, the object through which the subject constructs an objective construct despite the impossibility of objectivity, even subjectively, without an objectionable prior construction of how one constructs objects objectively. At least, that's my opinion.

A fundamental contradiction underlies the sport of basketball, obscuring the process by which the referees will decide whether Minute Bowl violated the Half-Court rule. When the sport is subjected to Derridian deconstruction,¹⁷ there is a deep, irreconcilable, irreducible, irremediable, and irresolvable contradiction in rhetorical arguments at the base of the Half-Court rule, each argument mandating a distinct outcome. On one hand, there is the rationale of "Fair Competition,"¹⁸ which encompasses equal opportunity and impersonal dispute resolution based solely on the facts and the relevant rules. But the Fair Competition rationale is a mirage, a "disorientation" (from the Swedish-Aboriginal *desurien*, meaning "to mirage," "to disorient").¹⁹

This argument masks its contradictory counter-part, the opposing rhetorical argument that inevitably suppresses the impulse towards Fair Competition to the disadvantage of the exploited and the marginalized outsiders (the players and fans, respectively). This contradictory value is Entertainment for Profit. Basketball is a money game,²⁰ by which entertainment disguised as competition is sold for big bucks to the ever-hungry consumer whose individuality has been turned into passivity and indifference. The result is intellectual atrophy, as the dominant power structure satiates us with the violence of a slam-dunk.

17. On deconstructionism, see JACQUES DERRIDA, *OF GRAMMATOLOGY* (1974). See also every issue of the *Yale Law Journal* since then.

18. The capital letters used here are meant to mock the whole process of linguistic marginalization that results from the use of upper-case letters. See, ANNINE DECEW, *THE LANGUAGE OF OPPRESSION* (1982) (recognizing the relation between the use of capital letters and capitalism).

19. See *THE MAD, MAD WORLD OF ETYMOLOGY* 57 (Noel Wise ed., 1986).

20. Cf. the works of RICHARD POSNER: *ECONOMIC ANALYSIS OF THE LAW* (1982) (a detailed and thorough analysis); *CARDOZO: A STUDY IN REPUTATION* (1990) (an excellent historical study); *THE PROBLEMS OF JURISPRUDENCE* (1987) (an insightful philosophical discussion); *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988) (a beautifully written work of elegant prose); *SEX AND REASON* (1992) (a f***ing great book).

In determining the outcome of the Minute Bowl incident²¹ the referees will rule in whatever direction is most compatible with the value of Entertainment for Profit. As adjudicators employed by the league, they will maximize profitability, and thus protect their own institutional position. (Foucault and Wittgenstein are, of course, the major influences on various conclusions,²² though perhaps not this one.)

Although the referees will claim that control is the determinative issue, this is clearly wrong. There can be no such thing as control over the ball, whose behavior is affected by a wide variety of sources, the least of which is the basketball player. To claim Bowl's agency is to engage in a delusion, as Bowl's actions will be determined by the influence of the prevailing socio-economic structures and strictures. There is no individual freedom, and each of us is nothing more than malleable clay in a fictionalized universe.²³

As for the precise outcome of the Minute Bowl dispute as analyzed through the prism of postmodernism, I have no time for such precise details; I deal only with larger issues.

B. Taking Basketball Seriously: The Correct Liberal Perspective

For the sake of clarity, a few definitions must precede any substantive discussion of the Half-Court rule.²⁴ The approach adopted in this section is not interpretive (that is, it is not interpretive in the sense that understanding text is a mechanical act of interpretation) but is rather non-interpretive (that is, it is interpretive in the sense that text cannot be properly understood

21. *Incident* is the French word that roughly translates into the English "incident," however, with an additional "Je ne sais quoi," if you know what I mean. See, e.g., JOHN AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962) (on "illocutionary" and "locutionary" speech acts). But see JOHN SEARLE, *SPEECH ACTS* (1969) (using "illocutionary" and "locutionary" but rejecting the distinction).

22. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 56 (1978) ("And then I beat myself viciously about the face and neck."); LUDWIG VON WITTGENSTEIN, *GEISFELLSCHAFTEN UND SCHNITZENGRUBEN* (James Zagel trans., 1981).

23. I wish to make it quite clear that I did not desire to write this. I was forced by my upbringing and society to write this sentence. If I had been truly free, I would have written, "Maladavia's abundant natural resources are its primary attraction for tourists."

24. Unlike my esteemed brethren, I am not afraid to use capital letters. See note 18 *supra*. I might note that although my colleague mocks the use of such notation, he employs it to add pomp and circumstance to his own title, viz., "The Postmodernist Perspective," as well as at the beginning of every sentence.

without recourse to values external to the text). Of course, interpretation of a sort must always occur, and I will use the transparent terms interpretive and non-interpretive to distinguish between the two sorts of interpretation described in this paragraph.

One further discussion is necessary at the outset. In basketball, it is essential to distinguish between receipt of the ball and its reception. Receipt is the general concept of having gained control of the ball. Reception is one particular conception of the term receipt. Now, how are we to understand the concept of receipt in the context of basketball or, more precisely, in its application to the Half-Court rule, that is, what is our best conception of reception?

To decide this, we must unearth the principles that lie beneath the Half-Court rule. Here the *Official NBA Rules* are of some assistance. The section entitled "Guides for Administration and Application of the Rules" offers guidance in administering and applying the rules. It states:

The restrictions placed upon the [basketball] player by the rules are intended to create a balance of play; equal opportunity for the defense and the offense; to provide reasonable safety and protection; and to emphasize cleverness and skill without unduly limiting freedom of action of player or team.²⁵

Thus, the principles behind the Half-Court rule, and behind all rules of basketball, are balance, equal opportunity, safety, constrained adroitness, and unfettered locomotion.²⁶ In deciding which of these principles will govern

25. *Official NBA Rules*, *supra* note 7, Comments on the Rules, § I, at 387. The fact that I can refer to this section as objectively applicable undermines the assertion that a rule can never be applied neutrally. To see the potential clarity of a linguistic reference, consider the following two lines of text:

that

that that

Notice that that that that is on the first line precedes that that that that is on the second line. If I were to say, "Please point to that that that that precedes," you would be forced to point to the second line. Alternatively, if I were to inform you that that that that that that follows is green, you would know with certainty that that that that is on the first line is green. My partner would deny the possibility of such a clear and objective interpretation.

26. My colleague would have you believe that these principles are a mere facade, and that I merely *think* these principles undergird the rules of basketball. But what could that mean? I might as easily respond that he merely *thinks* that they are a facade. Of course, he thinks that, otherwise he wouldn't have said it—unless he is lying, which he sometimes is—but he doesn't *merely* think it. Rather, he thinks that it is *true*. If it is true then he is

Minute Bowl's situation, the referee is not free to choose at his²⁷ discretion. Instead, she must decide what mix of these principles explains the rest of the rules of basketball and then she must apply the same mix to this situation, that is, he must apply the principles in a principled way. Assume that the rules constrain the conduct of a player in circumstances that implicate both the principle of constrained adroitness and that of unfettered locomotion. In a second situation that similarly implicates both rules, he—that is, the referee—must decide in favor of the same principle that she deemed paramount in the first situation.²⁸ Extend this rule across referees, and a principled rule-making procedure will result.²⁹

Minute Bowl's circumstances involve these two conflicting values, to wit, constrained adroitness and unfettered locomotion. That is to say, Bowl has made a receipt of the ball only if in these circumstances he has made a reception. And he has made a reception only if by balancing the relevant values of constrained adroitness and unfettered locomotion, we feel that he should be considered to have done so.³⁰

Thus, as suggested above, with razor-like precision we have disinterred the principles that were hiding underneath the situation. Assuming that we do not have recourse to any past situations that would offer us a prescription for how to balance these two values, we are free to choose the mix of them that unconstrained reason dictates.

right, otherwise he is wrong. Of course, I merely think all this, but I think it because it is true, which it is, and so I'm right to do so.

27. I alternate the gender of my pronouns throughout the argument to reflect the proportion of men and women in society. I would, ideally, use a female pronoun 51% of the time and a male pronoun 49% of the time, but I have not employed pronouns frequently enough to accomplish this goal, although, in pursuit of it, I have used pronouns where I normally would not have done so.

Although there are far fewer men and women than inanimate objects, I will not use the impersonal "it," except when referring to players on the Detroit Pistons.

28. To understand this claim, imagine a rainy Sunday afternoon in a British country home. There is nothing to do but play a game in which each person writes a chapter in a chain novel. I don't know about you, but I'd bloody well shoot myself.

29. See *Official NBA Rules*, *supra* note 7, Comments on the Rules, § I, at 387 ("Each official should have a definite and clear *conception*—as opposed to *concept*—of his overall responsibility to include the intent and purpose of each rule. If all officials possess the *same conception*—based on the *same concept*—there will be a guaranteed uniformity in the administration of all contests.") (words and emphasis added).

30. Of course, I rely here on Dworkin's notion of integrity. See RONALD DWORIN, *LAW'S EMPIRE* (1986). For an alternative approach, defining integrity as "returning one's

The principle of constrained adroitness would require that Bowl's dribbling be considered a violation of the Half-Court rule. Bowl clearly is not adroit at dribbling. I imagine him flapping his arms wildly—a veritable fish out of water—trying ineptly to shepherd the ball along. The rules are designed so that the game will not be delayed by clumsiness of this sort. He caused the ball to pass unnecessarily from the backcourt to the frontcourt and back to the backcourt again. Therefore, his team should be deprived of the ball.

Alternatively, the principle of unfettered locomotion would allow players to succeed in the game of basketball on their own terms. Let them be as creative as they wish. If rules barring awkwardness encumber the players' freedom, alternative avenues for expressing skill will be sealed shut, openings will be silenced, so that the game will never progress. This is all the more troubling because the more unique a skill, the more an untrained audience will be blind to its innovative and subtle tones.

Our ruling must balance these conflicting assessments in an ideal mixture. In this case, the resolution is particularly easy.³¹ The principle of constrained adroitness militates in favor of sanctioning Bowl's clumsiness. His actions violated the heart of that principle. In contrast, the principle of freedom of movement only tangentially supports Bowl's actions. He was not developing a novel skill, but rather doing aesthetic violence to one that is well-established. Our answer is precise and determinate.

PART III

Because we were clever enough to fit everything we had to say into Parts I and II, we do not need to include a Part III. Our claims in the Introduction notwithstanding, we have finished ahead of schedule, as it were, and are ready to conclude.

31. To anticipate a criticism, let me say that if the case were not easily resolved, that does not mean that analysis of it would be subjective. A problem may be difficult and yet have a single determinate, and therefore objective, answer. This is true of many difficult mathematical problems. Consider, for example, the following equation: $2 + (4 - 6 + 123,456) - 999$. See?

CONCLUSION

In the Introduction we introduced the topic, viz., the troubling interpretive questions raised by the Half-Court rule. In Part I, we established the foundation for discussing the topic. In Part II, we presented two perspectives on the topic, making relatively clear claims seem much more intellectually demanding than necessary. Part III turned out to be superfluous. In this conclusion, we have summarized the argument and, now, the conclusion, too.