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## INTERNATIONAL SPORTS LAW PERSPECTIVE

# DWORKIN ON THE HALF-FORWARD FLANK: THE JURISPRUDENCE OF AFL'S *SPIRIT OF THE LAWS*

ANTHONY S. MARINAC\*

In 2006, the Australian Football League supplemented the Laws of Australian Football with a new document entitled *Spirit of the Laws*.<sup>1</sup> This document contains an official expression of the principles underlying the laws of the game. Its intention was both to make those principles explicit and also to provide guidance for AFL umpires who are often called upon to make complex, split-second decisions under massive pressure. This process appears decidedly similar to the process suggested by Dworkin<sup>2</sup> to assist judges in dealing with hard cases. What, then, can Dworkin tell us about Australian Football, and what can Australian Football tell us about Dworkin?

It comes as a surprise to many first-time viewers of Australian Football (AFL)<sup>3</sup> that the game has rules at all. To newcomers, particularly those brought up watching the more structured rugby or American codes of football, AFL appears to be little more than a chaotic pell-mell of players running in random directions, while the ball—passed quickly by foot and hand—makes its way more or less accidentally towards one goal or another.

In fact, however, Australian football is governed by a comprehensive code of laws, which specify everything from the dimensions of the football to the distance a player may run while in possession of the ball.<sup>4</sup> During a football

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1. AUSTL. FOOTBALL LEAGUE, *SPIRIT OF THE LAWS* (2006), available at <http://www.nswafua.com/docs/resourceslaws/2006/SpiritLaws06.pdf>.

2. See RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81 (1977).

3. The acronym AFL actually stands for Australian Football League, but it has become commonly used as an abbreviation to describe the game itself.

4. See AUSTL. FOOTBALL LEAGUE, *LAWS OF AUSTRALIAN FOOTBALL* (2007) [hereinafter *LAWS*].

match, those rules are adjudicated upon by umpires. Before umpiring in official matches (even in junior competitions) umpires are required to undergo training in the laws and their application. Most of the decisions they make during a match will be relatively straightforward and uncontroversial. However, in many instances they will be called upon to adjudicate play where a number of rule infringements have arguably occurred, or where the complexity and speed of play make accurate decision-making difficult. In the past, this inevitably led to the game taking on a subtly different character depending on the approach of the umpire.

For many years this was accepted as part and parcel of the game of AFL. However in 2006, the Australian Football League introduced a new document entitled *Spirit of the Laws*.<sup>5</sup> In this document, the laws of the game are boiled down to seven core principles, and umpires are asked to use those principles to guide their decision-making when complex decisions are called for.<sup>6</sup>

It seems at first instance almost facetious to turn to jurisprudence for an explanation of the operation of the laws of AFL. Jurisprudence is serious business, as I learned whilst struggling through Rawls and Waldron. However, setting aside location, code of dress, and procedural strictures, the role of a football umpire is not altogether different from that of a judge-at-law. In each case, they are the disinterested adjudicator at the centre of a contest between two adversarial foes. In each case their role is to apply the law to the best of their ability, consistently, and comprehensibly. For each of them, the majority of decisions will be relatively straightforward; however, each will regularly come across circumstances where the law “simpliciter” does not provide them with an answer. These, according to Hart and Dworkin, are the “hard cases.”<sup>7</sup>

For Hart, hard cases were best resolved by judicial discretion.<sup>8</sup> Had Hart addressed himself to umpires rather than to judges, his advice would have been utterly consistent with the pre-2006 laws of Australian football. Judges were to apply the law as best they could under as many circumstances as possible and were to use their most sound discretion to resolve the most difficult decisions.<sup>9</sup>

Dworkin, dissenting from Hart, argued that discretion alone was

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OF AUSTRALIAN FOOTBALL], available at <http://www.afipa.com.au/media/2007%20Laws%20of%20the%20game.pdf>.

5. SPIRIT OF THE LAWS, *supra* note 1.

6. *Id.*

7. DWORKIN, *supra* note 2, at 81–83; H.L.A. HART, THE CONCEPT OF LAW 126 (1961).

8. HART, *supra* note 7.

9. *Id.*

insufficient as a guide for judges in hard cases.<sup>10</sup> He argued that underlying the laws were principles, and that in hard cases judges should turn to these principles for guidance and make a decision that is consistent with both the law and the principles underlying it.<sup>11</sup>

Dworkin's argument has a certain appeal—who would not like to believe that underlying the law is a set of coherent and beneficial principles? However, attempts to apply his arguments to real legal situations have fallen on difficulties. The laws of AFL, which represent a coherent code underpinned by explicit principles, provide a new opportunity to test the application of Dworkin's theory.

This paper endeavors to make this test. It begins by outlining Hart's approach to judicial discretion and, in rebuttal, Dworkin's theory of hard cases. In this first section the theories are dealt with on their own terms—as purely legal theories, with no application to football. In the second section of the paper, the laws of Australian Football are outlined, along with a brief discussion of their development and the means by which they are amended and applied. The development and application of the *Spirit of the Laws* is then described. In the third section of the paper, Dworkin and the AFL are brought together in order to answer the question set in the abstract above: what can Dworkin tell us about Australian Football, and what can Australian Football tell us about Dworkin?

### I. DWORKIN'S THEORY OF HARD CASES

To give an account of Dworkin's views on hard cases, it is useful to begin with his mentor and nemesis, H.L.A. Hart. Hart, a legal positivist, argued in *The Concept of Law* that while the words of the law (both in statute and precedent) can adequately guide conduct in most circumstances, at the margins of legal activity the words of the law will always have an "open texture."<sup>12</sup> That is, the words will become ambiguous and admit of more than one potentially equally-correct meaning. The resolution of cases at these margins then serves to further define the law:

When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for the purposes of this rule, of a

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10. DWORKIN, *supra* note 2, at 84

11. *Id.*

12. HART, *supra* note 7, at 126.

general word.<sup>13</sup>

This view seems quite familiar to students of any common law system, and is as neat a summary of *stare decisis* as any. But the question remains, how does our legal system “choose between the competing interests in the way which best satisfies us”?<sup>14</sup> In Hart’s view the system itself could not provide a way to choose; instead, the choosing must be left to the judicial system, and to judges in particular, to exercise discretion:

The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case.<sup>15</sup>

For Dworkin, this was not good enough. He described the positivist approach to hard cases as “wholly inadequate”<sup>16</sup> and set out to suggest an alternative theory under which a judge would settle disputes with respect to rights already in place, rather than using discretion to invent and retrospectively apply rights that were not in place when the acts subject to adjudication took place.<sup>17</sup> He begins with a similar view to that of Hart, accepting that the law has an open texture and that, where the words of the law are inadequate, the judge must effectively make law:

Statutes and common law rules are often vague and must be interpreted before they can be applied to novel cases. Some cases, moreover, raise issues so novel that they cannot be decided even by stretching or reinterpreting existing rules. So judges must sometimes make new law, either covertly or explicitly.<sup>18</sup>

In Dworkin’s view, the only appropriate way for judges to resolve such cases is to act on the basis of existing principles.<sup>19</sup> He used the term “principles” in a specific manner, to refer to rights that the individual might assert against the majority (and contrasted this with policy, which is essentially a description of communal goals).<sup>20</sup> Those rights then create a complementary duty (to relate back to football, if you have a right to a free kick, then I have a complementary duty to refrain from tackling you while you

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13. *Id.*

14. *Id.*

15. *Id.* at 132.

16. DWORKIN, *supra* note 2, at 81.

17. *See id.* at 81–130.

18. *Id.* at 82.

19. *Id.*

20. *Id.*

kick the ball). The task of the judge is to identify the principles most applicable to the current case, establish a complementary duty, and then test the defendant's conduct against it.<sup>21</sup> Dworkin distinguishes principles from the more explicit "rules," which are all-or-nothing. In describing rules, Dworkin himself resorts to a sporting metaphor, noting that "[i]n 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, and decide that a batter who has had three strikes is not out."<sup>22</sup>

Dworkin characterises principles as either absolute, or less than absolute.<sup>23</sup> Legal systems that recognise absolute principles will not countenance any reason for abrogating those principles, and any action or rule that purports to do so is void *ab initio*. Principles which are not absolute, however, may be traded off against one another: "[O]ne principle might have to yield to another, or even to an urgent policy with which it competes on particular facts."<sup>24</sup> The existence of non-absolute principles distinguishes Dworkin's theory sharply with legal positivism: unlike positivist laws, principles need not always apply. A judge, making a decision guided by principle, is entitled to allow one principle to yield to another.

Finally, Dworkin describes two further characteristics that rights [or principles] must possess if they are to guide judicial decisions in hard cases: they must be "concrete," and "institutional."<sup>25</sup>

Concrete principles are "precisely defined so as to express more definitely the weight they have against other political aims on particular occasions. . . . [t]he claim of a concrete right is more definitive than any claim of abstract right that supports it."<sup>26</sup> Dworkin contrasts the relatively abstract right to free speech with a more concrete right to freely publish military plans, provided national security and troop safety are not compromised.<sup>27</sup>

Institutional rights are those which are fixed to particular circumstances, rather than arising from "general morality."<sup>28</sup> In explaining his meaning, Dworkin himself resorts to sporting analogy, using the game of chess as an example to describe institutional rights. His use of this analogy is so germane to this paper that it bears (selective) quotation at some length. He begins by

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21. *Id.* at 85–86.

22. *Id.* at 24.

23. *Id.* at 82–83.

24. *Id.* at 92.

25. *Id.* at 92–93.

26. *Id.* at 93–94.

27. *Id.*

28. *Id.* at 101.

describing chess as an institution established by rules that operate only in that institutional sense: "In the case of chess, institutional rights are fixed by constitutive and regulative rules that belong distinctly to the game . . . . Chess is, in this sense, an autonomous institution . . . ."29

Dworkin then challenges this autonomous institution of laws with a hard case:

Even in the case of a fully insulated institution like chess some rules will require interpretation or elaboration before an official may enforce them in certain circumstances. Suppose some rule of a chess tournament provides that the referee shall declare a game forfeit if one player 'unreasonably' annoys the other in the course of play. The language of the rule does not define what counts as 'unreasonable' annoyance; it does not decide whether, for example, a player who continually smiles at his opponent in such a way as to unnerve him, as the Russian grandmaster Tal once smiled at Fischer, annoys him unreasonably.<sup>30</sup>

The referee, in arriving at a decision in this hard case, is forced to make judgments about what the nature of a chess contest is. While these are difficult judgments, which may have a profound impact on the competitors, Dworkin argues that they are made more or less intuitively, stating that "any official's sense of the game will have developed over a career, and he will employ rather than expose that sense in his judgments."<sup>31</sup>

Dworkin's argument, in summary, is that in hard cases, judges should seek to discover concrete, institutional principles that create rights (and therefore duties) in the situation at hand, and then should deliver a judgment to enforce those rights and impose those duties.<sup>32</sup> Does Dworkin's argument, and his chess analogy, extend to Australian football? And, if so, do *Spirit of the Laws* place the football umpire in a better position than the chess referee?

## II. THE LAWS AND SPIRIT OF AFL

In its infancy in the 1850s, football in Australia suffered from a surfeit of rules: players who had been educated at different (mainly English) schools, or who had been exposed to that school's system of football, each turned up expecting that the game would be analogous to that which they had already played. Chaos—and fisticuffs—were the inevitable result. To overcome this,

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29. *Id.*

30. *Id.* at 102.

31. *Id.* at 104.

32. *See id.* at 101–05.

a committee of four men met in a pub in Melbourne on May 17, 1859, to set out an agreed code of rules.<sup>33</sup> To attract sufficient interest, the rules would have to be an appropriate compromise between the ball-handling type of football played at the Rugby School in England and the soccer-style game then primarily associated with Eton.<sup>34</sup>

The four men drew up a simple code of ten rules, two of which related to general play: a rule giving a free kick to any player who took a “mark,” that is, who caught the kicked ball before it bounced; and a rule preventing players from lifting the ball by hand if it was on the ground (this soon became the more familiar rule requiring players in possession of the ball to bounce it or dispose of it before running fifteen metres<sup>35</sup>).

While those pioneers of Australian football had the laudable aim of keeping the rules simple, as the game grew, the laws of the game inevitably expanded. While, at its core, the game has changed relatively little in the past 100 years, those governing the sport have been unafraid to tinker with the rules in order to protect player safety or in order to produce closer, more exciting games. As of 2007, there were 113 separate laws divided into twenty-two chapters.<sup>36</sup> The laws cover virtually every aspect of administration and play.

The laws of the game are reviewed on an ongoing basis by the AFL Laws Committee. The Laws Committee considers submissions from football clubs, umpiring bodies, state-based football competitions, and other interested parties, before recommending changes to the rules. In recent years the Laws Committee has also relied heavily on expert advice from sports medicine experts, leading to a number of rule changes designed to reduce the incidence of on-field injuries. The Laws Committee makes recommendations for amendments to the game’s supreme governing body, the AFL Commission.

New rules are announced prior to each season. In addition, a truncated pre-season competition is used as a laboratory within which to experiment with new rules. The Laws Committee then closely monitors the application of the new laws to see whether they are having the desired effect. The new laws, and their effect, are reported upon in each AFL Annual Report.<sup>37</sup>

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33. The four were journalists William Hammersley and James Boyne Thompson, former Rugby schoolboy and colonial cricket champion Tom Wills, and Scotch College schoolmaster Thomas Smith. AUSTL. FOOTBALL LEAGUE, 100 YEARS OF AUSTRALIAN FOOTBALL 14–15 (1996). This brief historical introduction borrows heavily from Australian Football League, *100 Years of Australian Football. Id.*

34. *Id.*

35. See LAWS OF AUSTRALIAN FOOTBALL, *supra* note 4, art. 15.2.2.

36. *Id.*

37. See AUSTL. FOOTBALL LEAGUE, 2005 ANNUAL REPORT: FOOTBALL OPERATIONS (2005),

The laws are drafted in legal form and could, if necessary, be susceptible to construction by a court of law. More commonly, of course, they are applied on the football field by a field umpire appointed in accordance with the wonderfully simple law 8.2.1, which states, “The field Umpires shall officiate and have full control of a Match.”<sup>38</sup>

Most of the time, the application of the laws is not unduly complex. To take an example, law 15.2.5, Diving on Top of the Football, reads as follows:

Where a Player is in possession of the football by reason of diving on top of or dragging the football underneath his or her body, the field Umpire shall award a Free Kick against that Player if he or she does not immediately knock the football clear or Correctly Dispose of the football when Correctly Tackled.<sup>39</sup>

Under most circumstances, an umpire who is officiating from the correct position—roughly twenty metres from the play—will have little difficulty telling when a player has dived on the ball rather than risking it being seized by the opposition. A free kick is then paid, and the play moves on.

What happens, though, if the diving player is merely first to the ball? Immediately, four other players might be engaged in the scrimmage, each seeking either to possess the ball or to deny possession to the opposition. In the tangle of arms and legs, it may be difficult to see the ball at all. There may be other infringements—players pushing one another in the back or grappling around the head or neck—and these may be either deliberate or inadvertent.

In the past, different umpires would each make one out of several possible “correct” calls in the situation. From exactly the same piece of play, team A might be awarded a free kick by some umpires, team B might be awarded the free kick by others, while still other umpires would call for a “ball-up,” that is, they would resume play by allowing a new contest for the ball. All of these decisions would, on their own merits, be regarded as appropriate. However the inconsistency of such decision-making was a weakness in the game of football. *Spirit of the Laws* is designed to overcome, or at least to reduce, inconsistency between umpiring decisions.

According to *Spirit of the Laws*, Australian football boils down to seven core principles:

1. *The player whose sole objective is to contest the ball shall be*

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available at <http://www.aflpa.com.au/media/2007%20Laws%20of%20the%20game.pdf>.

38. LAWS OF AUSTRALIAN FOOTBALL, *supra* note 4, art. 8.2.1.

39. *Id.* art. 15.2.5. Note that the capitalised words and phrases have specific meanings within the laws.

*permitted to do so.*

2. *The ball shall be kept in motion.*

3. *The player whose sole objective is to contest a mark (that is, to catch the ball on the fly) shall be permitted to do so.*

4. *A player who is tackled illegally while in possession of the ball will be awarded a free kick.*

5. *The player whose sole objective is to contest the ruck (that is, the neutral ball put into play by the umpire) shall be permitted to do so.*

6. *The ball shall be kept in motion by permitting the team offended against to take advantage, provided play is continuous.*

7. *After a mark or free kick has been awarded, a 50-metre penalty will be awarded against the opposing team which unduly delays the play or abuses an umpire.<sup>40</sup>*

Those principles can now be applied to the umpiring decision discussed above. The player diving on the ball is required under law 15.2.5 to knock the ball clear. This law is based on *Spirit of the Laws* number two: “*The ball shall be kept in motion.*”<sup>41</sup> However, if the player has not knocked the ball clear, and he is tackled, the umpire can simply apply *Spirit of the Laws* number four: “*A player who is tackled illegally while in possession of the ball will be awarded a free kick.*”<sup>42</sup> The decision is then simple: if the tackle was legal, then the tackling player receives a free kick. If the tackle was illegal, the tackled player receives a free kick.<sup>43</sup>

By making a hard decision based on the principles underlying the laws, the umpire is able to make a clear and hopefully consistent decision every time a similar piece of play occurs. The umpires, players, coaches, and spectators are all able to follow the game without any need to second-guess the interpretative predilections of the umpire.

### III. CONGRUENCE AND DISCONGRUENCE

The current author is not the first to note and consider the relationship

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40. AUSTL. FOOTBALL LEAGUE, *supra* note 1.

41. *Id.*

42. *Id.*

43. For footballing aficionados, please assume that in this example the ball was not held to the player as per law 15.2.6, and ignore the question of prior opportunity. I have deliberately kept this example relatively simple, because sadly not all of those who read law journals have yet discovered the joy of Australian football, and I hope this article will be comprehensible to those whose interest in jurisprudence far outweighs their interest in football.

between Dworkin's theory of hard cases and the practice of umpiring. Legal academic and former baseball, soccer, and basketball referee Mark Graber's 1999 paper, *Law and Sports Officiating: A Misunderstood and Justly Neglected Relationship*, contained staunch criticism of Dworkin's use of sporting metaphors.<sup>44</sup> His argument, however, may have misrepresented Dworkin. Graber's view was that Dworkin had argued that games were bound by rules only, and not principles; Graber argued to the contrary, suggesting for example that "[e]xperienced referees dispute whether [soccer's] advantage rule should be applied in an uncontested fact situation."<sup>45</sup>

Graber's criticism of Dworkin does not bear close scrutiny. For one thing, as is clear from the chess example discussed at length above, Dworkin certainly did not consider that all games and sports were bound only by rules and never by principles. However, looking past Graber's destruction of a straw man, his actual argument contains significant comfort for the argument put in this paper. In Graber's view, regardless of the precise rules of a game, umpires and referees must have the capacity to look past the rules and interpret the principles which lay behind them.<sup>46</sup> In this, their position is very similar to that which Dworkin that describe for judges. Graber, drawing on the example of baseball, argued:

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." Similar complaints 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." A central point of Dworkinian theory is that such complains [sic] are invalid, at least to the extent they deny that laws must be interpreted in light of some more general moral theory.<sup>47</sup>

So, having outlined both Dworkin's theory of hard cases and the circumstances of the development of AFL's *Spirit of the Laws*, it remains to consider whether the two tell us anything about one another. Does *Spirit of the Laws* describe, to borrow Graber's words cited immediately above, a "general moral theory" for Australian football? For *Spirit of the Laws* to be comprehensible in terms of Dworkin's theory, three conditions must be

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44. Mark A. Graber, *Law and Sports Officiating: A Misunderstood and Justly Neglected Relationship*, 16 CONST. COMMENT. 293 (1999).

45. *Id.* at 299.

46. *Id.* at 300-01.

47. *Id.*

satisfied. First, it must be possible to argue that the laws of Australian football have (in Hart's words) an open texture. Second, the items in *Spirit of the Laws* must be identifiable as principles, not just an additional category of laws. Third, if those items are principles, they must be both concrete and institutional. If all of those conditions are met, then according to Dworkin *Spirit of the Laws* should assist umpires to make credible and consistent decisions even in hard cases.

The first consideration, then, is whether the laws of AFL have an open texture. It would in fact be a surprise if the laws were so utterly comprehensive that they covered every possible circumstance on the football field. Naturally, they do not. Two examples will suffice to show the open texture of the laws of AFL. First, one might look to law 15.4.4(a), which relates to "charging":

A Charge means an act of colliding with an opposition Player where the amount of physical force used is unreasonable or unnecessary in the circumstances, irrespective of whether the Player is or is not in possession of the football or whether the Player is within 5 metres of the football.<sup>48</sup>

The use of the phrase "unreasonable or unnecessary in the circumstances" is a clear indicator of open texture. There will be clear cases of gratuitous charging that will be easy for an umpire to penalise. There will also be negligible contact that the umpire can clearly identify as legitimate. But, especially in a contact sport such as Australian football, it will not be easy for an umpire to distinguish between hard, physical football and illegal charging. Any two umpires are very likely to make different judgments about the same piece of play. Supporters of opposing football teams are almost guaranteed to make different judgments about the same piece of play!

Second, nowhere in the rules of AFL are umpires given guidance as to whether rules prevail over one another. Generally speaking, if two infringements follow one another rapidly, the first will be penalised (except in the case where the victim of the first offence retaliates, in which case the penalty may be reversed). However, in a situation such as the one described earlier, where there is a scrum and potentially a number of offences, the rules provide the umpire with little guidance as to which is to be awarded. Consequently, it is clear that the laws of Australian football have an open texture.

The next question to consider is whether the *Spirit of the Laws* represents principles in Dworkin's sense. Are the *Spirit of the Laws* items susceptible to

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48. LAWS OF AUSTRALIAN FOOTBALL, *supra* note 4, art. 15.4.4(a).

description as rights (and corresponding duties) that have always been implicit in the laws themselves? Are they, in essence, a description of the moral structure upon which the laws are built? The answer in this case is also affirmative. In fact, every one of the laws that relates to actual on-field play can be related back to a specific *Spirit of the Laws* item, and the *Spirit of the Laws* items are also consistent with the various “interpretation” sections of the laws, which provide readers with further guidance as to the mischief towards which each law is directed.<sup>49</sup> Law 15.1.1 provides an example of such an interpretation section:

It is the spirit and intention of these Laws that a Free Kick shall be awarded to:

- (a) ensure that a Match is played in a fair manner;
- (b) provide to a Player, who makes obtaining possession of the football his or her sole objective, every opportunity to obtain possession;
- (c) protect Players from sustaining injury; and
- (d) a Player who executes a Correct Tackle which results in an opponent failing to dispose of the football in accordance with these Laws.<sup>50</sup>

Accepting, then that *Spirit of the Laws* describes principles in Dworkin’s sense, are those principles concrete and institutional? The question of “concreteness” is always open to dispute because it would always be possible to frame a principle in a more concrete way. The principle that “the ball shall be kept in motion” could become more concrete if it were expanded to read that “the ball shall be kept in motion *except when stationary in the hands of a player who has been awarded a free kick.*” It could be further expanded to read that “the ball shall be kept in motion *during the course of play* except when stationary in the hands of the player who has been awarded a free kick.”

In reality, the framers of the *Spirit of the Laws* have tried to walk a fine line in order to ensure that there are not too many *Spirit* items and they are not too complex. *Spirit* items that were too complex would defeat the purpose of having *Spirit of the Laws* at all. In the context of a game of Australian football, the *Spirit* items are sufficiently concrete to enable umpires to apply them to actual play. Some of them are more concrete than others. Law 7, “[a]fter a mark or free kick has been awarded, a fifty-metre penalty will be

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49. “Mischief” is used here in its statutory interpretation sense.

50. LAWS OF AUSTRALIAN FOOTBALL, *supra* note 4, art. 15.1.1.

awarded against the opposing team which unduly delays the play or abuses an umpire,"<sup>51</sup> is far more detailed than item 2, "the ball shall be kept in motion." However in each case they are more detailed than they might have been. One might discern within football a general principle that "the most skilled team should win," but this would hardly assist the umpires.

If it is accepted that the principles are sufficiently concrete, are they institutional in nature? This question is far simpler to answer, as it picks up on Dworkin's chess analogy rather precisely. The *Spirit of the Laws* items pertain to, and purport to pertain to, only the organisation and play of Australian football matches and competitions. The principles that apply during the game do not apply off the field. A player who would be expected to defer to an umpire on-field would not be expected to give way to that same umpire when exiting the car-park after the match (unless so required by the traffic laws). Similarly, a player who may validly tackle a player in possession of the ball during the match could well be charged with assault for doing so after the match, regardless of whether the victim had possession of a football.

The most significant distinguishing feature between Dworkin's principles and *Spirit of the Laws* is that for Dworkin, a judge or referee's identification of the principles will be an interpretative matter. Judges are expected to look into the legal history and leading judgments in a field of law to determine the principles laying behind it; similarly, his chess referee has developed his or her notion of the principles governing chess tournaments over the course of a career. The AFL, on the other hand, has now made these principles explicit. Umpires are not required to interpret the laws of the game in order to determine the principles underlying them. Players, coaches, and spectators are no longer required to observe umpires in order to make a secondary interpretation of what principles that umpire has discerned over an umpiring career. By identifying and publishing the principles, the AFL has given them consistency and legitimacy, which they might otherwise lack.

In summation, it appears that the AFL's *Spirit of the Laws* is consistent with Dworkin's approach to hard cases. The similarities between the two are not merely semantic or coincidental; rather, the AFL gives a practical expression of the form of decision-making that Dworkin set out theoretically.

#### IV. CONCLUSION

What, then, can Dworkin tell us about Australian football? First it is clear that, as for all other codes of written laws, the laws of Australian football will not be able to provide definitive guidance to every circumstance that may

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51. AUSTR. FOOTBALL LEAGUE, *supra* note 1.

occur on a football field. An attempt to provide a completely comprehensive code of football law would be futile at best, and at worst, may change the nature of the game to the point where it is hardly a game anymore. May the football gods prevent the day when the team compliance manager sits in the coach's box alongside the coaching staff.

Second, given the futility above, it is inevitable (according to Dworkin) that the adjudicators of the laws, in this case the umpires, must turn to some other authority for guidance in order to make decisions in situations where the law is not clear. In other words, for so long as there have been football umpires, these umpires have been forced to make decisions that look beyond the written laws in order to allow play to continue despite ambiguity in those laws.

Third, in the past when this decision-making power was exercised, it was exercised on the basis of the umpire's understanding, developed by his or her training and experience, of the principles that underlie the game of football. In other words, the principles that make up *Spirit of the Laws* are not themselves new; they have underpinned football for many years.

What *is* new is the codification of those principles into *Spirit of the Laws*. Umpires are no longer required to exercise their discretion in accordance with some abstract sense of the principles that underlie Australian football—those principles have now been set out clearly and will be commonly understood throughout the footballing community. *Spirit of the Laws*, then, appears to be a sensible document supported by and consistent with Dworkin's theory of hard cases.

Finally, what can Australian football tell us about Dworkin? One of the difficulties Dworkin's theory has always faced is the utter complexity of the law. Any attempt to reduce the laws of the land—the millions of pages of statutes, delegated legislation, and reported rulings—down to a set of consistent principles is doomed to failure almost by definition. Even attempts to isolate a single area of law and to organise the principles that underlie that single area would be a monumental task. In *Taking Rights Seriously*, Dworkin was forced to invent a rhetorical Judge Hercules, the only judge capable of seeing the full sweep of judicial principles.<sup>52</sup>

The horizons of Australian football are much narrower. While it is a complex and interesting game, with virtually infinite variations of play and strategy, it represents a very well-controlled set of circumstances, bound up by laws and principles that do not pretend to have application outside football. The laws of Australian football are not affected by the laws of rugby union in

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52. DWORKIN, *supra* note 2, at 105.

the way that, say, the law of contract is affected by the law of equity. This being the case, in an insulated legal “universe” such as a game of football, the principles underlying the laws *are* susceptible to exposition and widespread agreement. AFL officials, whether wittingly or otherwise, have shown that it is possible to identify, from a body of law, a consistent set of principles, and, perhaps more importantly, that it is possible for adjudicators to apply those principles to hard decisions.

Given that Hercules is not required as an umpire, perhaps we can convince him to play for my beloved team, the Essendon Bombers.

