

1-1-1994

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Publication Information

Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 *Conn. L. Rev.* 17 (1994)

Repository Citation

Oldfather, Chad M., "The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions" (1994). *Faculty Publications*. Paper 475.

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THE HIDDEN BALL: A SUBSTANTIVE CRITIQUE OF BASEBALL METAPHORS IN JUDICIAL OPINIONS

*Chad M. Oldfather**

In recent years several scholars have devoted their attention to the functions and effects of metaphor in legal discourse. This scholarship has two defining characteristics. First, it tends to focus on the use of metaphor within a single area of law, such as First Amendment, anti-trust, or standing. Second, it pays most attention to those metaphors that have been incorporated into or have come to define some doctrine within the body of law addressed. As a result of these two factors, this prior scholarship has examined primarily those metaphors that have had a dramatic impact in their field but which constitute only a small portion of all the metaphors that appear in judicial opinions. Furthermore, because it considered metaphors that have been consistently used, it could draw conclusions as to the effects of these metaphors with relative ease. The basic conclusion of that literature, stated in its simplest form, is that while metaphor can fulfill several useful functions in legal discourse, it ultimately is problematic because any metaphor alters the meaning of the underlying thing that it is used to describe.

This Article will approach metaphors from a somewhat different angle. While the prior work focused on the processes by which metaphors operate and the effects metaphors can have on thought, my focus will be on the substantive validity of an entire class of metaphors.¹

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1. I am using a broad definition of metaphor: "The essence of metaphor is understanding and experiencing one kind of thing in terms of another." GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 5 (1980). Thus what I refer to as "metaphor" in this Article includes what some would argue are more properly labelled as "simile" or "analogy." For the purposes of this Article, however, I believe the analysis is the same for all three. See Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 *GEO. L.J.* 395, 406-07, 407 n.75 (1986). See also Wayne C. Booth, *Metaphor as Rhetoric: The Problem of Evaluation*, 5 *CRITICAL INQUIRY* 49, 50 (1978) ("Metaphor has by now been defined in so many ways that there is no human expression, whether in language or any other medium, that would not be metaphoric in

More specifically, I will examine baseball metaphors and consider whether anything about their substantive content should lead us to conclude that their effects will be consistently skewed in certain ways. Because this Article will examine baseball metaphors as they are used across all of law, there will be little consistency in their usage. No baseball metaphor, with one exception,² has become associated with a legal doctrine to the extent that it has come to define that doctrine. As a result, one cannot trace the history of a baseball-metaphorical formulation—the way one can with a metaphor like “the marketplace of ideas”—to see how it has affected the doctrine it describes. Instead, one must consider first whether baseball and the law are suitable candidates for comparison in the abstract. Beyond that lies the same question with respect to specific attributes of the two.

The fact that baseball metaphors have not been employed in any systematic fashion does not mean that they can do no harm. As prior scholarship has described, metaphors can have prospective effects on our thought processes. Judges frequently use baseball metaphors in their opinions, and one suspects that they appear with even more regularity in the courtroom. Repeated metaphorical comparisons of baseball and the legal system surely shape (at some level) the views of those who are exposed to them, especially when the comparisons are made by judges, whose status lends credibility to their words. Furthermore, it seems almost inevitable that some judges will find that a baseball metaphor suits their conception of a doctrine and will use that metaphor consistently in discussions of the doctrine. Moreover, the fact that baseball metaphors appear in judicial opinions at all reveals something significant about how we view our legal system. That hundreds of judges have not only seen a connection between law and baseball but have found that relationship substantial enough to refer to it in their written opinions suggests that they perceive a fundamental similarity in the two. While the effects of baseball metaphors may be more diffuse because of the unsystematic ways in which they are used, they certainly exist. Indeed, to the extent that we believe that the activities of law and baseball are fundamentally similar, the effects of baseball metaphors are potentially more significant than those of metaphors whose usage is limited to a single area of law.

Baseball metaphors are, of course, merely a subset of a larger cate-

someone's definition.”).

2. The exception is the use of the term “hit-and-run.” See *infra* part III.A.

gory of sport or game metaphors, which appear frequently in the legal world as well as in society generally. Michael Oriard, in his comprehensive study of the rhetoric of sport and game in American culture, describes what is at stake where sports metaphors are concerned as including "American ideas not just about sport and play themselves, but about all of the things for which sport and play have become emblems—heroism, success, gender, race, class, the law, religion, salvation; the relations of Humankind, God, and Nature."³ "In a culture where the myth of objectivism is very much alive and truth is always absolute truth, the people who get to impose their metaphors on the culture get to define what we consider to be true—absolutely and objectively true."⁴ Thus any references to the law as a game—be they general references to "scoring points" with a jury or judge⁵ or the necessity of lawyers adhering to the "rules of the game,"⁶ assessment of the similarities between litigation and competitive sports⁷ or the more specific comparisons between law and baseball with which this Article is concerned—have implications for the legitimacy of our legal system and are thus deserving of analysis.

This Article is structured as follows: Part I reviews prior scholarship on the functions of metaphor and its effects on legal analysis. Appropriate observations and modifications are made along the way. Part II briefly examines the ethos of baseball, and then analyzes, at a broad level, the validity of the law-baseball comparison. Finally, Part III looks at four specific uses of baseball metaphors in an attempt to gain further insight into the issues addressed in Part II.

3. MICHAEL ORIARD, *SPORTING WITH THE GODS: THE RHETORIC OF PLAY AND GAME IN AMERICAN CULTURE* ix (1991).

4. LAKOFF & JOHNSON, *supra* note 1, at 160.

5. *See, e.g.*, *Morgan v. Hall*, 569 F.2d 1161, 1166 (1st Cir. 1978), *cert. denied*, 437 U.S. 910 (1978); *Washington v. United States*, 401 F.2d 915, 924 (D.C. Cir. 1968); *Drake v. United States*, 642 F. Supp. 830, 832 (N.D. Ill. 1986); *Corporation Trust Co. v. Logan*, 52 F. Supp. 999, 1005 (D. Del. 1943); *In re Lloyd, Carr & Co.*, 2 B.R. 714, 718 (Bankr. D. Mass. 1979); *Commercial Shearing & Stamping Co. v. United States*, 317 F. Supp. 750, 757 (Cust. Ct. 1970); *Simmons v. Yurchak*, 551 N.E.2d 539, 544 (Mass. App. Ct. 1990). Perhaps tellingly, the sentencing of criminal defendants typically involves the "scoring" of "points." *See, e.g.*, *People v. Polus*, 495 N.W.2d 402, 405 (Mich. Ct. App. 1992); *State v. Erickson*, 313 N.W.2d 16, 18 (Minn. 1981). For a detailed consideration of another class of metaphors frequently applied to criminal defendants, *see* Martha Grace Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 TUL. L. REV. 725 (1994).

6. *See, e.g.*, *Sanders v. State*, 517 So. 2d 134, 136 (Fla. Dist. Ct. App. 1987).

7. *E.g.*, Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal With A Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 41-50 (1987).

I. PRIOR SCHOLARSHIP ON METAPHORS IN LAW

This Part summarizes and integrates prior scholarship on the ways in which metaphors affect our thinking and their implications for our legal system. It also attempts to fill in some perceived gaps in that analysis.

A. *The Functions of Metaphor*

Previous commentators have identified four functions of metaphor in legal discourse.⁸ Metaphors serve a decorative purpose, lend concreteness to abstract principles or concepts, operate as a form of analogical reasoning, and spark new insights about the underlying concept that they describe. To these four roles I would add a fifth, related to but distinct from the second: metaphors are often a more economical means of expression than ordinary language; that is, a metaphor of one or a few words can describe its subject as fully as several pages of non-metaphoric language.

The decorative function of metaphor is more important than its name implies.⁹ Judicial opinions and legal scholarship must be persua-

8. Linguists George Lakoff and Mark Johnson have argued that human cognition is essentially metaphorical, that is, "that metaphor is pervasive in everyday life, not just in language but in thought and action. Our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature." LAKOFF & JOHNSON, *supra* note 1, at 3. Of course, the notion that metaphor is fundamental to human thought is not a new one. *See, e.g.*, HUGH R. WALPOLE, SEMANTICS: THE NATURE OF WORDS AND THEIR MEANINGS 142 (1941) ("Not only is Metaphor the guiding principle in everybody's use of words; it is the essential principle of self-preservation."). Although such insights surely have important implications for the law, *see, e.g.*, Steven L. Winter, *Death is the Mother of Metaphor*, 105 HARV. L. REV. 745 (1992) (reviewing THOMAS C. GREY, THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY (1991)), I need not address them here. Instead, this Article concerns what Lakoff and Johnson term "new metaphors." LAKOFF & JOHNSON, *supra* note 1, at 139. In contrast to "conventional metaphors," which "structure the ordinary conceptual system of our culture, which is reflected in our everyday language," *id.*, these "new metaphors" "are outside our conventional conceptual system [and] are imaginative and creative. Such metaphors are capable of giving us a new understanding of our experience." *Id.* Baseball metaphors, as well as those addressed by the literature on which I draw in this section, fall into this latter category. As such, the analysis in this Article is confined to the functions and effects of such "new metaphors."

Primarily as a result of this distinction, I also do not refer to the following works considering metaphors in legal contexts, except in this footnote: MILNER S. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY (1985); JAMES B. WHITE, WHEN WORDS LOSE THEIR MEANING (1984); James F. Childress, *Triage in Neonatal Intensive Care: The Limitations of a Metaphor*, 69 VA. L. REV. 547 (1983); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

9. I take the label from Michael Boudin, from whom the first four categories are borrowed.

sive in order to be successful. An opinion that is well-written and enjoyable to read will doubtless be more persuasive than one that possesses equal logical force yet is not as well-written. "The style of an opinion," observes Griffin Bell, "may affect the manner in which it is interpreted by the reader. It may also govern the frequency with which the opinion will be cited in other cases and thus determine the influence the opinion will ultimately have."¹⁰ Judge Richard Posner echoes this sentiment, noting that "what is particularly interesting about the style both of a work of literature and of a forensic utterance such as a judicial opinion is its contribution to making the reader believe, and not merely enjoy, the writer."¹¹ Metaphors, regardless of whether they relate to the central analytical thrust of an opinion or article, may improve it stylistically, making it more persuasive by making it more pleasant, thus leading the reader to return to its discussion in thinking about an issue, or to quote its language in her own writing.

Through their second function, that of making abstract concepts more concrete, metaphors serve a similar purpose, though in a more isolated and powerful fashion. Sometimes the sheer complexity of a concept makes metaphor an almost indispensable aid to comprehension. "Nonliteral language is often needed to explain the abstraction . . . that cannot be conveyed as effectively and persuasively through literal language. Through incorporation of tropes into legal opinions, what is abstruse and obscure becomes concrete and comprehensible."¹² Even a concept capable of conventional explanation can be enhanced through the use of metaphors which "shap[e] the concept with connotations and giv[e] it a weight and carrying power independent of its true worth."¹³ A reader who finds that a particular metaphor aptly captures a doctrine, or who does not understand the doctrine apart from its metaphorical formulation, will be likely in the future to think of the doctrine in terms of the metaphor. Even a metaphor that has no virtue apart from

Boudin recognizes the decorative function of metaphor to the extent that he asserts that there are three categories in which "metaphor is of practical importance . . . beyond mere decoration." See Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 395 (1986). He does not deal with the decorative category in any systematic way. In part, this is a result of his inclusion of some of what I would term metaphor's "decorative" functions in his "making abstract concepts more concrete" category.

10. Griffin B. Bell, *Style in Judicial Writing*, 15 J. PUB. L. 214, 214 (1966).

11. RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 272 (1988).

12. HAIG BOSMAJIAN, *METAPHOR AND REASON IN JUDICIAL OPINIONS* 47 (1992). For a review of Bosmajian, see Eileen A. Scallen, *Book Review*, 10 CONST. COMMENTARY 480 (1993).

13. Boudin, *supra* note 1, at 395.

being memorable can increase the impact of an opinion.¹⁴ As such, the person responsible for selecting the metaphor, if he chooses an effective one, can substantially impact the development of a doctrine by setting the terms in which it is conceived. Not surprisingly, this effect tends to be more pronounced in more complex areas of the law, because metaphors are more likely to be used as a tool for explanation and because judges and lawyers will often feel more comfortable working with the concreteness of a metaphor.¹⁵

Metaphor's third role is as a concealed form of analogical reasoning.¹⁶ While there may be some distinction between metaphors and analogies as they are strictly defined,¹⁷ they share the characteristic of comparing one concept with another for the purpose of pointing out similarities between the two that are thought to be helpful in answering an open question. Thus a lawyer whose client was hit by a puck while at a hockey game might analogize her client's situation to prior cases in which a spectator struck by a ball at a baseball game was allowed to recover damages. In so doing she would be arguing that the acts of watching baseball and hockey are similar in enough relevant respects to warrant recovery for persons injured in both activities. Similarly, a judge invoking the metaphor of the "wall of separation" between church and state says that the constitutionally-prescribed relationship between religion and government is analogous to a boundary, and also says something about the nature of that boundary (i.e., that it is rigid, well-defined, etc.). The analogy here is somewhat concealed¹⁸—as the anal-

14. *Id.* at 404; BOSMAJIAN, *supra* note 12, at 42-43.

15. Boudin, *supra* note 1, at 403.

16. *Id.* at 395.

17. Cass Sunstein makes the point as follows:

Consider the statement: "Abortion is murder," a statement that in the abstract, could be intended and received as a literal truth, a metaphor, or an analogy. If it is a metaphor, we know that the speaker believes that abortion is not literally murder, but is seeking to cast some light on the subject precisely by departing from literal description. ("Holmes was a lion of the law." "Michael Jordan is God.") But if the statement is an analogy, the speaker is claiming, and should be understood to be claiming, that abortion really is murder in the relevant respects; there is no acknowledgement that the statement is literally untrue. I believe that this is a large difference between metaphor and analogy, though I must be tentative on this point.

Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 748 n.26 (1993).

18. The "wall of separation," filling the second function of metaphors, represents a concrete formulation of church-state doctrine. By invoking the metaphor, the judge is saying that the present facts are similar in enough relevant respects to previous cases to warrant application of the doctrine.

ogies in metaphors often are¹⁹—but it exists nevertheless. Metaphor is powerful in this respect because analogical reasoning “is the mode through which the ordinary lawyer typically operates.”²⁰ Thus, lawyers and judges are apt to be comfortable with metaphor as a form of analogy.²¹

The fourth identified function of metaphor is “its almost magical capacity to unleash creative thought.”²² A metaphor provides a link between two often largely unrelated ideas. With this link provided, one often is led to a radically different view of the underlying subject. A non-legal example used by Stanley Fish demonstrates this function nicely.²³ Fish relates the story of a design team attempting to develop a paintbrush with synthetic bristles. While the synthetic bristles had many advantages over natural ones, the team seemed to have met an insurmountable obstacle in that it could not design the bristles so that they would smoothly apply paint to a surface. The team tinkered to no avail until one of its members said, “You know, a paintbrush is a kind of a pump.”²⁴ This observation led the team to a rapid reconception of the problem in terms of the hydraulic properties of the channels formed by the bristles. Having completely changed the way they looked at the problem, they were able to apply the tools of mechanical engineering to it, which eventually led them to a solution. In the same fashion, viewing a legal problem through the lens of a concept such as “the marketplace of ideas” or a whole range of concepts such as are subsumed in the game of baseball can serve to untrack a reasoning process that may have become stalled.

Finally, there is the role of metaphor that previous commentators, at least in legal scholarship, seem to have overlooked—its ability to express in a few words what in literal language might take several pages. Consider, for example, a metaphoric reference to a judge as a baseball umpire.²⁵ To say that a judge acts as an umpire conveys a whole

19. Boudin, *supra* note 1, at 406-07.

20. Sunstein, *supra* note 17, at 748.

21. Boudin, *supra* note 1, at 406.

22. *Id.* at 414, 414-21. See also LAKOFF & JOHNSON, *supra* note 1, at 147-55.

23. Fish uses the example, appropriately enough for purposes of this Article, in a piece of legal scholarship with a baseball reference in its title. See Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1775-79 (1987). Fish in turn borrows the example from Donald Schön, *Generative Metaphor: A Perspective on Problem-Solving in Social Policy*, in METAPHOR AND THOUGHT 254-60 (A. Ortony ed., 1979).

24. Fish, *supra* note 23, at 1775 (quoting Schön, *supra* note 23, at 257).

25. This metaphor, and its problems, will be considered in more detail below. See *infra* part III.B.

range of ideas: that the judge must ensure compliance with and proper application of the rules, make factual determinations, protect the integrity of the "game," and the like. Regardless of whether the metaphor accurately portrays the role of the judge—a subject that I will return to later—the metaphorical reference clearly makes its points more concisely than literal language could.

It seems beyond question that economy of expression is something to be valued in its own right. Thus, while there is surely some overlap between this "economy of expression" function and the "making concrete abstract concepts" role described above, the effects are of a different nature and need not occur together. The umpire example nicely distinguishes between the two. Few, if any, participants in the legal system find the concept of a judge difficult to grasp, and they need only visit a courthouse to find a concrete manifestation. Nevertheless, judges have frequently felt the need to describe themselves as "umpires," often as a shorthand way of reminding readers of their opinions of the role that judges play in our legal system.²⁶ A metaphor can, then, fulfill this function without making an abstract concept more concrete.

B. *The Effects of Metaphor*

One can easily imagine the good uses to which metaphors can be put in judicial opinions and legal scholarship. Style, concreteness, creativity, and economy of expression are generally things that we value, and a well-chosen metaphor can enhance all of these characteristics at once. To the extent that the use of metaphor affects these qualities, then, one would think it should be encouraged. Those who have examined the use of metaphor in legal discourse, however, have come away with a somewhat less sanguine view.

The basic problem is that a metaphor highlights certain aspects of its subject while obscuring others.²⁷ Thus, for all the good that a metaphor can accomplish, the reality that we envision when we view a subject through metaphor differs from the reality of that subject as we knew it "pre-metaphor."²⁸ It is not just that the meaning conveyed by a metaphor would be difficult to convey literally, or that it would take a large number of words to do so. Instead, the meaning of a subject

26. See *infra* part III.B.

27. See LAKOFF & JOHNSON, *supra* note 1, at 10-13.

28. Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1071-73 (1989).

once thought of in metaphoric terms will in a sense be polluted by the metaphor. The reader will now associate with the subject things that she would not have associated with it before, and because of the strength of these new associations might not as easily come to certain realizations about the subject. Furthermore, the "new" meaning conveyed by a metaphorical formulation of a concept cannot be literally translated. The metaphor will trigger different associations for the reader and writer and thus they will no longer assign congruent meanings to the concept, nor will they be able to express fully their shared meaning through literal language.²⁹ As Thomas Ross explains it: "If we attempt to express a meaning without explaining the significance of our culturally bounded imaginations, we probably say too little. But as soon as we attempt to explain in this way, we probably say too much."³⁰

Consider the extreme case of a reader who does not understand a concept apart from its metaphoric formulation. For that person the metaphor does not merely pollute the meaning of the concept, but rather it *is* the meaning. He will, of course, not be able to grasp the literal meaning or convey it to others. He will only be able to think and communicate about the concept through metaphor. Likewise, someone who finds that the metaphor significantly aids her understanding of a concept will tend to communicate through the metaphor, or will have her thinking shaped by the metaphor.

Because of these effects, metaphors have a tendency to take on a life of their own.³¹

New metaphors have the power to create a new reality. This can begin to happen when we start to comprehend our experience in terms of a metaphor, and it becomes a deeper reality when we begin to act in terms of it. If a new metaphor enters the conceptual system that we base our actions on, it will alter that conceptual system and the perceptions and actions that the system gives rise to.³²

Problems arise when lawyers and judges concentrate on or are influ-

29. *Id.* at 1071-72; LAKOFF & JOHNSON, *supra* note 1, at 142-44. As previous scholarship has failed to point out, this problem may be becoming more significant. As the legal profession and our society become more heterogeneous, the chances that a reader will not be able to understand a metaphorical reference at all increase. I discuss this point in more detail below in connection with baseball metaphors. See *infra* part II.B.

30. ROSS, *supra* note 28, at 1072.

31. BOSMAJIAN, *supra* note 12, at 38-39.

32. LAKOFF & JOHNSON, *supra* note 1, at 145.

enced by the metaphor rather than the sometimes abstract doctrine behind it. A focus on the images called to mind by a metaphor ("fruit of the poisonous tree," "marketplace of ideas," "wall of separation") can lead to inattention to other considerations that should rightly factor into the analysis. Thus, a metaphor that might once have allowed an escape from previously restricted reasoning about an issue can create anew the very problem it was employed to solve by limiting thinking as much as it was limited before.³³

Consider the "marketplace of ideas."³⁴ The metaphor was initially introduced into American law by Justice Holmes in his dissent in *Abrams v. United States*.³⁵ Holmes wrote: "[t]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market"³⁶ In 1965, Justice Brennan introduced the metaphor in its current form in *Lamont v. Postmaster General*,³⁷ which involved a postal regulation restricting the delivery of communist mailings. Brennan wrote: "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."³⁸ In 1969, Justice White placed the metaphor at the core of First Amendment jurisprudence, declaring in *Red Lion Broadcasting Co. v. FCC*³⁹ that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee."⁴⁰

Regardless of whether one concludes that there is a meaningful distinction between the Holmes and Brennan metaphors,⁴¹ the ideas of

33. *Id.* at 157-58.

34. Much of the basic information used in this example comes from Bosmajian's chapter on the "marketplace of ideas." See generally BOSMAJIAN, *supra* note 12, at 49-72.

35. 250 U.S. 616 (1919).

36. *Id.* at 630 (Holmes, J., dissenting).

37. 381 U.S. 301 (1965).

38. *Id.* at 308 (Brennan, J., concurring).

39. 395 U.S. 367 (1969).

40. *Id.* at 390.

41. David Cole believes that there is such a distinction:

Brennan's revision is significant. Brennan localized the metaphor; he gave the market a sense of place. Brought down from the Holmesian skies, the marketplace of ideas grounds "free trade" in a specific locale and context. Though it is often made to do so, Brennan's metaphor need not carry the baggage of economic theory that Holmes expressly adopted The marketplace of ideas connotes diversity and pluralism at

the "market" and "marketplace"—despite the fact that either phrase may invoke significantly different images in different people⁴²—are surely similar enough that they have shaped and limited the way we think about the First Amendment. Both call to mind notions of commerce, and the idea that the better product—in Justice White's formulation, that product is "truth"—will ultimately succeed. Perhaps most importantly, as Stanley Ingber points out, the metaphor has played at least some role in leading the Supreme Court to treat the First Amendment differently from other constitutional rights:

This focus on a marketplace seeking truth and promoting an informed citizenry has had a curious impact on judicial and scholarly attitudes toward the first amendment. Courts usually articulate constitutional rights as 'individual rights' that are justified because of the protection they afford to the person exercising the right. But courts that invoke the marketplace model of the first amendment justify free expression because of the aggregate benefits to society, and not because an individual speaker receives a particular benefit.⁴³

Invocation of the marketplace metaphor may cause courts to overlook what arguably should be important considerations. The "marketplace of ideas" doctrine generally holds that regulation of speech is presumptively bad—that truth will be recognized as such and emerge victorious over its competition, and that this process is better than declarations of "truth" by governmental fiat. Yet there are indicia of frequent failure in the marketplace of ideas. As Ingber argues:

ground level without resting on theories of abstract, truth-generating invisible hands. The marketplace metaphor thus avoids some of the conceptual weaknesses of Holmes' economic model, while focusing attention on the process of exchange in a particular context or medium.

David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 894 (1986).

It is, I believe, very easy to come to the opposite conclusion. According to Bosmajian, the "market" when Holmes wrote connoted something concrete—an actual gathering in a town square or similar area of buyers and sellers of relatively equal bargaining power who in fact bargained over price and other relevant terms of sale. See BOSMAJIAN, *supra* note 12, at 59-60. When I hear a reference to the "market" or "marketplace" I tend to think of an abstract concept and the equally mysterious "invisible hand." This may be nothing more than a product of my having received my legal education at a school that emphasizes the use of economics. At the very least, however, this demonstrates the fact that metaphors do not mean the same thing to everyone.

42. See *supra* note 41.

43. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 4.

[R]eal world conditions . . . interfere with the effective operation of the marketplace of ideas: sophisticated and expensive communications technology, monopoly control of the media, access limitations suffered by disfavored or impoverished groups, techniques of behavior manipulation, irrational responses to propaganda, and the arguable nonexistence of objective truth, all conflict with marketplace ideals.⁴⁴

There are, of course, plausible arguments that these problems do not really exist, or that they are not that serious and the market does not fail that often. Another, perhaps more powerful, response to Ingber suggests that even if the marketplace of ideas does not always function perfectly, it yields results significantly better than any of the alternatives. Regardless of whether one is convinced of the substantive validity of the marketplace metaphor, its blind invocation at best causes courts to fail fully to appreciate the existence of these issues, and at worst enables courts to avoid them.

It seems clear that the "marketplace of ideas" has shaped our thinking as to First Amendment issues in ways that are significant if not easily articulable. To appreciate this, one need only try to imagine how we might view the function of the First Amendment if Holmes had instead invoked a different metaphor. Zechariah Chafee provides two alternative metaphors. The first is of "open discussion as operating like an electric mixer . . . run it a little while and truth will rise to the top with the dregs of error going down to the bottom."⁴⁵ Having found that metaphor unsatisfactory, he settles on the following substitute for the "marketplace of ideas":

[A] bay with thousands of waves, piling up on the shore and then pulling back, sometimes higher, sometimes lower. We know that the tide is either coming in or going out, but we do not have a tide-table. The immeasurable motion appears aimless, but time will show the main course of the sea.⁴⁶

Either would surely have changed the way we view the problem. To take just one example, many argue that markets inevitably correct themselves, but no one can deny that a spatula is necessary to get things from the side of the bowl into the mixture.

44. *Id.* at 5.

45. ZECHARIAH CHAFEE, JR., *THE BLESSINGS OF LIBERTY* 107 (1956).

46. *Id.* at 111.

The "marketplace of ideas" example makes it easy to emphasize the damaging effects that metaphors can have, and to imagine them running amok, taking control of legal doctrines whenever they are used. One must realize, however, that judges recognize the power of metaphor and its ability to get out of control if not monitored. Justice Cardozo wrote: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."⁴⁷ Regarding the "wall of separation between church and state," Justice Reed in 1948 wrote: "A rule of law should not be drawn from a figure of speech."⁴⁸ On the same issue Justice Stewart noted, "I think that the Court's task . . . is not responsibly aided by the uncritical invocation of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution."⁴⁹

Metaphor's power over our thought processes is limited by our awareness of it. "While the power of metaphor is great, it is not the power to drive us to decisions we might reject on other deeply held grounds."⁵⁰ Ross demonstrates this point by examining the "fruit of the poisonous tree" metaphor used in Fourth Amendment jurisprudence. He points to several cases in which the Supreme Court acknowledged the applicability of the metaphor, yet created exceptions to the exclusionary rule for evidence that clearly qualified as "fruit of the poisonous tree."⁵¹ He concludes, "We can surely set aside the particular reality of the metaphor; we are not compelled to see only its reality."⁵²

It seems most appropriate, then, to describe metaphor as a device that modifies legal doctrines rather than controls them.⁵³ And although

47. *Berkey v. Third Ave. Ry.*, 155 N.E. 58, 61 (N.Y. 1926).

48. *McCollum v. Board of Educ.*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting).

49. *Engel v. Vitale*, 370 U.S. 421, 445 (1962) (Stewart, J., dissenting). *See also, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (referring to the "wall of separation" as "Jefferson's misleading metaphor"); *Oregon v. Elstad*, 470 U.S. 298, 304 (1985) (referring to the "fruit of the poisonous tree," noting that "taken out of context, each of these metaphors can be misleading").

50. Ross, *supra* note 28, at 1073.

51. *Id.* at 1073-75.

52. *Id.* at 1073.

53. Boudin draws a similar conclusion, stating with respect to the "bottleneck" doctrine in antitrust law:

Despite its embarrassing weakness, the bottleneck doctrine is nevertheless alive and well in the lower federal courts, doing mischief and gaining momentum It would go too far to assert that the doctrine exists because it is an effective metaphor, although the label may have played some role as a catalyst. A more modest suggestion would be that the metaphor has helped to shape the doctrine and has abetted the

this effect is undoubtedly significant, no one has yet expressly considered the extent to which non-metaphorical formulations of legal doctrines and concepts have similar effects. It is plausible that in many respects the potential for metaphorical language to distort meaning in law is no greater than that of its non-metaphorical counterpart.⁵⁴

We must nevertheless remain mindful of metaphor in legal discourse. Our judicial system daily exercises power over our economy and ourselves. Carelessly invoked, metaphor can lead to the use of that power without consideration of all the factors that ought to be taken into account. As Haig Bosmajian points out, some element of this is present in all metaphors: “[W]hat appears on the surface to be objective becomes rather subjective since a metaphor can be replaced with a different metaphor. By choosing one metaphor over another, like the poet, novelist, or politician, the jurist makes a subjective choice.”⁵⁵ Of even greater concern, however, is the possibility that an unscrupulous judge, aware of the power of metaphor, might intentionally use it to obscure his reasoning or to avoid explicit consideration of a decision’s consequences. In either case—whether they cause or facilitate faulty reasoning—carelessly invoked metaphors threaten to undermine the rule of law.

II. BASEBALL AND THE LAW

This Part first outlines what about baseball made it our “national pastime,” and observes that virtual judicial notice has been taken of that fact. It then proceeds to critique at a general level the validity of comparing law to baseball.

A. *The Game*

Baseball has been central to American culture for over one hundred years, and for most of that period it has towered above all other sports

tendency of courts to treat it as if it were a self-executing rule. Boudin, *supra* note 1, at 402.

54. There is at least some reason to believe that non-metaphorical formulations of legal concepts can potentially have some of the same negative effects as their metaphorical counterparts if invoked thoughtlessly. See, e.g., Donald C. Langevoort, *Disclosures that “Bespeak Caution,”* 49 BUS. LAW. 481, 497, 500 (1994) (expressing concern that courts might be led astray by mechanical application of the “bespeaks caution” doctrine in securities fraud cases). Of course, if all human cognition is metaphorical in nature, see *supra* note 8, then there really is no such thing as a non-metaphorical formulation of a legal concept.

55. BOSMAJIAN, *supra* note 12, at 200.

as our "national pastime." In 1911, Albert Spalding, one of the fathers of modern baseball, wrote:

To enter upon a deliberate argument to prove that Base Ball is our National Game; that it has all the attributes of American origin, American character and unbounded public favor in America, seems a work of supererogation. It is to undertake the elucidation of a patent fact; the sober demonstration of an axiom; it is like a solemn declaration that two plus two equals four.⁵⁶

Spalding then proceeded to elucidate the reasons for baseball's status:

The genius of our institutions is democratic; Base Ball is a democratic game. The spirit of our national life is combative; Base Ball is a combative game. We are a cosmopolitan people, knowing no arbitrary class distinctions, acknowledging none. The son of a President of the United States would as soon play ball with Patsy Flanigan as with Lawrence Lionel Livingstone, provided only that Patsy could put up the right article.

.
It would be as impossible for a Briton, who had not breathed the air of this free land as a naturalized American citizen; for one who had no part or heritage in the hopes and achievements of our country, to play Base Ball, as it would for an American, free from the trammels of English traditions, customs, or conventionalities, to play the national game of Great Britain.

Let such an Englishman stand at the batter's slab on an American ball field, facing the son of an American President in

56. ALBERT G. SPALDING, *AMERICA'S NATIONAL GAME* 3-4 (Bison Book ed., Univ. of Neb. Press 1992) (1911). Spalding's account of baseball as wholly American in origin has been thoroughly discredited in favor of an account that has the game evolving from the British game of rounders. See DONALD HONIG, *BASEBALL AMERICA* 2-5 (1985); 1 DAVID Q. VOIGT, *AMERICAN BASEBALL* 5-7 (1983). Spalding's writing nevertheless accurately portrays American attitudes toward the game during the time he wrote. By 1911, baseball

was no longer considered an oddity, an occasional diversion, or a trivial form of entertainment. Indeed, baseball had achieved a permanency and prominence in American life that was enjoyed by few other institutions Boys everywhere grew up reading baseball fiction, learning the rudiments of the game, and dreaming of one day becoming diamond heroes themselves No other sport quite captured the essence of the nation's character as much as baseball.

Benjamin G. Rader, *Introduction* to ALBERT G. SPALDING, *AMERICA'S NATIONAL GAME* ix (Bison Book ed., Univ. of Neb. Press 1992) (1911).

the pitcher's box, and while he was ruminating upon the propriety of hitting, in his "best form," a ball delivered by so august a personage, the President's boy would probably shoot three hot ones over the plate, and the Umpire's "Three strikes; you're out," would arouse our British cousin to a realization that we have a game too lively for any but Americans to play.⁵⁷

While the modern reader's reaction to Spalding is more likely to be a chuckle rather than a swelling of pride in the country and the game, the notion that baseball is the quintessential American game has not died.⁵⁸ Bookstores are filled with books from which one could draw quotation after quotation echoing Spalding's sentiments. As is so often the case when it comes to baseball, however, Roger Angell put it best: "It is the pastime: no other sport owns so sweet a monicker or qualifies for this one."⁵⁹

Today, however, some say that the game is in trouble. "There's nothing nice, easy or sunny about baseball these days. It's a gloomy world of squabbling millionaires, racist owners, dwindling attendance, shrinking TV ratings and all manner of other ills."⁶⁰ Yet it may be

57. SPALDING, *supra* note 56, at 6, 9-10. Similarly, Donald Honig writes: "The game's democratizing values were emphasized with pride by its adherents The ball park was a convening point for every element of society, a place where sweatshop drudges could feel sudden and sustaining bursts of exaltation, and arrogant merchant princes forced to sit in despair and dejection." HONIG, *supra* note 56, at 17.

58. Indeed, George Will has turned the notion that baseball reflects America around, arguing that the relation works both ways:

There . . . is a civic interest served by having the population at large leavened by millions of fans. They are spectators of a game that rewards, and thus elicits, a remarkable level of intelligence from those who compete. To be an intelligent fan is to participate in something. It is an activity, a form of appreciating that is good for the individual's soul, and hence for society.

GEORGE F. WILL, *MEN AT WORK: THE CRAFT OF BASEBALL 2* (1990).

59. ROGER ANGELL, *ONCE MORE AROUND THE PARK: A BASEBALL READER ix* (1991).

60. Rick Kogan, *What Price Profit? 'The Trouble With Baseball' Chronicles a Game Striking Out*, CHI. TRIB., Apr. 5, 1993, at 5. See also Dick Heller, *'The Trouble With Baseball' Tough Viewing for Diehard Fans*, WASH. TIMES, Apr. 4, 1993, at C9 ("Free agency, collusion, labor disputes, skyrocketing salaries and dwindling profits, the probable removal by Congress of the sport's antitrust exemption—all these merry aspects are covered in an agonizing account of the ongoing battle between baseball's two gangs of millionaires, owners and players."); Christopher Lehman-Haupt, *Why Baseball is Striking Out and How It Can Be Saved*, N.Y. TIMES, Feb. 22, 1993, at C15 ("Big-league baseball is sick. The symptoms abound. The quality of play has declined. Players and owners outdo each other in greediness. The price of seeing a game is up. Attendance and television ratings are down."). But see Bruce Jenkins, *Fear Not, Baseball Will Survive*, S.F. CHRON., Apr. 2, 1993, at BB9 ("If the game of baseball is dying, it is doing so within the minds of skeptics. They say the evidence of doom is everywhere, but for some of us, a single shining moment wipes out the whole theory. A moment like midday at

because the game and its problems so accurately mirror the rest of society that many continue to share the sense that there is something about baseball that makes it more uniquely "American" than other sports. "We can no longer speak of [baseball] with the oldtime certainty as our national sport. Basketball and football vie with it in popularity as mass-spectator attractions. But that both participants and watchers feel it a true expression of the American spirit few will deny."⁶¹

In 1972 the Supreme Court upheld major league baseball's exemption from the antitrust laws in *Flood v. Kuhn*.⁶² Part I of Justice Blackmun's opinion is perhaps the most famous incorporation of baseball into a judicial opinion. In it he traces the history of the game, provides a lengthy list of some of the game's most gifted players, and refers to "all the other happenings, habits, and superstitions about and around baseball that made it the 'national pastime' or, depending upon the point of view, 'the great American tragedy.'"⁶³ But perhaps more compelling is District Judge Cooper's language at an earlier stage of the case, which Justice Blackmun quotes:⁶⁴

Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business The game is on higher ground; it behooves every one to keep it there.⁶⁵

B. *The Game and the Law*

Given the strength and pervasiveness of the American affection for baseball, it is not surprising that our language is filled with baseball metaphors. In what is surely an incomplete compilation, Robert Palmatier and Harold Ray have gathered a list of 146 such meta-

Dodgertown, talking ball with Houston general manager Bob Watson. Like Roberto Alomar, diving for a ball up the middle and unloading it back to first, all in one motion. Like Francisco Cabrera homering off Steve Howe."); Dave Kindred, *A Game for All Reasons*, SPORTING NEWS, Mar. 22, 1993, at 7 ("This is silly. All this moaning. All this doomsaying by the media. It's plain silly. You'd think baseball is on its deathbed. The truth is, most any American industry would love to have baseball's 'problems.'").

61. Allan Nevins, *Foreword* to 1 DAVID Q. VOIGT, AMERICAN BASEBALL at vii. (1983).

62. 407 U.S. 258 (1972).

63. *Id.* at 264.

64. *Id.* at 266-67.

65. *Flood v. Kuhn*, 309 F. Supp. 793, 797 (S.D.N.Y. 1970).

phors.⁶⁶ Nor is it surprising that the law has been compared to baseball. Bart Giamatti, whose life included time spent as a professor at Yale and as Commissioner of Baseball, noted:

Law—defined as a complex of formal rules, agreed-upon boundaries, authoritative arbiters, custom, and a set of symmetrical opportunities and demands—is enshrined in baseball

[S]ymmetrical surfaces, deep arithmetical patterns, and a vast, stable body of rules ensure competitive balance in the game and show forth a country devoted to the ideals of equality of treatment and opportunity; a country whose deepest dream is of a divinely proportioned and peopled green garden enclosure; above all, a country whose basic assertion is that the law, in all its mutually agreed-upon manifestations, will govern—not nature inexorable, for all she is respected, and not humankind's whims, for all that the game belongs to the people.⁶⁷

Philosopher John Rawls has also compared adjudication to baseball.⁶⁸ Most important for purposes of this Article, however, is the fact that numerous judges have, implicitly or explicitly, compared law to baseball through the use of metaphor, simile, or analogy in their opinions.⁶⁹

As the next Part will show, a given baseball reference will often fulfill many of the five functions of metaphor.⁷⁰ It is hard to dispute that any mention of baseball serves a decorative function in a judicial opinion. Certain aspects of the law, after all, are not always intrinsically interesting. Explained in terms of baseball, however, the minutiae of ERISA or insurance policies might be easier to read about, and a court's analysis more readily remembered. A baseball metaphor can make an abstract concept more concrete as well as any metaphor, and baseball, as a realm in which rules are of great importance, seems on the surface a wonderful candidate for analogy to law. New insights into an issue can come from almost anywhere, and at least one judge has admitted to having had his analysis inspired by the national pastime.⁷¹

66. ROBERT A. PALMATIER & HAROLD L. RAY, *SPORTS TALK: A DICTIONARY OF SPORTS METAPHORS* 205-07 (1989).

67. A. Bartlett Giamatti, *Foreword* to *THE ARMCHAIR BOOK OF BASEBALL* II ix, x-xi (John Thorn ed., 1987) (quoted in Pamela Karlan, *Throwing Out the First Pitch*, 15 VA. L. SCHOOL REP. (No. 2) 23, 23 (1991) (comparing law school to baseball)).

68. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 25-27 (1955).

69. See *infra* part III.

70. See *supra* part I.A.

71. In *Gillette v. RB Partners*, 693 F. Supp. 1266, 1288 (D. Mass. 1988), the judge's deci-

Finally, as demonstrated above,⁷² baseball metaphors can be a more economical means of expressing a thought than can literal language.

Similarly, baseball metaphors can have the same negative effects as other metaphors. Like any other metaphor, a baseball metaphor changes meaning, and thus its invocation can cause courts to overlook some things that should factor into their analysis and overemphasize others. Of course, no baseball metaphor has come to stand for a concept as has the "marketplace of ideas." That is the product of fortuity. The point is that there is no reason to believe that baseball metaphors will have less of an effect than any other kind.

There are, however, several reasons to conclude that baseball might be particularly bad as a source of metaphors for legal discourse. That is, baseball metaphors may tend to change meaning in certain predictable, undesirable ways. The primary reason is that the analogy between the two breaks down at the very point where it initially seems the activities are most similar.⁷³ As Giamatti's quotation demonstrates, baseball and the law are thought to be good candidates for comparison because both are precise, rule-governed activities. Yet there is a fundamental distinction in the nature of the rules governing baseball and the rules that are the law. Ronald Dworkin makes the point well, though with reference to a different game:

Some legal philosophers write about common law adjudication as if it were . . . like chess, except that legal rules are much more likely than chess rules to require interpretation In fact, judges often disagree not simply about how some rule or principle should be interpreted, but whether the rule or principle one judge cites should be acknowledged to be a rule or principle at all In adjudication, unlike chess, the argument *for* a particular rule may be more important than the argument *from* that rule to the particular case⁷⁴

The distinction does not end there. The rules of baseball have been

sion not to defer to a determination made by the SEC in connection with a proxy contest was inspired in part by an umpire's blown call that determined the outcome in a game between the Red Sox and the Royals.

72. See *supra* notes 25-26 and accompanying text.

73. Many of the factual distinctions are brought out in part III.B.

74. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1089-90 (1975). See also Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1386 n.66 (1986) (noting that characterizing legal justification as a game is misleading "because legal proceedings often require us to question the rules themselves as well as what the rules mean").

relatively stable for the last ninety years,⁷⁵ and doubtless will continue to remain substantially the same. Furthermore, because virtually every possible scenario requiring interpretation of the rules has arisen in that time, an umpire will rarely be faced with a situation in which he does not know the standard that he must apply. Changes to the rules, if there be any, will come from the sport's governing body; umpires merely "find facts" and apply the rules of the game. In the legal system, on the other hand, the rules are subject to constant change as developments in thinking or technology reveal deficiencies in old ones. Complicating this is the fact that life yields a greater set of situations than baseball; courts every day hear controversies to which no existing rule applies even in the oldest, most thoroughly-developed areas of law. Finally, courts, in addition to legislatures, are empowered to create or reshape the rules. This power is broadest when courts are engaged in common law adjudication, but it also exists in constitutional and statutory interpretation cases, where the rule has ostensibly been provided for the court.

A jurist who briefly loses sight of this distinction and who thus decides a case a certain way because "that's what the rules of the game provide" accepts without question the status quo. As Oriard points out, this notion—that as long as the "rules of the game" were adhered to the result is acceptable—has been used throughout American history by those who have power to justify outcomes favorable to themselves.⁷⁶ Thus frontier lynchings at the turn of the century,⁷⁷ oppression of women throughout history,⁷⁸ and politics as nothing more than a naked quest for power,⁷⁹ among other things, have been explained in terms of "fair play." The use of such a justification sidesteps inquiry into the legitimacy of the rules and, indeed, of the "game" itself.⁸⁰

On another level comes the realization that litigation is not a game,

75. See LEONARD KOPPETT, *THE NEW THINKING FAN'S GUIDE TO BASEBALL* 10 (1991). This continuity in the rules of the game enabled an umpire to make the most clever response to hecklers that I have ever heard at a ballgame. When, following the customary remarks about blindness and so forth, a spectator asked the umpire why he would not at least clean off home plate, the umpire responded: "It's been in the same place for 125 years; I know exactly where it is."

76. ORIARD, *supra* note 3, at 23-28.

77. *Id.* at 26.

78. *Id.* at 331-34. Oriard points out that in novels by women "the 'game' consistently appears as a rhetorical sign of male oppression," *id.* at 332, and that feminist theorists have found in sporting rhetoric "the very essence of patriarchal oppression." *Id.* at 333.

79. *Id.* at 323.

80. *Id.*

and that characterizing it as such may trivialize what is at stake when parties turn to the legal system. Much more rides on the outcome of litigation than on a single baseball game or even an entire season. The power of a determined government over its citizens is virtually without limit, and an unsuccessful litigant can face consequences no less dire than jail (or even death), a life of poverty, or the end of its corporate existence. Furthermore, a lawsuit can create precedent affecting the lives of thousands or millions of people. Many baseball games, in contrast, are little more than recreation for their participants. Even at the professional level the dynamics of the stakes are different. The major league season is 162 games long; thus no single game shapes the financial future or professional career of a baseball player the way a lawsuit can shape the life of a participant. Indeed, one may be one of the best players in the game—with all the accompanying prestige and financial rewards—and yet play for one of the losingest teams (Steve Carlton and the '72 Phillies is the ultimate example of this phenomenon—he had 27 of the team's 59 wins⁸¹). And above all this is the fact that baseball is, after all, just a game.⁸² As a result, metaphorical references to baseball in judicial opinions may at some level lead judges to treat their subjects less seriously, or to give less consideration to the consequences of their decision, than they otherwise might.⁸³

Another consequence may be the implicit approval of cheating, or "bending the rules," which seems to be accepted if not admired in sports.⁸⁴ In the second game of the 1991 World Series, Minnesota's Kent Hrbek appeared to push Atlanta's Ron Gant off first base, then tagged Gant, who was called out.⁸⁵ Although Hrbek suffered considerable abuse at the hands of Atlanta fans during the remainder of the

81. John B. Holway & Bob Carroll, *Lives of the Players*, in TOTAL BASEBALL 301, 315 (John Thorn & Pete Palmer eds., 2d ed. 1991). Carlton led the National League in wins, earned run average and strikeouts. Of course, the financial rewards for greatness were different in those days. Carlton's salary the next year was a major league record \$167,000. *Id.*

82. Kirby Puckett, *A Dream (Post)Season*, STAR TRIB., Apr. 4, 1993, at 1C (noting that, "It's a game, man!").

83. Oriard concludes that this effect is more general:

When western expansion and Indian warfare are explained by analogy to a "game," the real human cost can be forgotten as the workings of brute force are transformed into "fair play." When business is explained metaphorically as the great "game of life," the actual impact of economic competition or monopolistic practices may become lost in the celebration of the successful businessman's sporting success.

ORIARD, *supra* note 3, at xv.

84. *Id.* at 15.

85. For an account of the play, see Bill Plaschke, *Hrbek Wins Game of Gamesmanship*, L.A. TIMES, Oct. 21, 1991, at C12.

Series, "in the end everyone pretty much accepted that he had just played hardball in a hardball game."⁸⁶ A Braves coach remarked that Hrbek "was playing good, hard baseball the way it's supposed to be played."⁸⁷ A sportswriter summarized this attitude by noting, "What you do in baseball is what you can get away with."⁸⁸ While there have doubtless always been attorneys willing to do whatever they could get away with, many commentators believe that the problem—often characterized as "hardball" or "Rambo" litigation—has become more widespread in the last decade or so.⁸⁹ Like Hrbek, the hardball litigator bends or breaks the rules with the hope of gaining an advantage:

Mr. Rambo files a written motion and seeks a court hearing on a minor matter which could have been easily resolved by a telephone call. Or he agrees orally to extend you an extra two days in which to file your answer to his complaint, but then he shows up in court and takes a default judgment. Two extra days are consumed in the process of taking the deposition of one of his witnesses because of his absurd objections and arguments. As the two of you walk toward the bench for a ruling during the trial, Mr. Rambo whispers a threat in obscene terms.⁹⁰

Depiction of the legal system in baseball terms does nothing to discourage this attitude, and may encourage it in addition to implicitly condoning it. To the extent that we disapprove of hardball legal tactics, then, we should disapprove of baseball metaphors if they foster the underlying attitudes toward the system.

A final problem with baseball metaphors is simply that not everyone will understand the reference. Our culture is becoming more diverse, and kids who in a different era would have grown up playing baseball now spend their time playing video games or other sports like

86. John Head, *World Series MVP: Most Vilified Person*, ATLANTA J. & CONST., Nov. 11, 1991, at A9.

87. Plaschke, *supra* note 85, at C12 (quoting Atlanta first base coach Pat Corrales).

88. Dave Kindred, *As a Baseball Bad Guy, Hrbek Pulls It Off*, SPORTING NEWS, Oct. 28, 1991, at 6.

89. For a colloquy on this point, see, for example, William A. Brewer III & Francis B. Majorie, *One Year After Dondi: Time to Get Back to Litigating?*, 17 PEPP. L. REV. 833 (1990); Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990); Thomas M. Reavley, *Response to "One Year After Dondi,"* 17 PEPP. L. REV. 851 (1990) [hereinafter *Response*].

90. *Response, supra* note 89, at 851.

soccer and basketball. The legal profession is also becoming more diverse, and while it may once have been the case that a lawyer could reasonably be expected to know something about baseball, that surely does not hold true today. A metaphor will be less effective when a reader has an incomplete or nonexistent understanding of it. Rather than making an opinion more stylish, the metaphor becomes a nuisance. The abstract and complex remains that way for one who does not understand the metaphor, and may be made more concrete in the wrong way for one who does not understand it completely. Concealed analogies are missed, and the creative link between two unrelated concepts never develops. Finally, a metaphor cannot be economical if it does not achieve its goals. This, too, cautions against the use of baseball metaphors.

III. BASEBALL METAPHORS IN THE CASES

This Part will briefly examine some of the baseball metaphors that have appeared in judicial opinions. These examples are intended to underscore and further illuminate some of the points made above, as well as to generate further insights into the effects of baseball metaphors, and metaphor generally. The selection of examples represents a small sample of those that I might possibly have examined, chosen so as not to be repetitive of the general analysis above. Courts have employed literally hundreds of baseball metaphors in their opinions; thus I might also have considered references to the infield fly rule,⁹¹ pitchers,⁹² the rule that "a tie goes to the runner,"⁹³ and so on.⁹⁴

91. See, e.g., *Kessler v. Pennsylvania Nat'l Mut. Casualty Ins. Co.*, 531 F.2d 248, 249 (5th Cir. 1976); *Security Union Title Ins. Co. v. Superior Court*, 281 Cal. Rptr. 348, 353 (1991).

92. See, e.g., *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 279 (D.C. Cir. 1973); *Gennaro v. Rosenfield*, 600 F. Supp. 485, 489 (S.D.N.Y. 1984); *Baird v. Bellotti*, 555 F. Supp. 579, 588 (D. Mass. 1982); *Orange County Employees Ass'n v. County of Orange*, 205 Cal. App. 3d 1289, 1294 (1988); *Rudnick v. Golden West Broadcasters*, 156 Cal. App. 3d 793, 804 (1984).

93. See, e.g., *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 541 (9th Cir. 1990); *Phillips v. Lincoln Nat'l Life Ins. Co.*, 774 F. Supp. 495, 502 n.5 (N.D. Ill. 1991); *Firstsouth, F.A., v. LaSalle Nat'l Bank*, 766 F. Supp. 1488, 1492 n.6 (E.D. Ill. 1991); *In re Richardson-Merrell, Inc. "Bendectin" Products Liab. Litig.*, 624 F. Supp. 1212, 1218 (S.D. Ohio 1985); *United States v. Provident Nat'l Bank*, 280 F. Supp. 1, 24 n.18 (E.D. Pa. 1968); *People v. Anderson*, 801 P.2d 1107, 1116 (Cal. 1990).

94. See, e.g., *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 130 (3d Cir. 1976) ("After the third out in the ninth inning the baseball game is over. But the provision for appellate courts means that the game of litigation is, or at least should be, played by different rules."); *St. Luke's Hosp. v. Secretary of HHS*, 632 F. Supp. 1387, 1393 (D. Mass. 1986) ("The analogy is to a baseball team playing a game under pro-

A. *Hit-and-Run*

The term "hit-and-run" is the closest a baseball metaphor has come to shaping a doctrine to the same extent as a metaphor such as "the marketplace of ideas." In baseball it refers to "a play in which a man on base runs with the pitch, and the batter attempts to hit the ball."⁹⁵ In law a "hit-and-run accident" is a "[c]ollision generally between motor vehicle and pedestrian or with another vehicle in which the [culpable] operator of vehicle leaves [the] scene without identifying himself"⁹⁶ The term was commonly used in baseball before automobiles were invented, and so was clearly borrowed by the law. Because the two events to which the term refers are not obviously similar, this metaphor seems to be different from most others in that it must have been borrowed because of the fact that it is a good literal description of what takes place in both instances. Thus the term is not used to invoke the image of baseball, and it would seem that courts should not look to baseball at all in their analyses of "hit-and-run" issues.

Courts have, nevertheless, done exactly that. Each time a court has looked to baseball to illuminate the meaning of "hit-and-run" the question has been whether there must be actual contact between the automobile that leaves the scene and the other automobile or person involved for an accident to be classified as a hit-and-run.⁹⁷ The plaintiffs in those cases were individuals seeking to recover under the uninsured motorist components of their insurance policies. All had been forced to swerve off the road to avoid an oncoming vehicle (which had then left the scene), and thereby hit something or rolled their cars. All were claiming that their insurance policies, which defined hit-and-run accidents as involving an actual collision, were invalid under their states' insurance laws.

No court based its holding solely on the meaning ascribed to "hit-and-run" in baseball, yet the five cases I found all treated the term's baseball meaning with some degree of seriousness, and not all came to the same result. The earliest case, *Prosk v. Allstate Insurance Co.*,⁹⁸ focused on literally defining "hit-and-run," and the court seriously con-

test").

95. AMERICAN HERITAGE DICTIONARY 625 (William Morris ed., 1976).

96. BLACK'S LAW DICTIONARY 730 (6th ed. 1990).

97. See *infra* notes 98-108 and accompanying text.

98. 226 N.E.2d 498 (Ill. App. Ct. 1967).

sidered plaintiff's arguments about the term's meaning in baseball, although it ultimately relied on the fact that the dictionary definition of "hit" required contact.⁹⁹ The court in *Marakis v. State Farm Fire and Casualty Co.*,¹⁰⁰ concluded that cases such as *Prosk* are

unmindful of various other uses of the term that do not necessitate physical contact [In baseball,] the applicability of the term does not hinge on the successful completion of the play (whether the batter hit the ball) Similarly, the term 'hit-and-run' aptly includes characterization of an accident which is caused without physical contact by one who leaves the accident scene without identifying him—or herself.¹⁰¹

The court in *Royal Insurance Co. v. Austin*¹⁰² agreed with the analysis in *Marakis*.¹⁰³ The courts in *Clark v. Regent Insurance Co.*¹⁰⁴ and *McGlynn v. Safeco Insurance Co.*,¹⁰⁵ on the other hand, seem to have taken the more prudent approach. In *Clark* the court made its determination on the basis of a weighing of the relevant policy considerations, concluding that "hit-and-run" is merely a term borrowed from baseball and thus should not be construed too literally.¹⁰⁶ The court balanced the argument that a collision requirement makes it more difficult to make fraudulent claims against the fact that uninsured motorist insurance is designed to cover these very situations, and came out in favor of the latter.¹⁰⁷ The *McGlynn* court echoed this analysis.¹⁰⁸

The term "hit-and-run" achieves few of the positive functions of metaphor. This is doubtless because it is not really a metaphor, but rather a borrowed term. It has come to have a distinct meaning in the law; therefore it cannot be decorative. It does not make an abstract concept more concrete; it cannot, because the term was not employed to achieve any kind of analogy between accidents and baseball. It is an economical way of expressing its doctrine, but only because of the

99. *Id.* at 499-500.

100. 765 P.2d 882 (Utah 1988).

101. *Id.* at 884.

102. 558 A.2d 1247 (Md. Ct. Spec. App. 1989).

103. *Id.* at 1250 ("We agree that the term 'hit-and-run' has developed a lexical common-place meaning wholly separate from the mere word 'hit.' The term should be read to include all accidents caused by one who 'flees the scene without being identified.'").

104. 270 N.W.2d 26 (S.D. 1978).

105. 701 P.2d 735 (Mont. 1985).

106. *Clark*, 270 N.W.2d at 30-31.

107. *Id.* at 29-31.

108. *McGlynn*, 701 P.2d at 738.

distinct legal meaning it has acquired. Yet, because some courts have treated "hit-and-run" as if it were a metaphor, the term has affected their analyses. This example simply underscores the power of metaphor. The game of baseball has nothing to do with these accidents or the policy considerations behind the issue. Litigants seeking to gain an advantage, however, have made arguments based on the term's meaning in baseball, and courts, focused on what they perceive to be a metaphor, have looked past these very real considerations at stake to baseball, where no logical answer is to be found.

B. *The Judge as Umpire*

The characterization of the judge as an umpire seems to be one of the most natural comparisons of law to baseball. Both serve the same general purpose of protecting the integrity of the process by making sure that the participants adhere to the rules, and one can easily discern a host of other parallels. Yet the comparison is surely inaccurate in one fundamental respect that stems from the nature of the rules in the two arenas.¹⁰⁹ Judges, unlike umpires, have the authority in most cases to change the rules when necessary and to create rules where none exist (a situation that confronts judges much more frequently than umpires). In so doing, judges must look beyond the facts of the case before them to consider the broader implications that a given rule might have. Indeed, a plausible argument could be made—especially with respect to common law adjudication—that judges have an *obligation* to question and reconsider the validity of the rules in each case before them, whereas umpires are obliged to follow the rules and have no opportunity or authority to consider their broader implications for the game. Even where a judge is engaged in statutory interpretation she generally has more room in which to maneuver than an umpire, as the legislature that passed the statute will not have conceived of all the possible situations that might arise under the enactment.

A number of less significant, but nevertheless important, distinctions exist. Perhaps the best way to appreciate these is to consider what a judge who undertook to do her job as an umpire would look like in her role. She would make decisions quickly and in an authoritarian manner (the less certain an umpire is about his call, the more confidence he exudes), and would provide little, if anything, in the way of justification.

109. See *supra* notes 73-76 and accompanying text.

Contempt sanctions (the equivalent of ejection) might be more frequently handed out. She might be more interventionist in structuring the path of litigation,¹¹⁰ yet would be less likely to consult with the parties before doing so. Exact predictions are difficult to make, because the personalities of umpires vary as much as the personalities of judges. It seems clear, however, that such a judge would be more formalistic and inclined to bright-line standards.

For the most part, we would like judges to operate in almost the opposite fashion. Though it is perhaps only an ideal in these days of crowded dockets, we envision judges pondering their decisions, and consulting with parties. Further, a judge faced with a difficult issue should write an opinion that reflects that fact. He must detail why he feels the issue is difficult, and provide the reasons behind his conclusions, for the benefit of future courts as well as those who wish to structure their affairs in accordance with the law. The umpire, in contrast, says only "you're out."

To their credit, many of the judges who have compared their function to the umpire's have done so for the purpose of reminding themselves and their readers that the judge's role does not parallel the umpire's. In *Richmond Newspapers, Inc. v. Virginia*,¹¹¹ Justice Brennan noted that the trial

plays a pivotal role in the entire judicial process, and, by extension, in our form of government. Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government*. While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large.¹¹²

In *Lebel v. Everglades Marina, Inc.*,¹¹³ the court, having lamented the lack of coherence in the law of personal jurisdiction, noted: "One

110. Cf. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1041-45 (1975) (contrasting the judge as intervenor with the judge as umpire); but see, Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71 TEX. L. REV. 1541, 1571 (1993) ("Most contemporary legal scholars doubt that the 'umpire role' is a metaphor for judicial review of constitutionality because it either overstates the power that courts have or overstates the strength of the ties that bind judges to sacred texts.").

111. 448 U.S. 555 (1980).

112. *Id.* at 595 (Brennan, J., concurring).

113. 558 A.2d 1252 (N.J. 1989).

yearns for the certainty of autocracy, for one like a baseball umpire who would call the action fair or foul."¹¹⁴ As a final example,¹¹⁵ in *Polulich v. J.G. Schmidt Tool Die & Stamping Co.*,¹¹⁶ the court rejected the "sporting theory of justice, in which the judge is an umpire calling balls and strikes but pitching none"¹¹⁷ Employed in this fashion, the contrasting of judges and umpires will generally be a good thing. Unless it is used by a judge to escape doing something that he in fact should do, pointing out what the judge *is not* would seem an effective way to highlight what he *is*.

Many courts, however, have revealed a less fine appreciation of the distinct roles of umpire and judge. In *Bolick v. State*,¹¹⁸ the court stated: "[I]n baseball parlance, [defendant's] attempt to reach home base failed and his squawk to this court in the position of umpire that 'They ain't playing fair!' fails because the game was conducted in conformity with the rules."¹¹⁹ Another court stated: "Whether one is a baseball umpire, a football referee or a court judge, in making decisions he must turn to the book to find the governing rules. He can't make up rules extemporaneously as he goes along, however much sometimes he would like to do so."¹²⁰ Whether the product or the source of the confusion, these examples show that courts can sometimes overlook their duty to consider and justify the bases for their decisions.

The point is not so much that these courts were led by metaphor to get the issue wrong, although that certainly is a problem to the extent it happens. Instead, these examples point out a way that courts use metaphors—not just baseball metaphors—that is disturbing. As Deborah DeMott has pointed out, metaphorical language seems appropriate in

114. *Id.* at 1252-53.

115. There are other such cases. *See, e.g.,* *Niemiec v. Seattle Rainier Baseball Club*, 67 F. Supp. 705, 706 (N.D. Wash. 1946) ("Many times I envy the baseball umpire who merely has to say 'strike one' or 'ball two' or 'you are out,' . . . but it is expected that I not only give my result but also the reasons."); *People ex rel. Dep't of Pub. Works v. Lillard*, 33 Cal. Rptr. 189, 193 (Cal. Dist. Ct. App. 1963) ("The judge is obligated to conduct the trial in a fair and impartial manner. He may not, of course, choose sides. His function, however, is much more than that of a plate umpire at a baseball game calling balls and strikes."); *Lustig v. Lustig*, 299 N.W.2d 375, 382 (Mich. Ct. App. 1980) ("While the court must consider all the factors . . . in deciding what is in the best interests of the child, such determination is much more difficult than merely tallying runs, hits, and errors in box score fashion following a baseball game.").

116. 134 A.2d 29 (Essex County Ct. N.J. 1957).

117. *Id.* at 33.

118. 194 S.E.2d 302 (Ga. Ct. App. 1972).

119. *Id.* at 305.

120. *Building Serv. & Maintenance Union Local No. 47 v. St. Luke's Hosp.*, 227 N.E.2d 265, 267 (C.P. Ct. Cuyahoga County, Ohio 1967).

some legal situations (such as arguments before juries), and inappropriate in others (such as statutes), because literal language is often needed to achieve precision of meaning.¹²¹ Judicial opinions seem to fall somewhere in between. At certain points in an opinion, such as where a court is summarily disposing of an issue, a metaphorical explanation seems unsatisfactory. The reason for this, I believe, has to do with a more fundamental consideration—that of maintaining the appearance of legitimacy. The courts quoted above, rather than indicating in literal language that they saw no reason not to apply existing rules (which would imply that they thought about it), effectively said “this is what the rules require, so this is the result” (which implies that they did not).¹²²

As a sitting federal judge recently wrote, “[n]o organ of American government bears a greater burden of justification for its own acts than the federal judiciary.”¹²³ Judges must tell us not merely the result of their deliberations, but how they reached it. A metaphorical dismissal of an issue that implies that there were no deliberations lessens the legitimacy of the decision, and in some circumstances could lead to a suspicion that the court was not being completely forthcoming. Wayne Booth has argued that we can judge the quality of a metaphor based on the purposes for and context in which it is used.¹²⁴ Because a purpose of judicial opinions is to present a reasoned elaboration of the court’s decision, we can safely say that, in order to be good, a metaphor should illuminate rather than obscure the judge’s reasoning.

The “umpire” metaphor, because it seems so natural, is frequently used in opinions. It does have its positive attributes. It certainly provides the opportunity for decoration, and renders more concrete the

121. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 890-91. Though they might seem inappropriate, metaphors do find their way into the statute books. See Scallen, *supra* note 12, at 480 n.3 (pointing out the presence of metaphors in the United States Tax Code and the accompanying regulations).

122. For contrasting views on a related subject, compare Marshall Rudolph, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175 (1989) with David A. Golden, *Humor, the Law, and Judge Kozinski's Greatest Hits*, 1992 B.Y.U. L. REV. 507. The problem with Golden’s analysis, to the extent that it exists, is that Judge Kozinski is quite atypical. As revealed by the lengthy excerpts quoted by Golden, Judge Kozinski’s sly puns and clever language invariably appear in the context of a thorough and thoughtful consideration of the issues. He is the sort of a judge who can use humor—or metaphor—to enhance the readability of an opinion without detriment to the analysis. Not all judges craft their opinions as carefully as Judge Kozinski, however, and it is for these judges that the indiscreet use of humor or metaphor can become a problem.

123. J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 781 (1989).

124. See generally Booth, *supra* note 1.

concept of judge to anyone for whom it is abstract. It also often achieves the goals of generating new insights and economy of expression. Yet the metaphor implicates the fundamental distinction between rule systems such as those in law and those in baseball. Thus, to the extent it misleads, it will tend to do so in a significant way. And even when it does not lead to a different result, its use will often lessen the legitimacy of opinions. The balance seems to weigh against its use.

C. *Baseball Metaphors Before the Jury*

Strictly speaking, baseball metaphors used before the jury are outside the scope of this Article. While accounts of the use of metaphors in argument and consideration of their effects on the jury may appear in judicial opinions, such metaphors are not a part of the court's reasoning process as recorded in the opinion. Nevertheless, the subject merits consideration because in considering how jurors might react to a metaphorical formulation of a legal concept we encounter a situation in which the effects of metaphor are likely to be magnified, which makes it easier to appreciate their potential effects in other situations.

Because jurors are almost uniformly aliens to the legal system, they are, except for the often erroneous information they may have received from the media, for the most part unfamiliar with legal procedures and concepts.¹²⁵ This makes them especially susceptible to the sway of metaphor in legal discourse. Unable to stay afloat in a sea of unfamiliar concepts, or perhaps simply bored by it all, a juror may latch on to a comfortable metaphor to the virtual exclusion of all else that is said at trial. He is then in the position of the person who does not understand a concept apart from its metaphorical formulation.¹²⁶ More likely is the juror who understands the concept but finds a metaphor to be a helpful aid in applying it.¹²⁷ Just as a judge who thinks primarily in terms of a poisonous tree rather than the policies animating the

125. This may be changing given the advent of Court TV and the publicity given to the O.J. Simpson and Menendez brothers cases. Whether the information gleaned from these sources is accurate, and whether jurors are thereby made more comfortable with the courtroom environment and thus, presumably, less susceptible to the distortions of metaphor, remains to be seen. See Jeffrey Weiss, *Stark Justice: Television Zooms In On Criminal Justice System*, DALLAS MORNING NEWS, July 31, 1994, at 1J. It seems likely, however, that any such effect would be limited by the fact that only certain types of cases are likely to generate public interest. Thus the issues involved in, for example, commercial, antitrust, or securities disputes are likely to remain foreign to jurors.

126. See *supra* notes 29-30 and accompanying text.

127. See *id.*

exclusionary rule is apt to be misled in some cases, so a juror under the spell of a metaphor might be led to misapply the law to the facts.

The use of metaphors in argument to juries is almost certainly widespread, and my research uncovered several opinions which mentioned the use of a baseball metaphor in jury argument.¹²⁸ Only one court was confronted with something resembling an argument that it should overturn a verdict based on metaphor's power to mislead a jury. It was not impressed. The court stated the issue and its analysis as follows:

The prosecutor used a baseball analogy in describing the state's burden of proof, stating that just as a tie "goes to the runner" in baseball, an "evidentiary tie" in a criminal case benefits the defendant. Defendant now claims that the jury may have interpreted that remark as meaning that defendant would prevail only if the evidence were closely balanced ("tied"), but would lose, despite a reasonable doubt, if the prosecutor's case slightly outweighed the defense.

We have reviewed the remarks in context and find no misconduct, for the prosecutor appears to have been merely observing that conflicting testimony and inferences must be resolved in defendant's favor.¹²⁹

It is likely that the jury was not swayed at all by the baseball reference. Some number of jurors greater than one or two would have had to make the metaphor the basis for their decision, and convince the rest of the jury to do so as well. Yet, while this scenario is unlikely, it might have happened, and given our concern with providing fair trials for criminal defendants the court should have spent more time explicitly considering the likelihood that the jury would have done so before calling the remarks harmless error.¹³⁰

128. See, e.g., *Lakin v. Daniel Marr & Son Co.*, 732 F.2d 233, 236 (1st Cir. 1984); *People v. Anderson*, 801 P.2d 1107, 1116 (Cal. 1990); *State v. DelVecchio*, 191 Conn. 412, 417, 464 A.2d 813, 817 (Conn. 1983); *State v. Reid*, 280 S.E.2d 46, 48 (N.C. Ct. App. 1981).

129. *Anderson*, 801 P.2d at 1116.

130. Indeed, greater sensitivity to the power of metaphor would only be consistent with other doctrines evincing courts' general concern that juries not be misled. For example, the United States Court of Appeals for the Third Circuit has held that any suggestion by a prosecutor that there exists evidence not introduced at trial which supports a witness' testimony requires *per se* reversal of a conviction. *United States v. DiLoreto*, 888 F.2d 996, 999 (3d Cir. 1989). While metaphors as a general category may not be as inherently prejudicial as this form of prosecutorial vouching, the same concerns animating *DiLoreto* require, at the very least, a high level of scrutiny in the analysis of metaphors used before juries.

The implications of this analysis extend beyond the realms of both baseball metaphors and juries. Any metaphorical formulation of a legal standard or factual scenario likely to be unfamiliar to jurors carries with it the potential to mislead. And the extreme level of distortion that metaphors can cause in the thought processes of jurors can occur in anyone uninitiated in the law.¹³¹ Of course, metaphors also function as very powerful tools of explanation in such circumstances, such that a proscription against their use before juries would be unwarranted. Nevertheless, courts and lawyers should be more attentive to their power to mislead.

D. *"Three Strikes and You're Out"*

It should come as no surprise that "three strikes and you're out" has made its way into a number of opinions.¹³² The litigation process contains many points at which either doing something three times ("going down swinging," one might say) or failing to do something three times ("going down looking") merits full or partial disqualification from further participation in the process. In such a situation "three strikes and you're out" comes readily to mind, and the fact that some judges have taken it out of their thoughts and put it into their opinions seems almost unremarkable.

Indeed, examination of the "three strikes" metaphor as used in judicial opinions adds little to the analysis provided in the preceding sections of this Article. It can conceivably attain all the positive effects of metaphor, and perhaps most often acts as a snappy stylistic flourish or an economical way of making concrete a shared notion that we as a society often find it useful to place bright-line, somewhat arbitrary limits on the number of chances one is given to complete a task or attain a goal. Likewise, if used in an unthinking manner it can facilitate the implementation of existing rules without consideration of whether

131. First-year law students fit this description. In this connection, it would be interesting to know whether opinions employing metaphors are more likely to make it into casebooks than those that do not. If, as I have postulated in my treatment of the decorative function of metaphor, such opinions are more likely to be persuasive, then there is reason to believe they would be.

132. See, e.g., *In re Tape City, U.S.A., Inc.*, 677 F.2d 401, 402 (5th Cir. 1982) (per curiam); *Ballan v. Upjohn Co.*, 1994 U.S. Dist. LEXIS 8434, at *21 (W.D. Mich. Apr. 21, 1994); *In re Compton*, 97 B.R. 970, 980 (Bankr. N.D. Ind. 1989); *Dryden Waterproofing, Inc. v. Bogard*, 488 So. 2d 672, 673 (Fla. Dist. Ct. App. 1986); *In re M.W.*, 616 N.E.2d 710, 711 (Ill. App. Ct. 1993).

those rules make sense or really ought to apply in a particular case. Thus the upside and the downside are in form no different than is the case with other baseball metaphors.

Outside the context of judicial opinions, however, this metaphor serves as an excellent example of the practical effect that a baseball metaphor can have. "Three strikes and you're out," of course, has in the past year become the mantra of politicians eager to appear tough on crime. Typically, the reference is to a law pursuant to which individuals convicted of three serious felonies are sentenced to life in prison with no exceptions.¹³³ These laws have become incredibly popular politically.¹³⁴ Indeed, in a memorandum to Democrats seeking re-election to Congress, Stanley Greenberg, a pollster employed by the White House, emphasized that passage of a federal "three strikes" law is of paramount importance to their campaigns.¹³⁵

An argument that "three strikes" laws are popular simply because of their name would be foolish. Without question the public's fascination with them has more to do with its perceptions that rising crime rates require action and that some criminals simply cannot be rehabilitated, coupled with a sense that mandatory life imprisonment for repeat offenders is good policy.¹³⁶ If the public did not feel that measures of this sort were warranted they would not lend it their support, no matter how clever the name.

Yet it seems equally undeniable that the name has had some effect. In the same fashion that the slogan "Just for the Taste of It" was a huge success for Diet Coke while "Taste It All" was a dismal failure,¹³⁷ "three strikes and you're out" is a more effective way to "sell"

133. See, e.g., *Beware the Three-Strike Laws*, N.Y. TIMES, Feb. 2, 1994, at A14; David S. Broder, *When Tough Isn't Smart*, WASH. POST, Mar. 23, 1994, at A21; Ian Fisher, *Why '3-Strike' Sentencing Is A Solid Hit This Season*, N.Y. TIMES, Jan. 25, 1994, at B1. Of course, there are variations among the proposed laws. One Pennsylvania legislator characterized another as advocating a "three strikes and you're dead" law, and Georgia has approved legislation under which persons convicted twice of certain crimes would be subject to a life sentence without parole. Larry Rohter, *In Wave of Anticrime Fervor, States Rush to Adopt Laws*, N.Y. TIMES, May 10, 1994, at A1.

134. See generally Rorie Sherman, *Crime's Toll on the U.S.: Fear, Despair and Guns*, NAT'L L.J., Apr. 18, 1994, at A1.

135. Richard L. Berke, *Advice for Democrats in Fall: Don't Be Too Close to Clinton*, N.Y. TIMES, Aug. 5, 1994, at A1.

136. See Sherman, *supra* note 134; John Carlson, *We've Got 'Three Strikes'—It's Working*, WASH. POST, Mar. 6, 1994, at C7. But see Colman McCarthy, *Three Strikes Is A Foul for Justice*, WASH. POST, Feb. 15, 1994, at D18.

137. See Larry Jabbonsky, *With diet segment in need of a boost, new diet Coke ads stress refreshment*, BEVERAGE WORLD, Jan. 31, 1994, at 1.

these laws to the public and legislators than would be referring to them as, for example, "repeat offender laws." "Three strikes" provides a familiar, economical encapsulation of what the laws actually do. More troubling, however, is the fact that the phrase tends to lull one into a false sense of security concerning its justness. Because we grew up hearing "three strikes and you're out" it sounds right to us, and so we are less inclined to ask whether four or five prior felonies might not be a more appropriate threshold.

This example, then, demonstrates well the type and magnitude of effect that a baseball metaphor, employed in the legislative arena or in a judicial opinion, can have. Liberals will not be led to join in a chorus of "Take Me Out to the Ballgame" as they picket to protest their legislators' softness on crime. Nor will those generally "tough on crime" but opposed to repeat offender laws find themselves suddenly converted, or those who have thought about it and concluded that five prior offenses ought to be a prerequisite to mandatory life imprisonment abandon their reasoning, simply because someone whispers "three strikes and you're out" in their ear. But there is a substantial danger that those who, for whatever reason, do not give the matter much thought will be swayed by the metaphor.¹³⁸ In a similar fashion, neither judges who write opinions nor those who read them are likely to do something contrary to their strongly-held beliefs simply because of a metaphor. But they may be led astray in those cases where, either because of a sense of comfort created by a metaphor or for some other reason, they did not take the time to think through an issue.

IV. CONCLUSION

This Article has sought to do a number of things. First and most basically, it attempted to summarize and fill some gaps in the existing literature on the functions and effect of metaphor in the law. Second, it attempted to examine the implications of viewing the law as a game through a substantive critique of baseball metaphors in the law. Finally, it attempted to at least open the debate as to when it is appropriate to use metaphors in legal discourse.

The fact that much of this seems relatively innocuous is, in many respects, the point. Had Justice Holmes chosen to forsake the "market-

138. While we would all like to believe that this is not the case, it is difficult to conclude that the Coca-Cola Company would spend all the money necessary to switch from "Taste It All" to "This is Refreshment," see Jabbonsky, *supra* note 137, if it did not feel that the change would have a significant effect on the sales of the same underlying product.

place of ideas" in favor of the "timeless battle between pitcher and hitter," it would be possible to have more dramatic insights into how baseball as a metaphor shapes legal doctrine. But he did not, and so the analysis must necessarily concern less tangible effects. Given that the vast majority of metaphors that appear in opinions are not like the "marketplace of ideas" or the "fruit of the poisonous tree," the analysis is also in a sense more important.

For the most part, metaphors operate below the surface to affect our perceptions of the legal system. To the extent that they have effects, it is through a gradual and barely perceptible process. No judge, having read one of the opinions cited above, will suddenly begin to view himself as an umpire and act accordingly. Any change will come about through a gradual process of accretion. Perhaps as important as their power to alter ways of thinking is the fact that metaphors reflect the beliefs and perceptions of those who use them. Thus, the fact that judges have seen fit to use baseball metaphors more frequently in recent years,¹³⁹ may be indicative of underlying changes in our legal system.

It cannot be emphasized enough that the judiciary has tremendous power over our lives. We all have an interest in the responsible use of that power. As Boudin concludes, however, metaphor "is often a kind of 'invisible hand' that guides events from afar without detection."¹⁴⁰ We must, therefore, be wary of its use, and vigilant against its misuse.

139. Which is my somewhat impressionistic assessment of the trend in the cases that I found in the course of researching for this Article.

140. Boudin, *supra* note 1, at 396.