

Florida State University Law Review

Volume 38 | Issue 3

Article 1

2011

Color Commentators of the Bench

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FLORIDA STATE UNIVERSITY LAW REVIEW



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VOLUME 38

SPRING 2011

NUMBER 3

Recommended citation: Adam Benforado, *Color Commentators of the Bench*, 38 FLA. ST. U. L. REV. 451 (2011).

COLOR COMMENTATORS OF THE BENCH

ADAM BENFORADO*

ABSTRACT

Featuring prominently in the last four sets of Supreme Court confirmation hearings, the judge-as-umpire analogy has become the dominant frame for understanding the role of the Justice and may also now act as a significant constraint on judicial behavior. Strong criticisms from legal academics and journalists attacking the realism of the analogy have had little destabilizing effect. This Essay argues that the best hope for shifting the public conception of the work of a Justice is to offer a counteranalogy that draws from an equally intuitive and familiar context, while also capturing the core essence of Supreme Court adjudication—the particular process of creative interpretation and explanation. The metaphor of the Justice as color commentator in the press box not only meets these criteria, but also makes explicit that judges are not robotic, objective arbiters. Moreover, in exposing the myth of judicial rationality and neutrality bolstered by the umpire analogy, the commentator alternative provides the possibility of helping Justices to better control for their biases and reducing damaging episodes of cognitive illiberalism. As further evidence of the appropriateness and robustness of the commentator analogy, the Essay concludes by demonstrating how sports commentating can be critiqued employing the precise implements developed by legal scholars to analyze judicial decisionmaking.

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I. INTRODUCTION

“[A] judge is like a surgeon”¹ A judge is like a platoon leader.²
“ ‘A judge is like a carpenter’ ”³ A judge is like an oyster.⁴

Over the centuries, we have used analogies not only to make sense of the work of judges, but also for instrumental purposes. In many instances, we have formulated judicial metaphors in order to define the role of the judge and to empower or constrain actual legal actors, rather than simply to explain or describe the nature of judging. Some analogies have arisen with seemingly little deliberate cultivation, emerging in line with basic intuitions about authority, reason, and fairness. However, various individuals and entities have also intentionally introduced and championed specific judicial metaphors to accomplish particular ends and advance particular agendas.

As Aaron Zelinsky points out in his recent, widely reported essay, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, in the United States today perhaps no metaphor is more dominant than the judge as umpire.⁵ Reinvigorated during the 2005 Supreme Court confirmation hearings of Chief Justice John Roberts,⁶ the

1. RICHARD H. KRAEMER ET AL., *ESSENTIALS OF TEXAS POLITICS* 185 (10th ed. 2008).

2. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189-90 (1987).

3. *The Administration of Justice in Russia as Illustrated by Its Proverbs*, 19 J. JURISPRUDENCE 642, 642 (1875) (citing *Russian Proverbs*, 139 LONDON Q. REV. 273 (1875)).

4. Stephanie Leonard Yarbrough, *The Jury Consultant—Friend or Foe of Justice*, 54 SMU L. REV. 1885, 1899 (2001).

5. Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113, 124 (2010), <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/the-justice-as-commissioner-benching-the-judge-11umpire-analogy/>. The piece has garnered an unusual amount of attention, with coverage in the *Wall Street Journal's* online edition, *Litigation and Trial*, and *SCOTUSBlog*, among other publications. See, e.g., Ashby Jones, *If Judges Aren't Umpires, What Are They? A Yale 3L Answers*, WALL ST. J. L. BLOG (Mar. 10, 2010, 5:36 PM), <http://blogs.wsj.com/law/2010/03/10/if-judges-arent-umpires-what-are-they-a-yale-3l-answers/>; Maxwell S. Kennerly, *Trial Judges Are Not Umpires*, LITIG. & TRIAL (Mar. 11, 2010), <http://www.litigationandtrial.com/2010/03/articles/the-law-for-people/trial-judges-are-not-umpires/>.

6. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 55-56 (2005) [hereinafter *Roberts Confirmation Hearings*] (statement of J. John Roberts) (“Judges are like umpires. Umpires don’t make the rules, they apply them. . . . They make sure everybody plays by the rules. . . . [A]nd I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”).

analogy was front and center in the subsequent hearings of Justices Samuel Alito,⁷ Sonia Sotomayor,⁸ and Elena Kagan.⁹

Like many other critics, Zelinsky challenges the accuracy of the analogy, but goes further to offer a replacement: the Supreme Court Justice as commissioner of Major League Baseball.¹⁰

Zelinsky makes a compelling argument that Justices are similar to commissioners in four key ways—“they provide . . . guidance to subordinates, undertake extended deliberation, take countermajoritarian action, and wield substantial rulemaking power.”¹¹ However, the analogy ultimately falls short because it fails—just like the umpire analogy—to capture what is arguably the most fundamental aspect of the work of a Justice: the process of creative interpretation and explanation. More importantly, although Zelinsky’s analogy offers a

7. Senators Orrin Hatch (R-Utah), Chuck Grassley (R-Iowa), Charles Schumer (D-New York), and Herbert Kohl (D-Wisconsin) all referenced the analogy during their comments and questions, as did Third Circuit Judge Anthony Scirica in his testimony. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 14 (2006) (statement of Sen. Charles E. Grassley) (“[I]t appears that Judge Alito tries to act like an umpire, calling the balls and strikes, rather than advocating a particular outcome.”); *id.* at 10 (statement of Sen. Orrin G. Hatch) (“When he was here last fall, Chief Justice Roberts compared judges to umpires who apply rules they did not write and cannot change to the competition before them. We do not evaluate an umpire’s performance based on which team won the game, but on how that umpire applied the rules inning after inning. We do not hire umpires by showing them the roster for the upcoming season and demanding to know which teams they will favor before those teams even take the field.”).

8. See *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 57-59 (2009) (statement of J. Sonia Sotomayor); Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 11, 2009, at WK 1 (chronicling the use of the umpire analogy during the Sotomayor hearings).

9. Just prior to the beginning of the hearings, Senator John Cornyn (R-Texas) argued that the key question was whether Kagan was able to “take off the mantle of political strategist, political adviser, and assume the role of a disinterested, impartial judge, calling balls and strikes.” CNN Wire Staff, *Senators Signal Contentious Hearing on Supreme Court Nominee*, CNN.COM (June 28, 2010, 11:34 AM), <http://www.cnn.com/2010/POLITICS/06/27/senate.supreme.court/index.html?hpt=T2>. During the actual hearing, Senator Amy Klobuchar (D-Minnesota) asked Kagan about her views on the analogy. See *Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010) [hereinafter *Kagan Confirmation Hearings*] (“Do you think the balls-and-strikes analogy is a useful one, and does it have its limits?”). Kagan suggested that it was “correct in several important respects”: “[Y]ou expect that the judge, as you expect the umpire, not to have a team in the game. . . . [T]here’s got to be neutrality. . . . [T]here’s got to be fairness to both parties. . . .” *Id.* Kagan also stated that she believed that the metaphor was apt in capturing that “[j]udges . . . [are] not the most important people in our democratic system of government.” *Id.* However, she also explained that “like all metaphors, it does have its limits” and could be misleading: “[T]he metaphor might suggest to some people that law is a kind of robotic enterprise. . . . [T]hat’s not right. And . . . especially not right at the Supreme Court level where the hardest cases go [L]aw does require a kind of judgment, a kind of wisdom.” *Id.*

10. Zelinsky, *supra* note 5, at 114.

11. *Id.*

challenge to Chief Justice Roberts' assertion that judges, like umpires, do not make rules, they only apply them, it does not contest Roberts' far more consequential claim that judges are objective, neutral arbiters who stand removed from the world, without significant biases or corrupting allegiances.¹² Indeed, Zelinsky's analogy appears to bolster this myth.

Even without venturing beyond the realm of sports, this Essay argues that it is possible to find a far superior analogy that directly addresses these concerns: the Justice as color commentator.¹³

Part II.A begins by making the case that there is value in devoting more scholarly attention to popular analogies in law and, specifically, in moving beyond critiquing existing metaphors to exploring possible alternatives that share common backdrops and basic components to facilitate comparison and deeper understanding. Part II.B then offers evidence that the commentator analogy is not only more accurate than the umpire or commissioner alternatives in capturing the core aspects of Supreme Court adjudication, but also draws attention to the reality that judges are not rational, neutral, and objective arbiters. In making the case for the latter proposition, Part II.C examines research from the mind sciences that reveals that judges, laymen, and even actual referees are all subject to cognitive processes and structures that can bias their assessments and actions, often beyond their conscious awareness or control. This leads to the conclusion that the commentator analogy may be a useful tool in reducing the impact of these biases, as well as damaging episodes of cognitive illiberalism. Finally, Part III demonstrates the robustness

12. See *Roberts Confirmation Hearings*, *supra* note 6, at 55-56. Outside of the Supreme Court confirmation hearing context, a number of sitting judges have also affirmed the umpire analogy. See, e.g., *Helgeland v. Wis. Muns.*, 745 N.W.2d 1, 7 (Wis. 2008) (“[A] judge’s job is like an umpire’s, . . . to make calls according to the rules, not according to the voices of a partisan crowd.”); *State v. Dabbs*, No. 01C01-9308-CR-00253, 1994 WL 504413, at *5 (Tenn. Crim. App. Sept. 15, 1994) (“Much like an umpire in a baseball game who does not make the rules defining the strike zone but must only call the balls and the strikes, the jurist has the duty to apply the laws as written.”).

13. This Essay considers color commentators—that is, sports broadcasters charged with providing analysis, background, and context to supplement the play-by-play reporting—generally because the dynamics of interest are largely consistent across many sports. Indeed, given that Justices regularly engage different areas of law, perhaps the best analogy would be to the multisport commentator who must contend with multiple sets of rules, traditions, and expectations. In comparing the color commentator to other analogues, the Essay focuses solely on (1) the MLB commissioner because Zelinsky does not address other sports, and (2) the baseball umpire because it is the dominant analogue and because there is significant variability in the responsibilities and practices of officials in different sports. See, e.g., Diarmuid F. O’Scannlain, U.S. Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, *The Annual Herbert W. Vaughan Lecture on America’s Founding Principles: The Role of the Federal Judge Under the Constitution: Some Perspectives from the Ninth Circuit 6-7* (Oct. 22, 2009), <http://web.princeton.edu/sites/jmadison/calendar/documents/Vaughan%20Lecture.doc.pdf> (arguing that a football referee analogy is superior to an umpire analogy because football referees have less discretion than umpires).

of the analogy by showing how sports commentating can be critiqued using the exact tools developed by legal academics to analyze judicial decisionmaking. As an example, this Essay adapts Karl Llewellyn's famous analysis of the canons of statutory construction used by appellate judges to the press box context.

II. THE JUSTICE AS COLOR COMMENTATOR

A. *The Value of a New Analogy*

The judge-as-umpire analogy, while undoubtedly influential, has sparked a considerable amount of vitriol,¹⁴ and an initial question is whether offering analogies for judging is appropriate at all. Why not simply describe the work of judges or speak plainly about what they should do without resorting to any sort of comparison to other domains? Who needs a metaphor?

The answer—at least partially—is that conceptualizing a judge's role without resorting to metaphor is likely to be extremely difficult and ultimately unhelpful. Metaphors are part of who we are. As linguists, psychologists, and others have documented, human cognition is grounded in metaphor.¹⁵ According to George Lakoff and Mark Johnson, “[M]etaphor is pervasive in everyday life, not just in language but in thought and action.”¹⁶ Analogies are not superfluous decoration to ornament our sentences; they form the basic structure of our understanding of the world.¹⁷ In the words of David Leary, “All

14. See, e.g., RICHARD A. POSNER, HOW JUDGES THINK 78-79 (2008) (condemning the analogy as highly inaccurate); Michael P. Allen, *A Limited Defense of (at Least Some of) the Umpire Analogy*, 32 SEATTLE U. L. REV. 525, 526 (2009) (noting that most of the academic commentary “has been highly critical of the comparison”); Paul Butler, *Rehnquist, Racism, and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019, 1035 (2006) (faulting the analogy for being misleading and incomplete); Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069 (2006) (arguing that it “is hard to think of a less apt analogy”); Stephen J. Choi & G. Mitu Gulati, *Ranking Judges According to Citation Bias (as a Means to Reduce Bias)*, 82 NOTRE DAME L. REV. 1279, 1279-80 (2007) (criticizing the analogy for its lack of realism); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 701-02 (2007) (noting the failures of the analogy).

15. See GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 3 (1980) [hereinafter LAKOFF & JOHNSON, METAPHORS]. In other work, George Lakoff and Mark Johnson have identified a set of “primary metaphors” (e.g., “Affection Is Warmth,” “Important Is Big,” “Happy Is Up,” and “Categories Are Containers”) that lie at the core of our beliefs and perceptions, and guide our interactions. GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT 50-54 (1999).

16. LAKOFF & JOHNSON, METAPHORS, *supra* note 15, at 3.

17. GEORGE LAKOFF & MARK TURNER, MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR, at xi (1989) (“Far from being merely a matter of words, metaphor is a matter of thought—all kinds of thought: thought about emotion, about society, about human character, about language, and about the nature of life and death. It is indispensable not only to our imagination but also to our reason.”).

knowledge is ultimately rooted in metaphorical (or analogical) modes of perception and thought.”¹⁸

It follows that metaphors are of central importance to law and legal reasoning.¹⁹ As Thomas Ross has articulated, in our legal realm, “liens float, corporations reside, minds hold meetings, and promises run with the land. The constitutional landscape is dotted with streams, walls, and poisonous trees. And these wonderful things are cradled in the seamless web of law.”²⁰ Our legal metaphors make our arguments more persuasive, shed light on abstract and abstruse concepts, help us reason, and facilitate creativity, among many other things.²¹ In his strong defense of reasoning by analogy, Cass Sunstein has pointed out that the analogical approach is not just for judges and legal academics, but “the mode through which the ordinary lawyer typically operates.”²² Indeed, even if we wanted to, it seems hard to imagine legal actors being able to function without resorting to analogies.²³ As Sunstein has explained further,

In this light, it seems most unfortunate that analogical reasoning has fallen into ill repute. To abandon this method of reasoning may be to give up, far too quickly, on some of the most useful methods we have for evaluating our practices, and for deciding whether to change them through law.²⁴

That said, even granting that metaphor has a place in legal discussions, one might question the prudence of offering a *sports* analogy for judging. Why not look farther afield for the best possible metaphor?

18. David E. Leary, *Psyche's Muse: The Role of Metaphor in the History of Psychology*, in METAPHORS IN THE HISTORY OF PSYCHOLOGY 1, 2 (David E. Leary ed., 1990).

19. Over the last thirty years, a number of legal scholars have asserted that we need to pay more attention to metaphors in the legal sphere. See, e.g., Adam Arms, *Metaphor, Women and Law*, 10 HASTINGS WOMEN'S L.J. 257, 257-58 (1999); James E. Murray, *Understanding Law as Metaphor*, 34 J. LEGAL EDUC. 714, 726-27 (1984); Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1053 (1989); Cass R. Sunstein, *Commentary, On Analogical Reasoning*, 106 HARV. L. REV. 741, 742 (1993); Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225, 231 (1995).

20. Ross, *supra* note 19, at 1053.

21. See Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 20-23 (1994).

22. Sunstein, *supra* note 19, at 748; see also Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 406 (1986) (noting that analogical thinking “has a natural appeal to lawyers versed in common law reasoning”).

23. See Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3, 8 (1991) (“If you were to tape your own classes, would you hear yourself speaking in war and sports metaphors?”); Michael J. Yelnosky, *If You Write It, (S)he Will Come: Judicial Opinions, Metaphors, Baseball, and “The Sex Stuff,”* 28 CONN. L. REV. 813, 817-18 (1996) (“Judges may be unable to avoid the use of metaphors in their opinions because metaphors are fundamental tools of thought and language.”).

24. Sunstein, *supra* note 19, at 791.

One of the major benefits of sticking to the realm of sports is that it is familiar to many people and does not require lengthy background description. We are a sports-obsessed culture—sports pervade our news coverage, advertising and marketing campaigns, casual conversations, video games, television programming, weekend free time, after-school activities, and many other aspects of our daily routines.²⁵ We live sports and we know sports: indeed, about half of U.S. children are active in at least one sports program,²⁶ and the vast majority of children have participated in an organized sport before they become an adult.²⁷ Hence, sports analogies for judging arguably present the best opportunity to demystify the world of law for the widest possible cross-section of the public at a time when distrust of the judicial branch of government is high and when myths about the work of judges proliferate.²⁸ One of the reasons that the umpire analogy has been so dominant—and has gained such widespread support from members of the public—is not that it is more accurate than the alternatives, but that it is readily cognizable by most people. It makes intuitive sense and resonates in a way that statistical analyses of appellate voting patterns and theories of countermajoritarian difficulties do not.

Without a doubt, some of the resistance to sports analogies has to do with the fact that sports are viewed as lowbrow and law is viewed as highbrow, and the notion that sports analogies “may detract unacceptably from the prestige and dignity indispensable to the judicial role.”²⁹ But that impulse to insulate the scholarly and erudite legal sphere from debasement ignores the fact that sports

25. See, e.g., JAMES A. MICHENER, *SPORTS IN AMERICA* 9 (1976); Matthew J. Mitten, *Forward: Symposium, Sports Law as a Reflection of Society's Laws and Values*, 38 S. TEX. L. REV. 999, 999-1000 (1997). As Charles Yablon has written,

Any American determined *not* to learn the fundamentals of baseball would have to make a lifelong effort to avoid all newspapers, television, playgrounds, and taverns, as well as certain forms of bubble gum and selected boxes of breakfast cereal. Anyone who chose to follow this unlikely . . . regimen would still likely wind up knowing what it means, in the American idiom, to “strike out,” “get to first base,” and “play in the big leagues.”

Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L.J. 227, 229 (1994).

26. See Douglas E. Abrams, *Sports in the Courts: The Role of Sports References in Judicial Opinions*, 17 VILL. SPORTS & ENT. L.J. 1, 6 (2010).

27. See *id.* at 6-7; Barri Katz Stryer, et al., *A Developmental Overview of Child and Youth Sports in Society*, 7 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 697, 697 (1998).

28. See, e.g., Geoffrey R. Stone, *Our Fill-in-the-Blank Constitution*, N.Y. TIMES, Apr. 14, 2010, at A27 (arguing that the public has been swept up in “appealing but wholly disingenuous descriptions of what judges—liberal or conservative—actually do”); *Public Views of Congress Recover Slightly*, THE PEW RESEARCH CENTER (July 9, 2010), <http://people-press.org/reports/pdf/632.pdf> (noting that views of the Supreme Court are less positive than a year earlier).

29. Abrams, *supra* note 26, at 10.

already influence how we make sense of the world and our values—including legal values.³⁰ If sports analogies are corrupting, we are already corrupted.

In fact, as suggested earlier, judges commonly employ metaphors from sports. Even before the umpire analogy came to the fore, Supreme Court nominees spoke of their role by using sports references. In his Senate testimony, Clarence Thomas, for example, argued that a proper Justice ought “to be stripped . . . like a runner,”³¹ and “shed [of] the baggage of ideology.”³² And in numerous contexts in opinions and at oral argument, the Supreme Court regularly employs sports analogies.³³ Members of the Court criticize each other for “punt[ing]” on difficult legal questions,³⁴ contest supposed “slam-dunk correlation[s],”³⁵ and set out standards of when a product “fall[s] below par.”³⁶ The fact that judges are both so fluent in sports metaphors and open to employing them suggests that articulating alternative sports analogies to the judge-as-umpire may actually have more of an impact on shaping future judicial behavior than other types of analogies.³⁷

Offering *alternatives* and not just critiquing existing sports metaphors is of central importance. Judge Benjamin Cardozo was right that “[m]etaphors in law” must be “narrowly watched” because they can quickly become engrained, enslaving the very concepts and ideas they were meant to liberate.³⁸ Yet the answer is not to reject metaphor altogether nor simply to point out the flaws in existing analogies (a quite easy and appealing tack, given that every analogy, by comparing nonidentical things, is subject to some criticism as misleading and incomplete). Rather, because people

30. “There is a reciprocal relationship between sports and societal values. Sports incorporates society’s existing values and reinforces these values on the playing field, in its rules, and through its established institutions. Sports also exports its principles and the lessons learned from participating in athletics and its governance to society in general.” Mitten, *supra* note 25, at 1000. See generally D. STANLEY EITZEN & GEORGE H. SAGE, *SOCIOLOGY OF NORTH AMERICAN SPORT* 43-55 (6th ed. 1997); DREW A. HYLAND, *PHILOSOPHY OF SPORT* 1-32 (1990).

31. Linda Greenhouse, *The Thomas Hearings: In Trying to Clarify What He Is Not, Thomas Opens Question of What He Is*, N.Y. TIMES, Sept. 13, 1991, <http://www.nytimes.com/1991/09/13/us/thomas-hearings-trying-clarify-what-he-not-thomas-opens-question-what-he.html> (quoting J. Clarence Thomas).

32. *Id.*

33. See Abrams, *supra* note 26, at 11-44 (providing a survey of sports references in judicial opinions in the Supreme Court and the lower federal and state courts).

34. *Morse v. Frederick*, 551 U.S. 393, 441 (2007) (Stevens, J., dissenting).

35. *Randall v. Sorrell*, 548 U.S. 230, 279 n.4 (2006) (Stevens, J., dissenting).

36. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 114 (2008).

37. In addition, in recent years, the Supreme Court has been filled with avid baseball fans so a baseball analogy may have more of an impact on the Justices than other potential analogies. See, e.g., Adam Liptak, *This Bench Belongs in a Dugout*, N.Y. TIMES, June 1, 2010, at A14.

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

naturally gravitate towards metaphorical descriptions and explanations, there is a need to offer counter analogies as replacements—a project which legal scholars, aside from Zelinsky, have largely avoided.³⁹ This presents the most promising avenue for avoiding the reification of the problematic judge-as-umpire analogy—in Sunstein’s words, a way to show that “a judgment about likeness that seems constitutive of thought actually depends on contestable substantive arguments”⁴⁰

Looking to sports for these alternatives has the added benefit of not only being familiar and intuitive (with resulting benefits in terms of influencing judicial and public audiences), but also focusing the discussion and facilitating comparison to the other two analogies currently on offer, which are both drawn from baseball. With possible judicial analogues all involved in the same “game,” it is easier to see the significant shortcomings of the umpire and commissioner vis-à-vis the color commentator. In certain respects, the advantages of engaging a common metaphorical framework may be likened to those gained from the employment of shared, readily understood scenarios across experiments and studies in other disciplines.⁴¹ Finally, it may also be “fairer play” to critique the existing analogies on their “home field”: the claim in this Essay is that even without venturing beyond the sports arena, it is possible to find a more accurate and socially beneficial analogy for the Supreme Court Justice than either the umpire or commissioner.

B. The Color Commentator as Creative Interpreter

To convey accurately the work of a Supreme Court Justice, it is essential for any analogy to capture the *process* of Supreme Court adjudication. It is this process that most notably distinguishes sitting on the Supreme Court from legislating, serving as a trial court judge, or riding the bench in a foreign jurisdiction. Unpacking the process also lays the groundwork for understanding that judging is not a

39. See Zelinsky, *supra* note 5, at 113-14 (noting that “no workable substitute for the judge-umpire analogy has been advanced”).

40. Sunstein, *supra* note 19, at 749.

41. One of the best examples might be the use of variations on the famous trolley problem in philosophy, cognitive science, and neuroethics. See, e.g., Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. 5, 8 (1967) (“[You are] the driver of a runaway tram which [you] can only steer from one narrow track on to another; five men are working on one track and one man on the other; anyone on the track [you] enter[] is bound to be killed.” Should you flip the switch if it will cause one person to die instead of five?).

simple matter of fairly reading the law and applying it to facts objectively viewed,⁴² the focus of Part II.C.

Although Justices and color commentators are guided by different ultimate goals and have different ultimate impacts on society,⁴³ in their work, they employ an analogous process of creative interpretation and explanation. The process is characterized by (1) commentating on the actions and assessments of others without being directly involved in unfolding events; (2) creative interpretation that is facilitated through collaboration, constrained by precedent or existing knowledge, and initiated by a concrete real-world interaction, not a hypothetical situation or general concern; and (3) the construction of narratives that contextualize, explain, and connect, rather than simply declare a judgment. Neither umpires nor commissioners engage all three of these facets of interpretation and explanation.

1. *Interpretive Distance*

Justices, like color commentators, are removed from the action. In contrast to umpires, they are not engaging with players and participating in events as the game transpires. While umpires are part of the field of play by rule, Justices and color commentators quite clearly are not.⁴⁴ A partial consequence of this distance is that Justices and commentators are largely addressing actions and events that have already occurred in which other individuals have already made assessments and determinations.⁴⁵ In the case of a Justice, a police officer may have stopped and frisked a suspect and a trial

42. See Justice David H. Souter, Text of Justice David Souter's Speech Harvard Commencement Remarks (May 27, 2010), <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech>.

43. Justices (and the judiciary) are largely focused on achieving just, fair, and accurate outcomes, whereas color commentators (and the larger sports establishment, of which umpires and commissioners are a part) are primarily concerned with entertaining. Likewise, the interpretations and determinations of Justices have binding effect on individuals, whereas the interpretations and determinations of color commentators influence individuals without mandating action or inaction. While these differences are worth noting, the claim is not that a color commentator is precisely like a Justice in every respect (no analogue offers perfect mimesis), but rather that the commentator analogy better captures the core work of a Justice than the alternatives, while also offering added debiasing benefits.

44. See, e.g., Playing Rules Comm., Major League Baseball, Official Baseball Rules R. 5.08 (2010), available at http://mlb.mlb.com/mlb/downloads/y2010/official_rules/2010_OfficialBaseballRules.pdf ("If a thrown ball accidentally touches a base coach, or a pitched or thrown ball touches an umpire, the ball is alive and in play."); *id.* 6.08(d) ("If a fair ball touches an umpire after having passed a fielder other than the pitcher, or having touched a fielder, including the pitcher, the ball is in play.")

45. The cases and controversies already exist prior to the Supreme Court entering into the picture, and with respect to the Court's appellate jurisdiction, another body has already reached a judgment by the time the Justices begin considering a matter. See U.S. CONST. art. III, § 2.

court judge may have ruled that drug paraphernalia found on the suspect's person was admissible in court. In the case of a commentator, a soccer player may have fallen in the box and a referee may have awarded a penalty kick. The Justice's or color commentator's role is to evaluate and interpret these actions and determinations. With respect to the Justice: How does the behavior of the police officer compare to the behavior of police officers in other cases; is this the type of police action that violates the Constitution; did the trial judge err; what are the likely consequences of holding one way or another? With respect to the commentator: Did the referee get it right; has he been consistent in penalizing other similar actions throughout the match; is this player known to feign being fouled; if penalties are given in this situation, does this incentivize future players to dive?

In weighing in, the commentator and Justice undertake a process of creative interpretation, which, as Ronald Dworkin has framed it, "aims to impose purpose over the text or data or tradition being interpreted."⁴⁶ What is an illegal search? What type of contact in soccer ought to be punished? Both the commentator and Justice are author-critics adding to the traditions they interpret,⁴⁷ even as they remain at a distance from relevant events. Although neither the color commentator nor the Justice is in a position to influence the game as it transpires, the analysis of each shapes the tradition, which impacts the future actions of various individuals. While much of the effect is ultimately felt by nonparticipants, this includes the actions of the "players" involved in the incident or controversy. In the case of a Justice's interpretation, parties before the Court may face prison time, financial burdens, or other consequences. Likewise, a lower court may be forced to rehear a dispute, lose reputational capital, or be compelled to change its practices. In the case of a sports commentator's interpretation, individual players may face public condemnation, lost sponsorship, economic penalties, or adverse treatment by officials in future matches.⁴⁸ And referees may face reputational impacts, lost opportunities, and attacks by the public, among many other things.⁴⁹

46. RONALD DWORKIN, *LAW'S EMPIRE* 228 (1986).

47. *See id.* at 229.

48. For example, shaped by color commentators' interpretations that he deliberately took a dive to win a penalty in a critical soccer match, Arsenal's Eduardo da Silva has faced significant repercussions. *See, e.g.,* Laura Williamson, *Lay Off Eduardo, He's Not a Diver! Arsene Wenger in Witch-Hunt Claims as Arsenal Striker is Hit by Cheat Charge*, DAILYMAILONLINE, Aug. 29, 2009, <http://www.dailymail.co.uk/sport/football/article-1209807/Lay-Eduardo-hes-NOT-diver-Arsene-Wenger-witch-hunt-claims-Arsenal-striker-hit-cheat-charge.html>.

49. *See, e.g.,* Jason Burt, *World Cup 2010: Holland Attack 'Chump' Howard Webb for Refereeing 'Scandal'*, TELEGRAPH, July 13, 2010, <http://www.telegraph.co.uk/sport/football/competitions/world-cup-2010/news/7886086/World-Cup-2010-Holland-attack-chump-Howard->

The umpire, by contrast, does influence the game as it actually unfolds, rather than after the fact. Indeed, unlike Justices or color commentators, umpires are necessary for the game to even occur.⁵⁰ Contracts are written and broken, torts and murders are committed, and unconstitutional statutes are enacted and enforced all without the members of the Supreme Court lifting a finger, but without an umpire there is no official match.⁵¹ And as a game proceeds, the umpire is right there in the middle, directing traffic and changing patterns of behavior and outcomes. For example, when an umpire adopts a very tight strike zone, pitchers may avoid throwing certain pitches, more players may get on base, and more runs may be scored.⁵² The determinations of Justices and commentators may be no less important in the long term, but in the heat of the moment, the discussion up in the press box and the prospect of later Supreme Court guidance are not driving the action.

2. The Limitations of Concrete Facts, Precedent, and Collaborative Creativity

Given that commissioners perform their functions without directly participating in actual games, it would seem that the commissioner would be as equally apt an analogue as the color commentator, but, in fact, the commissioner is at liberty to be far more disengaged from actual game interactions. The color commentator and Justice, much more than the commissioner, are reacting to concrete real-world scenarios and must accommodate existing knowledge and precedent. Moreover, their work is fundamentally collaborative in a way that a commissioner's is not.

The commentator is almost always addressing a particular matchup, a particular hit, or a particular call. Although these prompts may—and frequently do—lead to broader discussion with more wide-ranging implications, a commentator is necessarily constrained by the events that are occurring during the game. This is similar to the Justice who is always engaging in creative interpretation in the context of a specific case or controversy, rather

Webb-for-refereeing-scandal.html (noting the impact of media attacks on World Cup referee Howard Webb).

50. See Playing Rules Comm., Major League Baseball, Official Baseball Rules R. 9.01(a) (2010), available at http://mlb.mlb.com/mlb/downloads/y2010/official_rules/2010_OfficialBaseballRules.pdf.

51. See *id.*

52. See, e.g., T. O. Whenham, *MLB Umpires and Totals Betting*, DOC'S SPORTS SERVICE (Feb. 16, 2008), <http://www.docsports.com/current/mlb-umpires-totals-betting.html> (describing the impact of particular umpires' strike zones on the number of runners on base and runs scored).

than assessing abstract problems or dilemmas.⁵³ In an opinion, a Justice may—and frequently does—use the facts of a case to offer more general guidance, define fundamental values, or develop a larger critique, but the particular facts are always the starting point.⁵⁴

Commissioners are not generally responding to concrete incidents. They tend to focus on general trends or concerns rather than a particular call by an umpire or a particular game.⁵⁵ Presented with the opportunity to engage in the type of creative interpretation and judgment typical of a Justice facing a particular case, commissioners usually decline.⁵⁶ Indeed, in most of his work, the commissioner seems more of a legislative or executive figure, than a judicial one. Consider the “numerous dramatic changes to baseball” credited to Commissioner Bud Selig on his official MLB information page: “[i]nterleague play,” “[s]ignificant revenue sharing among clubs,” “[t]hree-division formats in the American and National Leagues,” “[a]n extra tier of playoffs and the Wild Card,” and “[t]he restoration of the rulebook strike zone.”⁵⁷ They are creative products—the result of reason and forethought, certainly—but none of these seem to reference a process grounded in a set of particular game-related facts. In Dworkin’s terms, the commissioner enjoys the freedoms of a novelist, while the color commentator and Justice are better likened to authors of creative nonfiction, whose points of interpretive departure are defined real-world interactions, or serial novelists, whose creative interpretations are limited by previous installments.⁵⁸

Concerning the latter, as with the Justice who must navigate a sea of judicial precedent, the process of interpretation for the color commentator depends on what is already known about the matter to be interpreted. Consider, for example, an interception thrown by New

53. See U.S. CONST. art. III, § 2, cl. 1 (outlining case and controversy requirement); *Muskat v. United States*, 219 U.S. 346, 356-57 (1911) (defining contours of requirement).

54. Justice Roberts made exactly this point during his confirmation hearing. See *Roberts Confirmation Hearings*, *supra* note 6, at 161 (statement of J. John Roberts) (“So the obligation to decide cases is the only basis for the authority to interpret the Constitution and laws. That means that judges should be careful in making sure that they have a real case in front of them, a real live dispute between parties who have actual injury involved, actual interests at stake, because that is the basis for their legitimacy.”).

55. Zelinsky seems to acknowledge as much: “[T]he [c]ommissioner of Baseball relays instructions to the umpires regarding how to interpret the rules of Major League Baseball, rather than reviewing their every call.” Zelinsky, *supra* note 5, at 119.

56. See, e.g., *Bud Selig Will Not Reverse Umpire’s Blown Call*, SPORTING NEWS (June 3, 2010), <http://www.sportingnews.com/mlb/article/2010-06-03/selig-will-not-reverse-umpires-blown-call> (Commissioner Bud Selig did not “specifically address umpire Jim Joyce’s botched call Wednesday night that cost [Armando] Galarraga [a] perfect game . . . [but a] baseball official familiar with the decision confirmed to The Associated Press that the call was not being reversed.”).

57. Allan H. (Bud) Selig, MLB executives, MLB Official Info, MLB.COM, http://mlb.mlb.com/mlb/official_info/about_mlb/executives.jsp?bio=selig_bud (last visited July 2, 2011).

58. See DWORKIN, *supra* note 46, at 228-38.

England Patriots quarterback Tom Brady. During Brady's first year in the league, following his selection in the sixth-round of the NFL draft, a color commentator might have reasonably interpreted the interception as resulting from Brady not being an NFL-grade talent.⁵⁹ However, now, after Brady has won three Super Bowls, been selected to five Pro Bowls, and won numerous other individual accolades,⁶⁰ using Dworkin's language, such an opinion "would be a poor interpretation, not because no one could think it a good one [(just ask a Colts fan)], but because it is in fact, on all the criteria so far described, a poor one."⁶¹

A further constraint for both the commentator and the Justice comes from the fact that the creative interpretation is usually collaborative. The umpire in chief may consult a first-base umpire on a checked swing and the commissioner of Major League Baseball may discuss a potential change with the rules committee,⁶² but these limited interactions are quite different from Justices and commentators who regularly construct a narrative together with coequal partners. One of the shared traits of both commentating teams and Justices is how they attempt to persuade one another and an external audience to move towards consensus, but how each participant is free to reach his or her own conclusions. The nuances of joining, concurring, and dissenting are central to understanding how the Supreme Court does its business—and in distinguishing the Court from other nation's judiciaries⁶³—but cannot be captured by either the commissioner or umpire analogies. These complexities, however, are quite familiar to commentators who often agree with the interpretations and judgments of their partners, but sometimes agree only with the conclusions and not with the reasoning, and still other times, agree with neither the conclusions nor the reasoning and explain to the audience why they view matters differently.

3. *Providing a Reasoned Explanation*

The final commonality between Justices and color commentators is that both sets of individuals offer explanations for their creative interpretations. Color commentators are in the business of

59. See Tom Brady—Official New England Patriots Biography, <http://www.patriots.com/team/roster/Tom-Brady/272d4f2c-1bb9-4372-b02c-dfa3fa60575b> (last visited July 2, 2011).

60. *Id.*

61. DWORKIN, *supra* note 46, at 233.

62. See Zelinsky, *supra* note 5, at 119.

63. In the Chinese system, for example, traditionally, no dissenting judgments have been allowed. ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 114 (1998); see also Nanping Liu with Michelle Xiao Liu, *Trick or Treat: Legal Reasoning in the Shadow of Corruption in the People's Republic of China*, 34 N.C. J. INT'L L. & COM. REG. 179, 236-39 (2008) (explaining recent limited experiments to introduce dissenting opinions into the Chinese judiciary).

storytelling. They fit this game, this play, this player, into a broader narrative. What does this strikeout mean for Big Papi? How significant is this win over the Phillies for the Mets? In what ways is LeBron James a better player than Michael Jordan was? Similarly, Justices do not just tell us whether the lower court judge got it right; they offer a narrative to contextualize, justify, explicate, and situate their interpretations in the form of opinions and their questions and comments at oral argument. And it is the narrative that Justices spin that facilitates the common law tradition. Without the rich explanations, the common law would lack weight, power, and legitimacy.

All of this is notably different than when an umpire weighs in on a matter. Umpires are far more like judges in China, where members of the judiciary have not traditionally explained their reasoning and where few of the brief decisions of the Supreme People's Court are published.⁶⁴ Umpires yell, "Strike!" "Ball!" "Safe!" "You're out!" They do not generally provide a narrative—and, on those very rare occasions when they do offer a few words of justification or contextualization, it is not to the public; it is a private explanation provided to an angry coach who storms out of the dugout or a distraught player who thought he was safe.⁶⁵ If Justices were like umpires, they would never pen thousands of pages each term for public consumption and certainly would never read opinions from the bench as Chief Justice Roberts and the rest of the Court have done on numerous occasions.⁶⁶

Zelinsky comes closest to addressing the Justice as narrator when he discusses how commissioners offer "interpretive guidance to their subordinates."⁶⁷ However, interpretive guidance is not a narrative. It is more like a carefully spun out rule. When Justices engage in the narrative process they are not simply providing a check list for how future courts should handle similar cases: they are explaining traditions, situating events and determinations within historical context, defining values, and giving voice to the voiceless, among many other things.

64. See, e.g., Lindsay Wilson, Note, *Investors Beware: The WTO Will Not Cure All Ills with China*, 2003 COLUM. BUS. L. REV. 1007, 1013 (noting that opinions are subject to only internal court circulation); see also JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK 64 (2d ed. 2005) ("[T]here is no formal system of judicial precedent [in the Chinese legal system].").

65. Part of the reason, of course, is that umpires do not generally need to provide an explanation—their calls are self-evident in a way that Justices' determinations are not.

66. See Charles Lane, *Split Roberts Court Cements Shift to Right*, SEATTLE TIMES, June 29, 2007, http://seattletimes.nwsource.com/html/nationworld/2003767319_scotuspost29.html (describing Chief Justice Roberts and Justice Breyer reading their opinions in the case of *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 709, 803 (2007)).

67. Zelinsky, *supra* note 5, at 120.

Appreciating the narrative process of interpretative collaboration with coequals based on concrete facts common to both Justices and color commentators reveals the complexity and richness of the Supreme Court's work, yet, as suggested in the sections that follow, the commentator analogy is also beneficial in highlighting the unappreciated biases and vulnerabilities that Justices bring to the bench.

C. *The Color Commentator as Everyman*

1. *Bringing the Justice and the Law Down to Earth*

In offering his commissioner analogy, Zelinsky does well to acknowledge that Chief Justice Roberts' conception of the Justice as umpire is a tool, not simply a description: its purpose is to advance "a model of judicial restraint."⁶⁸ Zelinsky counters Roberts' idea that Justices, like umpires, "don't make the rules, they apply them,"⁶⁹ by showing how "[t]he [c]ommissioner's rulemaking powers are analogous to the discretion the Supreme Court enjoys."⁷⁰

This critique is valuable, but Zelinsky misses the fact that Roberts' articulation of the Justice as umpire is a weapon in another more fundamental battle than the one over whether Justices make law or simply apply it. This clash is over the capacity of Justices to be objective, neutral arbiters assessing the claims before them dispassionately and without biases, and, more broadly, over an understanding of the law as neutral, clearly defined, uniform, and singular.

Although it is a debate which has been simmering for many decades,⁷¹ in recent years, it was drawn to the surface most notably during Justice Sotomayor's confirmation hearings because of prior comments that she had made about the process of adjudication. Sotomayor had previously taken the position that "[p]ersonal experiences affect the facts that judges choose to see,"⁷² and that judges might be incapable of being impartial "in all or even in most cases."⁷³ As she explained, given the ambiguities of the law, interpretation is inevitable, and "[w]hether born from experience or inherent physiological or cultural differences, . . . our gender and national origins may and will make a difference in our judging."⁷⁴

68. *Id.* at 117.

69. *See Roberts Confirmation Hearings, supra* note 6, at 55.

70. Zelinsky, *supra* note 5, at 124.

71. Indeed, way back in the nineteenth century, individuals like Oliver Wendell Holmes, Jr. were staking out positions in the debate. *See, e.g.,* O. W. HOLMES, JR., *THE COMMON LAW* 1 (1881) ("The life of the law has not been logic: it has been experience.").

72. Sonia Sotomayor, *A Latina Judge's Voice*, 13 *BERKELEY LA RAZA L.J.* 87, 91, 92 (2002).

73. *Id.* at 91.

74. *Id.* at 92.

Those in Chief Justice Roberts' camp strongly contest this conception: instead, they want to engrain an image of the Justice as a white lab-coated technician pulling the levers of a pristine and crystalline machine.⁷⁵ And Zelinsky seems quite content to acquiesce to this notion. Indeed, his replacement analogy seems only to change who happens to be operating the apparatus.⁷⁶ With their finely starched white coats, both Roberts' umpire Justice and Zelinsky's commissioner Justice are men above the fray, capable of setting aside their backgrounds and experiences to engage in rational and objective reasoning. Moreover, Zelinsky's analogy implicitly assumes that "preserving the integrity of [the] game"—the "fundamental duty" of the Justice and commissioner—has a single, clear, definite meaning that any reasonable, intelligent person could recognize and strive towards.⁷⁷

2. Evidence of Bias and Malleability

The best evidence from social psychology and related fields and the best empirical studies of judicial behavior, however, strongly undermine this understanding. Often what seems to be so clearly, objectively, and universally true is actually contingent on how things are presented to us and on our particular backgrounds and experiences.

One of the most compelling demonstrations of this dynamic actually comes from an experiment in which participants were asked to take on the role of a sports commentator assessing the fouls committed during a particularly violent November 1951 football game between the Dartmouth Indians and the Princeton Tigers.⁷⁸ Although the student participants from Princeton and Dartmouth watched the same footage and used the same rating system, they saw a very different game.⁷⁹ The Dartmouth participants judged the teams to be fairly equally culpable for the fouls, while the Princeton participants judged the Princeton team to have committed about half as many infractions.⁸⁰ Although they were not aware of it, students'

75. Sotomayor's comments caused such a backlash that during her confirmation hearings, Sotomayor was forced to distance herself from her earlier position and, in the words of Dahlia Lithwick, "stag[e] what was, in effect, a three-day infomercial for judges as mechanical umpires who simply 'apply the law' by 'calling balls and strikes.'" Dahlia Lithwick, *The Sotomayor Test: Will She Limit Obama's Next Pick?*, NEWSWEEK, July 23, 2009, available at <http://www.newsweek.com/2009/07/22/the-sotomayor-test.html> (asserting that "Sotomayor has proved conclusively that it's John Roberts'[] world now—we all just rent space there").

76. Perhaps Zelinsky's commissioner Justice also enjoys the ability to occasionally reprogram the machine.

77. Zelinsky, *supra* note 5, at 125.

78. Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 130 (1954).

79. *Id.* at 130-31.

80. *Id.* at 131-32.

perceptions were being powerfully influenced by their university affiliations.⁸¹ As the experimenters, Albert Hastorf and Hadley Cantril, later concluded, “[T]here is no such ‘thing’ as a ‘game’ existing ‘out there’ in its own right which people merely ‘observe.’ The ‘game’ ‘exists’ for a person and is experienced by him only in so far as certain happenings have significances in terms of his purpose.”⁸²

Building on this research, academics associated with the Cultural Cognition Project at Yale Law School have conducted a number of recent studies investigating how cultural values influence how we make sense of the world.⁸³ The work reveals how humans are inclined “to conform their beliefs about disputed matters of fact . . . to values that define their cultural identities.”⁸⁴ In one 2009 study, for example, Dan Kahan, David Hoffman, and Donald Braman showed that the cognition of even the seemingly most objective type of evidence in a case—a videotape of the events at issue—is subject to the influence of a viewer’s identity-defining characteristics and commitments.⁸⁵ Allowing 1,350 Americans to view a video of a high-speed police chase that the Supreme Court majority considered to so clearly and conclusively dispute the respondent’s version of events that summary judgment was in order,⁸⁶ Kahan, Hoffman, and Braman found notable divergence in perceptions—along cultural, ideological, and other lines—related to whether the chase was worth the risk, how dangerous it was, and who was at fault for the eventual crash, among other things.⁸⁷

Taken together, this research suggests that there is not one true, impartial take on the facts of a case. And there is no such thing as the “law” existing “out there” in its own right which people merely

81. *Id.* at 132.

82. *Id.* at 133.

83. See, e.g., Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569 (2006); John Gastil et al., *Deliberation Across the Cultural Divide: Assessing the Potential for Reconciling Conflicting Cultural Orientations to Reproductive Technology*, 76 GEO. WASH. L. REV. 1772 (2008); Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149 (2006); Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1 (2008). For other papers, see THE CULTURAL COGNITION PROJECT AT YALE LAW SCHOOL, <http://www.culturalcognition.net/> (last visited July 2, 2011) [hereinafter THE CULTURAL COGNITION PROJECT].

84. THE CULTURAL COGNITION PROJECT, *supra* note 83.

85. See Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) [hereinafter Kahan et al., *Whose Eyes?*].

86. See *Scott v. Harris*, 550 U.S. 372, 380-81 (2007). As the Court asserted, “[T]he videotape . . . speak[s] for itself.” *Id.* at 378 n.5.

87. Kahan et al., *Whose Eyes?*, *supra* note 85, at 872-79. In the researchers’ words, the study showed that “different people, with different experiences, can see different things.” *Id.* at 848.

“observe.” Certainly, there are statutes and legal opinions announcing certain rules, but those rules are generally subject to numerous interpretations and rearticulations—a fact borne out by many split decisions at the Supreme Court and the number of distinguished lawyers who make compelling arguments in support of divergent understandings.⁸⁸

If a person’s particular cultural and other commitments shape cognition of events, so too do exterior situational frames and cues.⁸⁹ Indeed, other psychological studies have shown that manipulations as subtle as changing a camera angle can influence how people make sense of others’ actions and apportion causal responsibility and blame when watching video footage.⁹⁰ In one set of experiments, participants observed a mock interrogation shot from the perspective of the interrogator, the suspect being questioned, or a third party.⁹¹ Those observing events from the perspective of the suspect were significantly more likely to judge the resulting confession to be coerced and the suspect to be not guilty than those provided with the perspective of the interrogator.⁹² For a partial real-world example of the same phenomenon, one need only consider the way viewing an instant replay can alter our understanding of whether a foul was committed, a ball was caught before it hit the ground, or a runner was safe—as well as our attributions concerning the referee. Watching a clip in slow motion, shot with a zoom lens, it is evident to us that the ball touched the ground and that the referee’s determination of a completed pass references his bias. But watching

88. Justice Elena Kagan made exactly this point during her confirmation hearings: “[N]ot every case is decided 9-0 and that’s not because anyone’s acting in bad faith. It’s because those legal judgments are ones in which reasonable people can reasonably disagree sometimes.” See *Kagan Confirmation Hearings*, *supra* note 9.

89. The Project on Law and Mind Sciences at Harvard Law School has been active in chronicling the impact of this dynamic for law and legal theory. See, e.g., Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333 (2010) [hereinafter Benforado, *Frames of Injustice*]; Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645 (2004); Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004).

90. See, e.g., Jennifer J. Ratcliff et al., *Camera Perspective Bias in Videotaped Confessions: Experimental Evidence of Its Perceptual Basis*, 12 J. EXPERIMENTAL PSYCHOL.: APPLIED 197, 197 (2006) (providing an overview).

91. See *id.*

92. See, e.g., G. Daniel Lassiter et al., *Videotaped Confessions: Is Guilt in the Eye of the Camera?*, 33 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 189, 206 (2001); G. Daniel Lassiter, *Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion*, 3 J. APPLIED SOC. PSYCHOL. 268, 268 (1986).

the exact same play in real time from the stands, the same perceptions and attributions become less likely.

In other work, conducted over the last half century, scientists have found numerous additional ways in which minor alterations in our environments can produce dramatic changes in our perceptions, judgments, and actions.⁹³ We assume that we would always interpret statutory language or the facts of a case in a certain way, but elements in our situations that appear to be irrelevant can lead us to very different conclusions. Ask someone how fast two cars were traveling when they “smashed” together in a film of an automobile accident and you are likely to get an answer nine miles-an-hour faster than if you use the word “contacted.”⁹⁴ Give someone a heavy clipboard while they are filling out a survey and they will report that an issue is significantly more important than if you give them a light clipboard.⁹⁵ Change the name on the top of a resume from Greg to Jamal, leaving all of the substantive information the same, and see the number of callback interviews drop precipitously.⁹⁶ We, quite simply, are not the clear-sighted, consistent, and objective perceivers and assessors that we imagine ourselves to be.

The umpire analogy—in propagating a narrative of judicial exceptionalism—implies that, even if the preceding is true, Justices must somehow be immune from these tendencies and influences, but, in fact, judges demonstrate exactly the same cognitive biases as members of the general population. Their backgrounds and experiences drive their perceptions, assessments, and attributions—even as they believe that they are acting completely objectively.⁹⁷ Jeffrey Rachlinski, for example, recently documented that judges, “like the rest of us, carry implicit biases concerning race” and that “these implicit biases can affect judges’ judgment.”⁹⁸ Likewise,

93. See Benforado, *Frames of Injustice*, *supra* note 89, at 1347-60 (providing an overview of studies); Julie Seaman, *Hate Speech and Identity Politics: A Situationist Proposal*, 36 FLA. ST. U. L. REV. 99, 112 (2008) (“Many studies performed in recent years support the proposition that situational elements—the physical, institutional, social, cultural and linguistic environment in which a person is situated—affect individual thought and action in measurable and fairly predictable ways.”).

94. See Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585, 586-87 (1974).

95. See Nils B. Jostmann et al., *Weight as an Embodiment of Importance*, 20 PSYCHOL. SCI. 1169, 1173 (2009).

96. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 998 (2004); *see also* Marianne Bertrand et al., *Implicit Discrimination*, 94 AM. ECON. REV. 94 (2005).

97. *See generally* Kahan et al., *Whose Eyes?*, *supra* note 85 (offering evidence of such a dynamic in the context of *Scott v. Harris*).

98. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195, 1221 (2009).

exterior cues and frames have been shown to influence judges' cognitions in simulations, including those involving the manipulation of camera angles.⁹⁹ Bolstering these psychological studies, political scientists and legal scholars have completed empirical work establishing that federal judges—far from neutral and objective—have ideologically-biased voting patterns.¹⁰⁰

Hence, as research in social psychology, social cognition, and related fields continues to expand into new areas, there is an emerging consensus that even those who seem so clearly immune to the influence of the unseen currents and rocky shoals of the mind—indeed, those we have long been held up as exemplars in that respect—are vulnerable to the influence of knowledge structures, affective states, motives, and other interior situational factors. Indeed, in a grandly ironic twist, there is growing evidence that referees, while believing themselves to be completely neutral and fair, may frequently manage the fields of play in biased ways.¹⁰¹ Thus, while scholars like Michael Allen are right to point out “that there are influences in judging that effect outcomes beyond the nature of the ‘play,’ ”¹⁰² they are incorrect that “[s]imilar influences tend to be absent from umpiring.”¹⁰³

As Roy Askins has written, “During the course of any contest there are many incidents which appear ambiguous, even to veteran officials. When this occurs, officials do basically what all humans do in such situations, i.e., they seek clarification through any means available at the time.”¹⁰⁴ Factors like “the color of a player’s uniform[,] preceding foul judgments[,] a team’s reputation[,] and

99. See, e.g., G. Daniel Lassiter & Andrew L. Geers, *Bias and Accuracy in the Evaluation of Confession Evidence*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 197, 207 (G. Daniel Lassiter ed., 2004).

100. See, e.g., Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193 (2009) (finding partisan bias in judicial decision making with respect to upholding or striking down federal agency determinations in a study of federal court decisions).

101. See, e.g., Norbert Hagemann et al., *When the Referee Sees Red . . .*, 19 PSYCHOL. SCI. 769, 769 (2008) (noting that “it is extremely difficult for [referees] to make objective judgments . . . [and] their judgments may show biases like those found in other social judgments”); Alexander Kranjec et al., *A Sinister Bias for Calling Fouls in Soccer*, PLOS ONE, July 2010, at 1, 1 (2010) (noting that “[l]ow-level perceptual biases can influence higher-order officiating judgments in . . . sports that involve ambiguity”).

102. Michael P. Allen, *A Limited Defense of (at Least Some of) the Umpire Analogy*, 32 SEATTLE U. L. REV. 525, 533 (2009). In fact, by only focusing on the impact of a judge’s life experience and judicial philosophy, Allen casts the set of influences on judicial behavior as far more “visible” and far narrower than they actually are. See *id.*

103. *Id.*

104. Roy L. Askins, *Observations: The Official Reacting to Pressure*, REFEREE, Nov. 1978, at 17, 18.

[home team] crowd noise” are not supposed to have any impact on the judgments of sports officials and yet they all seem to be influential.¹⁰⁵

Recent research, for example, shows that soccer referees are significantly more likely to award a foul to the taller of two players involved in an ambiguous foul situation.¹⁰⁶ They also call more fouls when seeing a right-to-left attack than when seeing one moving from left-to-right.¹⁰⁷ Other researchers have found that referees are inclined to grant more points to tae kwon do athletes wearing red than they are to those wearing blue.¹⁰⁸ In addition, college basketball referees demonstrate bias against visiting teams, and the larger the difference in fouls between two opposing squads, the more likely it is that they blow the next whistle on the team that has fewer fouls.¹⁰⁹ Most troubling, a study of the National Basketball Association found that white referees are more likely to call fouls on black players than white players.¹¹⁰ It is not that these N.B.A. referees are explicitly bigoted any more than the Premiership referees have explicit preferences for short people. Just as with judges, the cognitive mechanisms at work often operate at an implicit level, which make them hard to notice and equally hard to accept.

105. Niels van Quaquebeke & Steffen R. Giessner, *How Embodied Cognitions Affect Judgments: Height-Related Attribution Bias in Football Foul Calls*, 32 J. SPORT & EXERCISE PSYCHOL. 3, 14 (2010) (citations omitted).

106. *Id.*

107. Kranjec et al., *supra* note 101, at 3.

108. Hagemann et al., *supra* note 101, at 770.

109. Kyle J. Anderson & David A. Pierce, *Officiating Bias: The Effect of Foul Differential on Foul Calls in NCAA Basketball*, 27 J. SPORTS SCI. 687, 692-93 (2009). Similar effects have been found for soccer refereeing. *See, e.g.*, Ryan H. Boyko et al., *Referee Bias Contributes to Home Advantage in English Premiership Football*, 25 J. SPORTS SCI. 1185, 1191-94 (2007) (finding that English Premiership away teams were judged to have committed more penalties and scored fewer goals than home teams); Peter Dawson et al., *Are Football Referees Really Biased and Inconsistent?: Evidence on the Incidence of Disciplinary Sanction in the English Premier League*, 170 J. ROYAL STAT. SOC'Y: SERIES A 231, 249 (2007) (finding that English Premiership referees were more likely to award yellow and red cards against the away team); Matthias Sutter & Martin G. Kocher, *Favoritism of Agents—the Case of Referees' Home Bias*, 25 J. ECON. PSYCHOL. 461, 467-68 (2004) (finding that German Bundesliga referees awarded more stoppage time in matches in which the home team was losing than in matches in which they were winning, giving the home team a greater opportunity to equalize the score).

110. Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, IZA DISCUSSION PAPER No. 2863, June 2007, available at <http://ideas.repec.org/a/tpri/qjecon/v125y2010i4p1859-1887.html> (finding that the “biases are sufficiently large that [there are] . . . appreciable differences in whether predominantly black teams are more likely to win or lose, based on the racial composition of the refereeing crew”); *but see* Alan Schwarz, *Study of N.B.A. Sees Racial Bias in Calling Fouls*, N.Y. TIMES, May 2, 2007, <http://www.nytimes.com/2007/05/02/sports/basketball/02refs.html> (noting that the N.B.A. conducted its own study and found no bias in refereeing, but that that study was judged by experts to be far less sound than the one conducted by Price and Wolfers).

3. *A Salve to Cognitive Illiberalism*

The color commentator analogy acknowledges the reality that none of us—including judges—come to interpretive tasks free of biases and immune to situational primes. Color commentators are, in many ways, stand-ins for members of the public—we expect them to offer their opinions, to have allegiances and preconceptions, to see the game through colored lenses, and to be emotional. By analogizing the Justice to the color commentator we can make explicit that judges are real people and are vulnerable to the same cognitive proclivities and exterior frames as the rest of us. And by bringing Justices down to earth, we can be in a far better position to reduce and control for biases.

If our goal is to have Justices act in ways that are truly objective and unbiased, ironically, the solution is not to propagate an analogy that suggests that judges are like umpires; it is to propagate one that suggests that judges are like everyone else.

Recent research contests Michael Allen's claim that "judges will never be able to prevent their life experiences or even overall judicial philosophies from influencing their decisions."¹¹¹ As discussed in the previous section, there are many structures and processes in our brains operating beyond our conscious awareness or control, but, as Jennifer Joy-Gaba and Brian Nosek detail, there is a "growing body of evidence challenging the assumption of automatic inflexibility . . . [and offering a] new understanding of automaticity as contextually sensitive and amenable to change."¹¹² The increasingly rich literature offers insight into both the conditions that encourage decreased schema reliance and on debiasing more generally.¹¹³ In the context of overcoming implicit biases, two particularly promising approaches include "increasing vigilance about one's subtle behavior . . . and educating people about their implicit biases."¹¹⁴ If "motivation to avoid bias can help lessen the likelihood of its operation,"¹¹⁵ the first

111. Allen, *supra* note 102, at 533.

112. Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137, 137 (2010).

113. See, e.g., Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 331-37 (2008) (providing an overview of the research).

114. John T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 56 (2009).

115. Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 36 (2009) (reviewing research); see also Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCHOL. 835, 845-47 (2002) (investigating the influence of internal and external motivations on reducing race bias); E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCHOL. 811, 811 (1998) (same).

step is to understand and accept that we are not rational, neutral, and objective beings.¹¹⁶ As Rachlinski and his coauthors have found, “when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so”¹¹⁷—yet the “[c]ontrol of implicit bias requires active, conscious control.”¹¹⁸ Other researchers have documented similar results “that implicit bias can be recognized and modulated to counteract its effect on” critical real world decisions.¹¹⁹ But, again, the key is awareness and attention to the fact that we carry unconscious tendencies that can influence our cognition and are susceptible to frames and cues in our environment that can lead us to depart from true rational objectivity.

Thus, encouraging the myth that judges are capable of dispassionately and neutrally calling “balls and strikes” is a great way to ensure that they will never actually do so.¹²⁰

There is a danger, of course, that acknowledging that Justices carry biases may damage the respect that the judiciary enjoys. This is a genuine concern given research showing that the perceived legitimacy of legal authorities is both critically important to maintaining citizen compliance with the law¹²¹ and dependent on whether citizens believe that members of the judiciary employ fair, unbiased procedures.¹²² However, a judiciary whose legitimacy is

116. See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1090 (2006) (“As a threshold matter, in order to correct bias, decision makers . . . must be made aware of their own implicit biases.”).

117. Rachlinski et al., *supra* note 98, at 1221.

118. *Id.* at 1225.

119. Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1235-37 (2007) (studying physicians treating coronary artery disease in black and white patients).

120. Former Dean of Columbia University Law School Harlan Fiske Stone made a similar point about the dangers of “lack of candor” some 75 years ago:

[O]ne of the evil features, a very evil one, about all this assumption that judges only find the law and don’t make it, often becomes the evil of a lack of candor. By covering up the lawmaking function of judges, we miseducate the people and fail to bring out into the open the real responsibility of judges for what they do.

Edward Lazarus, *Overall, the Miers Nomination Is Troubling—But It Does Have One Virtue*, FINDLAW (Oct. 13, 2005), <http://writ.news.findlaw.com/lazarus/20051013.html> (quoting Chief Justice Harlan Fiske Stone).

121. See John Darley et al., *Psychological Jurisprudence: Taking Psychology and Law into the Twenty-First Century*, in 14 PERSPECTIVES IN LAW AND PSYCHOLOGY, TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY 37, 43 (James R. P. Ogloff ed., 2002) (“[A]lthough the threat of punishment is always in the background when dealing with legal authorities, most people accept the decisions of those authorities not because they fear them, but because they view their actions as legitimate.”); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 161 (1990) (providing evidence that individuals are more likely to defer to authorities assessed to be legitimate).

122. See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949,

based on the dissemination of a myth of fairness and impartiality, while delivering neither, is not worthy of respect or deference.

Selling such a myth through the use of the umpire analogy is particularly objectionable because it facilitates the marginalization of certain viewpoints, approaches, and assessments. As social psychologists have documented, it is already our natural proclivity to (1) believe that we see the world as it actually is (that is, neutrally and accurately), (2) assume that other reasonable people will see things exactly as we do, and (3) conclude that those who see things differently must be biased, ill-informed, or lacking in intelligence.¹²³ The umpire analogy encourages this process by offering assurance that our gut is correct: there is just one objective way to look at the law and facts, and it is our way. If the law is understood to be neutral, clearly defined, uniform, and singular, then the reason that others see things differently comes down to “ignorance, misinformation, bias, irrationality, and disloyalty.”¹²⁴ The result is “a state of cognitive illiberalism” with “distort[ed] judicial decisionmaking on factual issues that divide competing cultural and societal groups” and an “escalating cycle of recrimination and distrust.”¹²⁵ If Chief Justice Roberts is an umpire simply calling balls and strikes, it is not possible for another Justice or another citizen to reasonably disagree with him. A Justice who views matters differently than the Chief must be an “activist” with an agenda trying to legislate from the bench.

III. FLIPPING THE COIN: WHAT JUDGING CAN TEACH US ABOUT SPORTS COMMENTATING

In the preceding pages, the argument has been that Justices are like color commentators and that by drawing the analogy we can learn something important about the nature of Supreme Court adjudication to the ultimate benefit of the institution. However, if the analogy is truly robust it seems plausible that we might also take what we know about the work of the Court to illuminate sports commentary. While the discussion that follows is only meant to be evocative, considering the potential bidirectional nature of our legal metaphors may be a promising avenue for future research.

993 (2003) (arguing the voluntary compliance with the law is dependent on the justice system’s reputation for fairness); Darley et al., *supra* note 121, at 55 (same).

123. See Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in *VALUES AND KNOWLEDGE* 103, 110-11 (Edward S. Reed et al. eds., 1996) (terming this tendency “naïve realism”).

124. Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 *EMORY L.J.* 499, 573 (2008).

125. Kahan et al., *Whose Eyes?*, *supra* note 85, at 895-96 (emphasis omitted).

A. *The Insights of Legal Realism*

Although greatly reinforced by recent evidence from psychology and empirical work by political scientists and legal scholars, in many ways, the insight that judges are subject to biases and that often there is no single objective view of the facts or correct interpretation of the law has its origin in the work of legal realists in the early- and mid-twentieth century.¹²⁶ Over a span of decades, legal realists peeled back the veil on judicial decisionmaking to lay bare that judicial determinations were often grounded not in the unambiguous text of a statute or binding precedent, but in public dynamics, cultural traditions, and the judge's individual psychology and "political, economic, and professional background and activities."¹²⁷

Consequently, as a loose test of the strength of the analogy between Justices and sports commentators, it is worth considering whether the tools developed by legal realists to expose the true nature of judging might be used to expose parallel hidden realities of sports commentating.

By way of a concrete illustration, consider Karl Llewellyn's famous analysis of the canons of statutory interpretation used by appellate judges, including Supreme Court Justices, to construe the meanings of ambiguous statutes.¹²⁸ Llewellyn showed that although judges regularly cite principles or rules of parsing case law and statutes as if they are clearly established and dictate a particular, singular interpretation and resultant outcome, it is the desired outcome that often seems to drive—perhaps unconsciously—the choice of what amount to contradictory canons.¹²⁹ For instance, to justify and explain a holding that the EPA overstepped its bounds in regulating water features on golf courses, a Justice might select the canon that "[a] statute cannot go beyond its text."¹³⁰ On the other hand, to justify and explain the opposite holding that the EPA has authority to regulate the implicated features, a Justice might select the canon that "[t]o effect its purpose a statute may be implemented beyond its text."¹³¹ When confronted individually, the canons seem to fit nicely

126. See, e.g., Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY* 50, 52-53 (Martin P. Golding & William A. Edmundson eds., 2005).

127. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809, 846 (1935); see also JEROME FRANK, *LAW AND THE MODERN MIND* 120 (1963) (describing the "personality of the judge" as "the pivotal factor in law administration"); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 53 (1960) (noting that "the men of our appellate bench are human beings" who, like all human beings, are gripped, shaped, limited, and guided by various traditions and other forces).

128. LLEWELLYN, *supra* note 127, at 521-35.

129. See *id.*

130. *Id.* at 522.

131. *Id.*

into Chief Justice Roberts' world where umpire judges dispassionately apply neutral rules, but when matched with their opposing numbers, the farce of the objective, robotic Justice is exposed. For a list of additional examples, see Figure 1.

Figure 1: Canons of Statutory Construction

THRUST	BUT	PARRY
"Statutes in derogation of the common law will not be extended by construction." ¹³²		"Such acts will be liberally construed if their nature is remedial." ¹³³
"If language is plain and unambiguous it must be given effect." ¹³⁴		"Not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose." ¹³⁵
"Every word and clause must be given effect." ¹³⁶		"If inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage." ¹³⁷
"Expression of one thing excludes another." ¹³⁸		"The language may fairly comprehend many different cases where some only are expressly mentioned by way of example." ¹³⁹

B. Applying Realist Insights to Color Commentating

As with appellate judges construing law, the "accepted convention" with respect to interpreting ambiguous sporting actions and events "requires discussion as if only one single correct meaning could exist."¹⁴⁰ It is assumed that the actions that players, coaches, or teams take—for example, refusing to participate in voluntary workouts with the team during the offseason, spending a lot of money on free agents, or building a team around defense—have uniform, predictable consequences. In fact, various situational variables mean that the same action can lead to disparate outcomes and so there must be different—and frequently contradictory—canons of

132. *Id.*

133. *Id.*

134. *Id.* at 524.

135. *Id.*

136. *Id.* at 525.

137. *Id.*

138. *Id.* at 526.

139. *Id.*

140. *Id.* at 521.

interpretation. Announcers and sports writers often proclaim things with such assurance that we forget that they delivered exactly the opposite explanation in the last game. To justify and explain a football team grinding out a fourteen to zero win, the chosen canon is “great defenses win championships.” When a different team cruises to a fifty-six to twenty-eight victory, the explanation is “all-pro quarterbacks bring Super Bowl rings.” The outcome drives the selection of the canon. For some selected examples, see Figure 2, which shows canons commonly employed after a win (here, the “thrust”) and matching canons commonly employed after a loss (here, the “parry”).

Figure 2: Canons of Sports Interpretation

THRUST	BUT	PARRY
A rant to the media by a star player is sometimes just what's needed to set a fire under a team.		This type of selfish action always serves as a serious distraction and hurts team cohesion.
After last week's dominant performance, it was clear that these guys were going to come in and steamroll the competition.		What happened was after the big win, they got cocky and looked past their next opponent.
As frequently occurs when a key player goes down, other guys on the team stepped up their games.		Few teams can overcome the loss of their leader.
Getting tossed or a technical foul can be a very effective way to wake your team up.		When coaches lose their cool, their teams often lose focus.
When you've been sitting on the bench for weeks nursing an injury and finally have a chance to play, you come in and give it your all.		When you've been sidelined all season and you finally come back, you're bound to be cautious and careful. You need some time to get the rust out.
Calling a timeout at the end is just what an experienced coach knows he needs to do. It's always a good idea to bring your guys in, calm them down, and draw up a winning play.		It's always dangerous breaking the flow at the end and it gives the defense a chance to catch their breath.

Thus, sports canons—like their judicial counterparts—often come in clashing pairs, but since they almost never both show up at once, it is easy to miss the contradiction and the fact that commentators—like Justices—are not impartial analysts applying neutral rules of interpretation to unambiguous facts. Even as they believe in their own objectivity, they may be unconscious partisans selectively choosing interpretive rules and relevant facts to reach or justify a desired outcome.

IV. CONCLUSION

In the end, the allure of the umpire Justice and the commissioner Justice may have a lot to do with the certainty and control they seem to invoke. Just as it is cognitively appealing to believe that the law is clear, uniform, singular, and neutral, it is also appealing to believe that those charged with applying the law are enlightened souls, unbiased, with cloudless vision and perfect objectivity. As Justice David Souter recently asked, “Is there any one of us who has not lived through moments, or years, of longing for a world without ambiguity, and for the stability of something unchangeable in human intuitions?”¹⁴¹

Unfortunately, that is not the world we live in. As Souter aptly put it, judging is not—and cannot be—“a straightforward exercise of reading fairly and viewing facts objectively.”¹⁴² A Supreme Court Justice is like a color commentator charged with the task of creative interpretation and explanation, but subject to the same external frames and cues and the same cognitive pulls and pushes as all of us. Acknowledging this reality does not imperil the judiciary; it shows us the true nature of the playing field so that we can continue the long and ongoing process of filling the holes and leveling the pitch.

141. Souter, *supra* note 42.

142. *Id.*