METAPHORS MATTER: HOW IMAGES OF BATTLE, SPORTS, AND SEX SHAPE THE ADVERSARY SYSTEM

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Even its name begins to tell the story: the adversary system. American court procedure is labeled in a way that implies a fight or a contest, highlighting the conflict rather than the resolution. Technically, "adversary system" merely means that "neutral and passive factfinders . . . resolve lawsuits on the basis of evidence presented by contending litigants during formal adjudicatory proceedings." The phrase connotes more than its technical definition, however. A complex web of metaphor pervades the idea of the adversary system in a way that captures the hearts and minds of the lawyers who function within that system. In case law, academic literature, professional literature, and in popular culture, a trial is a battle and the lawyer the client's champion; a trial is a sports contest and the lawyer the client-team's winning coach or star player. Metaphors transform the trial lawyer from a mere person who presents information favorable to his client to a triumphant hero and change the other party to the dispute into the enemy. This metaphorical fixation on the combative, non-cooperative aspect of dispute resolution and the suppression of any duty to other

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2. "[T]he universal acceptance among lawyers of the justification by the Adversary System is a startling thing, a marvelous thing, a thing to behold. It can go something like this: one talks with a pragmatic and hard-boiled attorney. At the mention of legal ethics, he smiles sardonically and informs one that it is a joke. One presses the subject and produces examples such as the buried bodies case. The smile fades, the forehead furrows, he retreats into a nearby phonebooth and returns moments later clothed in the Adversary System, trailing clouds of glory. Distant angels sing. The discussion usually gets no further," David Luban, The Adversary System Excuse, in The Good Lawyer: Lawyers' Role and Lawyers' Ethics 89 (David Luban, ed., 1983).

3. These metaphors apply not only to the actual trial of the case but also to all the discovery, settlement negotiations, and other pretrial proceedings involved in resolving the dispute. Ideology designed to describe the presentation of evidence has thus expanded to apply to different kinds of activities.
litigants, the court system, or the community, contributes to a professional role that is severely out of balance.

The problem of adversary overkill is not, as bar associations seem to believe, a question of lost good manners or a few deviant individuals. Rather, the excesses of the adversary system are a result of powerful systemic forces, including the use of metaphor. Litigators as a group have a set of attitudes that give meaning to their work and provide the underlying assumptions and rules governing their behavior. One of the ways this litigious culture manifests itself is in pervasive professional metaphors. These metaphors, while originally mythical or aspirational, become real and influence the way litigators think and behave. In addition to reflecting reality, they shape it. We cannot ignore the metaphors as pretty decorations; they have real effects and can do real harm.

Professional ethics dictate a role for trial lawyers that rests on sometimes conflicting obligations to the client and to others. The obligations are not, however, equally prominent. The dominant role is that of partisan advocate. As long as a client’s objectives are “lawful” the lawyer is required to help the client achieve them. This part of


6. “A lawyer should represent a client zealously within the bounds of the law.” Model Code of Professional Responsibility Canon 7 (1970) (hereinafter “CPR”). “The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.” Id. EC 5-1. The rules proposed by the American Trial Lawyers Association are even more client-oriented: “A lawyer shall use all legal means that are consistent with the retainer agreement, and reasonably available, to advance a client’s interests as the client perceives them.” American Lawyer’s Code of Conduct Rule 3.1 (Rev. Draft May 1982). The bar’s classic defense of the adversary system is found in Lon Fuller & John D. Randall, Professional Responsibility: Report of the Joint Conference of the ABA-AALS, 44 A.B.A.J. 1159 (1958).

7. CPR, supra note 6, DR 7-101(A)(1) (“A lawyer shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules.” See also CPR, EC 7-3 (“While serving as an advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law . . . ”); EC 7-4 (“The advocate may urge any permissible construction of the law favorable to this client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail . . . ”); EC 7-6 (“In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his clients”). The ABA Model Rules of
the lawyer role is supported and enhanced by the war, sports, and sex metaphors. The weaker role is less adversarial, and contains some limits on adversariness based on duties to others and to the court system. There are even some images supporting this shadow role such as officer of the court or counsel for the situation. These images, however, lack the vividness and the pervasiveness of the war/sports/sex metaphors and do little to limit pro-client zeal.

This article collects and analyzes, for the first time, a kind of lawyer talk that is uniquely revealing about legal culture. It will begin by discussing the nature and effect of metaphors in society, using insights

Professional Conduct have parallel provisions. For example, the lawyer's duty to expedite litigation is limited by the interests of the client. Model Rules of Professional Conduct Rule 3.2. And while the lawyer may not offer the court "known perjured or falsified evidence... it is only at a point not far short of such extremes that an advocate even has discretion to refuse to present such evidence." Geoffrey C. Hazard, Jr., & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, § 403, at lxxvii (2d ed. 1992). See generally Model Rule 3.3(a).

8. The three metaphorical systems are identified separately in this article. However, our cultural references to war, sports, and sex are so overlapping that it is not always possible to say for sure which one is being used in a particular context. For example, both war and games have winners, losers, and strategy. Athletes may see themselves as warriors. One description of high school football players notes that "the solemn ritual that was attached to everything, made them seem like boys going off to fight a war for the benefit of someone else..." H. G. Bissinger, Friday Night Lights: A Town, A Team, AND A DREAM 11 (1990). In football games, there are bombs and blitzes. George Orwell characterized serious sport as "bound up with hatred, jealousy, boastfulness, disregard of all rules and sadistic pleasure in witnessing violence; in other words, it is war without the bullets." George Orwell, quoted in John Winoker, The Portable Cursmudgeon 256 (1987).

Sports and sex also use overlapping language. A man who has succeeded in obtaining sex is said to have "scored." One reason for the power of these metaphors is the way in which they fit together into a coherent system that centers on competing and winning and that associates winning with proving one's masculinity.


11. "Vague notions that attorneys owe a duty to the judicial system by virtue of their status as court officers are feeble counterweights in making day-to-day tactical decisions." Arthur R. Miller, The Adversary System: Dinosaur or Phoenix, 69 Minn. L. Rev. 1, 18 (1984). See also Geoffrey Hazard, Ethics in the Practice of Law 64-65 (1978) ("the role of 'lawyer for the situation' [has not been] idealized by the bar in parity with the role of partisan advocate.").
from recent psychological literature concerning the power of metaphor. The article will then survey and analyze the dominant metaphors for the adversary system and for the role of trial lawyers within that system. Further, the article will suggest some of the reasons for the powerful hold these metaphors have on American legal culture.

Next, the article will assess the impact of the metaphors on the behavior and identity of the people who work within the adversary system. It will argue that although the competitive metaphors sometimes promote good behavior, they more often foster unacceptable actions and attitudes. They disguise situations in which the parties should be able to achieve a cooperative or different vision of their dispute. Metaphors lie behind substantive, procedural, and ethical rules that reward competition and discourage greater cooperation; they keep us from seeing the extent of problems within the adversary system and possible solutions to those problems. Therefore, the article will conclude by suggesting that we adopt and nurture new metaphors that will emphasize those parts of the adversary system that are obscured by the currently dominant metaphors of war, sports, and sex.¹²

I. THE NATURE AND EFFECT OF METAPHORS

"All thinking is metaphorical."

—Robert Frost¹³

A metaphor is "a figure of speech containing an implied comparison, in which a word or phrase ordinarily and primarily used for one thing is applied to another."¹⁴ In making such a comparison, the

¹². To free lawyers from complete client domination, the profession must "create norms powerful enough to constrain the lawyer's conscience and calculations." Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. Rev. 1, 34 (1988). In some settings, a more client-centered outlook may be appropriate. It is possible, for example, that criminal defense work requires a more thoroughly adversarial approach. This is true not because of the customary ideology of the adversary system — adversary presentation leading to truth — but because the criminal justice system should overprotect the rights of the criminal defendant in order to protect the rights of the individual against the state in that particular setting. See David Luban, Lawyers and Justice 58-63 (1988). One of my colleagues, who teaches criminal law, fears that cooperative models would lead to "more and more people in prison (but politely)." This article primarily addresses civil litigation. It does not address the issue of whether the new metaphors alone could work for criminal defense lawyers. Note, however, that if criminal defense is different it is not because of the needs of the adversary system itself. Note also that prosecutors' appropriation of the mindset of war may be responsible for much prosecutorial misconduct despite their theoretically public roles. Keeping the traditional metaphors may do even criminal defendants more harm than good.


speaker says that one thing has certain traits of the other.\textsuperscript{15} If a metaphor says, then, that "all the world's a stage," it says that there are some things about the world that are like a dramatic production. Metaphor thereby provides new ways of understanding experience.\textsuperscript{16}

Most people first learned to think about metaphor as a mere poetic or rhetorical device, something to make the use of words more colorful or persuasive. Modern psychological and linguistic researchers, however, have demonstrated that metaphor is much more fundamental, not a matter of words but a matter of thought.\textsuperscript{17} Indeed, most of anyone's ordinary conceptual system is metaphorical in nature.\textsuperscript{18} Each culture has unique foundational metaphors which play a part in shaping the way members of that culture conceptualize their experience.\textsuperscript{19} Identifying those metaphors provides valuable clues about how a society thinks about things and defines its reality.\textsuperscript{20}

The pervasiveness of metaphor and the way in which it organizes thought processes can be illustrated by examining a simple metaphorical system - for example, up-down spatialization metaphors.\textsuperscript{21} In American culture, things that are desirable tend to be associated with "up" while things that are undesirable are associated with "down." Thus happy is up and sad is down. (I'm feeling up. That boosted my

\textsuperscript{15} Aristotle wrote that metaphor "consists in giving the thing a name that belongs to something else." Aristotle, Poetics (1457b) (J. Bywater trans. 1954). In more technical terms, "[w]e use a metaphor to map certain aspects of the source domain onto the target domain, thereby producing a new understanding of that target domain." George Lakoff & Mark Turner, More Than Cool Reason: A Field Guide to Poetic Metaphor 38-39 (1989).

\textsuperscript{16} "Metaphor provides us with a means for comprehending domains of experience that do not have a preconceptual structure of their own. A great many of our domains of experience are like this. Comprehending experience via metaphor is one of the great imaginative triumphs of the human mind." George Lakoff, Women, Fire, and Dangerous Things: What Categories Reveal about the Mind 303 (1987).

\textsuperscript{17} George Lakoff & Mark Johnson, Metaphors We Live By 3 (1980); Paul Ricoeur, The Rule of Metaphor (Robert Czerny with Kathleen McLaughlin & John Costello, S.J. trans., 1975); On Metaphor (Sheldon Sacks ed., 1979); Haig Bosmajian, Metaphor and Reason in Judicial Opinions 38 (1992); Susan Sontag, AIDS and its Metaphors 5 (1988) ("Of course, one cannot think without metaphors").

\textsuperscript{18} Lakoff & Johnson, supra note 17, at 4.

\textsuperscript{19} Lakoff & Turner, supra note 15, at 9.

\textsuperscript{20} Donald A. Schon, Generative Metaphor: A Perspective on Problem-Setting in Social Policy, in Metaphor and Thought 254 (Andrew Ortony ed., 1979). This is similar, but not identical, to the way in which storytelling or fictions affect legal culture. See Milner S. Ball, Legal Storytelling: Stories of Origin and Constitutional Possibilities, 87 Mich. L. Rev. 2280 (1989) (stories about formation of United States influence constitutional interpretation); Lon L. Fuller, Legal Fictions (1967); Aviam Soifer, Reviewing Legal Fictions, 20 Ga. L. Rev. 871 (1986) ("We employ legal fictions to preserve a notion of continuity with the past, yet legal fictions help short-circuit attempts to comprehend the complexity behind the assumptions a legal fiction conveys. Like sunlight, legal fictions affect how growth will tilt.").

\textsuperscript{21} The examples in this paragraph are suggested in Lakoff & Johnson, supra note 17, chapter 4 (orientational metaphors).
spirits. I’m depressed. My spirits sank.) Health and life are up and sickness and death are down. (Lazarus rose from the dead. He’s sinking fast. He dropped dead.) More is up and less is down. (Our numbers are up. His income rose. He is under age. Turn the heat up.) High status is up and low status is down. (She’ll rise to the top. He’s climbing the corporate ladder. They’re from the lower class.) Good is up and bad is down. (Things are looking up. We hit a peak last year, but it’s been downhill ever since. A good person goes up to Heaven, while a bad one goes down to Hell.) These spatial metaphors are rooted in physical and cultural experience, and they are not universal. In some cultures, balance or centrality play a much more important role than in our up-down culture. But within any one culture, it is very difficult to conceptualize experience outside of these metaphorical constructs. It would seem incoherent, as in “I’m appealing this case to a lower court” or “I’m feeling narrow.” The metaphors come to limit the way people think and the way they perceive their physical and social realities.

Metaphors not only structure experience, they do so selectively. Since they compare things that are not in fact identical, metaphors emphasize some traits of their subject and exclude others.22 In forcing us to focus on one aspect of a concept, a metaphor can keep us from focusing on other aspects of the concept that are inconsistent with that metaphor.23 For example, a fundamental conceptual metaphor in American society is “Argument is War.” (Your claims are indefensible. I attacked his argument. I shot his argument down. I will win the argument.) This metaphor structures the actions we perform in arguing; we attack and defend, we have strategies, we see the person we are arguing with as an opponent. The metaphor emphasizes the battling aspect of arguing. At the same time, the war metaphor obscures the cooperative aspects of arguing. For example, people who argue are giving each other their time, a valuable commodity, in an effort at mutual understanding.24

Metaphors are thus powerful cultural tools. They structure the way we perceive reality, and they structure it in a way that chooses to emphasize certain parts of our experience at the expense of others.25 They do both of these things in a way that we hardly notice:


25. The power of metaphor in substantive law has been demonstrated by legal scholars. See, e.g., Michael Boudin, Antitrust Doctrine and the Sway of Metaphor, 75 Geo. L.J. 395 (1986); Martha Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 Harv. L. Rev. 727 (1988) (changes in rhetoric changed the substantive law of custody); Henly, supra note 22 (effect of penumbra metaphor on constitutional law); Eileen A. Scallen, Promises Broken vs. Promises
Anything that we rely on constantly, unconsciously, and automatically is so much part of us that it cannot be easily resisted, in large measure because it is barely even noticed. To the extent that we use a . . . conceptual metaphor, we accept its validity. Consequently, when someone else uses it, we are predisposed to accept its validity. For this reason, conventionalized . . . metaphors have *persuasive* power over us.26

Without a careful awareness of our dominant metaphors, then, and without competing alternate metaphors, people act and think on the basis of “limited comprehension masquerading as the whole truth.”27

Because metaphors are so powerful and so potentially deceptive, we must examine carefully the metaphors that structure our experience of litigation. By studying the metaphors we can learn something about our concept of dispute resolution; we can see what the metaphors emphasize and what they hide.

II. Metaphors For The Adversary System

“This is a case in which a government lawyer played litigation hardball with a hand grenade.”28

Metaphors so pervade our language about litigation that it is almost impossible to talk about a trial without using metaphors. There are a variety of metaphors available, but the ones that by far dominate our formal, public29 discussion of litigation30 are the ones comparing

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29. The metaphors discussed in this article are found primarily in published sources, especially in reported cases and legal scholarship. This public part of legal discourse is influential and important. The way courts and scholars talk about the judicial system expresses public values. This discourse influences the way both lawyers and non-lawyers feel about litigation and the way they behave when they are engaged in litigation. Thus, even if the metaphors are not used for other kinds of lawyering, or are used differently in certain kinds of private discourse even by litigators, it is important to study what we are saying publicly about the nature of litigation. **Cf. Kennneth L. Karst, Law's Promise, Law's Expression** 3 (1995) (“In defining meanings in our public life, no form of expression is more powerful than the law.”)
30. These public sources do not tell us whether and how lawyers use the metaphors privately, with each other and with clients. It is possible that the war/sports metaphors are: 1) not used (ignored or rejected); 2) used ironically, indicating that the lawyers do not believe themselves to be acting consistently with the metaphors; 3) used
litigation to war, sports and, to a lesser degree, sex. Metaphors are used knowingly and unknowingly, as descriptions and as criticisms, but they are always used.

A. Wars and Fighting

Litigation is commonly referred to as a war, or more often as a battle. The other battle metaphors flow from this premise. For ex-

as a scare tactic for client control, in order to discourage or settle litigation; and 4) used seriously. It may be that metaphorical use varies from lawyer to lawyer, or there may be patterns that tend to apply to different kinds of practice. Further empirical study is needed to examine the use of metaphor in informal lawyer talk. Cf. Austin Sarat & William L.F. Felstiner, Law and Strategy in the Divorce Lawyer’s Office, 20 LAW & SOC’Y REV. 93 (1986); Stewart Macaulay, Lawyers and Consumer Protection Laws, 14 LAW & SOC’Y REV. 115 (1979).

30. Other kinds of lawyering also have their own metaphorical systems, and these do not center on fighting and competing. Lawyers acting as brokers or deal makers talk about things like horsetrading, splitting the baby, half a loaf, cooling off, breaking even, cutting a deal, and expanding the pie. Nor are the war/sports/sex metaphors used by all litigators, or used all the time by those litigators who do see themselves as metaphorical warriors. Cf. Sarat & Felstiner, supra note 29, at 93 (some divorce lawyers tend to steer clients toward settlement rather than adjudication due to expense, delay, and unpredictable nature of litigation). Nevertheless, when many trial lawyers believe themselves to be in a litigation setting, images of war and sports structure the lawyers’ understanding of the lawsuit and their role within it. Likewise, public discussion of ethical codes and procedural rules are influenced by war and sports imagery. These understandings are reinforced by other forces in American culture and the American legal system discussed infra.

31. In order to locate the metaphors, I read hundreds (maybe even thousands) of cases found both by reading cases about procedural issues and by searching for specific phrases that seemed to be common metaphors for the adversary system. I also read scores of law review articles regarding issues of professional responsibility, law review articles about the adversary system, books intended to teach trial advocacy skills, lawyer continuing education materials, and biographies of prominent trial lawyers. I have also drawn on my own recollections of big and small firm litigation, and have discussed the issue with numerous trial lawyers and judges. While such a survey cannot claim to be scientific, I think it does accurately identify the dominant metaphorical systems and their relative frequency in published sources that discuss litigation. I have cited representative sources in the article without attempting exhaustive string cites to all the cases or other authorities using the metaphors. The use of reported cases may bias the sample toward the most adversarial of situations, as many of the opinions reflect fully litigated cases. It is clear, however, that these metaphors are a major part (I believe the major part) of public lawyer discourse about litigation. Further, in this context the metaphors appear to be used in dead earnest.

32. They may even be used in the law school classroom. “If you were to tape your own classes, would you hear yourself speaking in war and sports metaphors?” Carrie Menkel-Meadow, Can A Law Teacher Avoid Teaching Legal Ethics?, 41 J. LEGAL EDUC. 3, 8 (1991).

ample, some refer to the roles that trial lawyers play in this war. They can be heroes, hired guns, gladiators, warriors, champions, generals, lone gunfighters, or the man on the firing line. Like soldiers, lawyers can be seasoned or battle-tested. They are assisted by squadrons of young lawyers who function as shock troops. People v. Packing Co. v. Doskocil Co., 126 F.R.D. 662, 664 (N.D. Ill. 1989) ("all out war"); Whisenhunt v. State, 370 So.2d 1080, 1105 (Ala. Crim. App. 1979) (trial is "a legal battle, a combat"); Asia Investment Co., Ltd. v. Borowski, 184 Cal. Rptr. 317 (Cal. Ct. App. 1982); Thornton v. Breland, 441 So.2d 1348, 1349 (Miss. 1983) (en banc) ("A lawsuit . . . is often a small war."). See also BALL, supra note 27, at 132; MARVIN E. FRANKEL, PARTISAN JUSTICE (1980); Robert C. Post, On the Popular Image of the Lawyer: Reflections in a Dark Glass, 75 CAL. L. REV. 379, 386 (1987); CHARLES TESSMER, CRIMINAL TRIAL STRATEGY 76-78 (1968) ("A good strong beginning is half the battle."). The war metaphor has also been used to describe substantive law. See, e.g., IAN MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 1 (1980) ("contract between totally isolated, utility-maximizing individuals but war").


36. Cooke v. Cooke, 319 A.2d 841, 843 n.3 (Md. Ct. Spec. App. 1974). See also TANFORD, supra note 34, at 280 (cross-examination is "the paradigm of the gladiatorial aspect of litigation"); FRANKEL, supra note 33, at 4 (containing war and sports metaphors passim).


38. TANFORD, supra note 34, at 6 ("lawyer can embrace the heroic image of the champion battling for a cause"); David Schuman, Beyond the Waste Land: Law Practice in the 1990s, 42 HASTINGS L.J. 1, 4 (1990); Deborah Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 600 (1985) ("champion system"); Lawry, supra note 9, at 320 ("I accept the lawyer's role as 'champion' of his or her client because that is universally accepted as a central part of the moral tradition of lawyering.").

39. SYDNEY C. SCHWEITZER, TRIAL GUIDE 1156 (1945) (counsel is like a general before a battle, planning the disposition of his forces); SOL M. LINOWITZ (WITH MARTIN MAYER), THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 14 (1994) (quoting lawyer for R.J. Reynolds comparing cigarette company's litigation strategy to that of General Patton).

40. Lawry, supra note 9, at 336 (noting also that the trial lawyer is a figure of "mythic proportions" in America).


42. THOMAS A. MAFET, FUNDAMENTALS OF TRIAL TECHNIQUES 237, 239 (1980).

43. Chayes & Chayes, supra note 35, at 296.
people who help the lawyer are allies, while other parties are barbarians and enemies, opponents, the other "side." People injured by the litigation process are casualties.

Other metaphors describe litigation activities in warlike terms. Parties arm themselves, draw battle lines, offer or refuse quarter, plan preemptive strikes, joust, cross swords, undertake frontal assaults, win by attrition, seek total annihilation of their enemies, marshal forces, attack, and sandbag their opponents. They deliver blows, attack flanks, kill, fire opening salvos, skirmish, and cry craven. There are various kinds of battles: discovery battles, uphill battles, courtroom battles, first battles, heated battles.

44. Id. at 295; Post, supra note 33, at 386.
45. Robert L. Simmons, Winning Before Trial: How to Prepare Cases for the Best Settlement or Trial Result 223 (1974) (unfriendly witness will say and do whatever he can to help his ally beat you).
50. Id. at 778. See also Butler v. Commonwealth, 387 S.W.2d at 869 ("The warrior whose offer of quarter is spurned must fight on to win whatever he can.").
54. Barnhill v. United States, 11 F.3d 1360, 1370 (7th Cir. 1993). See also Hegland, supra note 53, at 61 ("Frontal attacks on the core of the testimony ... are far more difficult").
56. Lawty, supra note 9, at 331.
58. Maul et, supra note 42 at 9. See also Schweitzer, supra note 39, at 1322 ("point of attack").
59. Maul et, supra note 42 at 20.
60. George Colman, CROSS-EXAMINATION: A PRACTICAL HANDBOOK 136-50 (1970) ("swift and damaging blow"); "deliver the blow at once").
61. Browne, Understanding Appellate Advocacy, in Bellow & Moulton, supra note 57, at 410 (describing Thurgood Marshall's legal argument in the school desegregation cases); Hegland, supra note 53, at 61.
64. Id.
65. Rhode, supra note 38, at 599.
tles;\textsuperscript{70} custody battles;\textsuperscript{71} credibility battles;\textsuperscript{72} battles of experts;\textsuperscript{73} and all-out battles.\textsuperscript{74}

Still other war metaphors depict the equipment and location of war and apply those words to litigation. Trials can take place in trenches,\textsuperscript{75} staging areas,\textsuperscript{76} and battlefields.\textsuperscript{77} The litigants use arsenals,\textsuperscript{78} weapons,\textsuperscript{79} war chests,\textsuperscript{80} launch vehicles,\textsuperscript{81} legal swords,\textsuperscript{82} artillery,\textsuperscript{83} hand grenades,\textsuperscript{84} ammunition,\textsuperscript{85} bombs,\textsuperscript{86} and explosives.\textsuperscript{87}

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  \item 73. Edwards v. Aguillard, 482 U.S. 578, 596 (1987); Harris v. United States, 19 F.3d 1090, 1096 (5th Cir. 1994); Fujii v. Benefit Trust Life Ins. Co., 18 F.3d 1405, 1412 (7th Cir. 1994).
  \item 74. Schuman, \textit{supra} note 38, at 5.
  \item 75. Thibeault v. Square D Co., 960 F.2d at 244; United States v. Decoster, 624 F.2d 196, 296 (D.C. Cir. 1976).
  \item 76. Atkinson, \textit{supra} note 47, at 857.
  \item 77. Hardman v. Helene Curtis Indus., 198 N.E.2d 681, 688 (Ill. App. 1964) ("the clashing of redoubtable protagonists in our adversary system provides a battle-ground for hard-hitting, relentless and ingenious tactics."); United States v. Sepulveda, 15 F.3d 1161, 1184 (1st Cir. 1993) (trial judges make "swift battlefield decisions"); Richards v. General Motors Corp., 850 F. Supp. 1325, 1340 (E.D. Mich. 1994) ("[W]e decided this case on the narrow battlefield...the parties have chosen."). \textit{See also} Miller, \textit{supra} note 11, at 16.
  \item 78. Scott Baldwin, \textit{Cross Examination of Lay Witnesses}, in Rumsey, \textit{supra} note 51, at 107; Lorna E. Propes, \textit{Impeachment by Prior Inconsistent Statement}, in \textit{id.} at 120. \textit{See also} Miller, \textit{supra} note 11, at 15 (employ "every weapon in their arsenal").
  \item 79. \textit{See MAUET, \textit{supra} note 42, at 269 (impeachment of a witness is a "dramatic weapon"). In a symbolic variation on this theme, Skadden, Arps provided its lawyers on a law firm retreat with water pistols and guns that shot rubber bands. LINCOLN CAPLAN, SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE 163 (1993). The "weapon" metaphor may also have a somewhat sexual connotation. Andrews v. Bible, 812 S.W.2d 284, 292 (Tenn. 1991) ("this Court views Rule 11 as a \textit{potent} weapon") (emphasis added).
  \item 81. Layman v. Combs, 981 F.2d 1093, 1107 (9th Cir. 1992).
  \item 82. Commonwealth v. Marker, 331 A.2d 883, 886 (Pa. Super. 1974). \textit{See also} HEGLAND, \textit{supra} note 53, at 62 ("draw your sword and charge up the mountain").
  \item 85. MAUET, \textit{supra} note 42, at 299, 241.
  \item 86. \textit{Id.} at 250.
  \item 87. SIMMONS, \textit{supra} note 45, at 224-25 (an explosive sufficient to blow credibility right out of the witness).
They aim at targets.\textsuperscript{88} Even non-litigators strive to make their documents ironclad or bombproof.\textsuperscript{89}

War metaphors also illustrate strategies of litigation. As in war, litigation has winners and losers, victors and vanquished.\textsuperscript{90} The lawyers make strategic choices.\textsuperscript{91} Litigants may use Rambo tactics,\textsuperscript{92} Pearl Harbor tactics,\textsuperscript{93} scorched earth tactics,\textsuperscript{94} kamikaze tactics,\textsuperscript{95} pit bull tactics,\textsuperscript{96} and Hiroshima tactics.\textsuperscript{97} They may fight hard or fight fair,\textsuperscript{98} make an attack plan,\textsuperscript{99} adopt a take-no-prisoners approach,\textsuperscript{100} and take calculated risks.\textsuperscript{101}

This is a representative but incomplete list of the battle metaphors for litigation. War provides a rich source domain for trial metaphors, providing words for process and participants and communicating the message that a hostile and competitive attitude is

\textsuperscript{88} Caplan, supra note 79, at 122.

\textsuperscript{89} Schuman, supra note 38, at 5. This one is an example of adversary litigation mentality creeping into the theoretically less adversarial world of transactional lawyering.

\textsuperscript{90} Johnson v. Colglazier, 348 F.2d 420, 426 (5th Cir. 1965); In the Matter of Jacqueline F., 391 N.E.2d 967, 971 (N.Y. 1979).

\textsuperscript{91} Washington v. Strickland, 693 F.2d 1243, 1254 (5th Cir. 1982); Colosimo v. Pennsylvania Elec. Co., 486 A.2d at 1387. See also Browne, supra note 61, at 410 (pinchers strategy); Wayne Brazil, The Adversary Character of Civil Discovery: A Critique and Proposal for Change, 31 Vand. L. Rev. 1295, 1331 (1978) ("tactics and plans").


\textsuperscript{94} In re Auto Specialties Mfg. Co., 153 B.R. 457, 477 (W.D. Mich 1993); In re Kendavis, 91 B.R. 742, 750-51; Harvey v. Allstate Ins. Co., 1993 U.S. App. LEXIS 33865 at *2 (10th Cir. Dec. 21, 1993); Layman v. Combs, 981 F.2d 1093, 1107 (9th Cir. 1992) ("this type of scorched earth litigation - the juridical equivalent of the firebombing of Dresden"); In re Kunstler, 914 F.2d 505, 516-17 (4th Cir. 1990); White v. General Motors Corp., 908 F.2d 675, 684 (10th Cir. 1990). See also New York Times, Aug. 5, 1988, at B5, col.1 (many attorneys say litigation is war, advocating a "scorched earth" policy).

\textsuperscript{95} Layman v. Combs, 981 F.2d at 1108.

\textsuperscript{96} Schuman, supra note 38, at 5.

\textsuperscript{97} Rhode, supra note 38, at 597.


\textsuperscript{99} Harris, supra note 51, at 141.


\textsuperscript{101} MAUET, supra note 42, at 239.
an important characteristic of the adversary system. The same is true of the sports metaphors.

B. Sports and Games

Game metaphors describing litigation are not quite as straightforward as the war metaphors. Probably because games have a less serious connotation, courts that recognize parallels between trials and games sometimes affirm and sometimes deny the accuracy of the metaphor. In other words, when making an outright comparison, courts will sometimes say that litigation is a "game," "sport," or "contest," and sometimes will say that it is not. Even when courts negate the metaphor (e.g. "a lawsuit is not a game of chess"), they do so because they have recognized something in the parties' behavior that does evoke qualities of the game in question. And in describing litigation activities, courts and commentators often use sports and game metaphors.

Some sports metaphors, like war metaphors, have to do with roles. They portray trial lawyers as game players, boxers, team members, or forensic athletes. Judges, not surprisingly, are referees or umpires.

102. The war metaphors for litigation parallel the war metaphors used in American culture to represent the concept of "argument." As noted in the text accompanying notes 22-24 supra, Americans structure their concept of argument in terms of war. We see both everyday arguments and lawsuits as activities with opponents, verbal versions of physical battles. This consistency bolsters the war metaphors in the litigation context.

103. Some societies actually do use games to resolve disputes. See Brenda Danet, Language in the Legal Process, 14 LAW & SOC'Y REV. 445 (1980) (identifying cultures that use "play" methods of dispute resolution).

104. See State v. Myers, 536 P.2d 280, 290 (N.M. Ct. App. 1975) (sporting contest). See also HEGLAND, supra note 53, at 256 ("Two can play that game"); KEETON, supra note 52, at 7, 92 ("contest"); MAUET, supra note 42, at 9; TANFORD, supra note 34, at 6, 28; Brazil, supra note 91, at 1304 ("sport").

105. See, e.g., Carrie Menkel-Meadow, Portia in a Different Voice: Speculations on a Women's Lawyering Process, 1 BERKELEY WOMEN'S L.J. 39, 51 (1985) ("The conduct of litigation is relatively similar (not coincidentally, I suspect) to a sporting event — there are rules, a referee, an object to the game, and a winner is declared after the play is over.").


108. Laxey v. Louisiana Bd. of Trustees, 22 F.3d 621, 622 (5th Cir. 1994).

109. FRANKEL, supra note 33, at 40.

Other metaphors compare lawsuits to particular sports or games: blind man’s bluff,\(^{111}\) hide and seek,\(^{112}\) chess,\(^{113}\) a game of chance,\(^{114}\) a game of wits and strategy,\(^{115}\) a cat and mouse game,\(^{116}\) a poker game,\(^{117}\) a football game,\(^{118}\) a boxing match,\(^{119}\) tennis,\(^{120}\) fishing,\(^{121}\) a tug of war,\(^{122}\) dice,\(^{123}\) a race,\(^{124}\) hunting,\(^{125}\) Monopoly,\(^{126}\) and even a confidence game.\(^{127}\) Metaphors using sports as a reference for litigation activities are also common. For example, litigants sometimes play with one hand tied behind their backs,\(^{128}\) skate close to the edge,\(^{129}\) strike a blow,\(^{130}\) lay their cards on the table,\(^{131}\) go close to the line,\(^{132}\)


\(^{116}\) In re Matter of Adoption of BGB, 599 P.2d 375, 378 (Mont. 1979).


\(^{118}\) Laxey v. Louisiana Bd. of Trustees, 22 F.3d at 622.


\(^{120}\) State v. Myers, 536 P.2d at 290. See also Heglund, supra note 53, at 5-6 (inner game of tennis vs. inner game of advocacy).

\(^{121}\) Simmons, supra note 45, at 232 (reference to hooks and skewers).


\(^{123}\) People v. Williams, 538 N.E.2d 564, 580 (Ill. App. Ct. 1989) (the die is cast).

\(^{124}\) Mauet, supra note 42, at 21.

\(^{125}\) Heglund, supra note 53, at 60 (cross examiners need to “bring down their quarry”).

\(^{126}\) Id. at 153 (“I will warn you of a disturbing influence in the matter of ethics — your overwhelming desire to win; not to do justice, right a wrong, protect society, defend the oppressed or even to earn a fee, but simply to win. As in Monopoly.”).

\(^{127}\) See Abraham S. Blumberg, The Practice of Law as a Confidence Game: Organizational Coprofession of a Profession, 1 LAW & SOC’Y REV. 15 (June 1967).


\(^{129}\) Thornton v. Breland, 441 So. 2d at 1350.

\(^{130}\) Stryker, supra note 119, at 342.


\(^{132}\) Caplan, supra note 79, at 138.
bluff,\textsuperscript{133} coach witnesses,\textsuperscript{134} ask for an extra inning,\textsuperscript{135} or get an elbow in the eye.\textsuperscript{136}

Sports metaphors also illustrate litigation strategy. As in war, the goal is to win.\textsuperscript{137} The players must know the rules of the game.\textsuperscript{138} Lawyers employ stratagems and devices; they need gamesmanship and game plans.\textsuperscript{139} As in chess, successful litigators make moves\textsuperscript{140} and need defensive gambits;\textsuperscript{141} as in cards, they need a poker face;\textsuperscript{142} as in wrestling, they "go to the mat."\textsuperscript{143} Litigators can be hard hitting,\textsuperscript{144} play rough,\textsuperscript{145} or play tough but fair.\textsuperscript{146} It is currently extremely popular, despite frequent criticism, to play hardball.\textsuperscript{147}

Games also provide metaphors for the location of litigation. It can be in an arena,\textsuperscript{148} an obstacle course,\textsuperscript{149} or the omnipresent level playing field.\textsuperscript{150} Finally, there are metaphors, primarily from card

\textsuperscript{133} Priscilla Fox, \textit{Good-bye to Gameplaying}, 8 JURIS DR. 37, 39 (Jan. 1978).
\textsuperscript{134} United States v. Rugiero, 20 F.3d 1387, 1392 (6th Cir. 1994); United States v. Haddad, 10 F.3d 1252, 1259 (7th Cir. 1993); Frattalone v. Markowitz, 1994 U.S. Dist. LEXIS 12790 (S.D.N.Y. 1994).
\textsuperscript{135} Westvaco Corp. v. Internat'l Paper Co., 991 F.2d 735, 740 (Fed. Cir. 1993).
\textsuperscript{136} CAFLAN, supra note 79, at 146.
\textsuperscript{138} State v. Mains, 669 P.2d 1112, 1123 (Or. 1985); Brierwood Shoe Corp. v. Sears, Roebuck & Co., 479 F. Supp. 563, 568 (S.D.N.Y. 1979) (Marquis of Queensberry rules); Southwest Community Health Serv. v. Smith, 755 P.2d 40, 45 (N.M. 1988); State v. Myers, 536 P.2d at 290. \textit{See also} LAWSY, supra note 9, at 340; L. RAY PATTISON & ELLIOTT CHEATHAM, \textit{The Profession of Law} 105-09 (1971) (trials are games played by rules).
\textsuperscript{139} Fells v. State, 345 So. 2d 618, 623 (Miss. 1977); State v. Huerta, 855 P.2d at 785; \textit{In re} James S., 278 Cal. Rptr. 295, 299 (Cal. Ct. App. 1991). \textit{See also} BELLOW & MOULTON, supra note 57, at 120 (strategy); MAUET, supra note 42, at 247 (game plan).
\textsuperscript{140} BELLOW & MOULTON, supra note 57, at 19.
\textsuperscript{141} HEGLAND, supra note 53, at 68.
\textsuperscript{142} MAUET, supra note 42, at 250.
\textsuperscript{143} State v. Knowles, 739 S.W.2d 753, 754 (Mo. App. 1987) (prosecutor chose to "go to the mat" with defendant); People v. Torres, 581 N.Y.S.2d 788, 789 (N.Y. App. 1992) ("When defense counsel and judge go to the mat, can justice end up as the victor?").
\textsuperscript{145} Harris, supra note 51, at 137.
\textsuperscript{146} Lawy, supra note 9, at 344.
\textsuperscript{148} Welex v. Broom, 806 S.W.2d at 871.
\textsuperscript{149} FRANKEL, supra note 33, at 19.
\textsuperscript{150} State v. Huerta, 855 P.2d at 780; Norman v. Taylor, 25 F.3d 1259, 1266 n.6 (4th Cir. 1994); Laxey v. Louisiana Bd. of Trustees, 22 F.3d at 622; SEC v. Graysont Nash, Inc., 25 F.3d 187, 193 (3d Cir. 1994); Burlington Northern R.R. Co. v. Department of Revenue, 23 F.3d 299, 241 (9th Cir. 1994); Shaw v. Dow Brands, Inc., 994
games, for the things lawyers use to play the litigation game: wild cards,\(^{151}\) bargaining chips,\(^{152}\) high stakes,\(^{153}\) and high cards.\(^{154}\)

C. *Sex and Sexuality*

The sexual metaphors for litigation are much more underground than the other metaphors and therefore harder to document. One hears them mostly in lawyers' offices and in continuing legal education speeches. These metaphors, however, definitely exist. In part, they are tied to the system of war metaphors, since sexual imagery has long been a part of the world of warfare.\(^{155}\) They are also part of a conceptual system that links male sexuality with conquest, sex with power.\(^{156}\) For these sexual metaphors are not images of mutually pleasurable adult relationships; they are images of domination and aggression.

Lawyers thus speak of “screwing [their opponents] to the wall” or “sticking it to” opposing counsel. When they win they “score.” An unimpressive victory is like “kissing your sister.” A lawyer who loses is “screwed” or “fucked.” Someone treated badly by an opponent was “screwed over” or “fucked over.” Litigants locked in intractable disputes are said to be playing “mine’s bigger.”\(^{157}\) One continuing education speaker for the State Bar of Texas often describes the subject of...


\(^{152}\) Harris, *supra* note 51, at 140.

\(^{153}\) Thornton v. Breland, 441 So.2d at 1349.

\(^{154}\) *George Vetter, Successful Civil Litigation* (1977); Hegeland, *supra* note 53, at 264 (ace of spades).

\(^{155}\) Carol Cohn, *Sex and Death in the Rational World of Defense Intellectuals*, 12 SAGS 687, 693-94 (1987) (“bang for the buck”; “nicest hole”; “vertical erector launchers”; “soft lay downs”; “deep penetration”; “orgasmic whump”; “harden our missiles”; “thrust capability”; “optimal penetration”). To the extent that this kind of language has permeated sports discourse, there is also a link between sports talk and sex talk. It is sometimes difficult, if not impossible, to tell from any particular metaphor whether the reference is to war, sports, sex, or all three.

\(^{156}\) Karst, *supra* note 29, at 33-34.

\(^{157}\) They are also said to be having a “pissing contest,” but this is probably more phallic than sexual. It is also said of certain lawyers that they “really have balls.”
his speech as "real sex" while whatever insignificant processes come before are merely "foreplay." 158

Even in the world of published lawyer talk, there are hints that adversary lawyering is somehow linked to male sexuality. For example, two law partners writing in a newspaper for lawyers warned that "[l]itigators should be aware of these wolves in sheep's clothing who threaten to emasculate our profession by chilling effective advocacy." 159 Courts also label threats to the litigation process as emasculating. 160 Similarly, courts equate ineffectiveness with impotence. For example, one court rejected an interpretation of a rule of evidence because it would "render Rule 703 impotent as a tool for testing the trustworthiness of the facts and data underlying the expert's opinion." 161 This choice of metaphor suggests that litigation involves some kind of proof of manhood, expressed through the culturally acceptable ritual of adversary trials.

The use of sexual metaphors along with war and sports metaphors is not surprising because sexual desire is partly understood in America in terms of war and sports. 162 Therefore, in one metaphorical system, lust is war. ("He's known for his conquests. That's quite a weapon you've got there. Better put on my war paint. He fled from her

158. If he is speaking about trial skills or processes, then discovery is foreplay. If he is talking about post-trial motions or appeals, then the trial was foreplay. Whatever the topic, it's the penetration part a lawyer really wants to be involved in; anything else is a distasteful job that he does because it's necessary to get where he wants to go.


160. United States v. Valdez-Soto, 31 F.3d 1467, 1477 (9th Cir. 1994) (broad reading of residual exception to Rule 803(24) would "emasculate" the hearsay rule); United States v. Johnson, 27 F.3d 1186, 1192 (6th Cir. 1994) ("such an approach would emasculate Rule 404(b)'s general prohibition on character evidence"); Miller v. United States, 1994 U.S. App. LEXIS 17162 (6th Cir. 1994) ("To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."); Vana v. Mallinckrodt Med., Inc., 849 F. Supp. 576, 578 (N.D. Ohio 1994) ("Over the years, decisions requiring denial of summary judgment if there was even a suggestion of an issue of fact tended to emasculate summary judgment as an effective procedural device."); Reliance Ins. Co. v. Marathon LeTourneau Co., 152 F.R.D. 524, 525 (S.D.W.Va. 1994) (party's position would "emasculate the provisions of Rule 36").


162. LAKOFF, supra note 16, at 412.
advances. . . . She surrendered to him"). In another, lust is a game. (“I think I’m going to score tonight. You won’t be able to get to first base with her. He’s a loser. I struck out last night. She wouldn’t play ball. Touchdown!”). What is apparently lacking in American culture is any metaphor for healthy, mutual lust. Comparisons of litigation to sex thus do not serve to introduce concepts of communication or balance or recognition of the interests of others. Instead, sexual metaphors for the adversary system further glamorize and reinforce the adversarial nature of the war and sports metaphors, and the cultural overlap of the metaphors add a suggestion of sexual victory to their images.

III. MESSAGES FROM THE METAPHORS

The war, sports, and sex metaphors portray the judicial system as highly competitive, bi-polar (win/lose), and client-centered. The litigants have no relationship to each other except as adversaries and their ends are completely antithetical. The purpose of litigation is to win, to be better than the opposing party. In achieving this goal, the only duty is to the client; anyone else who wanders into the war zone or playing field can protect herself only by hiring her own champion. And by winning the litigation battles and games, the litigator powerfully demonstrates his manhood.

A. Competition and Victory

The war metaphors are, by their very nature, competitive. Battles have sides who compete against each other. In addition, the combative setting can excuse misbehavior because it occurs “in the heat of battle.” There is also a feeling of righteousness involved in the competition. The warrior/competitor is “constantly fighting [but] never at fault.”

The complex use of game metaphors also reinforces competitive values and behavior. The sin here is not playing too hard, but failing to take the game seriously. Many judges state that litigation is not a game because the game image fails to recognize the seriousness of the competition or suggest that the outcome might be somewhat ran-

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163. Id. at 411. There is also a metaphorical system in which love is war. (“He is known for his many rapid conquests. She fought for him, but his mistress won out. He fled from her advances. He won her hand in marriage. There is a misalliance . . .”). LAKOFF & JOHNSON, supra note 17, at 49.
164. LAKOFF, supra note 16, at 412.
165. Id. at 415 (“The domains we use for comprehending lust are HUNGER, ANIMALS, HEAT, INSANITY, MACHINES, GAMES, WAR, and PHYSICAL FORCES”).
Nevertheless, metaphors describing game activities are frequently used to describe what goes on in litigation, and are used approvingly to describe the strategic and competitive aspects of lawsuits. The most popular metaphor is boxing, a sport in which hurting the opponent is part of the game. In fact, litigation metaphors primarily refer to two-sided sports in which the player either wins or loses (boxing, football, baseball, chess) rather than cooperative games or games having multiple winners.

Analogies to team sports could be used to highlight the value of working together, the reality that everyone loses sometimes, and the idea that there are better and worse ways of losing and winning. These implications of the sports metaphors, however, do not tend to appear in discussions of litigation. Most of the messages about interactions with one's own team drop out and the metaphors focus only on the opponent. In doing so, the metaphors stress winning at all costs rather than fair play and rules.

As noted above, the sex metaphors merely reinforce the aggressive and competitive overtones of the war and sports metaphors. They smack more of conquest than of romance, and have to do with dominance rather than relationship. Further, the metaphors equate achieving sexual intercourse with victory, so much so that anything that threatens the ability of the lawyer-participants to compete threatens their masculinity.

Occasionally, the metaphoric systems are used to indicate that competition has been carried too far. For example, when adversariness exceeds normally-accepted parameters it is called “Rambo” litiga-

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167. Thus “wild cards” are generally, but not always, used to describe something unpredictable and therefore bad.

168. This may be typical, at least of the contact sports. See, e.g., BISINGER, supra note 8, at 13 (“It was the whole reason he played football, for those hits, for those acts of physical violence that made him tingle and feel wonderful, for those quintessential shots that made him smile from ear to ear and earned him claps on the back from his teammates...”). A psychological version of this may exist in all games and sports. See Leff, supra note 119, at 1001 n.26 (“There is a good deal of evidence that... achieving actual personal dominance over someone else is also a source of intense satisfaction. A game is a way to act that out too.”).

169. One writer has suggested that baseball can teach such lessons to American society. “Learning to accept both victory and defeat, the random hand of fate, the endless possibility of reparation and improvement, we are daily instructed in the conduct of our lives.” GEORGE GRELLA, BASEBALL AND THE AMERICAN DREAM, IN SPORTS INSIDE OUT 267, 279 (DAVID L. VANDERWERKEN & SPENCER K. WERTZ EDNS., 1985).

170. Francine Hardaway, FOOL PLAY: SPORTS METAPHORS AS PUBLIC DOUBLESPEAK, IN SPORTS INSIDE OUT, supra note 169, at 576, 577. See also HUGH RANK, WATERGATE AND THE LANGUAGE, IN LANGUAGE AND PUBLIC POLICY 2, 7 (HUGH RANK ED., 1974).

171. As far as I can tell, these images are exclusively masculine. I have found no metaphors that express a fear that lack of adversariness would make litigators less feminine, nor would I expect to find any.
tion.\textsuperscript{172} This is only a half-hearted pejorative term, since John Rambo is the hero of action-adventure movies, and the violence toward enemies and bystanders in those movies is presented as admirable rather than morally ambiguous. The image of the lawyer as Sylvester Stallone swinging through the jungle may not, in fact, deter much adversarial behavior.\textsuperscript{173} The sports counterpart of Rambo litigation is “hardball” litigation. Again, this is only partly successful as a reproach. Hardball, after all, is what the big kids get to play when they graduate from the juvenile (and female?) game of softball. Probably for this reason, the “hardball” metaphor is sometimes used admiringly.\textsuperscript{174} Some critical uses of the metaphors are less ambivalent, as when a court condemns “Pearl Harbor tactics” or “kamikaze tactics.”\textsuperscript{175}

The game metaphors occasionally refer to the rules of the game, but the use of metaphors to describe cheating is uncommon.\textsuperscript{176} Cases do contain references to “hitting below the belt” or “dealing from the bottom of the deck,” but they do not occur with any frequency. One case filled with football metaphors referred to a “flag on the play.”\textsuperscript{177} A foul, however, is an expected part of a football game for which one merely takes his penalty and goes on (rather like a routine discovery sanction). Only a large number of penalties or a penalty at a crucial moment seems to be considered outcome determinative in football. In basketball, fouling an opponent is often part of a team’s strategy. The “foul” metaphor thus operates to make low-level rule violations a part of the system rather than to encourage scrupulous allegiance to the rules.\textsuperscript{178}

\textsuperscript{172} Similarly, terms like “scorched earth” tactics and “take-no-prisoners” litigation are generally used to indicate that the lawyer has exceeded the accepted limits on adversarial behavior but are occasionally used approvingly.

\textsuperscript{173} There does not seem to be a sports counterpart to the Rambo metaphor, but one could be created. An image of “Charles Barkley tactics” or “Conrad Dobler litigation” would provide the required ambivalent combination of disapproval and admiration.

\textsuperscript{174} Thompson v. United States, 546 A.2d at 428 (“Prosecutors generally do not, and cannot be expected to, play patty cake instead of hardball with those who sell [drugs].”)

\textsuperscript{175} There is also an unfortunate anti-Asian theme to these negative labels. Battle tactics are more likely to be labelled as bad when they are not committed by Americans.

\textsuperscript{176} But see United States v. Collatos, 798 F.2d 18, 20 (1st Cir. 1986); Ross v. United States, 180 F.2d 160, 167-168 (6th Cir. 1950); United States v. Balistrieri, 577 F. Supp. 1532, 1547 (E.D. Wis. 1984); Poe v. Texas Employers Ins. Ass’n, 250 S.W.2d 619, 622 (Tex. 1952).

\textsuperscript{177} Laxey v. Louisiana Bd. of Trustees, 22 F.3d at 622.

\textsuperscript{178} While some sports authorities argue that strategic fouling is not good for the game, others contend that you can cheat and still be a legitimate winner. See, e.g., Warren Fraleigh, \textit{Why the Good Foul Is Not Good}, in \textit{Sports Inside Out}, supra note 169, at 462-66; Craig K. Lehman, \textit{Can Cheaters Play the Game?}, in \textit{Sports Inside Out} supra note 169, at 467-73.
B. Client Supremacy

Because of the emphasis on competing and winning, the only role for the lawyer reflected in the metaphors is to further the desires of the client — the lawyer's "side" or "team." A general commanding troops would never help his opponent, nor would a football coach send plays to the other team. To do so would be unthinkable, not only unnecessary but also treasonous.

Similarly, there is no lively metaphor within these systems depicting concern for non-litigants. In a war, injuries to non-combatants may be inevitable,\(^ {179} \) and in the game metaphors, non-players are invisible except for the judge-referee. War and sports metaphors stressing a duty to the judicial system itself, to the extent they exist at all, tend to be weak ones. There are war metaphors depicting extreme behavior, such as "Rambo litigation" or "scorched earth tactics," but these carry with them at least grudging admiration. There is no metaphor representing the warrior’s responsibility to use the "minimum necessary force."\(^ {180} \)

C. Lawyer Role

While the lawyer's only duty is to the client, each metaphorical system provides a fringe benefit for the trial lawyer: a glamorous role to play.\(^ {181} \) He is a hero, a winning athlete, a general. The competitive role is not only required but also attractive. The litigator gets to see himself as General Patton, Sir Lancelot, Joe Montana, or Michael Jordan. These fantasies are very seductive, and they strengthen the single-minded competitiveness contained in the metaphors.

The combination of war, sports, and sex metaphors also indicates strongly that the world of litigation is populated solely by men. In this culture, the participants in war and sports are generally pictured as male (despite the real life participation of women in both worlds). Similarly, the metaphors' use of male sexuality suggests that litigators are male. These metaphors refer exclusively to heterosexual male sexuality, thus excluding all others from the metaphorical lawyer world, or forcing them into a stereotypical male role.

\(^ {179} \) Some version of the rules of engagement undoubtedly places limits on inflicting unnecessary harm on civilians, but these limits, if any, have not generally found their way into the war metaphors used to describe trials. The lone exception that I located was the lament of one judge that the adversary system lacks a kind of Geneva Convention for divorce cases. Jackson v. Jackson, 478 A.2d 1026, 1031 (Conn. App. 1984). For references to harm to non-combatants, see Layman v. Combs, 981 F.2d 1093, 1107 (9th Cir. 1992) (comparison of overly adversarial behavior to the firebombing of Dresden); Rhode, supra note 38, at 597 (criticizing Hiroshima tactics).


\(^ {181} \) The lawsuit often psychologically, for the lawyer, becomes a contest not between the clients but between the lawyers. Thus lawyers return from hearings and trials reporting that they personally "kicked [opposing counsel's] butt," not that their client prevailed over the other party.
In real life, of course, women are lawyers and judges and clients. But they are invisible in this metaphorical paradigm. To fit into existing war/sports/sex talk, they must speak in male metaphors and tell male stories. It may be that the increasing presence of women in the profession will ultimately motivate changes in the dominant metaphors and the adoption of newer, more inclusive ones.\textsuperscript{182} Presently, however, the metaphors do not reflect the presence of women in litigation.

D. Suppression of Harm and Objectification of Participants

Real battles involve more than a general concocting strategy. Real battles also involve pain and suffering, death and destruction. These traits of war, however, are largely ignored in the litigation metaphors. The metaphors describing litigation spring from popular culture rather than from complex reality.

One military history scholar has described the complex nature of battle:

What battles have in common is human: the behaviour of men struggling to reconcile their instinct for self-preservation, their sense of honour and the achievement of some aim over which other men are ready to kill them. The study of battle is therefore always a study of fear and usually of courage; always of leadership, usually of obedience; always of compulsion, sometimes of insubordination; always of anxiety, sometimes of elation or catharsis; always of uncertainty and doubt, misinformation and misapprehension, usually also of faith and sometimes of vision; always of violence, sometimes also of cruelty, self-sacrifice, compassion; above all, it is always a study of solidarity and usually also of disintegration — for it is towards the disintegration of human groups that battle is directed.\textsuperscript{183}

Battle involves a risk of death or injury to soldiers and non-combatants; it involves deliberate killing.\textsuperscript{184} It inflicts terrible psychological harm even on those who suffer no physical wounds. American psychologists studying combat soldiers during World War II learned that

\textsuperscript{182} See, e.g., Menkel-Meadow, supra note 105, at 39. For some suggestions about possible changes, see section VI infra.

\textsuperscript{183} Keegan, supra note 180, at 297-208.

\textsuperscript{184} Id. at 320-331.

\textsuperscript{185} Id. at 329.
General William Tecumseh Sherman, reflecting in old age, said, “I am tired and sick of war. Its glory is all moonshine. . . . War is hell.”186 This face of battle is absent from the metaphors used to describe litigation. The metaphors choose only glory, strategy, and generalship and ignore fear, violence, and destruction. The use of war metaphors is very selective.

Similarly, the sports metaphors function to emphasize strategy and hide moral ambiguity. Since sports are a socially acceptable way of releasing aggressive impulses, if litigators use the sports metaphor then they suggest that the aggressiveness of litigation is likewise acceptable.187 The metaphors highlight the glamour of sports, the risk, the strategy, the victories. They do not mention greed, pain, mud, sweat, broken bodies, illegal drug use, or student athletes deprived of a meaningful education.

Further, both war and sports metaphors create dehumanizing roles for everyone except the lawyer-hero. The closest to human a party comes is to be a “combatant.” More often they are things: ammunition; weapons; bombs; high cards. Still more often they are just invisible. The only important role is that of the lawyer, who creates the strategy and bravely directs the battle or quarterbacks the team.

IV. CULTURAL SUPPORT FOR THE METAPHORS

“Because the ideals of professionalism and capitalism are the dominant ones within our culture, it is harder than most of us suspect even to take seriously the suggestion that radically different styles of living, kinds of occupational outlooks, and types of social institutions might be possible, let alone preferable.”188

The pervasiveness of metaphors in legal discourse is powerful. The metaphors themselves make it difficult to even think about litigation in non-competitive terms, and they provide an aura of glamour to those competitive activities. They are also powerful because the metaphors’ vision of dispute resolution is consistent with other conceptual underpinnings of American society. First, the adversary metaphors are compatible with liberal political theory and the competitive, free market economic system. Second, the metaphors parallel cultural

186. Quoted in John Keegan, A HISTORY OF WARFARE 6 (Alfred A. Knopf ed., 1993). The military itself also uses language to downplay the human costs of battle as, for example, by turning dead civilians into “collateral damage.”


188. Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 HUM. RTS. 1, 13 (1975). See also Schuman, supra note 38, at 6 (“It is difficult to examine these ideas about the necessity and value of conflict with any objectivity because we hold them at such a fundamental level.”)
and psychological archetypes. Third, the metaphors reinforce cultural concepts of male identity. Fourth, the behavior portrayed metaphorically is consistent with the instrumental vision of the law conveyed in legal education, lawyer training, and legal realist philosophy. Finally, there is a personal financial appeal to the competitive metaphors. The economics of law practice, created by client pressure for undivided lawyer loyalty, encourage the kind of behavior depicted by the metaphors.

A. Free-Market Individualism

Historically, the development of the role of lawyers in the adversary system coincided with the rise of utilitarian philosophy and its emphasis on rugged individualism.189 The element of party control of legal proceedings appealed to the intensely individualistic policy of the eighteenth and nineteenth centuries.190 It remains attractive today. Liberal political theory still makes individual autonomy a positive moral value, and allows for state intervention primarily to ensure individual choice and opportunity.191 Therefore, a system and a lawyer role such as those suggested by the war and sports metaphors are also believed to be good because they enhance the individual autonomy of the lawyer's client.192

The competitive nature of the adversary system and the aggressive, ruthless litigator/champion fit beautifully into the American economic system.193 These character traits are emphasized and valued by the capitalistic ethic for the same reason they are valued by the adversary system.194 Just as competition is supposed to produce the most

189. Landsman, Brief Survey, supra note 1, at 797.
190. L. LANDSMAN, READINGS, supra note 1, at 21. See also Schudson, Public, Private and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles, 21 AM. J. LEGAL HIST. 191, 192 (1977) ("The most available redefinition of the lawyer's role, in the context of a democratic market society, was that the lawyer would do the greatest good by submitting to the will of his clients, regardless of the justness of their causes. Lawyers moved toward this position more and more confidently during the nineteenth century . . .").
192. Stephen L. Pepper, The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities, 1986 AM. BAR FOUND. RES. J. 613, 617. The metaphors even amplify the value given to autonomy by failing to reflect any competing moral values. See Luban, Lysistratian, supra note 147, at 639 ("Pepper appears to have blurred the crucial distinction between the desirability of people acting autonomously and the desirability of their autonomous act . . . You must remember that some things autonomously done are not morally right.").
193. Sports "fit philosophically with the widely accepted American dream of open competition in a free market economy. Americans believe in competition, foster it, and encourage it. They live by its rules." Hardaway, supra note 170, at 576.
194. Wasserstrom, supra note 188, at 13. See also ARTHUR BRITTAN, MANLYNESS AND POWER 79 (1989) ("economic theory from Adam Smith's time onwards has highlighted the necessity of competition for human welfare. Competition was discovered
efficient outcome in a market economy, competition within the adversary system is supposed to produce the most accurate trial outcomes. 195

The tie between the war metaphor and capitalism may also support the tendency toward excess adversariness, despite the costs that adversariness can impose even on the litigants themselves. "Abuse of the military metaphor may be inevitable in a capitalist society, a society . . . in which it is thought foolish not to subject one's actions to the calculus of self-interest and profitability. . . . In all-out war, expenditure is all-out, unprudent -- war being defined as an emergency in which no sacrifice is excessive." 196

B. Psychological Archetypes

The metaphorical lawyer roles are also powerful because they coincide with fundamental psychological archetypes. An "archetype" can be defined as a "metaphor repeated so often that it seems to be a universal idea of truth." 197 The concept of archetypes also plays an important role in Jungian psychology, in which archetypes are said to be derived from human experience and present in the unconscious of all individuals. 198 Because the metaphorical images of litigators are consistent with certain fundamental cultural concepts, they are even more influential and harder to shake. Three archetypes in particular are relevant to understanding the power of the legal metaphors: the Hero, the Trickster, and the Helper. The first two archetypes are part of the lawyer self-image, while the third is generally rejected by lawyers.

A 1975-80 empirical study of both lawyers and non-lawyers revealed that both groups primarily identify lawyers with the Hero archetype, an image consistent with the metaphors. The Hero is:

the champion or representative of worthy causes, principles, organizations, or people. Not only a competitor, he takes the initiative in a series of struggles against enemies, generally expecting to best

to be the fundamental law of economic life, a law founded on the notion that men always act to maximize their self-interests."); Elliott Cheatham, The Lawyer's Role & Surroundings, 25 Rocky Mt. L. Rev. 405, 410 (1953) ("The adversary system in law administration bears a striking resemblance to the competitive economic system.").

195. Schuman, supra note 38, at 6 ("The adversary judicial system and the adversarial role of attorneys . . . share the assumption that conflict is not only inevitable but ultimately good; that it is part of a larger scheme governed by an invisible hand that magically turns private vices like greed and aggression into public virtues like prosperity and stability."). Cf. Ronald J. Allen et al., A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine, 19 J. Legal Stud. 359 (1990) (law and economics analysis of evidentiary privileges).

196. SONTAG, supra note 17, at 11.

197. Shibles, supra note 13, at 32.

them by intelligent effort and self-faith. He combines honor with toughness or nonsentimentality. A person having this highly dramatic role has a strong feeling of being a hero, as we all need to be in the sense of being important, an object of primary value, a person that counts in the universe. He can expect to have his self-esteem sustained and rewarded by others who share vicariously in his battles.199

The Hero is aggressive, self-confident, competitive, energetic, and successful.200 Litigators also, however, identify their profession as conforming to the Trickster archetype. The Trickster is tricky, evasive, manipulative, overbearing, greedy, and cold.201 This archetype reveals the dark side of the war and sports metaphors, and it is one that lawyers believe in. Like the Hero, the Trickster is interested in winning; but unlike the Hero, the Trickster fights neither fairly nor openly.202

The Trickster image may also be lurking in the sex metaphors. In American culture, there is an "emphasis on antisocial behavior in our definition of masculinity, accompanied by . . . a reservoir of repressed aggression."203 Metaphors that portray the trial lawyer as sexually aggressive and successful and that understand adversariness as a component of masculinity take advantage of the Trickster archetype.

Litigators apparently see the combination of Hero and Trickster as necessary for success in the adversary system. To achieve victories and favorable settlements, the litigator "must appear both capable of doing harm and willing to do it."204 His credibility derives from his high status and willingness to be disliked. Thus both of these sets of traits are rolled into the lawyer's image of the warrior litigator.

Finally, the Helper archetype, which tends not to be associated with lawyers by members of the bar, is helpful, likable, cooperative, broadminded, understanding, and informal.205 The Helper image is little used by lawyers and Helper behavior "is in many ways repressed and devalued by the bar."206 The Helper is always identified with females — a "wholly positive version of the great mother or white goddess."207 This archetype is cooperative, empathetic, and oriented

199. Mindes, supra note 34, at 180.
200. Id.
201. Id.
202. Id.
203. Id. at 217.
204. Id. at 221
205. The Helper is associated with mothers and nurturing and the Helper's traits with the traditional "female" virtues. Thus the profession's rejection of the Helper image is also a way of defining the practice of law as an essentially male profession. Id. at 225-226. Interestingly, while some lawyers identified themselves as having "Helper" traits, they did not choose Helper traits to describe lawyers generally or see Helper traits in other lawyers.
206. Id. at 228.
207. Id. at 224.
toward solutions rather than rules. It is thus quite different from the Hero and Trickster images, and far removed from the battle, sports, and sex metaphors.

The Hero and Trickster archetypes have been identified by psychologists as projections of basic male psychological traits: the need to compete; the need to win; the need to be admired; the need to rebel against authority; the need for power. If the psychologists are right, it is no wonder that the war, sports, and sex metaphors resonate for lawyers, and that within those metaphorical systems they choose roles and activities that are about competing and winning (and sometimes even cheating).

C. Cultural Concepts of Male Identity

Language about the judicial system, like other legal language, was created by the people who ran the system, and those people were male. It should not, therefore, be surprising that the metaphors for the adversary system reflect male “patterns of socialization, experience, and values.” The individualistic, conflict-oriented nature of the metaphors parallels those habits of thought that are stereotypically male and reflects a system created for people for whom conflict is natural or even desirable.

The adversary model is congruent with the cultural trappings of manhood:

According to these images a man is supposed to be: active; assertive; confident; decisive; ready to lead; strong; courageous; morally capable of violence; independent; competitive; practical; successful.

208. Lucinda Finley, Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning, 64 NOTRE DAME L. REV. 886, 892 (1989) (“Throughout the history of Anglo-American jurisprudence, the primary linguists of law have almost exclusively been men — white, educated, economically privileged men.”); Carrie Menkel-Meadow, Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law, 42 U. MIAMI L. REV. 29 (1987) (“The story of law in the United States is largely a story about one group of people, middle to upper class white males ”). Some linguistic theorists argue that all language, as we currently know it, is male. See, e.g., DALE SPENDER, MAN MADE LANGUAGE (2d ed. 1985).

209. Finley, supra note 208, at 893. See also KARST, supra note 29, at 34 (“centrality of male rivalry”).

210. Attaching gender labels to certain kinds of behavior is, of course, problematic, since gender itself is culturally constructed. For purposes of this article, however, I assume that empirically demonstrable gender differences currently exist in American culture. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982); ANNE WILSON SCHAEF, WOMEN’S REALITY (1981); JEAN BAKER MILLER, TOWARD A NEW PSYCHOLOGY OF WOMEN (2d ed. 1986). Neither all men nor all women will fit the gender-associated assumptions. The article does not address the issue of whether the observed differences are biological, sociological, political, or some combination of these. See R. BLEIER, SCIENCE AND GENDER: A CRITIQUE OF BIOLOGY AND ITS THEORIES ON WOMEN (1984) (biological); SUSAN BUCK-MORSS, SOCIO-ECONOMIC BIAS IN PIAGET’S THEORY: IMPLICATIONS FOR CROSS-CULTURAL STUDIES, IN PSYCHOLOGY IN SOCIAL CONTEXT 349 (Allan R. Buss ed., 1979) (sociological); CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) (political).
in achieving goals; emotionally detached; cool in the face of danger or crisis; blunt in expression; sexually aggressive and yet protective toward women. "Proving yourself" as a man can take many forms, but all of them are expressive, and all are variations on the theme of power.\textsuperscript{211}

The sexual metaphors involving "emasculating" lawyers are no accident. The American ideology of masculinity includes a belief that "power is rightfully distributed among the masculine in proportion to their masculinity" or "by their ability to dominate and avoid being dominated."\textsuperscript{212}

The war, sports,\textsuperscript{213} and sex metaphors for the adversary system fit beautifully into this cult of manhood, and competition within lawsuits becomes an appealingly dramatic forum in which manhood can be expressed.\textsuperscript{214} In American culture, "[t]o be a warrior means to be a man" and to be a successful warrior is to be a hero.\textsuperscript{215} Likewise, society sends the message that to compete in sports "is manly, and that to win is more manly still."\textsuperscript{216} The sex metaphors make the same point. "We prove our manhood on the football field or the basketball court by scoring points against other men. We prove our manhood in sex by scoring with women."\textsuperscript{217} The use of the war, sports, and sex metaphors tells trial lawyers that winning a lawsuit doesn't just win a lawsuit: it proves their masculinity. This is a heady reward that makes use of the metaphors hard to resist.

The link between the metaphors and the psychological archetypes also shows a male orientation in our conception of lawyers. The Hero figure, the dominant cultural image of lawyers, is associated with fathers or other dominant males.\textsuperscript{218} The Trickster represents rebellion and is associated with sons or peripheral males.\textsuperscript{219} Thus the Hero's traits strongly overlap the stereotypical "male" virtues while the

\textsuperscript{211} Karst, supra note 29, at 32-33.

\textsuperscript{212} Id. at 34.

\textsuperscript{213} On a less fundamental level, the war and sports metaphors work because they are the conversational subjects with which men are most comfortable. See Carl Crawford Schmidt, Message to Men, 111 Christian Century 805 (Sep. 7-14, 1994) ("How are men to relate in a group of other men? ... the sporting event motif may be appropriate. The only obviously available competing model is military.").

\textsuperscript{214} Karst, supra note 29, at 113 ("Because manhood has no existence except as it is expressed and perceived, the pursuit of manhood is an expressive undertaking, a series of dramatic performances."). The metaphors sometimes explicitly reject the female. See, e.g., Arant v. State, 167 So. 540, 544 (Ala. 1936) ("We must not lose sight of the fact that a trial is a legal battle, a combat in a sense, and not a parlor social affair.").

\textsuperscript{215} Gerzon, supra note 166, at 12, 31. There may be an element of racism involved in these images as well. At least for those whose image of the hero was formed by watching Hollywood movies, "[t]he hero was a white man." Id. at 14.

\textsuperscript{216} Id. at 156.

\textsuperscript{217} Id. at 175.

\textsuperscript{218} Mindes, supra note 34, at 224-25.

\textsuperscript{219} Id.
Trickster's traits are associated with what psychologists call "protest masculinity" and include a strong rejection of female behavior. Attorneys reject, however, an identification of lawyers with the Helper archetype, an image associated with women and nurturing behavior. Taken together, lawyers' reactions to the three images indicate that they believe acting like a lawyer means exhibiting masculine behavior and that being a trial lawyer — a competitive, warlike trial lawyer — allows a man to reinforce his male identity.220

D. Legal Education and Legal Realism

The metaphors emphasize fierce aggression rather than any limits that might inhere in warfare or sports. Why should there be no strong metaphors for the parts of battles and games that represent limits? Part of the answer lies in the thought processes taught by legal education and in the concept of law itself held by legal realists.221 Lawyers who are taught to always argue both sides, and that the law is what the court says it is, see few limits in rules. "The duty of zealous advocacy has seemed to overwhelm lawyers' sense of responsibility to operate within legal bounds, in part because the bounds don't amount to much when the law is so variable."222

Law school training can operate to orient future lawyers toward combative roles. The case method and usual teaching techniques often send the message that every argument has two sides, that every position can be taken with a straight face.223 The values underlying classroom discussion are individualism and autonomy rather than responsibility to and for others.224 Likewise, the adversarial nature of the Socratic method socializes law students into the art of legal warfare. The overall effect of the law school experience may be to prepare law students for adversarial conflict225 and to think of themselves as amoral technicians.226 Whether because of self-selection227 or because of the law school experience, law students learn to display per-

220. Id. at 226. See also STRYKER, supra note 119, at 120 ("the whole legal profession is pre-eminently a manly one").

221. Atkinson, supra note 47, at 857 ("The old role morality is primarily imbibed in two contexts: by new initiates in law schools, the Eleusian mystery of the lawyer cult, and by full-fledged members of the law fraternity in their sacramental meals, bar association banquets. It means the former away from the moral commitments of their undergraduate idealism, and it fortifies the latter against the moral ambiguities of practice.").

222. CAPLAN, supra note 79, at 134.

223. Schuman, supra note 38, at 11.


225. G. Andrew H. Benjamin et al., The Role of Legal Education in Producing Psychologica Distress Among Law Students & Lawyers, 1986 AM. BAR FOUND. RES. J. 225, 251; Derek Bok, A Flawed System of Law Practice and Training, 33 J. LEGAL EDUC. 570 (1983); Atkinson, supra note 47, at 855-57 (law school teaches students role morality).

sonal traits that suit the combative metaphors. And while legal ethics courses may raise questions about the advocate orientation of professional ethics, many such courses "persist in offering a traditional vision of the profession and the lawyer's role. This is a vision in which the integrity of the adversary system, the importance of attorney neutrality, and the centrality of partisanship are all featured."229

After law school, the legal realist philosophy that the law student has now internalized continues to reinforce client-centered advocacy. Legal realism, by stressing that law is discovered by determining what courts and other enforcers do, treats the law as open-textured and manipulable.230 The advocate can represent the law to the court in as pro-client a way as possible. This fuzziness about the rules is magnified when the lawyer's advice also includes the probability of being caught in improper practices. (There's only a foul if the referee calls it one.) Viewed this way, the law, whether substantive or procedural, ceases to be a significant source of limits on adversarial behavior. The game player is constrained only by the enforceable rules of the game, and those rules turn out to be almost non-existent.231

E. Law Firm Economics

In addition to generalized political, economic, psychological, and philosophical support, the competitive metaphors are reinforced by good old-fashioned greed. Client-centered competition is good for the law firm balance sheet. Historically, the development of the ad-

227. Richard L. Abel, American Lawyers 213 (1989) ("Law students may be a self-selected group who emphasize thought over emotion or are tough-minded rather than tender-minded.").
228. Menkel-Meadow, supra note 32, at 8 ("Students, because they are laughed at, abandon the common sense and morality they bring to law school and may not relearn them after mastering the technicalities of law."); A.J. Schwartz, Law, Lawyers and Law School: Perspectives from the First-Year Class, 30 J. Legal Educ. 437, 438 (1980) (law students "learn the requirements of the system and then turn themselves into the kind of people the situation demands"); Benjamin et al, supra note 225, at 251 (to prepare law students for adversarial conflict, "it may be necessary to create people who are more paranoid, hostile, obsessive-compulsive, and the like.").
230. Pepper, supra note 192, at 624. Professor Luban describes this as a caricature of legal realism rather than the genuine article. Luban, Lysistratian, supra note 147, at 646 Even if this is a perverse version of legal realism, the view that the law is "whatever I can get officials to give my client" is common among lawyers. Id. at 648 (describing this understanding as Low Realism). This tendency to view the law as almost infinitely flexible is exacerbated by the non-judgmental stance dictated by ethics codes. A lawyer doesn't even have to believe an argument to be allowed to make it. The ABA Code of Professional Responsibility, for example, states that the advocate "may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail." CPR, supra note 6, EC 7-4.
231. Cf. Bissinger, supra note 8, at xiv ("[W]hile [high school athletics] lasts, it creates this make-believe world where normal rules don't apply.").
versary system provided an economic benefit to lawyers. The same is true today. While the pro-client stance may contain certain psychological or moral implications, economic concerns invariably lurk beneath their surface.

Whether by the hour or by contingent fee, the client pays the bills. These clients demand the kind of undivided loyalty depicted in the adversary metaphors. "How and why should the client pay for loyalties divided between himself and the truth?" The litigator-warrior is permitted to serve his clients' needs and obey his clients' directions, thus increasing client satisfaction and making the lawyer's job easier. Lawyers help protect this role when they lobby for an adversary orientation in professional ethics rules, advocating provisions that benefit their typical client.

Research concerning the power structure of large law firms confirms the power of client control. The partners who have the greatest decision-making authority within a firm are those with the strongest link to clients. These "rainmakers" have tremendous influence within firms based on their ability to bring in client business, and "eat what you kill" compensation structures reward their efforts. Even as firms become more specialized internally and become more bureaucratic in structure, client control remains.

232. LANDSMAN, supra note 1, at 21 ("Adversarial process was in the interest of lawyers as a group. It created ever more work for attorneys, as increasing numbers of potential litigants sought legal advice. It also provided a dramatic public outlet for lawyers' forensic skills.")

233. LAWRY, supra note 9, at 330. See also CAPLAN, supra note 79, at 138 (quoting a partner in a "well-known firm" as stating: "being a complete asshole for your client has a high payoff."). Cf. WILLIAM F. MAY, THE PHYSICIAN'S COVENANT: IMAGES OF THE HEALER IN MEDICAL ETHICS 19 (1983) ("an institution that perceives itself as a fighter . . . relies heavily on the rhetoric of war to secure a growing share of the GNP").

234. At least one scholar has suggested that the duty of undivided loyalty to clients was created by the robber-baron era corporate bar, introduced for the convenience of those clients. L. Ray Patterson, LEGAL ETHICS AND THE LAWYER'S DUTY OF LOYALTY, 29 EMORY L.J. 909, 948-55 (1980). See also JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976).

235. BELLOW & MOULTON, supra note 57, at 372.


237. SCHNEYER, supra note 10, at 141 (tracing the lobbying behind the Model Rules) ("One is struck by how often the ethical concerns and viewpoints of bar groups can be traced to the peculiarities of their workplace, clientele, or political environment."). See also ROBERT W. GORDON & WILLIAM H. SIMON, THE REDEMPTION OF PROFESSIONALISM?, IN LAWYERS' IDEALS, supra note 5, at 251 ("The ABA's Model Rules of Professional Conduct were drafted . . . to give primacy to the advocate's role and to reduce dissonance between the law and the immediate interests of the client by encouraging acquiescence to the client.").


239. Id. at 228.
As the economy forces law firms to compete for business, this tendency to cater to client desires will only increase. Pressing for maximum client advantage will be seen as a way to attract future business. In a competitive market, law firms seeking to sell their services “cannot take the posture of neutral experts seeking to achieve a just resolution of conflicting positions; they must present themselves as zealous advocates.” The metaphors thus create economic rewards: the champion has great marketing potential.

V. The Effect of Adversary Metaphors

“Sure, winning isn’t everything. It’s the only thing.”

—Henry “Red” Sanders

Not many things are all bad, and the battle and sports metaphors do have some redeeming social value. When they encourage lawyers to rise above self interest, they operate for the good. When they make it possible for a fact finder to render a decision based on a greater amount of clearly-presented information, they operate for the good. Unfortunately, the metaphors also cause problems. Taken together, they make lawyers overly adversarial in carrying out the tasks of formal litigation, and they obscure the possibility of mutually beneficial solutions. They subvert attempts to modify rules of procedure and ethics in ways that could decrease the benefit of adversarial gamesmanship. They submerge any concept of cooperative behavior or community values. And, at least for some, they take a personal toll on the lawyer’s private self.

A. Working Hard for Others

Champions and heroes have their good points. The notion of representing some higher ideal and some person besides oneself may get lost in the discussion of artillery and tactics and winning, but it is important that the idea is there. When the images deter lawyer-client conflict or encourage professional competence, they are positive features of the judicial system.

In some settings, it may be in the lawyer’s interest not to be too adversarial. Blumberg, for example, has documented the tendency of certain criminal defense lawyers to represent their clients inadequately in order to win the favor of the prosecutors and judges with

240. Id. at 263.
241. Id. at 271-72.
243. It’s hard to find anything positive about the sex metaphors as currently conceived. Eliminating these metaphors completely would surely be an improvement.
whom they must deal regularly. Others recount stories of lawyers who abuse clients by self-serving behavior when more zealous advocacy would threaten the lawyer’s social or financial well-being. A lawyer in a small town, for instance, might not want to represent her client too well for fear of antagonizing prominent citizens or the local legal community. If the metaphor of the lawyer as the client’s champion or a member of the client’s team helps to eliminate this kind of lazy or corrupt lawyering, then it performs a valuable service.

The adversary role may also work for good when it encourages lawyers to take on unpopular causes. John Adams defended the Boston Massacre defendants despite community disapproval. Lord Erskine defended Thomas Paine against seditious libel charges stemming from the publication of *The Rights of Man* despite the criticism of his contemporaries. Southern civil rights lawyers pursued their cause in the face of community hostility and even death threats. If the heroic images supported these lawyers in their efforts, then the images have worked for good.

Finally, the metaphors imply a lawyer who performs her job with energy and competence. The warrior and the athlete must work hard at their jobs. These metaphors, then, tell lawyers to do their job well. Lawyers should investigate their cases thoroughly and they should present them clearly. With the distortions of “winning is the only thing” or “the client is always right” stripped away, the metaphors could incorporate positive images into a theory of dispute resolution.

B. Playing Games and Hiding Alternatives

The metaphorical saturation of legal discourse, together with the societal pressures discussed above, have created a competitive race with no logical finish line. When competing, winning, and making the client happy become the only goals of the litigator, the results are unacceptable. Clients seek only victory, trial lawyers see the law as a manipulable instrument that the lawyer must use to maximize client satisfaction, and neither perceives a duty to either the opposing party or to the community.

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247. See generally Jack Bass, *Unlikely Heroes* (1981) (Story of the southern judges of the Fifth Circuit who interpreted the Supreme Court’s *Brown* decision to desegregate the south).

248. The dominant metaphors for the adversary system foster “persistent moral tunnel vision and general atrophy of the organs of ethical discernment, leading to atrocities against other combatants and mounting casualties among the civilian population.” Atkinson, supra note 47, at 857-58.

249. “Our problem now posits: (1) a client seeking access to the law who frequently has only weak internal or external sources of morality; (2) a lawyer whose
metaphors can warp counseling about the substantive law, negotiation postures, and procedural choices during litigation. Sometimes this approach hurts both parties by preventing them from seeing an opportunity for full or partial resolution of the merits.\textsuperscript{250} It impairs lawyers' ability to see negotiation, litigation, mediation, and settlement as integral parts of a single dispute resolution process, and it makes all of the processes more adversarial than is appropriate. Sometimes the competitiveness promoted by the metaphors causes pre-trial and trial proceedings to be unnecessarily contentious, increasing costs for all parties and for the court system. When this game playing hurts one party more than the other, it also impairs the integrity of the judicial system if the uneven impact of the costs affects settlement and trial outcomes.

During a trial, the competitive metaphors and desire to win encourage behavior that may skew the fact finder's perception of the evidence. Rules of procedure allow a lawyer-warrior to:

- shape friendly witness testimony to maximize favorable information, even if this means making factual changes in the witness' original recollection, as long as the witness now affirms the testimony as true;
- present only the version of the facts most favorable to the client, even when the lawyer is aware that other versions exist and may be more nearly accurate (and even when the lawyer has used privilege claims to prevent other parties' access to those other versions);
- rely on the rules of evidence, when possible, to hide unfavorable information;

professional role mandates that he or she not impose moral restraint on the client's access to the law; (3) a lawyer whose understanding of the law de-emphasizes its moral content and certainty, and perceives it instead as instrumental and manipulable; and (4) laws designed as (a) neutral structuring mechanisms to increase individual power . . . , (b) a floor delineating minimum tolerable behavior rather than moral guidance, and (c) morally neutral regulation. From this perspective, access to the law through a lawyer appears to systematically screen out or de-emphasize moral considerations and moral limits. . . . [W]hat the lawyer does may be evil: lawyers in the aggregate may consistently guide clients away from moral conduct and restraint." Pepper, \textit{supra} note 192, at 627. Professor Pepper argues that changes in the system and in other social institutions can help to correct these problems. He nevertheless recognizes the danger inherent in the amoral, competitive lawyer role.

\textsuperscript{250} For example, parties may overlook mutually beneficial settlement opportunities. They may fail to attempt settlement at an early and less expensive point in time. Or they may reject partial resolutions that could decrease the total amount of harm. Even in the fairly polarized world of tort litigation, for example, it would sometimes benefit everyone if a defendant would advance money to a plaintiff to help pay for medical or rehabilitative costs. Studies indicate clearly that early rehabilitation is very successful in reducing ultimate disability. Thus this approach could both increase plaintiffs' well being and decrease defendants' potential liability for damages. Even self-insured defendants, however, often refuse to take this step. The battle mentality could be part of the reason for the resistance to such mutually beneficial cooperative behavior.
• play on emotions, biases, and prejudices of the fact finder when helpful to the client;
• discredit through cross-examination witnesses believed to be truthful;
• try to pick a jury which is not neutral but biased in favor of the client;
• use traps to lead a witness to give testimony that he or she would not otherwise give.

Under applicable ethical rules, the lawyer as zealous advocate may be required to take these steps or face the possibility of a grievance or legal malpractice claim.²⁵¹

At trial, all these adversarial ploys are, in theory, rendered harmless by the fact that both sides have adversary champions. They are not. In reality, the tactics become problematic because of unequal litigant resources, unequal talent in the lawyer pool,²⁵² unequal access to information,²⁵³ and other systemic problems that prevent the theoretically equal clash of champions.²⁵⁴ And even under conditions of equality, these kinds of activities tend more to increase the amount of aggression and trickery than to improve the quality of information presented to the fact finder.²⁵⁵ They encourage one lawyer to constantly outdo the other’s ploys, to “fight fire with fire.” Further, most of these tactics are inconsistent with the truth-seeking goal of the adversary system. They are not aimed at producing more accurate outcomes, they are aimed at winning. But any criticism of these defects in the process are met with invocations of the metaphors: litigation is a battle, the system is adversarial, and so the existing rules are necessary and even good.

Even more damage can be done by the expansion of the adversary metaphors into the pre-trial process. The adversary images were originally addressed to trial behavior, which at least takes place in a

²⁵¹. This is an example of the way in which metaphors both reflect and construct legal reality. In order to prevail in a malpractice claim, the client must show, through expert testimony, that the lawyer departed from a professional standard of care. Thus the standard itself is dependent on what the profession decides is acceptable. By using different metaphors (and different ways of thinking about the litigator’s role) the standard of care itself might evolve in a way that is less likely to prohibit cooperative behavior.

²⁵². Theodore Schneyer, Modern Philosophy’s Standard Misconception of Legal Ethics, 1984 Wis. L. Rev. 1529, 1542 ("Though Neutrality and Partisanship might promote wise and informed decisions when both parties are represented by equally well-equipped lawyers whose performance is closely monitored by an impartial judge, such ideal lawsuits are only the tip of our legal iceberg.").


²⁵⁵. “The win-lose assumptions held by the Trickster and the Hero tend to encourage progressive escalation in the quantum of both legal power and trickery.” Mindes, supra note 34, at 223.
public forum with a neutral overseer. Today, however, an overwhelming number of cases are settled before trial, and the bulk of litigator time is spent on pre-trial activity rather than at trial. In this context, a competitive metaphor with no normative or legal limits leads to:

- filing dubious complaints (subject to amorphous and unpredictable Rule 11 limits);
- filing false denials (defendants' duty to admit allegations of the complaint, if it exists at all, is quite limited);
- filing Rule 11 motions for purposes of harassment;
- creating excessive discovery requests in order to strain opponent resources;
- making excessive objections to discovery requests in order to strain opponent resources and conceal information;
- reading discovery requests narrowly in order to avoid divulging harmful information, or to strain opponent resources by requiring motions to compel or follow-up discovery requests;
- failing to produce documents, without acknowledging their existence or publicly claiming a privilege;
- drafting misleading interrogatory answers;
- training friendly witnesses to prolong depositions by methods such as answering questions with questions and quibbling about definitions;
- suppressing the identity of persons with relevant information, especially harmful information;
- destroying documents, before or after a discovery request;
- producing a mountain of irrelevant documents in order to make it more difficult, or impossible, to locate relevant ones;
- keeping files in a way that makes discovery more burdensome;
- creating document retention systems that allow written information to exist only in privileged form;
- waiting until the last possible moment to divulge the identity of expert witnesses;
- filing summary judgment motions to create strategic advantage;
- refusing to agree to anything absent a court order;
- lying during settlement negotiations;
- missing deadlines;

256. Albert W. Alschuler, Foreword: The Vanishing Civil Jury, 1990 U. Chi. Legal F. 1, 2-4. The fact that a huge percentage of cases are settled rather than tried does not demonstrate a lack of adversariness in the litigation process. The existence of a settlement is not necessarily proof of a cooperative process. Brazil's study, for example, showed settlements that had been affected by obstructionist adversarial behavior. Wayne D. Brazil, Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 Am. B. Found. Res. J. 219; Wayne D. Brazil, Civil Discovery: Lawyers' View of Its Effectiveness, Its Principal Problems and Abuses, 1980 Am. B. Found Res. J. 789. It is as justly likely that settlements are adversarially arrived at and reflect a decision that the expected costs of trial (fees, expenses, inconvenience, and risk) exceed the expected benefits. Many settlements are preceded by extremely adversarial pretrial procedures. Nevertheless, the existence of settlements and the increasing popularity of alternative dispute resolution also show that lawyers or their clients can see value in cooperation and compromise. A changed set of metaphors for litigation could provide support for those lawyers with a different vision of litigation itself.
• creating delay whenever possible, when delay helps the client.

Most lawyers would probably identify some of the actions listed above as appropriate adversary behavior and some as “abuses” (although there would not be consensus about which were which). Wherever a particular trial lawyer would draw the line, the metaphors encourage these strategies. The very same forces that push a lawyer over the line got him to the line in the first place.

These ploys have no tendency to improve the dispute resolution process. Thus while a “battle of the experts” at trial might result in a more thorough airing of relevant information and opinion, pre-trial battles result in unnecessary expense and confusion. To the extent that these combative activities hurt one kind of litigant more than another, they also affect settlement and trial outcomes. If adversary trials have problems, adversary pre-trial is a disaster.257

The competitive behavior modelled by the metaphors can even invade the theoretically more cooperative world of alternative dispute resolution. There is some indication that this sometimes happens. For example, many mediation programs adopt the adversarial language of traditional courtroom litigation, calling one party the complainant and the other the respondent, rather than simply “the parties.” Thus, in some respects, “ADR has become just another battleground for adversarial fighting rather than multi-dimensional problem-solving.”258 Where this happens, the adversary metaphors distort not only litigation but also other forms of dispute resolution.

The war metaphors also impede law reform efforts. The metaphors cause us to view litigation as a purely competitive process. When we look at litigation, elements of cooperation or duties to a larger community are pale or invisible. This in turn shapes the way we write rules of procedure and the way we write ethics rules. The metaphors make the problems hard to see. Sure, we admit, lawyers use tricks to try to win, but lawsuits are supposed to be a series of skirmishes. Even when problems become visible, the metaphors help obscure possible solutions. We oppose some alternatives because they are insufficiently adversarial; others we fail to see at all. Thus, existing

257. Note that pre-trial adversariness is not a matter of the aberrant behavior of a few lawyers, and it is not something that can be cured with courtesy codes. Rather, it is a product of the concept that a lawyer’s goal is to win, and only to win, and become the metaphorical warrior. Tinkering with various pre-trial rules cannot eliminate this fundamental problem. Thus reducing the scope of discovery, as many defense lawyers advocate, can shrink the playing field, but could not cure the basic attitudinal characteristics that promote adversarial behavior. Nor can automatic disclosure rules alone eliminate rather than shift adversary behavior. Like Rule 11, rules designed to provide a weapon against excess can become an added battlefield in the litigation wars. Changes in attitude must accompany rule changes if adversarial gameplaying is to decrease.

law and metaphor reinforce each other, and we continue to live with problems that the metaphors help to hide.

C. Suppressing Duties to Non-Clients

Although lawyer ethics are based primarily on the adversary model, our cultural notions and our ethics codes also contain elements of a more cooperative and altruistic orientation. Thus Brandeis could recommend that the lawyer act as "counsel for the situation" rather than mere client mouthpiece. Ethical codes also include a concept of the lawyer's duty to the fair functioning of the legal system. There are even a few images reflecting this lawyer role: "guardians of the law"; "officer of the court"; "licensed fiduciaries for the public interest"; "notaries of justice."

These duties to opponents, third persons, and the legal system find at least some embodiment in ethics codes. For example, a litigator is permitted to "accede to reasonable requests of opposing counsel which do not prejudice the rights of his client." In addi-

259. "Lawyers are accustomed to discount the interest of nonclients to an extent that I believe is inexplicable without referring to the adversary system." Luban, Lysistratian, supra note 147, at 645.

260. Gordon, supra note 12, at 13 ("The vision of lawyering as a public profession has real historical content . . . ").

261. Penagar, supra note 9, at 311; Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1717 (1976) ("The essence of altruism is the belief that one ought not indulge a sharp preference for one's own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful. It has roots in culture, in religion, ethics and art, that are as deep as those of individualism."). See generally L. Blum, FRIENDSHIP, ALTRUISM AND MORALITY (1980).

262. Frank, supra note 10, at 702.

263. "Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system." CPR, supra note 6, Preamble.

264. Id.

265. ABA Comm. on Professionalism, In the Spirit of Public Service 28 (1986) ("A far greater emphasis must be placed by the Bar on the role of the lawyer as both an officer of the court and, more broadly, as an officer of the system of justice. . . . [L]awyers must avoid identifying too closely with their clients."). Cf. Model Rules of Professional Conduct, Preamble ("officer of the legal system").

266. Gordon, supra note 12, at 73.


268. See, e.g., Model Rules of Professional Conduct, Preamble 5 (1992 ed.) ("A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.") Ethics codes "may be viewed as a collective and formal expression of the consciousness of contemporary lawyers." Penagar, supra note 9, at 309. See also Schneyer, supra note 246, at 17 ("the ABA ethics codes contain a number of rules that tend to muzzle the hired gun even as other provisions load it").

269. CPR, supra note 6, DR 7-101(A)(1). See also Model Rules of Professional Conduct Rule 3.2 (allowing the lawyer to make "reasonable efforts to expedite litigation consistent with the interests of the client").
tion, the lawyer should not file a suit merely to harass or maliciously injure another,270 nor should she inflict needless harm.271 Duties to the system also exist. Lawyers should not falsify evidence272 or knowingly fail to disclose "that which he is required by law to reveal."273 "The law," as in "[a] lawyer should represent a client zealously within the bounds of the law,"274 is also supposed to be a source of lawyer ideals.275 An attempt to enlarge the public duties of lawyers in the newer Model Rules of Professional Conduct was largely rejected,276 but lawyers do have permission to "limit the objectives" of representation by excluding aims they find "repugnant or imprudent."277

The officer of the court metaphor for lawyer behavior is supposed to be the counter-force that limits the forces of zeal.278 Why doesn't it work? Don't lawyers want to be guardians and fiduciaries?

270. CPR, DR 7-102.
271. Id., EC 7-10.
272. Id., DR 7-102(A)(4)-(6). "A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured." EC 7-26. According to the Model Rules of Professional Conduct, a lawyer cannot offer evidence she knows to be false. Rule 3.3. The duty of candor to the tribunal is somewhat limited, however. While the lawyer may not practice self-deception, she may (indeed, should) give the client the benefit of the doubt. Further, the lawyer is not prohibited personally from making a false statement to the court unless it is "material." Rule 3.3(a)(1). Hazard & Hodes, supra note 7, §§ 3.3:102; 3.3:201 & 3.3:208.

273. CPR, DR 7-102(A)(9). See also Model Rules of Professional Conduct Rule 3.3(a)(2) (the lawyer must disclose unmentioned facts to the tribunal if they are material and disclosure is "necessary to avoid assisting a criminal or fraudulent act by the client").

274. CPR, Canon 7.
275. See, e.g., Model Rules of Professional Conduct Rule 3.4 (lawyer shall not "unlawfully obstruct another party's access to evidence"; lawyer shall not "knowingly disobey an obligation under the rules of a tribunal"; lawyer should comply with "legally proper" discovery request). As noted above, however, when lawyers' concept of the law is extremely flexible, and when a lawyer is allowed to urge any permissible construction of the law, this limitation loses much of its force. See id., Rule 3.1 cmt. ("in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change").


277. Schneyer, supra note 10, at 142 (citing Model Rule 1.2[c]).
278. Mirjan R. Damaska, The Faces of Justice and State Authority 142-43 (1986) ("invocation of counsel as officer of the court is designed to constrain the excessive amalgamation of the lawyer's interest with that of his client and to forestall the transformation of privately managed litigation into a melee of self-seeking.") Some lawyers' concepts of their public roles are very narrow. For example, the Preamble to the American Lawyers' Code of Conduct states that "[i]n the context of the adversary system, it is clear that the lawyer for a private party is and should be an officer of the court only in the sense of serving the court as a zealous, partisan advocate of one side of the case before it."
In part, any limit on client-centered competition is overwhelmed by the political and economic forces that reward such behavior. The problem, however, is also exacerbated by the metaphors. The dominant images of war, sports, and sex leave little room for a non-competitive lawyer role. That part is assigned to the judge (as, for example, in the metaphor of judge as referee). Further, the dominant metaphors create coherent, overlapping metaphorical systems. While they are not consistent (they form no single image), they fit together: all of them are about competing and winning. The officer of the court metaphor, however, stands alone. There are no connected images to support it.

Another problem may be the metaphors themselves. The image of guardian is not as vivid as that of champion. The mental pictures it creates, if any, are passive. It sounds like a savings bank. At best one might think of a Crusader pointlessly guarding the Holy Grail for centuries, dying of old age before he is able to be of any use. “Fiduciary” also brings no glamorous cultural icons to mind. To the extent that it has metaphorical strength, it draws on feelings of trust and confidence, concepts that may be powerful when we think of two humans but that become weak if we think of trust between a person and an abstract concept. Lawyers are far more likely to find some meaning in being a “fiduciary” to their clients. When these two fiduciary duties conflict, duty to the client is likely to prevail. The word “votary” may send many people scrambling for the dictionary: not much influence there. Further, the religious connotation of being a votary may be unappealing to those who see themselves as operating in a secular society. “Officer of the court” these days sounds more like a bailiff than a lawyer. This is not an image appealing enough to counteract the more macho conventional metaphors.

D. Harming Lawyers as Humans

Despite the stereotypical fit, the adversary metaphors and the competitive, amoral stance they represent do not come naturally to everyone and can harm even those who like to be fighters. Conforming to the warrior image may be “achieved at the sacrifice of the

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279. The battle, sports, and sex metaphors may also deter lawyers who dislike the images from becoming litigators, thus leaving litigation to those who are more comfortable with the competitive role.

280. This is the most common way in which metaphors connect. LAKOFF & JOHNSON, supra note 17, at 41-45.


282. Scallen, supra note 25, at 923.


284. The point of the metaphor is apparently that “as an extension of the court [the lawyer] holds public office.” Schneyer, supra note 246, at 15.
lawyer's private, individual self." Lawyers take on the champion's mantle at great personal cost.

It probably begins in law school. Beginning with the first day of class, lawyers are taught to "suspend emotion in favor of cold, legal analysis. . . . [This] rigid way of thinking also can transform sensitive personalities into overworked, frustrated, hostile individuals. . . ." Students experience the law school socialization process as "intellectually monolithic, emotionally overwhelming, and personally transformative."

The problem continues in practice. Some lawyers deal with their moral qualms by creating a kind of professional denial. Those who serve clients that the lawyers regard as "amoral social menaces" learn to adapt. They "withdraw into technique, into the professional cult of craftsmanship and competence for its own sake, or just into the cynicism that seems to be our profession's main defense mechanism." The dissonance between the lawyer's personal ethical standards and the client's desires can be unbearable, so the lawyer learns to ignore it. The lawyer disconnects from thinking about what she is doing except to take pride in doing it very well.

Even lawyers who revel in the metaphors at work can pay a price at home when the adversary persona is carried over into the lawyer's personal life:

The religions that lawyers practice eight, ten, or twelve hours a day are aggressive disputation . . . . If we had to invent from scratch our own version of the Waste Land, a milieu characterized by emptiness and alienation, by failures to connect, we could not invent a more fitting constitutional religion. . . . There are no commuters to the Waste Land; you can't work there sixty hours a week and then shed its influence as you return to the more civilized suburbs.

Thus the gladiator finds that he has lost touch with his own emotions, distrusts everyone, has conflicted relationships with family, compulsively competes in all contexts, and even suffers from physical manifestations such as heart attacks and a lowered immune system. The warrior image carries a big price tag.

285. Penegar, supra note 9, at 388.
287. Abel, supra note 227, at 212-14 (discussing law school socialization).
289. Schuman, supra note 38, at 5.
290. Drell, supra note 286, at 70-73. Cf. May, supra note 293, at 183 ("Resentful spouses, broken marriages, alienated children, drug addiction, early health problems, and career burnout reflect this psychic disarray.").
VI. The Need For New Metaphors

“That which dominates our imagination and our daily thoughts will determine our life and character. Therefore it behooves us to be careful what we are worshipping, for what we are worshipping we are becoming.”

—Rabbi Harold L. Kudan

Metaphors highlight, but they also hide. Our metaphors for the adversary system limit us to a system based on hierarchy, competition, and binary results. They depend on concepts of social contract and market forces rather than trust and mutual respect. The war, sports, and sex metaphors control our very idea of litigation, so much so that anyone proposing a less adversarial approach has had to create the idea of a different system. Scholars talking about cooperative strategies, mutually acceptable solutions, or win/win results are almost forced to talk about “alternative dispute resolution” rather than litigation. A more varied set of metaphors might allow litigators to see litigation, mediation, settlement, and trial as potential parts of a single process for reconciling the interests of their clients. In this process it would be sometimes appropriate to compete, sometimes appropriate to cooperate, but always necessary to be fair and honest.

This vision of a single, less adversarial process will require some changes in procedure and ethics rules in order to become a reality. Changes in the rules alone, however, will not be enough; attitudes need to change as well. As long as lawyers believe that when they are doing “litigation” their job is to be almost-Rambo, any changes in the rules will re-locate but not eliminate strategic behavior. Changes in the law and changes in the metaphors must go hand in hand.

Sometimes, it is possible to nurture new metaphors. New metaphors can alter the perceptions and actions of people within a culture. A different set of metaphors for the adversary system might transform trial lawyers’ conception of their work, and thus the way they go about it. These metaphors need to change the existing conceptual system in a way that highlights what the adversary comparisons

291. quoted in Schuman, supra note 38, at 5.
293. “No amount of procedural reform alone will change anything if the culture and traditions of the people who administer and use the institutions remain the same, but the culture and traditions of our people cannot change if the procedures persist in condoning and rewarding mutual distrust, competition, and nastiness.” Martha Minow, Some Realism and Realism: A Parable for the Fiftieth Anniversary of the Federal Rules of Civil Procedure, 137 U. Pa. L. Rev. 2249, 2257 (1989).
294. Powerful social groups at least attempt to use metaphor to manipulate public perception all the time. Thus we get “Operation Desert Shield,” a “war on drugs,” a “Contract with America,” and a “Star Wars” defense system.
hide. They should emphasize cooperation and responsibility to others. They should provide active and important roles for parties and witnesses rather than transforming them from people into things (e.g. ammunition and high cards). They should also be more gender-neutral metaphors that do not conjure images of people and activities that are predominantly male.

A. Adapting the Old

There are a number of ways that this might be accomplished. We could try to modify the sports and war metaphors so as to highlight rules and sportsmanship rather than competition and victory. Phrased in terms of the archetypes, the goal would be to combine the Hero with the Helper rather than with the Trickster.\footnote{295} The war and sports metaphors can be used to emphasize rules and fairness. For example, one court noted that the litigation battle should be “fought hard — but fought fairly. Vigorous advocacy is not inconsistent with decent behavior toward one’s adversary and respect for the court and does not mean the advocate may dishonor the judicial system and demean the court simply because it will advance his client’s cause.”\footnote{296} In the realm of sports, there are some ways in which Americans do value playing by the rules. Unfortunately, the aspects of war and sports that involve limits and rules are so eclipsed by the emphasis on winning that it may be impossible to achieve a richer version of the battle and game motifs that could limit the harmful effects of adversary zeal.

Popular culture paints an incomplete picture of the nature of battle in many ways. Military training provides the average soldier with a simplified and polarized view of his role.\footnote{297} Military history has been written as a success story, with wars represented as crusades or used to exemplify the life and exploits of great men.\footnote{298} Historians wrote about battles not to depict the experience of being in a battle, but to emphasize the result: winning or losing.\footnote{299} The military has always chosen to “emphasize the dash and bravado of military life,”\footnote{300} to tell about “the valor but not the vomit.”\footnote{301} All of this tends to summon mental images of Henry V or General Patton rather than the Geneva Convention or rules of engagement when war metaphors are used.

\footnote{295} This is not completely far-fetched. The researchers found, for example, that while lawyers believed in the Hero/Trickster combination, clients were attracted to an image that combined Hero traits with Helper qualities. Mindes, supra note 34, at 207.


\footnote{297} Keegan, supra note 180, at 18-25.

\footnote{298} Id. at 59.

\footnote{299} Id. at 60-61 (the “Decisive Battle” idea).


\footnote{301} Gerzon, supra note 166, at 56.
Similarly, the cultural story of sports is a story of competition. "In sports . . . winning — not pleasure in the activity — is the ultimate goal. . . . The goal of victory is so important for many that it is laudable even if attained by questionable methods." The athlete may give a hand up to an opponent who has fallen, but this does not modify the drive to compete and win. Sports franchises and college teams find themselves with fan support only as long as they win. Despite personal health risks, take illegal steroids to improve their chances of winning. More than half of the 106 NCAA Division I-A football members were either censured, sanctioned, or put on probation during the 1980's, some more than once.

The viability of an effort to modify the war and sports metaphors depends ultimately on the qualities that Americans (and especially litigants) associate with war and sports. Unless the culture itself values rules over victory, the attempt may be doomed to failure, and the war and sports concepts carry significant competitive baggage. While experts on war or sports may have a more limited and sophisticated vision, popular culture emphasizes the partisan and competitive aspects of these activities. It seems unlikely that modified metaphors could conjure up the rules without the excessive competition.

B. Adopting the New

Without more metaphors, the cultural picture of litigation will remain lop-sidedly adversarial. Additional metaphors are required, each balancing the competitive forces of the war, sports, and sex images. The new metaphors should emphasize duties to other litigants, the community, and the judicial system, cooperative interaction with others, and the recognition that "every dispute involves people and every person has a soul like our own." They should represent the constructive rather than destructive end of the conflict continuum or get out of the conflict mindset altogether. To give the new

303. Id. at 61 ("Coaches are fired if they are not successful; teams are booed if they play for ties").
304. One government study estimated that about seven percent of high school seniors have taken anabolic steroids to increase weight and muscle. Id. at 113.
305. Lee Goldman, SPORTS AND ANTITRUST: SHOULD COLLEGE STUDENTS BE PAID TO PLAY?, 65 NOTRE DAME L. REV. 206, 207 (1990) (citing a "climate of disrespect for rules generally" within college sports and an atmosphere in which athletes are taught that "rules and regulations were designed to be broken"). See also EITZEN & SAGE, supra note 302, at 63, 112 (listing ways of cheating to win and noting that some high school players are coached to use illegal but difficult-to-detect techniques).
307. Schuman, supra note 38, at 11.
308. George Levinger & Jeffrey Z. Rubin, BRIDGES AND BARRIERS TO A MORE GENERAL THEORY OF CONFLICT, NEGOTIATION JOURNAL 201, 205 (July 1994) (comparing constructive and destructive conflict).
metaphors a better chance to flourish, they should grow out of existing American metaphorical systems. What follows are some ideas. Whether they work for particular readers will depend on the readers’ experience of the adversary system and of the things described in the suggested metaphors. Undoubtedly readers could, and should, supply additional metaphors of their own. In evaluating new metaphors it is important to remember that the traditional metaphors are also illusions rather than definitions, and that the very point of a new metaphor is to call attention to the neglected corners of experience.

1. Structure and the Arts

The lawsuit is a structure or a work of art, and the lawyers are builders or artists. The battle, sports, and sex metaphors discussed above are the most vivid and most prevalent metaphors for the adversary system. There are others, however, that appear in case law and in academic and professional literature. One set of metaphors is built around a concept of a trial as a kind of building or structure. The others compare trying a case to creating some kind of work of art.

The structural metaphors parallel the general cultural metaphor that an idea or argument is a building. Therefore, in describing what lawyers do in preparing and trying a case, courts and commentators use the same kind of language. A lawyer’s case has structure. Therefore, there are tools to shape, build, and construct cases.

309. Thus our everyday way of talking about ideas reflects the metaphor. (“Is that the foundation for your theory? The theory needed more support. The argument is shaky. We need some more facts or that theory will fall apart. We need to construct a strong argument for that. I haven’t figured out yet what the form of the argument will be. Here are some more facts to shore up the theory. We need to buttress the theory with solid arguments... The argument collapsed. They exploded his latest theory. We will show that theory to be without foundation. So far we have put together only the framework of the theory.”) Lakoff & Johnson, supra note 17 at 46.

310. Keisling v. Ser-Jobs For Progress, Inc., 19 F.3d 755, 761 (1st Cir. 1994) (“the burden-shifting structure of an ADEA case”); Belk v. Purkett, 15 F.3d 803, 814 (8th Cir. 1994) (“in an effort to structure his own argument”); In re Prudential-Bache Energy Income Partnerships Securities Litigation, 1994 WL202994 *6 (E.D. La.) (“case management structure”); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 39 (Tex. 1994) (Doggett, J., concurring) (“the fact-finding edifices which the Constitution and a complex set of procedures carelessly entrust juries to assemble”). See also Colman, supra note 60, at 137 (“It may be that counsel is lucky enough to have at his command a powerful piece of material... with which he is able to strike a swift and damaging blow at the structure which the witness is seeking to build up.”).

311. Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 885 (5th Cir. 1988) (“Rule 11 is a powerful tool for judges in their roles as judicial overseers...”); Andrews v. Bible, 812 S.W.2d 284, 292 (Tenn. 1991) (“Rule 11 is a powerful tool for judges...”). See also Lorna E. Propes, Impeachment by Prior Inconsistent Statement, in MASTER ADVOCATES’ HANDBOOK, supra note 51, at 130 (“It is an indispensable tool in the art of trial lawyering.”); Scott Baldwin, Cross Examination of Lay Witnesses, in MASTER ADVOCATES’ HANDBOOK, at 107 (mixing his metaphors: “Cross examination is one of the most important tools in the attorney’s arsenal.”) Better yet, there are “power” tools. See Eric E. Jorstad, Note, Litigation Ethics: A Niebuhrian View of the Adversarial Legal System,
When evidence admitted by one party makes new evidence admissible, the party has "opened the door."\textsuperscript{313}

Before evidence can be introduced, lawyers must "lay the foundation."\textsuperscript{314} Trial lawyers are usually the builders in this scenario, but they sometimes become part of the structure, as in the lawyer is "a conduit through which the client pursues his ends."\textsuperscript{315} Likewise the system itself may be described using building metaphors. For example, important parts of the judicial system are described as bulwarks.\textsuperscript{316}

Fine arts metaphors find their way into descriptions of trial techniques. The most common ones are those using drama as a base. The trial itself is a play and the participants are actors, directors, and an audience.\textsuperscript{317} Similarly emphasizing the creation of narrative, a trial is a work of fiction and the litigator is the author.\textsuperscript{318} Sometimes the trial is a painting or sculpture and the litigator is the artist.\textsuperscript{319} Sometimes

\textsuperscript{99} Yale L.J. 1089, 1089 (1990) ("tool of power"). It may be that in some contexts, the use of "tool" also has a sexual connotation.

312. Hirschkop v. Snead, 594 F.2d 356, 366 (4th Cir. 1979) (adversary system "relies deliberately on highly partisan advocacy by counsel, both in shaping and moving litigation along"); Rahilly v. North Adams Regional Hospital, 636 N.E.2d 280, 289 (Mass. App. 1994) ("constructs his edifice"); Ibanez v. Fla. Dep't of Business & Prof. Reg. Bd. of Accountancy, 114 S.Ct. 2084, 2085 (1994) (Board must "build its case on specific evidence"); Beard v. City of Northglenn, 24 F.3d 110, 116 (10th Cir. 1994) ("the facts here present no obvious basis on which to build a case"). See also Colman, supra note 60, at 136 ("build up").

313. United States v. Falsia, 724 F.2d 1399, 1343 (9th Cir. 1983); Simmons v. Iowa, 28 F.3d 1478, 1484 (8th Cir. 1994); United States v. Flanagan, 34 F.3d 949, 959 (10th Cir. 1994).


315. Thornton v. Breland, 441 So.2d at 1350). See also Luban, Partisanship, supra note 35, at 1005 (conduit of client's will).

316. Wilkerson v. Whitley, 28 F.3d 498, 502 (5th Cir. 1994) (trial by jury as the great bulwark of civil and political liberties); Belk v. Purkett, 15 F.3d 803, 813 (8th Cir. 1994) (confrontation clause "among the very strongest bulwarks of justice"); Saavedra v. City of Albuquerque, 859 F.Supp 526, 532 (D.N.M. 1994) ("The best bulwarks against such unconstitutional conduct are a neutral and detached decisionmaker and adequate judicial review.")

317. See Milner S. Ball, The Play's the Thing: An Unscientious Reflection on Courts Under the Rubric of Theater, 28 Stan. L. Rev. 81 (1975); Melvyn Zerman, Call the Final Witness 122 (1977) ("actor"); Stuart M. Speiser, Closing Argument, in Master Advocates' Handbook, supra note 51, at 225 ("high drama"); Bellow & Moulton, supra note 57, at 189-98; Howard Hilton Spellman, Direct Examination of Witnesses 61-63 (1968); Hegland, supra note 53, at 34 (possibilities for drama; livening up your performance; star witness).

318. Baldwin, supra note 78, at 111 ("Ask questions which tell a story"); Tanford, supra note 34, at 24 ("A trial is like a book, consisting of characters, a conflict, a plot, and a dramatic trial scene."); Bellow & Moulton, supra note 57, at 179-80, 293.

319. Banque Libanaise Pour le Commerce v. Khrich, 915 F.2d 1000, 1007 (5th Cir. 1990) ("It was the Bank's burden to provide the legal pigment and then paint the district court a clear portrait of the relevant Abu Dhabi law. The Bank failed to provide a pallet, a painter with a usable brush, and paint possessing distinct visibility. The
the trial is a musical composition with the litigator as composer or performer,320 or a tapestry with the litigator or jury as weaver.321 While these metaphors occasionally occur in judicial opinions, their real home is trial advocacy literature. They are offered as ways for trial lawyers to better accomplish their jobs as advocates.

While one would expect the arts-related metaphors to lack a competitive edge, they do not work to blunt the adversary emphasis of the dominant metaphors. These metaphors also describe litigation activity as a one-sided operation. The lawyer may create a story, orchestrate a symphony, paint a picture, or weave a cloth, but whatever she does, she does it without regard for the other side. The object is to overcome the other litigant’s dialogue, notes, colors, or threads and to convince the jury that the client’s plot, tune, painting, or tapestry is better than the alternative. After all, most of these metaphors come from trial advocacy manuals, and their purpose is to teach lawyers how to win. Therefore, even though these metaphors describe activities that are not inherently competitive, they are used in a context which imports winning and losing into artistic endeavors. The arts metaphors make the adversary system a juried competition rather than an aesthetic experience.

resultant picture contains neither abstract nor realistic exposition.”). See also Patrick Bennett, An English Point of View, in MASTER ADVOCATES’ HANDBOOK, supra note 51, at 2 (“You start with a bare canvas. Before you choose your brushes or mix the paint, you decide first what you want your painting to look like and what effect you want it to have on the viewer.”); Speiser, supra note 317, at 295 (“closing argument should be a focal point throughout the litigation”); Hegland, supra note 53, at 10, 68 (lawyer should “sculpt” testimony; “color” testimony with “your colors”).

320. Cates v. United States, 451 F.2d 411, 412 (5th Cir. 1971) (trial judge “sounded this high note”); Crowell-Collier Publishing Co. v. Caldwell, 170 F.2d 941, 945 (5th Cir. 1949) (“the argument ended on this high note”); United States ex rel. Freeman v. Lane, 1990 U.S. Dist. LEXIS 5876 (N.D. Ill. 1990) (prosecutor “ended his rebuttal argument on a high note”); Whittington v. Estelle, 704 F.2d 1418, 1420 (5th Cir. 1983) (“sour notes”); United States v. Mussehl, 453 F. Supp. 1235, 1237 (D.N.D. 1978) (“sour note”). See also Bennett, supra note 319, at 3 (“If you have hit the right note and have repeated it often enough, it will echo in the Jury’s mind when they retire.”); Speiser, supra note 317, at 235 (“final argument most demands a virtuoso performance”); Majet, supra note 42, at 18 (don’t “start your case on a bad note”); Hegland, supra note 53, at 258 (“orchestration of discovery devices”).

321. Stewart v. United States, 366 U.S. 1, 20 (1961) (“The jury was not left to pick at such threads in order to weave the cords of its verdict”); United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 47 (1st Cir. 1991) (“appellants weave an ingenious argument”); Moore v. Kemp, 824 F.2d 847, 870 (11th Cir. 1987) (“Moore had ample thread from which to weave the fifth and sixth amendment claims”); Baker v. State, 391 So.2d 1010, 1011 (Miss. 1980) (jury’s function to “pick up a thread of truth here, and another there, and weave a completed tapestry of truth”). See also LOUIS E. SCHWARTZ, PROOF, PERSUASION AND CROSS EXAMINATION 104 (1978), quoting LOUIS NIZER, MY LIFE IN COURT 142 (1961) (the work of the advocate is “weaving thousands of threads of disconnected testimony in a cloth of persuasive patterns, while at the same time dexterously eliminating those strings which would spoil the design”).
Perhaps, however, new metaphors could be created from this existing cultural base. The parties to litigation (and their lawyers) need to be thought of as co-creators of a single artwork. Ball suggests, for example, that litigation could be conceived "along the lines of a dance... The participants would then be taking part in a joint enterprise whose purpose is a performance that works."³²² Whatever the artistic medium chosen, the metaphor "Litigation is a Collaborative Work of Art" has the potential to create a new concept of dispute resolution.³²³

We could begin to envision the implications of the metaphor by listing our beliefs about, and experiences of, what it means for something to be a collaborative work of art, and applying these traits to litigation.

- litigation is work
- litigation requires cooperation
- litigation requires dedication
- litigation requires compromise
- litigation involves shared responsibility
- litigation requires communication
- litigation involves creativity
- litigation requires a shared aesthetic
- litigation creates a reality
- litigation requires great honesty
- litigation is interactive
- litigation needs funding
- litigation can yield a sense of satisfaction from joint efforts
- litigation can be frustrating

Just like the war, sports, and sex metaphors, the "litigation is a collaborative work of art" metaphor highlights certain features while suppressing others. This metaphor emphasizes cooperation, communication, interaction, and mutual agreement because of the concept of collaboration. It also emphasizes the search for common principles that might be required to get two people to agree that something is a work of art. The images point to the hard work and creativity involved in litigation, as well as to its potential expense and frustration. If all of these qualities fit part of our experience of resolving disputes, the experiences "form a coherent whole as instances of the metaphor."³²⁴ If they do not fit our experience, they just won't work.

This metaphor would require, in part, a different vocabulary for talking about disputes. Parties to litigation would not be "opponents" or "sides"; they would be collaborators. There would be not a "battle" but a "performance" or "painting" or "writing" or "weaving." Lawyers would not be warriors or boxers but artists of various kinds. The out-

³²². Ball, supra note 27, at 183.
³²³. This section is inspired by Lakoff & Johnson's example of "love is a collaborative work of art" as a possible new metaphor. See Lakoff & Johnson, supra note 17, chapter 21.
³²⁴. Id. at 140.
come would not be victory or loss but a process of collaboration and a resulting artwork.\textsuperscript{325}

The existing artistic metaphors strengthen the potential influence of this metaphor. Trial lawyers could still paint a picture, tell a story, hit high notes, and lay foundations. The difference would be that now they would be working \textit{with} the other party’s lawyer to create a single work rather than creating duelling artworks.

Some may reject this kind of metaphor out of hand. It does, after all, ignore the fact that parties to litigation have different, possibly incompatible, goals. Nevertheless, they are no more one-sided than the traditional metaphors. The war and sports metaphors highlight only competition and ignore the possibility that the parties may also have compatible goals and at least share a need to resolve the conflict. “Since a metaphor is a word or phrase appropriate to one context but used in another, no metaphorical construction can be univocally applied, that is, applied in the form of identity.”\textsuperscript{326} The use of new metaphors can highlight the qualities of litigation that the war and sports metaphors suppress or ignore.

2. Education

\textit{Litigation is an educational process, the courtroom is the classroom, and the lawyers are the teachers.} The lawyer/teachers’ joint goal would be to instruct. During the pre-trial phase they instruct their clients\textsuperscript{327} and each other. During the trial they instruct the finder of fact. Their common goal would be to present a clear and complete lesson to the fact finder, and there would be no place for hiding information or misleading the class. Nor would the teacher be the only speaker. “[T]he heart of the classroom experience is the process of question and response. Here if anywhere the several educations going on in the room can meet, the different minds can recognize their differences and make a conversation.” The co-teacher, the class, and any “guest speakers” would be treated with respect.\textsuperscript{328}

The teacher role would require preparation, hard work, and clear communications from the lawyer. Further, the lawyer/teacher should be not only an expert but also a professional who must make connections with the other participants in the learning experience. “Good teaching depends not only upon a direct grasp of one’s subject, a desire to share it, and some verbal facility, it also requires a kind of

\textsuperscript{325} The metaphor could be adapted to refer to either the \textit{process} of creating art or the \textit{product} created, depending on context.

\textsuperscript{326} McFague, \textit{supra} note 22, at 22.

\textsuperscript{327} Thinking of clients in a student role is also consistent with ADR techniques such as mini-trials in which corporate executive officers preside or observe in order to get a more accurate picture of their cases.

\textsuperscript{328} This educational metaphor probably describes an idealized rather than an actual classroom situation. In that sense it is subject to the same criticism as the war and sports metaphors: it uses image rather than reality as the basis for comparison.
moral imagination that permits one to enter into the life circumstances of the learner."329

The rich school vocabulary of most Americans should be able to supply plenty of images for litigation activities. Lawyers would have lesson plans to guide them. They could use visual aids to help the students learn. At the end of a class, they could give the students a test. Changes in procedural rules could allow the students to ask questions or take notes. The school principal could keep the teachers focused on their goals and help them to use proper teaching methods. Witnesses could be "called on" to speak. The classroom image can depict an interactive activity in which the shared goal is the accurate instruction of the class.

3. Journey

_Litigation is a journey and the lawyers are the guides._ This metaphor, too, implies cooperation, or the lawyers would be guiding people off in opposite directions. Like teachers, guides have no interest in losing those they are guiding, either by hiding the trail markers, breaking the compass, or leading toward the wrong destination.

This metaphor would be consistent with the general cultural metaphors "An Argument is a Journey" and "An Argument Defines a Path." These metaphors indicate that an argument has a goal; it must have a beginning, proceed in a linear fashion, and make progress in stages toward that goal. These journey images appear in normal conversation in ways that are hardly noticeable as metaphors. (He set out to prove his point. Our goal is to show that defendant is innocent. That argument went in the wrong direction. Can you follow my argument? I've lost you. We have arrived at our conclusion. Where is this argument going?).

Since litigation is seen in America as a kind of argument, the transfer of vocabulary from arguing to litigating is a natural one. In fact, it already exists. For example, many lawyers explain to jurors that their opening statement is a kind of "road map" to help the jury "follow" the case. Judges tell lawyers to "proceed" with their cases. Lawyers accuse opposing counsel of attempting to "mislead" the jury.

This cultural coherence for the journey metaphor enhances its ability to catch on. However, because it is based on the concept of "argument," it will be difficult to separate it from the war metaphors. If the lawyer/guides cannot be regarded as sharing a common goal, the metaphor will flip into competition mode and fail to offset the battle mindset.

4. Food

_The trial is a meal, pre-trial activity is food preparation, and the lawyers are the cooks._ The litigator/cooks must cooperate in order to produce

a digestible meal. Further, since preparing food for someone can be thought of as offering care to that person, the metaphor also creates a relationship between the lawyer cooks and those who will consume the trial meal.\textsuperscript{330} The fact-finders are the guests or, if a more judgmental role is desired, food critics. If lawyer activity is also envisioned as relating to other parties and to witnesses, these people become guests as well.

Food preparation language could provide vocabulary for various aspects of trial and pre-trial. During the pre-trial process, lawyers shop for ingredients and prepare the food. Witness testimony becomes a dish offered at the meal. Cross-examination adds spice or some other ingredient to the food. The lawyers collectively have a menu, while the plan for the testimony of each witness is a recipe.

This metaphor, like the others, may be flawed in that it makes the lawyers the main actors. The litigants, who should have central roles, appear only in the form of food or guests.\textsuperscript{331} If we transform the meal into a pot-luck supper, the litigants and witnesses gain more importance and control. In such a metaphor the parties and witnesses would choose and prepare the food. They would be offerers of food rather than dishes to be consumed. They might also be consumers of food. The pot-luck image would depict each participant offering food of her own and also tasting other people’s dishes. There is clearly more of an implication of interaction here than there is in the war/sports/sex scheme. Under some circumstances, the concept of sharing a meal together could even promote a sense of community.

The pot-luck version of the metaphor also provides fewer suggestions of lawyer excess. There would be less of a fear that the lawyer concocted the content of each dish, illicitly turning stew into gumbo. The lawyers, however, would still have an important function. They would collect rather than prepare the food, and at trial could organize the presentation of food so as to assure an optimal combination of salads, main courses, and desserts served in the proper order. Their job would still be to maximize the meal’s digestibility, but they would have to do so within the limits of available dishes. And all of the lawyers would still be charged with working together on the meal.

Food metaphors also have parallels in general discourse. One common metaphor is “Ideas are Food.”\textsuperscript{332} Thus we say that some-

\textsuperscript{330} It may be that the only “eaters” in this metaphorical system are the jurors. On the other hand, if the meal is intended not only for the ultimate fact-finder but also for all of the parties to litigation, the metaphor of serving food also might imply at least some level of care for other litigants. Unfortunately, it tends to turn witnesses into food to be consumed.

\textsuperscript{331} Similarly, in the classroom metaphor the litigants are guest speakers or students; in the journey metaphor the litigants are travelers, although they may be travelers who have chosen the destination. The traditional metaphors also have no prominent place for the litigants, and actions are performed by their lawyer surrogates.

\textsuperscript{332} This metaphor is identified in Lakoff & Johnson, supra note 17, at 46-47.
thing left a bad taste in my mouth. We talk about raw facts, half-baked ideas, and warmed-over theories. We find some ideas hard to digest, or refuse to swallow certain claims. We stew over ideas or let them percolate. Complex concepts provide food for thought and are quite meaty. A person who was persuaded by an argument ate it up. Since it is natural in our culture to talk about ideas as food, it should not seem odd to talk about the trial in these same terms.333

5. Conversation

Litigation is a conversation and the participants are speakers. This is not the kind of conversation that we would label an "argument." Instead, it is one in which the speakers take turns, listen to each other, and cooperate (although they need not always agree). Each turn at talking must be part of the conversation as a whole, and these parts must be put together in a certain fashion for there to be a coherent conversation.334 Further, this should not be the stereotypically male kind of conversation that orally ritualizes conflict.335 It is a kind of conversation that both recognizes the individual's view of her own situation and complicates that view by allowing her to recognize the claims of another. It is like a tough friendship insisting on the reality and validity of others.336 A lawyer can be one of the speakers in this scheme, but must also be one of the listeners. Parties and witnesses, judge and jurors, speak as well. Litigation thus becomes each participant's chance to tell her story in a forum where it will be heard.337

The conversation metaphor could also help to dilute the tendency of lawyer culture to adopt male styles of interaction. Professor Menkel-Meadow has speculated that a female-created dispute resolution system might be quite different from the adversary model. Women "might create a different form of advocacy, one resembling a 'conversation' with the fact-finder ... a more cooperative, less war-like system of communication between disputants in which solutions are mutually agreed upon rather than dictated by an outsider, won by the victor, and imposed upon the loser."338 The choice of metaphors consistent with a "conversation" model rather than an "argument" model would encourage a different kind of process.

C. Evaluating the New Metaphors

Clearly it is possible to merely write down new metaphors that describe aspects of dispute resolution. Writing them down, however,

333. Id.
334. Id. at 77-78.
337. Id. at 265.
338. Menkel-Meadow, supra note 105, at 54-55. See also Menkel-Meadow, supra note 292, at 196.
does not end the inquiry. The new metaphors also raise a number of questions. First, is it possible to impose new metaphors on a culture? Second, do these particular metaphors have enough points of congruence with dispute resolution to meaningfully shape and reflect lawyer activities within litigation? Third, will these, or other substitute metaphors have sufficient strength to capture the imagination of lawyers in a way that changes the way they conceive of their role? They need to be so appealing that they can wean litigators away from battles, sports, and sex at least long enough to glimpse other possibilities for dispute resolution. And these new metaphors should use images that balance the impact of the traditional metaphors by calling attention to the possibilities of dispute resolution that the war and sports images reject.

1. Can Metaphors Be Chosen?

Metaphors work in two directions: they arise from physical and cultural experience and they shape our perception of experience. Metaphor plays a very significant role in determining what is real for us since we conceive of our social reality largely in metaphorical terms. Most metaphors grow naturally; they evolve in a culture over a long period of time. However, metaphors can also be “imposed upon us by people in power.” So far, those in power in the judicial system have supported the competitive metaphors. They also have the ability to facilitate change.

It is, admittedly, very difficult to change the metaphors under which we operate. Because the existing metaphors work constantly and subconsciously, it would not be possible to make a quick and easy change away from the battle and sports metaphors on the basis of a conscious decision. But change is possible.

New metaphors have the power to create a new reality. The first step is to become aware of the old metaphors and loosen their unconscious hold on legal culture. Lawyers and judges can, with an effort, think before they say “battle” or “level playing field” and realize the implications of their choice of language. Second, those who experience or wish to experience dispute resolution processes differently can begin to articulate their experiences in new language and new metaphors; they can tell new stories about litigation. Litigators must begin to realize more often that lawsuits do not only and always involve unmitigated competition, and must begin to tell the other part

339. LAROFF & JOHNSON, supra note 17, at 19.
340. Id. at 146.
341. Id. at 160.
342. The socialization of lawyers into the dominant legal culture in a given community has the power to increase the lawyers’ level of cooperation. Ronald J. Gilson & Robert H. Mnookin, Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation, 94 COLUM. L. REV. 509, 549 (1994).
343. LAROFF & JOHNSON, supra note 17, at 145.
of the truth. Both of these actions can be taken by individual lawyers. They can also be reinforced by organized groups: judge school; law school; professional organizations; continuing legal education. Writers of rules of procedure and professional responsibility can stop using the military metaphors in rules and comments. And all these things would have to be done consistently, over a long period of time.

To claim that creating new metaphors would be easy is unrealistic. To claim that creating new metaphors is impossible or pointless would be unnecessarily defeatist. New metaphors, like paradigm shifts, are possible. If lawyers start to understand their experience of dispute resolution in terms of new metaphors, and begin to act in terms of those metaphors, those metaphors "will alter the conceptual system and the perceptions and actions that the system gives rise to. Much of cultural change arises from the introduction of new metaphorical concepts and the loss of old ones." 345

2. Are These Metaphors Accurate?

There are two ways in which the new metaphors are particularly vulnerable in terms of accuracy. First, the new metaphors reflect a judicial system that emphasizes and rewards cooperative behavior. To some extent, this is already a reality within the judicial system. There actually are some benefits to cooperation, particularly in the pre-trial setting. 346 New metaphors can make these situations more visible. In other ways, however, the changed metaphors would work better if accompanied by systemic changes that decrease the incentive for competitive behavior. These could take the form of changes in the rules of pretrial and trial procedure, changes in the ethics rules that adopt less of an advocacy model, and even changes in remedies law that provide more flexibility in court-ordered relief. 347 And there may be situations in which a cooperative model is simply not appropriate.

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344. This can be compared to the now perhaps unfashionable concept of "consciousness raising" used by feminist groups. One scholar describes the process as "the collective articulation of one's experience . . . which has produced, and continues to elaborate, a radically new mode of understanding the subject's relation to social-historical reality. Consciousness raising is the original critical instrument . . . developed toward such understanding, the analysis of social reality, and its critical revision." Teresa de Lauretis, Alice Doesn't: Feminism, Semiotics, Cinema 186 (1984), quoted in Carolyn G. Heilbrun, Writing a Woman's Life 45 (1988).

345. Lakoff & Johnson, supra note 17, at 145. ("For example, the Westernization of cultures throughout the world is partly a matter of introducing the TIME IS MONEY metaphor into those cultures.")

346. See Gilson & Mnookin, supra note 342, at 509 (using prisoner's dilemma game theory to identify the advantages of cooperation and proposing reforms that would allow lawyers to help overcome obstacles to cooperative strategies). For a discussion of game theory generally, see David M. Kreps, Game Theory and Economic Modelling (1990).

347. Remedies rules that do not require all harm to be monetized, for example, could help reduce the zero-sum perception of litigation. See also Gilson & Mnookin,
Second, the more cooperative metaphors assume that there are some limits on legitimate arguments about the law. If an extreme version of legal realism is correct, however, and the law is simply what the judge says it is, then any argument is legitimate. According to legal realist philosophy, "the meaning of the law is never a given. It is always and in principle contestable."\(^{348}\) Neither substantive law nor procedural rules limit the lawyer's pro-client efforts. If this view is correct, then cooperative metaphors are unworkable because they reflect an inaccurate picture of the nature of law.

This totally indeterminate view of law, however, exaggerates the range of likely legal outcomes and reasonable predictions about the law. It also mischaracterizes most lawyers' operative view of the law. When not wearing their partisan hats, lawyers in fact believe that the law has some determinable content, although there are areas in which it is genuinely uncertain.\(^{349}\) The new metaphors depict lawyers striving to discern and vindicate the relevant legal merits.\(^{350}\) They do not require that the lawyer adopt the interpretation of the law that is least helpful to the client or that she omit arguments that the law should be changed. Rather, the more cooperative models require the lawyer to act in good faith and reflect a lawyer's discretion to refuse to always make the most extreme possible argument short of fraud to the court.\(^{351}\)

\(^{supra}\) note 342, at 550-57, for a discussion of some of the changes needed in ethics rules in order to allow more cooperative lawyer behavior.

\(^{348}\) LUBAN, supra note 12, at 19.

\(^{349}\) William H. Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083, 1120 (1988) ("In the dominant understanding, judgments about legality and justice are grounded in the norms and practices of the surrounding legal culture. These norms and practices are objective and systematic in the sense that they have observable regularity, and are mutually meaningful to those who refer to and engage in them. Even when lawyers disagree about such judgments, they usually do not regard them as subjective and arbitrary. One indication of this fact is that they do not articulate or experience their disagreement as an opposing assertion of subjective preference or arbitrary will. Rather, they oppose decisions on the ground that they are wrong — wrong in terms of norms and practices that they plausibly believe binding on the decisionmaker"). \(^{Id.}\)

\(^{350}\) \(^{Id.}\) at 1134. To the extent that dispute resolution looks forward toward solutions that satisfy all parties, disagreements about the limits of applicable law and the accuracy of accounts of past events will have less influence. Disagreements about the law and the facts influence these processes by shaping the parties' predictions about possible trial outcomes and, therefore, about the risk and benefits of settlement. In many pretrial settings, then, legal realist qualms about the indeterminacy of the law are only a minor factor in a lawyer's role in dispute resolution. To the extent that dispute resolution becomes a backward-looking, in-court presentation of testimony about past events and arguments about the application of the law to those events, there will be less opportunity for shared goals. There still should be limits on a lawyer's willingness to make arguments about the law and to present evidence to the court. Similarly, pretrial litigation activities should be undertaken consistently with the lawyer's duty to the court and not only in order to benefit her client.

\(^{351}\) \(^{Id.}\) at 1103.
3. Are These Metaphors Compelling?

Lawyers are also more likely to work to nurture new metaphors if they find those metaphors appealing. Some of the new metaphors may suffer from the same problem as the "officer of the court" images. Being a teacher is just not as exciting as being a knight on a white horse. Being a cook is not as alluring as being a football hero. Being one of several speakers is not as glamorous as being the writer, director, and star of a very dramatic play. If litigators find the new metaphors boring or repulsive, they will have little impact. Nevertheless, there is hope that these new metaphors, though nontraditional, may create strong enough images to resonate with lawyers.

The new metaphors must also be rich in order to survive. Just as the war/sports/arts metaphors provide numerous ways to talk about what goes on in litigation, the new metaphors must prove similarly flexible. A one-phrase metaphor (like "officer of the court") without obvious forms of elaboration to name the roles, activities, and objects of litigation cannot have much impact. The suggested new metaphors, however, should be sufficiently adaptable. They describe common human activities (learning; travelling; eating; talking). Further, all of them coincide with metaphors used constantly in American culture.

VII. Conclusion

The metaphors trial lawyers use influence their identities as professionals. They shape the way those lawyers perceive reality and the way they behave when carrying out their professional duties. The metaphors for the adversary system consistently stress the competitive, partisan features of dispute resolution at the expense of any other qualities or potential qualities of litigation. These metaphors are used so pervasively and so consistently that many people have ceased to notice that they are only metaphors and not definitions.

The metaphors need to change so that a more complete picture of dispute resolution can emerge. They need to change so that rulemakers are better able to see problems and solutions in the litigation process. They need to change so that trial lawyers must face their conflicting roles within the judicial system rather than suppressing the less appealing prospect of divided loyalties. New metaphors can demonstrate that the competitive parts of litigation are not the only parts, that unmitigated competition does not always benefit even the client, and that the client is not the only person whose interests are important. New metaphors will not erase the social and economic pressures to maximize client desires, but they can still serve a purpose.

352. "About that metaphor, the military one, I would say, if I may paraphrase Lucretius: Give it back to the war-makers." SONTAG, supra note 17, at 95.
353. Floyd Abrams, Why Lawyers Lie, NEW YORK TIMES MAGAZINE at 54 (Oct. 9, 1994) ("[I]t is time to ask whether it really leads to justice to have a system in which
Modern lawyers “find themselves embedded in a complex and contradictory cultural matrix in which little is precluded or guaranteed. Competing visions and limited constraints provide room for maneuver and opportunities for struggle. The interesting questions lie in the moments in which these opportunities are taken or not taken.” 354 Providing new metaphors can provide support for litigators in their struggle to achieve a fuller vision of their roles in the legal system and in the community. 355 Every day, in specific contexts as specific decisions must be made, new metaphors may help those lawyers to use that fuller vision to make wiser choices.


355. “The lawyer in society [is not] the same person as the lawyer in community.” Schudson, supra note 190, at 192.