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Metaphor, Women and Law

*Adam Arms*

Metaphors in law are to be narrowly watched, for starting out as devices to liberate thought, they end often by enslaving it.¹

―Benjamin Cardozo

Legal discourse is pregnant with metaphor. The legal world has been described as a magical one in which “liens float, corporations reside, minds hold meetings, and promises run with the land.”² Sports, battle and sex metaphors dominate discussion of the adversary system.³ Metaphors permeate law school lectures.⁴ Indeed, it would be difficult to have a conversation about law without resorting to the use of metaphor.

Is this use of metaphor in legal speech merely ornamental? Are metaphors inherently ambiguous and unnecessary frills, or are they essential to understanding the legal world?⁵ Recent linguistic and

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3. See also 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.”); Thornton v. Breland, 441 So.2d 1348, 1349 (Miss. 1983) (en banc) (“A lawsuit ... is often a small war.”); United States v. Valdez-Soto, 31 F.3d 1467, 1477 (9th Cir. 1994) (Zilly, District J., dissenting) (broad reading of Rule 803(24) would “emasculate” the hearsay rule).
4. See Carrie Menkel-Meadow, Can a Law Teacher Avoid Teaching Legal Ethics?, 41 J. LEGAL EDUC. 3, 8 (1991) (“If you were to tape your own classes, would you hear yourself speaking in war and sports metaphors?”). See also Eileen A. Scallen, The Big Game: Metaphor and Education in the Simpson Trial, 6 HASTINGS WOMEN’S L.J. 289 (1995).
5. See Andrew Ortony, Metaphor, Language and Thought, in METAPHOR AND THOUGHT 2–3 (Andrew Ortony ed., 2d ed. 1993) (providing a general discussion of two theories of metaphor—"constructivist theory" which sees metaphor as essential to human understanding, and "nonconstructivist theory" which views metaphor as mere rhetoric and
psychological research suggests that metaphor, far from being merely colorful language, is constitutive of understanding. Metaphors appear in "everyday life, not just in language but in thought and action." Some researchers have demonstrated that at the very core of our ability to understand and act within the world around us lies a metaphorical conceptual system. In short, metaphor matters.

This Note examines metaphor's power to construct reality and determine action. Part I explores the metaphorical nature of conceptual systems and surveys the use of metaphors in legal discourse. Part I also considers how a number of metaphors, many of which currently dominate legal speech, have played a role in the silencing and subordination of women. Part II outlines possible remedies. This section also includes suggestions for manipulating metaphor and a brief discussion of alternative metaphors.

I. LEGAL METAPHOR AND THE SILENCING AND SUBORDINATION OF WOMEN

A. THE METAPHORICAL NATURE OF THOUGHT

"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 worshiping, for what we are worshiping we are becoming." Metaphor is commonly defined as "a figure of speech containing an implied comparison, in which a word or phrase ordinarily and primarily used of one thing is applied to another." However, this bare definition overlooks the everyday importance and predominance of metaphor. Linguistic and psychological research indicates that metaphor wields enormous power over thought and behavior. In fact, some researchers thus inessential to understanding).


7. LAKOFF & JOHNSON, supra note 6, at 3.

8. See id. ("We have found . . . that metaphor is pervasive in everyday life, not just in language but in thought and action. Our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature."). See generally GEORGE LAKOFF, WOMEN FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987).


10. WEBSTER'S NEW WORLD DICTIONARY 852 (3d College ed. 1988).

11. See supra notes 5 & 6.
assert that _all_ knowledge is metaphorical in nature, and that metaphor is thus indispensable for human imagination and reason. 12

George Lakoff, professor of linguistics at U.C. Berkeley, and Mark Johnson, professor of philosophy at University of Oregon, co-authors of _Metaphors We Live By_, investigate and outline metaphor’s relationship to thought and action. Utilizing the conceptual metaphor ‘argument is war,’ Lakoff and Johnson give an example of a metaphorical concept and how it structures activity. 13 Employing everyday expressions, Lakoff and Johnson show how this metaphor is embedded in our culture: “Your claims are _indefensible_. He _attacked every weak point_ in my argument. His criticisms were _right on target_. . . . If you use that _strategy_, he’ll _wipe you out_. He _shot down_ all of my arguments.” 14 Lakoff and Johnson explain that these are not just figures of speech but evidence of an underlying metaphor—‘argument is war’—which molds the way we view arguments, thus shaping the way we perform while arguing. 15 Accordingly, the person with whom one is arguing is seen as an opponent, someone to attack and overpower.

The range of acceptable outcomes may also be limited by this metaphor. For example, accepting the ‘argument as war’ metaphor may predispose one to only experiencing satisfaction with winning, as opposed to feeling gratification when compromises are reached. In contrast to a war, an argument can result in two winners. Arguments can be informative and enlightening for all parties involved, and mutual respect may be gained. However, if one views an argument as a win/lose situation—likened to a war or a sporting event, for example—one will not likely aim for nor appreciate an argument’s other valuable products.

While metaphor aids in the conception of abstract concepts, such understanding is necessarily limited. The comparison which allows us to understand “one aspect of a concept in terms of another (e.g., comprehending an aspect of arguing in terms of a battle) will necessarily hide other aspects of the concept.” 16 For example, while the ‘argument is

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12. _See_ Leary, _supra_ note 6, at 2 (“All knowledge is ultimately rooted in metaphorical (or analogical) modes of perception and thought.”); _George Lakoff & Mark Turner, More Than Cool Reason: A Field Guide to Poetic Metaphor_ xi (1989) (“Far from being merely a matter of words, metaphor is a matter of thought—all kinds of thought: thought about emotion, about society, about human character, about language, and about the nature of life and death. It is indispensable not only to our imagination but also to our reason.”).


14. _Id._ (emphasis in original).

15. _Id._

Many of the things we _do_ in arguing are partially structured by the concept of war. Though there is no physical battle, there is a verbal battle, and the structure of an argument—attack, defense, counterattack, etc.—reflects this. It is in this sense that the _argument is war_ metaphor is one that we live by in this culture; it structures the actions we perform in arguing.

_id._ (emphasis in original).

16. _Lakoff & Johnson, supra_ note 6, at 10.
war’ metaphor fastens on and highlights the combative aspects of a dispute, other aspects of arguing inconsistent with the metaphor are hidden. Cooperative aspects, such as the fact that arguments are an effort at mutual understanding, as noted above, are often overlooked. Awareness of this highlighting/hiding effect becomes especially important when dealing with legal metaphors. As discussed below, what legal metaphors hide may lead to oppression and marginalization.

Not all researchers view metaphor as a powerful influence. Some, such as Earl R. Mac Cormac, are willing to concede that metaphor may play an initial role in understanding but then loses its influence with time and use. This view sees the oft-used metaphor’s power as eventually dying and the metaphor “becoming part of a mundane conventional language, the cemetery of creative thought.” From this perspective, embedded, conventional metaphors play little if any role in the conception of abstract domains.

However, conventional metaphors—unconsciously used elements of everyday language—are far from dead. George Lakoff and Mark Turner assert that “[t]he things most alive in our conceptual system are those things that we use constantly, unconsciously and automatically.” The omnipresence of, and systematic coherence between, various metaphoric expressions evidences the unconscious power and life of these so-called dead metaphors.

Social science researchers Nandini Nyack and Raymond Gibbs have explored the significance of conventionalized metaphor. In one study, subjects given a story describing a woman’s anger at another gentleman in terms of heat in a pressurized container gave higher appropriateness ratings to the oft-used metaphorical phrase “she blew her top,” than to another commonly used phrase, “she bit his head off.” In another situation, subjects gave higher appropriateness ratings to the term “she bit his head

17. See id.
18. See infra section IC.
19. See LAKOFF & JOHNSON supra note 6, at 236. Lakoff and Johnson discuss the potential dangers of “political and economic metaphors,” but the same reasoning may be applied to legal metaphors: “[I]n the area of politics and economics, metaphors matter more, because they constrain our lives. A metaphor in a political or economic system, by virtue of what it hides, can lead to human degradation.” Id.
22. See generally MAC CORMAC, supra note 20.
23. See LAKOFF & TURNER, supra note 12, at xi.
24. Id. at 62.
25. This is seen in the ‘argument is war’ examples discussed previously. See LAKOFF & JOHNSON, supra note 6, at 4.
27. Id. at 326–27.
off' where the woman’s anger was described in terms of a ferocious animal. Nyack and Gibbs believe these subjects picked up on connections existing between metaphorical phrases and evidence in the descriptions of anger.\textsuperscript{28} For example, they suggest that the general knowledge people have of heat in a pressurized container is mapped onto their knowledge of anger.\textsuperscript{29} They see these metaphors, and metaphor in general, as constitutive of meaning and influential on action rather than merely a decorative figure of speech.\textsuperscript{30}

Other telling research has demonstrated the necessity of metaphor in accessing and conceptualizing abstract subjects. One example is a study by Dedre and Donald Gentner examining students’ understanding of electricity.\textsuperscript{31} They found that students understood electricity metaphorically in one of two ways: as a fluid or as a crowd of individual entities.\textsuperscript{32} The behavior of electricity is such that it is correctly predicted in some situations when it is seen as having the properties of a liquid,\textsuperscript{33} while in other situations electricity’s behavior is only correctly predicted if viewed as a crowd of individual entities.\textsuperscript{34} This study supports the proposition that a meaningful understanding of electricity requires the use of metaphor and, as was shown here, entails the ability to conceptualize and use multiple metaphors.

Thomas Kuhn, in his landmark work, \textit{The Structure of Scientific Revolutions}, writes about the need for metaphorical models in science.\textsuperscript{35} These models, according to Kuhn,

supply [scientists] with preferred or permissible analogies and metaphors. By doing so they help to determine what will be accepted as an explanation and as a puzzle-solution; conversely, they assist in the determination of the roster of unsolved puzzles and in the evaluation of the importance of each.\textsuperscript{36}

Metaphor has permeated all realms of science, including the natural sciences.\textsuperscript{37} Both Carl Linnaeus, arguably history’s most influential

\begin{thebibliography}{9}
\bibitem{28} See id.
\bibitem{29} See id.
\bibitem{30} See id.
\bibitem{32} See id. at 107–11 (discussing the two analogies used).
\bibitem{33} See id. at 115–16 (situations involving electricity and batteries).
\bibitem{34} See id. (situations involving electricity and parallel resistors).
\bibitem{36} Id. at 184.
\bibitem{37} See LONDA SCHIEBINGER, \textit{NATURE’S BODY: GENDER IN THE MAKING OF MODERN SCIENCE} (1993). Paralleling Kuhn’s view, supra text accompanying notes 35–36, Schiebinger notes, ‘[M]etaphors and analogies are themselves constitutive elements of science. The prominent eighteenth-century notion, for example, that nature was a machine gave direction to research, suggested interpretive frameworks, and, in many cases, dictated
\end{thebibliography}
taxonomist, and Charles Darwin used hypersexual metaphors to describe plant life. Professor Londa Schiebinger notes how “Linnaeus’s system [for describing plant reproduction] focused as much on the ‘nuptuals’ of living plants as on their sexuality. Before their lawful marriage, trees and shrubs donned ‘wedding gowns.’ Flower petals spread as ‘bridal beds for a verdant groom and his cherished bride . . . .’” Such conspicuous use of metaphor, not to mention unobtrusive usage, continues to pervade science.

In sum, we rely upon metaphor constantly and unconsciously in our daily lives. Metaphor wields an incredible amount of power over us—it determines not only our understanding of abstract phenomena, but of everyday occurrences and commonplace things. However, metaphor hides certain aspects of the very domains it helps us to understand. Moreover, unconscious usage means uncritical usage; we do not question metaphor’s validity, and when used by another person, we tend to accept a conventionalized metaphor’s legitimacy without a critical thought.

B. METAPHOR IN LEGAL DISCOURSE

Metaphor plays an important role in many fields. As previously discussed, the social sciences and the physical sciences rely heavily on metaphor. Metaphor shapes the questions to be asked, determines the routes to finding solutions and defines what will be accepted as reasonable answers. Metaphor has the same impact in the legal world.

Elizabeth Thornburg, professor at Southern Methodist University School of Law, researched the use of metaphor in the legal context. She ascertained that “[m]etaphors so pervade our language about litigation that it is almost impossible to talk about a trial without using metaphors.” She found that battle, sports and sex metaphors dominate discourse within the American adversary system.

Thornburg’s extensive research uncovers numerous instances of the use what counted as proof or explanation.” Id. at 24 (citations omitted). Schiebinger’s book provides an intriguing look at notions of sexuality and gender in the history of the natural sciences.

38. See id.
39. Id. at 23. Schiebinger also discusses how Linnaeus’ sexual metaphors involved the marriage customs of the time period. She notes that the two types of plant marriage Linnaeus contemplated, “public” and “clandestine,” corresponded to the European customs of his time.
40. See id. at 27.
41. See LAKOFF & TURNER, supra note 12, at 63.
42. See generally Ortony, supra note 5.
43. See KUHN, supra note 35, at 184.
44. See id.
46. See id. at 231–32.
of war metaphors to describe the process of litigation. “Parties arm themselves, draw battle lines, offer or refuse quarter, plan preemptive strikes, joust, cross swords, undertake frontal assaults... seek total annihilation of their enemies, marshal forces, attack...” The location of the trial is also often described by way of battle metaphors. “Trials can take place in trenches, staging areas, and battlefields.” Litigation strategy, as well, is described with war metaphors. “Litigants may use Rambo tactics, Pearl Harbor tactics, scorched earth tactics, kamikaze tactics... and Hiroshima tactics.”

Thornburg documents the use of sports and game metaphors describing litigation. Trial lawyers are seen “as game players, boxers, team members, or forensic athletes. Judges, not surprisingly, are seen as referees or umpires.” Lawsuits are compared to “blind man’s bluff, hide and seek, chess, a game of chance... a cat and mouse game, a poker game, a football game, a boxing match... a race, hunting, Monopoly, and even a confidence game.”

Law students’ initiation into the world of law includes being introduced to its metaphors. Law professors, consciously or unconsciously, work with and within conventional metaphor. Paul Bergman, professor of law at the University of California, Los Angeles, in a trial advocacy treatise aimed at students, posits that some litigators see trial as “always something of a crapshoot.” Continuing in the sports metaphor vein, in a section describing how factfinders use evidence to construct stories, Bergman offers a diagram of the factfinder’s task “based on an off-tackle play developed by the 1938 Chicago Bears...” Professor Eileen Scallen states, after noting the power and omnipresence of the ‘trial as sport’ metaphor, “I teach the game; I teach how to play it effectively.” For Scallen, the ‘trial as sport’ metaphor has its downsides, such as emphasizing winning and losing—which leads Scallen to try to focus students’ attention on how the game should be played. Professor Carrie Menkel-Meadow notes that law professors constantly use war and sports metaphors in lectures.

The use of the baseball metaphor in legal discourse and theory has become a source of lively scholarly debate. The legal world’s embracing

47. See id. at 235.
48. Id. (footnotes omitted).
49. See id.
50. Id. (footnotes omitted).
51. Id. at 236 (footnotes omitted).
52. Id. at 237 (footnotes omitted).
53. Id. at 238 (footnotes omitted).
55. Id at 17.
56. Scallen, supra note 4, at 292.
57. Id.
58. See Menkel-Meadow, supra note 4, at 8–9.
of the baseball metaphor has been criticized by some, heralded by others. However, there is agreement that America’s obsession with baseball is reflected in America’s legal discourse.

Sexual metaphor also pervades legal language. Courts speak of "emasculating" the following: the rule against hearsay, the right to cross-examination and "summary judgment as an efficient procedural device." Courts also use impotence to describe ineffectiveness. Although Elizabeth Thornburg’s research suggests that sexual metaphors tend to be used more covertly, she posits that sexual imagery in the legal world is often tied to war and sports metaphors’ imagery of domination and aggression.

Law professor Thomas Ross also writes of metaphor in the legal world, examining the contradictions legal metaphors pose and the paradoxes they create. Ross suggests that "[l]egal metaphors are indispensable pieces of the legal culture, not merely tolerated, but needed." Metaphor, suggests Ross, is crucial to understanding and allows us to construct our realities—including legal reality. He describes some conventional legal metaphors—property metaphors of "bundles" and "lists," constitutional metaphors of "walls" and "lenses," and the "poisonous tree" metaphor used in criminal procedure to describe excluded evidence. Ross examines the power of each to shape our understanding of the particular areas of law in which they have found a foothold.

Our understanding of the First Amendment has been influenced by the "marketplace" metaphor. Chad Oldfather suggests that Justice White

61. See id. at 824.
62. See U.S. v. Valdez-Soto, 31 F.3d 1467, 1477 (9th Cir. 1994).
65. See Thornburg, supra note 45 at 241 ("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.'") (footnote omitted).
66. See id. at 240.
67. See Ross, supra note 2.
68. Id. at 1076–77 ("Put simply: metaphors are essentially paradoxical pieces of language; law is essentially paradoxical; thus, legal metaphors are a perfectly sensible way of talking about law.").
69. See id. at 1053. For a discussion of metaphor and the construction of legal reality, see MILNER S. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY (1985).
70. Ross, supra note 2, at 1055–63.
71. Id. at 1063–67.
72. Id. at 1067–75.
73. See id. at 1053–75.
74. Oldfather, supra note 59, at 26–27.
“placed the metaphor at the core of First Amendment jurisprudence”75 when he declared in a 1969 decision that “it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .”76 This metaphor is alive and well today, and continues to form the background against which courts view First Amendment issues.77

There are far too many conventional legal metaphors to address here, but doing so is not the purpose of this section; my aim is to show that law needs metaphor. Metaphor structures the way we talk about the legal actors and events and, more importantly, it consciously and unconsciously structures the way we conceive of the legal world. It is the very nature of law which makes legal metaphor matter. Life, liberty, property, dignity, family and community are all affected by legal decisions which in turn are formulated in part by, and understood through, legal metaphor.

Acknowledging the need for legal metaphor, it is of utmost importance to turn a critical eye toward them and to evaluate their effects. What do legal metaphors hide? What do they highlight? Does their shaping of our understanding of the law marginalize or subordinate certain populations or communities? If so, are ‘fairer’ alternative metaphors available which would tend to empower these populations?

C. LEGAL METAPHOR AND WOMEN’S SILENCING AND SUBORDINATION

As noted above, metaphor is omnipresent in legal discourse, and certain metaphors tend to dominate in specific areas of law—for example, the aforementioned prevalence of sports, war and sex metaphors in litigation language. Different effects flow from the use of one particular metaphor over another.78 I suggest that the effects of some conventional legal metaphors have detrimentally impacted women in a variety of ways. This section will examine two areas where such metaphors have contributed to women’s silencing and subordination: first, women have been disproportionately denied certain property rights via reliance on the conventional property law ‘bundle of sticks’ and ‘grasped thing’ metaphors; and second, the exclusion of women and women’s voices from law’s discourse caused by uncritical use of the gender-linked sports, war and sex metaphors omnipresent in legal language.

Thomas Kuhn proposes that science uses metaphors to determine what problems exist to be solved, what rules will be followed in solving them and what solutions will be acceptable.79 Similarly, legal scholar Lucinda

75. Id. at 26.
77. See Oldfather, supra note 59, at 26–29. See also HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS (1992).
78. See supra section IA.
79. See KUHN, supra note 35, at 184.
Finley posits that "[l]egal language frames the issues, it defines the terms in which speech in the legal world must occur, it tells us how we should understand a problem and which explanations are acceptable and which are not."80 Using conventional legal metaphor to define law's questions, problem-solving processes and solutions has consequences—consequences that may be more dangerous and far-reaching than apparent at first glance.

(i) Property Metaphors

Property, as a concept, is abstract. After all, what is property? Is it to "have a thing in our hands, to keep it, to make it, to sell it, to work it up into something else..."?81 Or is property solely a human construction, merely a function of law?82 Perhaps property is simply a definable relation between individuals.83 One has described the idea of property such that "[t]here is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind."84 One thing is clear—metaphor has been used throughout history to define property.

Two traditional property metaphors will next be discussed: the 'bundle of sticks,' and the 'grasped thing.'85 Both of these metaphors have become embedded in the common legal conception of, and discourse surrounding, personal property86—and both metaphors have played a part in the subordination of women.

Thomas Ross acknowledges that metaphor functions as a builder of legal realities, not simply a figure of speech.87 Metaphors, he contends, "shatter and reconstruct our realities. And in ways we cannot say."88 Ross's concern is that the metaphors the legal world so desperately needs also serve to hide important realities.89 He acknowledges that decisions in the legal world often have very powerful, sometimes violent, consequences—the danger we risk by uncritically using metaphors is the risk of becoming sheltered from this reality.90

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82. See id. at 113 ("Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.").
84. BENTHAM, supra note 81.
85. These are not the only metaphors of property law, but they are arguably the most widely used.
87. See Ross, supra note 2.
88. Id. at 1076.
89. See id. at 1084.
90. See id.

Our choices are hard; the consequences are cruel. . . . We can hide from all
Ross explores the significance of the 'bundle of sticks' metaphor embraced by property law.\footnote{Ross, supra note 2, at 1055-63. For another interesting look at the 'bundle of sticks' metaphor, see Stephen J. Safranek, Can Science Guide Legal Argumentation? The Role of Metaphor in Constitutional Cases, 25 Loy. U. Chi. L.J. 357 (1994).} He traces the history of this metaphor, finding its genesis in the New Deal.\footnote{See Ross, supra note 2, at 1056.} Ross postulates that the early natural law concept of private property was that of "thing ownership," but increasing governmental regulation of property use to redistribute wealth rendered this conception unworkable.\footnote{Id. at 1055-56.} Notions of private property became more complex \"[s]o, we adopted a metaphor. Property, we came to understand, is a 'bundle of sticks.'\"\footnote{Id. at 1056.} The various legally recognized rights incident to ownership of some tangible or intangible thing compose the "sticks" of the "bundle."\footnote{See id. "The 'bundle' is a metaphorical characterization of the aggregate of legally recognized rights of an individual in some particular thing. My rights to sell, lease, give, and possess my house are the sticks which together constitute the bundle." Id.}

Ross next critiques metaphor. He notes that this metaphor, like any other, cannot capture the complete essence of the equivocal subject of "private property."\footnote{Id. at 1058.} Property is not simply an aggregation of legally recognized rights, it can be "a fundamental idea, a source of autonomy, an instrument of oppression, and so on."\footnote{Id.}

Scholars have also criticized the 'bundle of sticks' metaphor because of its penchant to carry a sense of uniformity to various forms of property.\footnote{See id. at 1062. See also Margaret Jane Radin, Property and Personhood 34 Stan. L. Rev. 957 (1982). In addition to its critics, the 'bundle of sticks' metaphor has its supporters. See, e.g., Safranek, supra note 91, at 401 (offering that the metaphor has been useful, "serv[ing] as a guide to the Supreme Court, lower courts, and the public.").} Each "interest stick" within the bundle is seen as identical\footnote{Ross, supra note 2, at 1062. "Each interest after all is a stick. Thus, my right to lease my home may seem the analytical equivalent of my right to physically possess it." Id.} and the metaphor assumes a sense of sameness as one moves from object to object.\footnote{See id.} This has its consequences. For example, Ross believes the metaphor ignores the very real distinctions in feelings he has for things he owns; he notes that under the 'bundle of sticks' metaphor, "[t]he bundle that is my computer is the same as the bundle that is my wedding ring."\footnote{Id. (footnote omitted).} This parallels Margaret Jane Radin's belief that a very real difference exists this in the shelter of our metaphors. We can make believe this is not so. . . . But by what right do we take for ourselves this shelter when we impose on another human being the power and violence that is law?\footnote{Id. (footnote omitted).}
between fungible property, "property that is held purely instrumentally,"102 and personal property, which Radin defines as "property that is bound up with a person."103 Radin theorizes that certain items of personal property may become so bound up with one's sense of self that they should not be considered traditional "property" at all.104 Her position can be said to advocate for refocusing the view of property in order to take individuals' feelings and meanings into account.

Property law's 'bundle of sticks' metaphor has had effects more insidious than denying feelings of connection to property. For example, the uncritical acceptance of this metaphor has played a part in structures, procedures and traditions that have traditionally subordinated and marginalized women. The history of family law offers illustrations—specifically in cases where women, upon marriage dissolution, were denied shares of married couples' human capital due to courts' reliance on the 'bundle of sticks' (often in combination with the 'grasped thing') metaphor. As a result, divorced single women have historically been thrust into poverty in massive numbers.105

Legal scholar Joan Williams examines this connection between poverty and gender.106 She notes that "[s]ixty percent of all people in poverty and two-thirds of the elderly poor are women."107 A woman's standard of living declines by an average of 73 percent in the year following divorce, while men, on the average, experience a 42 percent rise.108 The average income for female-headed families is less than half that of male-headed families, and "families composed of women and children are ten times more likely to stay poor than are families where a male is present."109 This impoverishment, argues Williams, is primarily due to the unfair system of property allocation upon divorce.110 Historically, a husband's wage has not been characterized as property subject to apportionment and hence divorced women and their children have been disproportionately impoverished.111 She posits that, although today's laws may be aimed at providing women with an equal right to own property, "the legal definition of property excludes human capital, leaving women with disproportionately

102. Radin, supra note 98, at 960.
103. Id. at 960.
104. Id. at 959.
107. Id. (footnotes omitted).
109. Williams, supra note 105, at 826–27 (footnote omitted).
110. See Williams, supra note 106, at 384.
111. See id.
little property to own...” 112

Williams suggests that judges, being overwhelmingly male and successful in a profession which requires huge investments in human capital, directly benefit from a definition of property that does not include human capital.113 It is much more to their advantage, should their marriages dissolve, for their law degrees and prestigious positions to not be defined as property. Otherwise, both could be portioned out to an ex-spouse. Arguably, this may unconsciously effect male judges’ motivations, possibly pushing them to rely on one metaphor over another when deciding how to frame human capital in divorce proceedings. Some judges may feel compelled to stick to the boundaries of conventional, traditionally male-benefiting, metaphors when defining human capital.

In *Re Marriage of Graham*, a Colorado Supreme Court case, confronted the issue of whether a husband’s human capital in the form of a master’s degree in business administration (M.B.A.) constituted a property right which the wife jointly owned, rendering it subject to division by the court upon dissolution of the marriage.114 During their marriage, the husband was primarily a student, earning his B.S. and M.B.A., while the wife worked full-time and contributed seventy percent of the couple’s financial earnings.115 The wife also did most of the housework and meal preparation for the couple.116 No children were born and no marital assets were accumulated.117

In dissolution proceedings, the trial court found that “an education obtained by one spouse during the marriage is jointly-owned property to which the other spouse has a property right.”118 The court of appeals reversed, “holding that an education is not itself ‘property’ subject to division...”119 The Supreme Court of Colorado affirmed the court of appeals, basing its decision on the following reasoning:

An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of ‘property.’ It does not have an exchange value or any other objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be

112. *Id.* at 407-08.
113. See *id.* at 401.
115. See *id*.
116. See *id*.
117. See *id*.
118. *Id.* at 76
119. *Id.*
acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.\textsuperscript{120}

Looking closely, it is clear that the court relied on a particular metaphor to deny the ex-wife a valuable property right. The definition of human capital is at issue, and the court decided to use the ‘bundle of sticks’ metaphor as its frame of reference. An M.B.A., according to the court, lacks some of the essential attributes of property.\textsuperscript{121} The court labeled some of these characteristics: exchange value, transferable value on the open market, assignability, conveyability and inheritability.\textsuperscript{122} Here, the court defined some of the separate ‘sticks’ which comprise property’s bundle of sticks and concluded that because an M.B.A. lacks certain sticks it is not property. The court’s strict adherence to the ‘bundle of sticks’ metaphor in this case disallowed a conception of property which could include human capital.

The ‘bundle of sticks’ metaphor is relatively young in legal terms, and is predated by other property metaphors, such as property as a ‘grasped thing.’\textsuperscript{123} While the ‘bundle of sticks’ metaphor focuses on legally-defined rights between persons, earlier definitions of property involved conceptions of a person having physical control over some external thing.\textsuperscript{124} Accordingly, property historians comment on the development of the concept of property in ‘grasping’ or ‘grabbing’ terms.\textsuperscript{125} One such historian states, ‘In fact, the ‘own’ which the laws of property protect is whatever an individual has managed to get hold of, and equality of right, applied to property, means only that every man has an equal right to grab.’\textsuperscript{126}

The grasping metaphor focuses on the tangible. Property as a ‘grasped thing’ necessarily involves an actor (the grasper), an act (grasping) and an object being grasped (a res or ‘thing’).\textsuperscript{127} A mental image is formed of a

\begin{footnotesize}
\begin{enumerate}
\item[120.] Id. at 77. Cf. O’Brien v. O’Brien, 66 N.Y.2d 576 (1985) (holding a medical license earned during marriage was marital property subject to equitable distribution).
\item[121.] See Graham, 574 P.2d at 77.
\item[122.] See id.
\item[123.] See generally Schroeder, supra note 86.
\item[124.] See id.
\item[125.] See RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA (1951).
\item[126.] Id. at 130–31 (“The institution of property was an agreement among men legalizing what each had already grabbed, without any right to do so, and granting, for the future, a formal right of ownership to the first grabber.”).
\item[127.] The idea that early personal property definitions were solely “physicalist conceptions,” that is, involving only external physical objects, has been contested: J. Vandevelde argued that they were, and that Blackstone was the chief backer of this view. J. Vandevelde, The New Property of the Nineteenth Century: The Development of the Modern Concept of Property, 29 BUFF. L. REV. 325 (1980). However, Jeanne L. Schroeder contests this idea: “Moreover, Blackstone not only is aware but absolutely insists that ‘things,’ as so
\end{enumerate}
\end{footnotesize}
hand gripping a physical object. Use of this metaphor to conceive of personal property, and utilization of the image it invokes, necessarily limits one’s understanding of property to that which is consistent with the metaphor. Knowing this, we must question what the metaphor hides from us. We must uncover the consequences of using this particular metaphor.

First, the metaphor renders it difficult to conceive of personal property that is intangible. It is difficult to conceive of grasping something that has no corporeal presence. Second, the metaphor focuses on the relationship between the actor and the res, while pushing aside aspects of the idea of rights between individuals. Any sense of property’s place in the community is suppressed by the metaphor. The idea that owning property involves a number of legal rights, some of which can be taken away or altered by the state, is hidden.

Perhaps to a greater extent than the ‘bundle of sticks’ metaphor, the property as a ‘grasped thing’ metaphor has contributed to women’s subordination. For example, the grasping metaphor has been used in combination with the ‘bundle of sticks’ metaphor in family law, again, to prevent women from sharing in a couple’s human capital upon dissolution of marriage.

Todd v. Todd, a California case, presents a similar issue to the one seen in Graham above. A husband earned an L.L.B. during a seventeen-year marriage and was admitted to the California State Bar. The wife worked during the entire marriage, using her income to help her husband through law school. Upon dissolution of the marriage, the wife claimed the husband’s law degree was valuable community property subject to division. The court held that the husband’s degree was possibly a property right, but was clearly not subject to division, stating:

At best, education is an intangible property right, the value of which, because of its character, cannot have a monetary value placed upon it for division between spouses.

Plaintiff has cited no case law holding that the education of a spouse acquired in whole or in part with community moneys is tangible property, the value of which may be divided with the other spouse.

Here the court is using the ‘bundle of sticks’ metaphor and the ‘grasped thing’ metaphor to reinforce each other. The court suggests that because

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129. See id.
130. See id. at 790.
131. See id.
132. Id. at 791 (emphasis added).
133. Jeanne L. Schroeder contends that the ‘bundle of sticks’ metaphor is simply an
one crucial stick—a amenability to monetary value—attachment—is missing from the bundle of sticks, the educational degree is not tangible nor graspable property and thus is not ‘true’ property. Reliance on the two metaphors allows a narrow view of property that devalues intangible property and intangible property rights; property that doesn’t have the right sticks in its bundle can not be grasped and is thus not property. The *Graham*[^134] and *Todd*[^135] cases are but two cases of many where women have been denied their fair share of a couple’s human capital—a valuable property right—upon divorce. One wonders about the number of divorced women, some jobless, some with children, who thus suddenly found themselves with a paucity of resources to eke out a living. Much of this seems due to courts’ reliance on conventional metaphors incompatible with a perspective of property that would include human capital.

Property metaphors’ oppressive capacity is seen again when examining the rationale historically used to explain away married women’s property rights. Mid-Nineteenth century common law held that a woman and a man became one legal person upon marriage[^136], and that one person was the husband[^137]. Essentially, during marriage the husband “had nearly absolute authority over [his wife’s] person and property . . .”[^138] The husband “became the owner, outright, of all her personal property” and he “owned all the economic value of any property that a woman might bring to or acquire during marriage—stocks and bonds, bank accounts, houses, farms, carriages, cattle and even wages.”[^139] A woman herself became property—her husband’s property—during marriage[^140].

The property as a ‘grasped thing’ metaphor played a stabilizing role in the perpetuation of this oppressive scheme. The metaphor has, at its foundation, a subject and an object; the subject is the actor physically grasping the object; historically, married women have been viewed as

[^134]: 574 P.2d 75 (Colo. 1978).
[^137]: See id.
[^138]: Id.
[^139]: Id.
[^140]: See [LORENNE M.G. CLARK & DEBRA J. LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY 112-17 (1977)]. Clark and Lewis discuss how women have been traditionally seen as “objects rather than the subjects of property rights: women were among the forms of private property owned and controlled by individual men.” Id. They also note that “[u]nder Anglo-Saxon law, rape . . . was punished by orders to pay compensation and reparation. If a woman was raped, a sum was paid to either her husband or father, depending on who still exercised rights of ownership over her . . . .” Id.
objects. Women have been the things grasped and not the graspers. How can an object reach out and hold something? It conflicts with an object’s nature. However, men have always been subjects, and men have been the actors in this metaphorical scheme which contemplates aggressive hands grasping property. Acceptance of the ‘grasped thing’ metaphor made more incomprehensible the concept of women grasping, and thus their owning of, property and helped keep women bereft of property’s power.

Despite their shortcomings and the availability of alternatives, these two metaphors—the ‘grasped thing’ and the ‘bundle of sticks’—have been traditionally used to conceive of private property. Property is power, and judicial reliance on these two conventional metaphors, especially in the area of family law, has tended to deny women valuable property rights and their accompanying social power, thereby contributing to women’s subordination.

(ii) Sports, War and Sex Metaphors

Law is power. Law colors every aspect of life, fixes the limits of liberty and defines morality. Law is essentially the choices we make for other people: the decision to obliterate someone else’s community; the decision to deny to another person the ability to speak to her god in her chosen place and way; the decision to put some other human being in a cage; and on and on. The next part of this section describes how law’s language and metaphor may alienate women and prevent women from participating in law’s powerful dialogue.

Ostensibly, the American adversary system simply involves “active and unhindered parties contesting with each other to put forth a case before an independent decision-maker.” However the reality of the system is more complex and contains influential subtleties. Sports, war and sex metaphors permeate every corner of litigation language. White, educated, privileged men have written the story of law and crafted its language, so it is not surprising that the nature of these metaphors, and

141. See Morris R. Cohen, Law and the Social Order: Essays in Legal Philosophy 46-47 (1967) (“We must not overlook the actual fact that dominion over things is also imperium over our fellow human beings.”).
143. Ross, supra note 2, at 1084 (footnote omitted).
144. BLACK’S LAW DICTIONARY 20 (Pocket Ed. 1996).
145. See supra notes 44–61 and accompanying text.
146. See Finley, supra note 80, at 892; Thornburg, supra note 45, at 251 n.208. White
the way they have been traditionally utilized, have highlighted masculine “patterns of socialization, experience, and values.”

Many in legal academia are concerned about the messages these metaphors convey—and rightly so. The legal war metaphor inherently portrays a brutal two-sided affair in which misbehavior is excused, is sometimes condoned, and may be instrumental in helping one reach the ultimate goal: defeating one’s opponent. Most sports metaphors used in the legal world involve two teams within the confines of a violent win/lose dichotomy. The cooperative aspects of team sports are left out of legal discourse, the emphasis typically placed on “winning at all costs rather than fair play and rules.”

Professor Eileen Scallen is concerned for her students. She writes, in an article discussing the O.J. Simpson trial, about the focus on the outcome of the litigation “game.” She notes that games have winners and losers, and what gets lost in the anticipation of the outcome is the question: “Does it matter how you play the game?”

Other scholars have debated the consequences of using sports metaphor in legal discourse. Chad Oldfather critiques the baseball metaphor’s use, and notes that “feminist theorists have found in sporting rhetoric ‘the very essence of patriarchal oppression.’” Michael Yelnosky responds to this males continue to craft and interpret law’s language. See Sheldon Goldman, Bush’s Judicial Legacy: The Final Imprint, 76 JUDICATURE 282, 287-93 (1993) (noting that 85% of President Reagan’s U.S. district court appointees and 92% of his U.S. appeals court appointees were white males).

147. Thornburg, supra note 45, at 251, citing Finley, supra note 80, at 893.

148. See Thornburg, supra note 45.

149. See id. at 243. In fact, “[t]he most popular metaphor is boxing, a sport in which hurting the opponent is part of the game.” Id. A 1983 U.S. court of appeals decision provides one example of the boxing metaphor: Blonder-Tongue did not throw merely a jab at the multiplicity of patent litigation; rather, it intended a knockout blow through the doctrine of collateral estoppel so that any time a patent was found invalid in a fair fight with a knowledgeable referee, the courts could count to ten and the patent holder could no longer maintain that he was champion.


A quote taken from a San Francisco Bay Area periodical, although made in a political rather than legal context, typifies the hard-nosed nature of legal sports metaphor: “If you show up with a tennis racket, you’re not going to play. You better show up with spikes.” F.J. Gallagher, Playing Hardball, THE INDEPENDENT, April 21, 1998, at 1 (quoting Calvin Welch, an affordable-housing developer).

150. Thornburg, supra note 45, at 243.

151. Scallen, supra note 4.

152. Id. at 289.

153. Oldfather, supra note 59, at 36 n.78. Others question the broader oppressive nature
criticism by suggesting that some feminist scholars "have used sports as a metaphor not for the oppression of women but instead for the emancipation of women . . . ."154 Women are participating in sports in ever increasing numbers, Yelnosky suggests, and sports metaphors in general, and baseball metaphors in particular, can be useful for both sexes in understanding and working within the law. 155 Further, Yelnosky suggests that sports have meaningful "feminine" aspects which have been largely ignored. 156

Professors Maureen Archer and Ronnie Cohen examine sports metaphor use in judicial opinions and conclude that those unfamiliar with sports or sports metaphors' idiomatic meanings—a group comprised of a disproportionately large number of women—are often excluded from law's dialogue. 157 Archer and Cohen quote one commentator's argument: "The trivia of sports, like the pseudo-complexity of academic language, makes the out-group, the oppressed group, feel awed and powerless. And that's just how men want women to feel about sports and about life."158

However, Archer and Cohen agree with Yelnosky, that, despite the fact that "games and sport are [still] highly institutionalized aspects of our culture that help to maintain male hegemony,"159 female participation in sports is on the increase and women are becoming more comfortable with the language of sports. 160 Therefore, while the language of sports continues to perpetuate male privilege in the legal world by way of its limited accessibility, its ability to do so in the future may decrease.

Sex metaphors, although arguably more subtly used than sports and war metaphors, are often combined with these metaphors to reinforce the idea of a legal system dominated by heterosexual male sexuality. 161 The combination of these metaphors "indicates strongly that the world of
litigation is populated solely by men.”162 Women, as a result of this specific metaphorical structuring of litigation, are often non-entities in conceptions of the legal world, unless they adopt male traits.163 Furthermore, legal sexual metaphors “are not images of mutually pleasurable adult relationships; they are images of domination and aggression.”164

In conclusion, legal metaphor is a valuable tool. It helps us frame issues, comprehend abstract concepts and shape our understanding of the larger legal world. Unfortunately, a metaphor is an imperfect tool and its uncritical use leaves important realities unilluminated. Uncritical reliance on some legal metaphors, in addition to other effects,165 has aided in disadvantaging women and excluding women from law’s dialogue.

II. METAPHOR MANIPULATION AND NEW MEANING

Uncritical adherence to legal metaphor has harmful consequences. Fortunately, metaphor can also be a powerful progressive tool for reshaping realities; metaphor can enlighten and create positive change.166

This next section will focus on a number of possible manipulations of metaphor which should facilitate new meaning and understanding, which in turn could lead to a more ‘just’ justice system. Different strategies include: 1) extending the used part of traditional metaphors; 2) utilizing the unused parts of traditional metaphors; 3) introducing novel metaphors; 4) mixing metaphors; and 5) unpacking and destabilizing traditional metaphors.

Understanding by way of metaphor involves using one’s understanding of one thing to understand something else. Linguists often refer to the

162. Id. at 245 (“In real life, of course, women are lawyers and judges and clients. But they are invisible in this metaphorical paradigm.”). Furthermore, this system seems to allow no room even for men to break out of this stereotyped role.

163. See id. at 246.

164. Id. See also supra note 66 and accompanying text.

165. See id. at 256–65. (The pre-trial process, alternative dispute resolution, the lawyer’s duty to opponents and third persons and even the lawyer’s integrity, are each harmed by the types of adversary metaphors which dominate litigation discourse.) A lawyer does not simply engage an enemy in a ‘battle to death’ for the good of her client. Litigation involves give-and-take and a good amount of cooperation between opposing sides. While all lawyers are not unfeeling, battling automatons, many live this litigation metaphor at work. See id. at 265. The result could be that “the gladiator finds that he has lost touch with his own emotions, distrusts everyone . . . compulsively competes in all contexts, and even suffers from physical manifestations such as heart attacks and a lowered immune system.” Id. at 265 (discussing Adrienne Drell, Chilling Out, A.B.A. J. 70, 70-73 (1994)).

166. However, such change may require patience.

[T]he transition of a language from an old quality to a new does not take place by way of an explosion, by the destruction of an existing language and the creation of a new one, but by the gradual accumulation of the elements of the new quality, and, hence, by the gradual dying away of the elements of the old quality.

Josef Stalin, Revolution From Above, quoted in Marxism: Essential Writings 308 (David McLellan ed., 1988).
understood thing as the "source domain" and the thing to be understood as the "target domain." Typically, only certain parts of a source domain are used, or highlighted, to understand the target domain. In other words, there are used parts and unused parts. For example, in the conventional metaphor "theories are buildings," general knowledge of buildings is used to help grasp "theory" as a concept. However, only the foundation, outer walls and support structure of buildings are typically used to describe theories. Everyday linguistic expressions evince this: "Your theory has no foundation. I've only put together the framework of a theory. Your argument is shaky." Other parts of buildings such as staircases, hallways and rooms are not typically used to understand theories. These are the unused parts of the metaphor.

Manipulation of conventional metaphor by way of extending its used parts should effect new meaning. With the "theories are buildings" metaphor above, Lakoff and Johnson offer the following examples for such extension: "These facts are the bricks and mortar of my theory," and "My theory is strengthened by concrete and steel; it is no weak argument." One is still working within the general metaphor and applying the parts traditionally used, but extending them to gain a richer understanding of the target domain.

Turning to the legal world, judges are most often umpires in the baseball metaphor prevalent in legal discourse. Inevitably, they enforce the rules of the 'game,' which includes calling balls and strikes. These are some of the used parts of the metaphor—umpires, the strike zone, balls and strikes—parts which may be extended as seen in the following language:

When a fastball comes in over the plate, quite close to the knees, some persons might think it was a strike, others a ball, but whatever way the umpire calls it, there was probably substantial evidence to justify his judgment. . . . In this case . . . the hearing officer said he had to decide a factual question that 'is a close one.' When there is substantial evidence to support the . . . conclusion, I

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167. LAKOFF & TURNER, supra note 12, at 63.
168. See LAKOFF & JOHNSON, supra note 6, at 10-13.
169. See id. at 46.
170. Id.
171. See id. at 52-53.
172. Id. at 53.
174. "In addition to enlarging the 'strike zone' for admissible scientific evidence, Daubert also replaces the umpire calling the game." Estate of Bud Hill et al. v. Conagra Poultry Co., 1997 WL 538887, at *3 (N.D. GA. August 25, 1997).
do not believe that simply because a case is close the Board must lose, even though others might have 'called it' differently.175

Here, the idea of the judicial strike zone is expanded. The author suggests that, as opposed to every judge working with the same, constant strike zone, each judge has her own conception of the zone and that close calls may go either way. This highlights the subjective nature of some judicial decisionmaking and suggests that different judges may make different rulings on the same set of facts.

The batter is another aspect commonly used in the legal baseball metaphor, and, typically, lawyers or litigants are batters, having to step up to the plate.176 Extending this used part, one appellate judge writes, “We step back into the batter’s box, having allowed one to go by us and tipping another, in the hopes that on our third and final swing we can avoid a judicial strike-out.”177 This example stretches the batter concept to include judges, who typically are seen as umpires,178 and suggests that a judge’s role may entail more than passively deciding balls and strikes. Litigants, lawyers and judges, it follows, are in a position where they must rise to the task and perform for their colleagues and supporters.

Another way to enrich and enliven understanding by manipulating a traditional metaphor is by exploring its unused parts.179 As mentioned above, the foundation, walls and support structure are the parts of a building traditionally used in the ‘theories are buildings’ metaphor.180 Examples of employing unused parts of the metaphor are seen in the following, offered by Lakoff and Johnson: “His theory has thousands of little rooms and long, winding corridors,” and “He prefers massive Gothic theories covered with gargoyles.”181 New perspective, flavor and appreciation of theories is gained by utilizing the traditionally unused parts of the metaphor.

An example of using the unused part of a traditional legal metaphor is seen in Garcia v. San Antonio Metropolitan Transit Authority,182 a 1985 Supreme Court decision. Justice O’Connor’s dissent includes the following language: “The Court today surveys the battle scene of federalism and sounds a retreat. Like Justice Powell, I would prefer to hold the field and, at the very least, render a little aid to the wounded.”183 Here,

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175. Medical Center of Beaver County, Inc. v. N.L.R.B., 716 F.2d 995, 1002 (Higginbotham, J. dissenting).
176. See, e.g., Adrabawi v. Carnes Co., 152 F.3d 688, 697 (7th Cir. 1998) (“[defendant] steps up to the plate on this issue with two strikes already called.”).
178. See supra note 173.
179. See LAKOFF & JOHNSON, supra note 6, at 52–53.
180. See id.
181. Id. at 53.
183. Id. at 580. O’Connor’s use of the war metaphor is also interesting because it supports
Justice O'Connor uses the war metaphor ubiquitous in legal discourse, but highlights an aspect of war that is conventionally pushed aside. She brings up the fact that war involves human victims who need medical aid. War requires some compassion and mercy. By highlighting aspects of war other than its brutality, competitiveness and hostile nature, the war metaphor may be used within the law as a tool for creating a more cooperative, more compassionate legal system.

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

Novel metaphors allow one to rediscover things thought to be familiar; they hold the power to recreate realities. Lakoff and Johnson give an example of novel metaphor use in describing how an Iranian student arrived in Berkeley, and upon hearing the phrase “the solution of my problems,” internalized it in a very different way than his American peers. He thought of the metaphor as involving a chemical solution rather than the more commonly imagined puzzle-solving type of solution. The student took the expression to describe “a large volume of liquid, bubbling and smoking, containing all of [one’s] problems, either dissolved or in the form of precipitates, with catalysts constantly dissolving some problems [for the time being] and precipitating out others.” This novel chemical metaphor suggests that problems are not solved, whereupon they disappear forever, but rather that they are temporarily dissolved and may reappear again if the conditions are right. Instead of investing time and energy in trying to solve problems once and for all, as is possible under the “problems are puzzles” metaphor, one seeing problems using the chemical solution metaphor may direct their energy into “finding out what catalysts will dissolve [their] most pressing problems for the longest time without precipitating out worse ones.”

the proposition that the use of this violent, ‘masculine’ metaphor is so pervasive that it crosses gender lines.

184. See LAKOFF & JOHNSON, supra note 6, at 139–46.
185. Id. at 145.
186. Id. at 143.
187. See id.
188. Id.
189. See id. at 143–44.
190. Id. at 144.
The sports, war and sex metaphors used in litigation language tend to emphasize violence and competition between two opponents—winning, losing and aggression are highlighted by these metaphors. However, cooperation and compromise are essential to the practice of law. Introducing a novel metaphor may act as a catalyst, altering the perception of law to include this reality. Elizabeth Thornburg suggests a few suggest metaphors. Law, according to Thornburg, may be understood through metaphors of fine arts, education, journey, food and conversation. Used in lieu of the adversarial metaphors which permeate the legal world, these metaphors suggest a more cooperative, less hostile legal system.

Margaret Radin offers a novel metaphor for certain kinds of private property: "property as personhood." Radin posits that a piece of personal property, if important enough to its owner, may become so enmeshed with the owner's conception of self that it actually forms a piece of the psychological self. Radin's metaphor offers a feminist legal perspective, attacking legal notions of "abstract idealism, transcendence, foundationalism, and atemporal universality. . . ." By seeing property as constitutive of personhood, one must give up the idea that a piece of property is the same piece of property for everyone in all circumstances. The metaphor favors a case-by-case analysis of the meaning of property to its owner and thus recognizes that a wedding ring, for example, does not have the same meaning for a ring dealer as it does for someone who has worn it for twenty years.

Jeanne Schroeder suggests a property metaphor of her own: "property as liquid." After laying out the inadequacies of the 'bundle of sticks' metaphor, she suggests the 'property as liquid' metaphor, one that is less brittle and less solid. Schroeder argues that "property rights, like liquid, do not move in a single discrete piece, or as a series of disaggregated sticks. They flow."

Underlying conditions of the metaphor could foster a flexible conception of property. For example, liquid must be somehow contained lest it spread about. Flexibility may thus flow from the fact that "[l]iquid

191. See supra notes 148–50 and accompanying text.
192. See Thornburg, supra note 45, at 269-76.
193. See id.
194. Radin, supra note 98.
195. Id.
197. For a critique of Radin's theory, see Jeanne L. Schroeder, Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolate Feminine Body, 79 MINN. L. REV. 55 (1994).
199. See id. at 1340.
200. Id.
property can take on the form of whatever bottle it is poured into, and contemporary property can be reconfigured into new legal functions.\footnote{Id.} The courts in the Todd and Graham cases, discussed above, could have used a novel metaphor similar to Schroeder's to address the problem of how to conceive of human capital upon dissolution of a marriage.\footnote{See supra section IC(i).} Realizing human capital does not fit within traditional property law 'boxes,' and acknowledging that a graduate degree obtained during a marriage is a valuable asset earned by both partners, the courts could have characterized property rights attaching to the graduate degrees as flexible and flowing. A 'fluid' conception of property may have allowed the Graham court to avoid the task of counting rigid property-rights sticks\footnote{See supra notes 120-27 and accompanying text.} and prevented the Todd court from focusing on 'graspability.'\footnote{See supra notes 132-33 and accompanying text.} Such a characterization could have recognized the wives' contributions to, and investments in, the degrees and permitted the courts to resolve the 'diploma dilemmas' equitably.

A fourth way to use metaphor to create new meaning is to combine metaphors. Although the admonishment "don't mix your metaphors" is often heard, creatively mixing metaphors can be very powerful. Lakoff and Turner suggest that mixing metaphors may "produce a richer and more complex set of metaphorical connections, which gives inferences beyond those that follow from each of the metaphors alone."\footnote{LAKOFF \& TURNER, supra note 12, at 70.} Research investigating sports and war metaphors in political discourse includes discussion of mixed metaphors.\footnote{See N. Howe, Metaphor in Contemporary American Political Discourse, 3 METAPHOR \& SYMBOLIC ACTIVITY 87 (1988).} One piece of research discusses a sentence spoken by a Marine officer: "Washington is trying to have it both ways. They're playing Monday morning general."\footnote{Id. at 99.} Decisionmakers in Washington are seen as "a general" and "spectators of a football game."\footnote{Id.} One immediately perceives that the Marine views these policy makers as having an incredible amount of power, "an amateurs' retrospective wisdom" about the "game" of war, and as occupying a position distant from the violence and consequences of war.\footnote{Id.} Science also involves mixing metaphors. In the realm of cognitive science, researchers have posited that "metaphors of loops, programs, feedback and copies or traces are not mutually exclusive but can be mixed and rearranged to develop new theories and guide further research."\footnote{Robert R. Hoffman et al., Cognitive Metaphors in Experimental Psychology, in METAPHORS IN THE HISTORY OF PSYCHOLOGY 97 (David E. Leary ed., 1990).}
Professors Archer and Cohen, in their discussion of sports metaphor use in judicial opinions, address mixing metaphors. They offer one court opinion mixing sports metaphors: "I know of no law directing that a plaintiff who misses with his first shot at proving damages should be given a second shot. If we have cases suggesting such, they may be safely said [to be] out in left field." Another opinion mixes sports and non-sports metaphors: "open the floodgates to potential 'cheap shots' against the interest of a defendant."

Following is an interesting mixed metaphor found in an appellate decision: "The battle of the forms in this case takes the form of something very like a badminton game..." Twisting convention, the author uses a sports metaphor, which usually highlights the competitive nature of the legal world, to soften the conventional war metaphor. The battle of the forms is not really a battle at all in this case. There are no warring parties, no brutality in the trenches, no win-at-all-costs attitudes. By carefully mixing metaphors—metaphors which are often linked—this appellate judge conveys a sense of two litigating parties engaged in a relatively harmless and often enjoyable game that most people associate with lazy spring or summer days.

Finally, metaphor may be manipulated through unpacking or destabilization. Eighteenth century philosopher Thomas Reid contended that people "are naturally disposed to conceive a greater similitude in things than there really is." And, as discussed above, many common comparisons and metaphors tend to be used unconsciously and uncritically.

Our knowledge and understanding is thus limited because metaphorical structuring is necessarily partial; some parts of reality are highlighted while other parts are ignored. Destabilizing, or unpacking, a metaphor includes asking 'what does it mean for this to be seen in terms of that?' 'What is made salient for me and at what expense?' It includes exploring the strengths and weaknesses of attributing the features of one thing to another.

Lakoff and Turner suggest Othello is doing just this in act five of Shakespeare's Othello:

211. See Archer & Cohen, supra note 157.
214. Northrop Corp. v. Litronic Industries, 29 F.3d 1173, 1175 (7th Cir. 1994).
215. See Thornburg, supra note 45.
216. I acquired these terms and this idea from Dr. James Temple, Professor of Psychology, Saint Mary's College of California.
218. See supra notes 23-30 and accompanying text.
219. See supra notes 16-17 and accompanying text.
Yet she must die, else she'll betray more men.
Put out the light, and then put out the light:
If I quench thee, thou flaming minister,
I can then thy former light restore,
Should I repent me; but once put out thy light,
Thou cunning'st pattern of Excelling nature,
I know not where is that Promethean heat
That can thy light relume. 220

Othello uses the common conceptual metaphor “life is a flame,” when equating killing with “putting out the light.” He then goes on to acknowledge a weakness in the metaphor’s portrayal of reality when describing how “he can put out the candle as he can snuff out her life, but it is only the candle that he can relight.” 223

A controversy from the history of the philosophy of science provides another example. The ‘mechanistic’ world view, espoused by Leibnitz years ago and many cognitive scientists today, essentially sees the mind as a machine. Thomas Reid was critical of this world view—this mind as machine metaphor—and inverts the metaphor in order to destabilize it:

Shall we believe with Leibnitz, that the mind was originally formed like a watch wound up; and that all its thoughts, purposes, passions and actions, are effected by the gradual evolution of the original spring of the machine, and succeed each other in order, as necessarily as the motions and pulsations of a watch?

If a child of three or four years, were put to account for the phenomena of a watch, he would conceive that there is a little man within the watch, or some other little animal that beats continually, and produces the motion. Whether the hypothesis of this young philosopher in turning the watch spring into a man, or that of the German philosopher into turning a man into a watch spring, be the most rational, seems hard to determine. 224

Reid exposes the mind as machine metaphor for what it is—a metaphor, a theory about thought processes. Reid makes the comparison involved explicit, and by criticizing it invites others to expand their conception of the human mind.

221. Lakoff & Turner, supra note 12, at 31.
223. Id.
224. Reid, supra note 188, at 444, quoted in Metaphors in the History of Psychology 37, supra note 6.
Professor Clay Calvert provides an example of metaphor unpacking by addressing the "information superhighway" metaphor ubiquitous in discussions surrounding laws affecting new telecommunications technologies and computer-mediated communication. Calvert tracks the metaphor's history and then examines what the metaphor emphasizes and what it downplays. "Commerce, speed, and point-to-point communication" are highlighted, suggests Calvert, while "culture, stability and non-point-to-point communication" are pushed aside. Calvert writes:

There is no experience of travel as suggested by the 'information superhighway' metaphor. In fact, in a situation where there is complete time-space convergence, the point-to-point metaphors do not make much sense because in this new communication topography one does not travel from one point to another but, instead, virtually brings two points together. The points are no longer rooted in a particular geographic location but are fluid and mobile on the flow of information streams.

Throughout his article, Calvert picks apart the 'information superhighway' metaphor and forces the reader to critically examine its limits. Calvert urges legal and policy decisionmakers to do the same when addressing issues of novel telecommunications and computer technologies.

Law review pages are fertile soil for metaphor destabilization—they contain numerous thought-provoking examples of conventional legal metaphor unpacking. Here, legal scholars peel off the successive layers of the "states as laboratories," "standing," and health law's "physician as fiduciary" metaphors to name but a few.

In sum, these different manipulations of metaphor can be effective tools. They allow us to view complex and even familiar concepts from different vantage points. In focusing on language and metaphor, there is

226. See id.
227. Id. at 553.
228. Id. at 556. (footnote omitted). Notice how Calvert inserts a novel metaphor at the end of his critique: "information streams."
229. See id.
230. See id. For a similar critique of electronic information and communication metaphors, see Pamela Samuelson, The Quest For Enabling Metaphors for Law and Lawyers in the Information Age, 94 Mich. L. Rev. 2029 (1996).
always the danger of "shrinking from law's noontime realities of prisons and money, pain and greed, into the more sheltered domain of texts, tropes and dialogue," but there is also the possibility of rearranging world-views to allow in less harmful, more just conceptions of property, litigation and the legal world in general.

III. CONCLUSION

Metaphor shapes thought and action. Our very ability to understand the world around us may only be possible through use of metaphor. Likewise, it may be impossible to speak of the legal world without using metaphor; metaphor pervades legal discourse and creates legal reality. However, a metaphor only tells part of the story—some facets of reality are concealed by its use, and uncritical acceptance of a metaphor limits our understanding. Uncritical acceptance of legal metaphor can be dangerous. Communities may be destroyed, homes lost, innocents imprisoned, people put to death, families shattered and, as discussed in this Note, groups may be silenced and subordinated. However, we have the tools to prevent metaphor from injuring. We have the tools to make metaphor a catalyst for progressive change. Changes in law's language, and corresponding changes in thought and action, can be empowering. Therefore, we must not only narrowly watch our legal metaphors, as Cardozo suggests, but we must also creatively employ them in our continuing effort to gain a fuller vision of the law.

234. Margaret Jane Radin, presentation at the 1989 annual meeting of the Association of American Law Schools (quoted in THOMAS C. GREY, DEATH IS THE MOTHER OF METAPHOR (1991)).
235. Berkey v. 3d Ave. Ry. Co., 244 N.Y. 84, 94 (1926) ("Metaphors in law are to be narrowly watched, for starting out as devices to liberate thought, they end often by enslaving it.").