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Articles

SPORTS IN THE COURTS: THE ROLE OF SPORTS REFERENCES IN JUDICIAL OPINIONS

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I. INTRODUCTION

Early in the morning of July 23, 2000, four police officers responded to a call about a “melee” at a home in Brigham City, Utah.¹ Through a screen door and windows, the arriving officers witnessed a violent fight and a victim spitting blood into the kitchen sink.² The officers opened the door, announced their presence, entered the kitchen, quelled the altercation, and made arrests.³

In *Brigham City v. Stuart*, the Supreme Court unanimously held that the Fourth Amendment permitted the officers to enter the home without a warrant because they had an objectively reasonable basis for believing that an occupant was seriously injured or imminently threatened with such injury.⁴ Writing for the Court, Chief Justice John G. Roberts, Jr. reinforced the holding with a sports analogy: “The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.”⁵ *Brigham City’s* analogy was unprompted because no reference to sports appeared anywhere in the briefs of either party or any *amicus*.⁶

Chief Justice Roberts – former captain of his high school football team and thus conversant in athletics – employed a rhetorical technique used by the Justices and lower federal and state judges with increased frequency since the early 1970s.⁷ In cases with no claims or defenses concerning sports, written opinions frequently help explain holdings with references to the sports rules or terminology familiar to many Americans.⁸ Prior to the 1970s, sports ref-

1. See *Brigham City v. Stuart*, 547 U.S. 398, 400 (2006) (discussing facts of case).

2. See *id.* at 401.

3. See *id.*

4. See *id.* at 406 (“We think the officers’ entry here was plainly reasonable under the circumstances.”).

5. See *id.* (explaining holding that officers’ actions were reasonable).

6. See generally Brief for Respondents, *Brigham City v. Stuart*, 547 U.S. 398 (2006) (No. 05-502), 2006 WL 794710 (containing no sports references); Brief for Petitioner, *Brigham City v. Stuart*, 547 U.S. 398 (2006) (No. 05-502), 2006 WL 422138; Reply Brief for Petitioner, *Brigham City v. Stuart*, 547 U.S. 398 (2006) (No. 05-502), 2006 WL 1002047.

7. See Elisabeth Bumiller, *An Interview By, Not With, the President*, N.Y. TIMES, July 21, 2005, at A1 (explaining Chief Justice Roberts’ background).

8. See, e.g., *Everything Cycles, Inc. v. Am. Honda Motor Co.*, 2008 U.S. Dist. LEXIS 34561, at *23 n.6 (D. Or. 2008) (“A sports analogy may help illustrate this point.”); *Olick v. Kearney* (*In re Olick*), 398 B.R. 532, 550 n. 26 (Bankr. D. Pa. 2008) (“To employ a sports analogy from baseball, it does not matter if your team is in first place on June 1st. What matters is the team’s place in the standings at the end of the season.”); *State ex rel. Ohio Roundtable v. Taft*, No. 02AP-911, 2003 WL

erences were not unknown in Supreme Court and lower federal and state court opinions, but they were quite rare. A court might discuss legal “ground rules,” liken difficult argumentation to the contortions characteristic of “gymnastics,” or declare specified conduct or arguments “out of bounds.”⁹ Few decisions, however, ventured beyond these core sports terms that were already ingrained in the American lexicon.¹⁰

21470307, at *15 (Ohio Ct. App. 10d June 26, 2003) (Tyack, J., dissenting) (“To use a sports analogy, a baseball player does not conduct a baseball game if the player’s only true power is to walk off the field.”).

9. *See, e.g.*, Utah Pie Co. v. Cont’l Baking Co., 386 U.S. 685, 702 (1967) (“Congress has established some ground rules for the game.”); California v. Lo-Vaca Gathering Co., 379 U.S. 366, 376-77 (1965) (“[T]he gas industry is entitled to know the fundamental ground rules by which it should conduct itself.”); Hickey v. Pittsburgh Pension Bd., 106 A.2d 233, 238 (Pa. 1954) (“Whether it be in the field of sports or in halls of the legislature it is not consonant with American traditions of fairness and justice to change the ground rules in the middle of the game.”); Divine v. Universal Sewing Mach. Motor Attachment Co., 38 S.W. 93, 98 (Tenn. Ct. Chan. App. 1896) (discussing “ground rules, well settled in their multifiform application where rights of creditors are involved”); Atl. Ref. Co. v. FTC, 381 U.S. 357, 367 (1965) (“legal gymnastics”); Nippert v. Richmond, 327 U.S. 416, 423 (1946) (“mental gymnastics”); Cooney v. Moomaw, 109 F. Supp. 448, 450 (D. Neb. 1953) (quoting Hitaffer v. Argonne Co., 183 F.2d 811, 816 (D.C. Cir. 1950)) (“legalistic gymnastics”); Williams v. United States, 3 App. D.C. 335, 341 (D.C. Cir. 1894) (“skillful and subtle legal gymnastics”); Wong v. Public Util. Comm’n, 33 Haw. 813, 815 (1936) (“juridical gymnastics”); Savage v. Prudential Life Ins. Co. of America, 121 So. 487, 489 (Miss. 1929) (“mental and legal gymnastics”); Walker v. Yarbrough, 76 So. 390, 394 (Ala. 1917) (on application for rehearing) (“judicial gymnastics”); Kellum v. State, 1 So. 174, 174 (Miss. 1886) (“technical gymnastics”); Holt v. Virginia, 381 U.S. 131, 138 (1965) (Harlan, J., dissenting) (“This Court now sets aside the trivial disciplinary penalty imposed simply because in its view petitioners’ conduct was not out of bounds.”); Beck v. Washington, 369 U.S. 541, 555 (1962) (“some of [the prosecutor’s] threats were out of bounds”); Beauharnais v. Illinois, 343 U.S. 250, 262 (1952) (“[I]t would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State’s power.”); Bridges v. California, 314 U.S. 252, 300 (1941) (Frankfurter, J., dissenting) (stating that state court’s conclusion was not “out of bounds”); Arye v. Dickstein, 12 A.2d 19, 20-21 (Pa. 1940) (reducing punitive damages award because “the jury went entirely out of bounds by awarding punitive damages of \$6,000.”); Diamond Cab Co. v. Jones, 174 S.E. 675, 678 (Va. 1934) (discussing that reply by plaintiff’s counsel to remark was not “so far out of bounds as to justify a new trial”); Wehenkel v. State, 218 N.W. 137, 139-40 (Neb. 1928) (“getting out of bounds and an erroneous decision thereon may be lost sight of in a real game, but in a legal controversy they show up when the picture is developed and the proofs are submitted for inspection and review”).

10. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting) (discussing alternative theory of Fourth Amendment exclusionary rule by stating “‘sporting contest’ thesis that government must ‘play the game fairly’”); Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 290 (1966) (Clark, J., dissenting) (“shadow boxing”); Brannan v. Stark, 342 U.S. 451, 470 (1952) (Black, J., dissenting) (“the majority’s body blow to cooperatives would be justified if required by congressional command”); Patriarca v. United States, 402 F.2d 314, 319 (1st Cir. 1968) (stating that defense counsel “touched all the

Linking cause to effect is often an imprecise art. The flowering of sports references in federal and state judicial opinions, however, began in earnest shortly after the Supreme Court handed down *Flood v. Kuhn* in 1972.¹¹ *Flood* was a response to the St. Louis Cardinals' trade of Curt Flood to the Philadelphia Phillies after the 1969 season without his consent.¹² Flood wrote to Baseball Commissioner Bowie Kuhn objecting that he was not "a piece of property to be bought and sold irrespective of [his] wishes."¹³ When the letter fell on deaf ears, the three-time all-star and seven-time Gold Glove winner filed an antitrust suit challenging the reserve clause in the standard Major League baseball contract.¹⁴ The reserve system bound a player to his first club for the duration of his career unless

bases in vigorous, evocative language"); *Probst v. S. Stevedoring Co.*, 379 F.2d 763, 766 (5th Cir. 1967) (explaining that federal statute gave claimant "fielder's choice," right to damage suit or right to demand payment for compensation); *NLRB v. Kohler Co.*, 351 F.2d 798, 801 (D.C. Cir. 1965) (describing 11-year-old dispute as "an extra-inning game, even by modern judicial standards"); *Walton v. Owens*, 244 F.2d 383, 388 (5th Cir. 1957) (discussing witness' "ringside seat" to automobile accident); *Pa. Crusher Co. v. Bethlehem Steel Co.*, 193 F.2d 445, 447 (3d Cir. 1951) ("Every lad who has stood at home plate anxiously awaiting the pitcher's delivery realizes that a foul ball will not bolster his batting average."); *Premier-Pabst Sales Corp. v. Grosscup*, 12 F. Supp. 970, 971 (E.D. Pa. 1935) (discussing where "the line of scrimmage between the interstate commerce laws and those of the state should be drawn"); *Smoky Mountains Beverage Co. v. Anheuser-Busch, Inc.*, 182 F. Supp. 326, 333 (E.D. Tenn. 1960) (comparing relationship between inexperienced businessperson and his experienced counterpart "to a green rookie baseball player going to the big leagues in spring training and undertaking to tell a major leaguer who was seasoned in the business how to play baseball"); *Lurie v. Ind.*, 198 N.E. 2d 755, 762 (Ind. 1964) (Achor, J., dissenting) (discussing "practice of making end runs around and through the constitution"); *Abernethy v. Burns*, 173 S.E. 899, 900 (N.C. 1934) (saying *pro se* plaintiff "may not get to first base, but he is entitled to come to the bat"), *rev'd on other grounds*, 188 S.E. 97, 97 (N.C. 1936) (explaining plaintiff "did come to the bat . . . and was called out on strikes. He again appeals, complaining at the rulings of the umpire."); *State v. Strong*, 196 N.E.2d 801, 809 (Ohio Ct. App. 1963) (reversing conviction of capital murder defendant, who has "the right to . . . insist that the state touch all the bases," because of prejudicial trial court error); *T. C. Young Constr. Co. v. Brown*, 372 S.W.2d 670, 675 (Ky. Ct. App. 1963) (discussing "lawyer coming down the home stretch of a trial"); *People ex rel. Dep't of Pub. Works v. Lillard*, 33 Cal. Rptr. 189, 193 (Cal. Ct. App. 1963) (stating judge's "function . . . is much more than that of a plate umpire at a BASEBALL game calling balls and strikes. . . . Indeed, 'it is the right and duty of a judge to conduct a trial in such a manner that the truth will be established in accordance with the rules of evidence.'") (citations and internal quotations omitted).

11. See *Flood v. Kuhn*, 407 U.S. 258 (1972) (discussing history of baseball including game play while ruling on lawfulness of unilateral trades for players).

12. See *id.* at 265 (explaining that Flood was not informed about trade until after it was made).

13. *Id.* at 288-89 (Marshall, J., dissenting) (discussing background of case).

14. See *id.* at 265-66 (describing Flood's complaint); see also *Curt Flood Facts – The Baseball Page*, <http://www.thebaseballpage.com/players/floodcu01.php> (last visited Oct. 31, 2009) (listing Curt Flood's statistics).

the team traded him – that is, assigned his contract – in which case the player would then be bound to the new club until a future unilateral trade.¹⁵

Flood acknowledged that professional baseball is a business engaged in interstate commerce, but held that Major League baseball's reserve system enjoyed an exemption from the federal antitrust laws unless Congress legislatively overruled prior decisions of the Court that had conferred the exemption.¹⁶ Even before presenting the facts of the case and proceeding to legal analysis, Justice Harry A. Blackmun's majority opinion opened with a reverential history of the "colorful days" of baseball, climaxed by a list of eighty-eight former Major League stars who "have sparked the diamond and its environs and . . . provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season."¹⁷ The page-long list closed with this solemn disclaimer: "These are names only from earlier years. By mentioning some, one risks unintended omission of others equally celebrated."¹⁸

Justice Blackmun's odyssey into baseball lore was an unabashed fan's pure dictum in a decision awaited not only by baseball fans, but also by fans of other sports that enjoyed no judicially-conferred antitrust exemption.¹⁹ *Flood's* visibility continued to grow when arbitrator Peter Seitz struck down baseball's reserve system in the 1975 *Andy Messersmith-Dave McNally* case, and four years later when Bob Woodward and Scott Armstrong's best-seller, *The Brethren*, offered a behind-the-scenes account of the Justices' deliberations leading to what the two authors called *Flood's* "ode to baseball."²⁰

So prominent an ode in so prominent a decision by the nation's highest court likely helped signal an expanded role for sports references in official judicial writing, not only in cases raising claims

15. See *Flood*, 407 U.S. at 259 n.1 (explaining reserve system and providing excerpts of Major League Rules). Trading a player was properly known as assigning a contract. See *id.* ("A club may assign to another club an existing contract with a player.").

16. See *id.* at 282 (stating that professional baseball is engaged in interstate commerce, but its reserve system is exempt from anti-trust law).

17. *Id.* at 261-63.

18. *Id.* at 263 n.3.

19. See *id.* at 282-83 ("With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. . . . Other professional sports operating interstate – football, boxing, basketball, and, presumably, hockey and golf – are not so exempt.").

20. See, e.g., JOHN HELYAR, LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL 151-70 (Ballantine Books 1994); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHERN: INSIDE THE SUPREME COURT 190 (Simon & Schuster 1979).

directly related to sports, but also in other cases, such as *Brigham City*, in which a sports reference might help a court explain salient points of law or fact.²¹ Lower court judges, after all, typically examine Supreme Court opinions in the advance sheets. *Flood* lent an aura of respectability to sports references that the Justices themselves and the lower courts have embraced in their official writing ever since.²²

Flood reached the United States Reports at a particularly opportune moment for cultivating this respectability. Since the early 1970s, judges have had greater reason than ever before to presume their readers' familiarity with a wide range of sports and their respective vocabularies. Today's judges, lawyers and litigants grew into adulthood amid an unprecedented saturation of professional and amateur sports in broadcasting, the print media and more recently, on the Internet. Newspapers, conventional radio, and network television now coexist with, and frequently face eclipse by, all-sports radio stations, cable and satellite television channels, interactive blogs, and other outlets that provide instantaneous around-the-clock access to sports, teams and star players. "[T]hrough their pervasive presence in the media," says the U.S. Court of Appeals for the Sixth Circuit, "sports . . . celebrities have come to symbolize certain ideas and values in our society and have become valuable means of expression in our culture."²³

For most Americans, immersion in (as the U.S. Court of Appeals for the Third Circuit put it) the nation's "sports-dominated culture" begins at a tender age.²⁴ Annually, almost half the nation's children, approximately 30 to 35 million, participate in at least one public or private organized sports program.²⁵ Nearly all children

21. For a further discussion of *Bingham City*, see *supra* notes 1-6 and accompanying text.

22. Thank you to Dean Jim Devine for suggesting this thought.

23. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 937-38 (6th Cir. 2003) (discussing First Amendment protections for use of golf star Tiger Woods's intellectual property).

24. See *Butts v. Nat'l Collegiate Athletic Ass'n*, 751 F.2d 609, 612 (3d Cir. 1984) (quoting Linda Green, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U. L.J. 101, 137 (1984)) ("Even if the college athlete does not reach the professional ranks, our sports-dominated culture often rewards outstanding college athletes in both tangible and intangible ways."); see also *Crane v. Ind. H.S. Athletic Ass'n*, 975 F.2d 1315, 1326 (7th Cir. 1992) (Posner, J., dissenting) (discussing "our sports-obsessed society").

25. See R.A. Demorest et al., *Pediatric Residency Education: Is Sports Medicine Getting Its Fair Share?*, 115 PEDIATRICS 28, 28-33 (2005) (explaining large number of children involved in sports leads to need for pediatricians' training in area of sports medicine); FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHILDREN IN BRIEF: KEY NATIONAL INDICATORS OF WELL-BEING xiv

have first-hand experience playing organized sports before they turn 18, and no other activity, outside the home or school reaches so many children from coast to coast.²⁶ Play continues beyond childhood and adolescence with so-called “carryover,” or “lifetime,” sports conducive to active participation throughout adulthood.²⁷ With influential public and private voices advocating the demonstrated health benefits of vigorous lifelong physical activity, sports today attracts not only adult spectators drawn to mass public entertainment, but also adult participants drawn to gymnasiums and playing fields nationwide.²⁸

Sports references ingrained in the national experience find a comfortable place in written judicial opinions because courts, like athletic competition, apply an adversary model that produces winners and losers in contests monitored by neutral decision-makers who apply established rules and procedures. Judges frequently invoke sports to illuminate core values inherent in the adversary system in the playing field or the court room, such as the “level playing field,” an ideal of fair play central to amateur and professional athletics and to the quest for equal justice under law.²⁹

Images of the level playing field in written judicial opinions produce corollary images similarly grounded in adherence to the rules of the game. Like officials who evenhandedly apply the rulebook to the particular circumstances of a ballpark or other

(2009), available at http://www.childstats.gov/pdf/ac2009/ac_09.pdf (providing statistical information about number of American children).

26. See Bari Katz Stryer, et al., *A Developmental Overview of Child and Youth Sports in Society*, 7 CHILD & ADOLESCENT PSYCHIATRY N. AM. (Sports Psychiatry) 697, 697 (1998) (reviewing children’s participation in sports); see also, *Having Fun Is a High Priority*, USA TODAY, Sept. 10, 1990, at 14C (estimating that only one in twenty children has played no organized sport).

27. See, e.g., U.S. DEP’T OF HEALTH AND HUMAN SERVS., HEALTHY PEOPLE 2000 55 (1991) (discussing physical activity level of Americans); ROBERT S. GOTLIN, DR. ROB’S GUIDE TO RAISING FIT KIDS 5-12 (DiaMedica 2008) (discussing physical activity level of Americans).

28. JULIE STURGEON & JANICE MEER, THE FIRST FIFTY YEARS 1956-2006: THE PRESIDENT’S COUNCIL ON PHYSICAL FITNESS AND SPORTS REVISITS ITS ROOTS AND CHARTS ITS FUTURE 56 (The President’s Council on Physical Fitness and Sports 2006), available at http://www.fitness.gov/resources/toolkit/the_first_fifty_years.pdf (discussing use of celebrities to advocate for President’s Council on Physical Fitness).

29. See, e.g., *Hawkins v. Budd Co.*, No. 86-674, 1987 U.S. Dist. LEXIS 3063, at *1 (E.D. Pa. 1987) (“Courts are generally reluctant to deny class-action certification in cases alleging racial discrimination in employment, if for no other reason than that class certification tends to provide a level playing field, given economic disparities.”); *Hug v. City of Omaha*, 749 N.W.2d 884, 892 (Neb. 2008) (Connolly, J., concurring) (“So, it has fallen on the courts to ensure that the citizens of this state can compete on a level playing field.”).

sports venue, the Supreme Court and lower courts alike frequently remind readers that judges apply procedural and substantive “ground rules.”³⁰ Similar to baseball players, litigants “may play ‘hard ball,’ but ‘foul ball’ is . . . totally unacceptable.”³¹ In civil and criminal proceedings alike, the lawyers’ lack of civility can degenerate unacceptably into “mud wrestling.”³² When sharp practice attempts an “end run” around a rule or obligation, the offending party or offending lawyer should be “thrown for a loss,”³³ the setback that sometimes happens in football to a ball carrier who seeks to evade tacklers by cutting a wide path around his own end. The parties’ arguments and conduct must remain “in bounds,”³⁴ be-

30. *See, e.g.*, *Jones v. Bock*, 549 U.S. 199, 213 (2007) (establishing “the usual procedural ground rules”); *Edwards v. Carpenter*, 529 U.S. 446, 454 (2000) (Breyer, J., concurring) (relaying “elementary ground rules”); *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 463 n.12 (1995) (discussing “United States internal law that sets the ground rules for exemptions [from federal taxation] accorded employees of foreign governments and international organizations”); *Waybright v. Frederick County*, 528 F.3d 199, 208 (4th Cir. 2008) (“Congress and the federal judiciary often set the ground rules for those claims in terms of scope. . . .”); *United States v. Foster*, 783 F.2d 1082, 1086 (D.C. Cir. 1986) (“To change the ground rules after the trial . . . would retroactively convert a thoroughly sensible trial tactic into a disastrous one.”); *Pac. & Sw. Annual Conference of United Methodist Church v. Super. Ct.*, 147 Cal. Rptr. 44, 53 (Ct. App. 1978) (stating trial judge “has broken a prime ground rule of the judge’s craft”).

31. *Commonwealth v. Thomas*, 692 N.E.2d 97, 103 (Mass. App. Ct. 1998) (Brown, J., dissenting in part); *see, e.g.*, *United States v. Weiss*, 599 F.2d 730, 739 (5th Cir. 1979) (discussing “the government’s hardball game” in its dealings with defendant); *First Interstate Bank, N.A. v. Serv. Stores of Am., Inc.*, 128 F.R.D. 679, 680-81 (W.D. Okla. 1989) (discussing “stereotypical attitudes about the lawyer who plays ‘hardball’ at any cost, and does precious little to promote the interests of the clients or integrity of the profession he has sworn to serve”).

32. *See Walker v. Packer*, 827 S.W.2d 833, 848 (Tex. 1992) (Gonzalez, J., concurring) (discussing contentious nature of discovery disputes).

33. *See, e.g.*, *Green v. Mansour*, 474 U.S. 64, 73 (1985) (stating that “declaratory judgment is not available when the result would be a ‘partial end run’ around” Court’s 1974 decision); *Maryland v. Macon*, 472 U.S. 463, 476 (1985) (Brennan, J., dissenting) (“the Court today sanctions an end run around constitutional requirements carefully crafted to guard our liberty of expression”); *Maryland v. Louisiana*, 451 U.S. 725, 765 (1981) (discussing temptation to attempt to persuade state to file suit in its name “to make an end run around the barriers” faced by private litigants); *Moore v. City of East Cleveland*, 431 U.S. 494, 525 (1977) (plurality opinion) (Burger, C.J., dissenting) (highlighting court decisions that “encourag[e] ‘end runs’ around the administrative process”); *United States v. Warford*, 791 F.2d 1519, 1523 (11th Cir. 1986) (explaining that government should have used state court rather than doing “end run in the federal court”); *United States v. Lanni*, 466 F.2d 1102, 1108 (3d Cir. 1972) (stating that appellants’ “end-run tactics might be suitable on a football field, but they are not persuasive in a court of law”); *Chappee v. Vose*, 843 F.2d 25, 33 n.5 (1st Cir. 1988) (“thus enabling the trial court more easily to bar the out-of-state lawyer’s continued participation in the trial when his procedural end run was thrown for a loss”).

34. *See, e.g.*, *Cleveland-Scott v. Hillside House Mgmt. Corp.*, 853 N.Y.S.2d 251, 254 (N.Y. Sup. Ct. 2008) (“the law recognizes that litigating parties and their lawyers need to be kept in bounds”); *State v. Hartfield*, 252 S.E.2d 139, 141 (S.C.

cause stepping “out of bounds” brings sanction in court, as it does on the playing field in many sports.³⁵

Part II of this article moves beyond these core values and surveys the broad array of sports whose references now helpfully lace substantive and procedural analysis in written opinions in the Supreme Court and the lower federal and state courts.³⁶ The sheer breadth reflects writer James A. Michener’s observation in 1976 that “[s]ports have become a major force in American life.”³⁷ Whether at the amateur or professional level, the term “sports” sometimes conjures images of mere fun and games inconsistent with formal legal writing, but any such images overlook the grip of professional and amateur athletics on contemporary American culture. “We devote more money and time to [sports] than we realize,” said Michener, and “[t]hey consume a major portion of our television programming, and our newspapers allocate tremendous space to their coverage.”³⁸

Part III discusses the balancing process that should guide judges who contemplate invoking sports references to help illuminate factual or legal analysis in their official writing.³⁹ One side of the scale finds a natural place for sports references that (like references carefully drawn from other fields) can advance judges’ communication with their readers, particularly when the references help the court explain and resolve complex issues of law or fact. Courts hold public authority to resolve society’s disputes presented

1979) (“[T]he judge should be meticulous to see that . . . evidence and argument, if presented, is kept in bounds and used only for relevant and proper purposes.”).

35. See, e.g., Rankin v. McPherson, 483 U.S. 378, 401 (1987) (Scalia, J., dissenting) (discussing constable’s entitlement to rule “particular speech out of bounds in [a] particular work environment”); United States v. Young, 470 U.S. 1, 13 (1985) (explaining “the practice of zealous counsel’s going ‘out of bounds’”); *Id.* at 28 (Brennan, J., dissenting) (saying Court castigates ‘going out of bounds’); Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 578 (1982) (Burger, C.J., concurring) (declaring court of appeals “went ‘out of bounds’” by writing dictum); United States v. Mespouledé, 597 F.2d 329, 335-36 (2d Cir. 1979) (“Where one jury has ‘necessarily determined’ that the defendant was innocent of participation in one deal, that transaction is out of bounds on retrial.”); United States v. Bell, 506 F.2d 207, 226 (D.C. Cir. 1974) (“The prosecutor’s statement . . . was improper, but we cannot believe that it was so far out of bounds that it could have corrupted the jury’s verdict.”); State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999) (describing prosecutor’s closing argument as “‘plainly out of bounds’ for calling defendant’s alibi witnesses ‘pack of liars’”).

36. For a further discussion of sports references in judicial opinions, see *infra* notes 44-220 and accompanying text.

37. JAMES A. MICHENER, SPORTS IN AMERICA 9 (Fawcett 1976).

38. *Id.*

39. For a further discussion on the balance judges must strike when referencing sports, see *infra* notes 235-287 and accompanying text.

to them, and “sports is a microcosm of American society”⁴⁰ with “a special significance in our culture.”⁴¹

The other side of the scale, however, cautions that in some circumstances, sports references in a written opinion may detract unacceptably from the prestige and dignity indispensable to the judicial role. As a threshold matter, a particular sports reference may not facilitate the communication of ideas. Judicial opinions speak first to the parties and their lawyers, and then to future courts and litigants, and academic and professional researchers; opinions on matters of social concern may also reach lay readers.⁴² Particularly where the contemplated reference concerns a relatively low-visibility sport, the reference might lie beyond the grasp of some anticipated readers and the judge should consider avoiding it entirely, or else providing necessary explanation unless meaning would emerge from context.

Even where a particular sports reference would impose no apparent barrier to the communication of ideas, however, the over-

40. KENNETH L. SHROPSHIRE, IN *BLACK AND WHITE: RACE AND SPORTS IN AMERICA* 16-19 (New York University Press 1996); see also BRIAN LAMPMAN, *Conclusion: Sport, Society, and Social Justice*, in *LEARNING CULTURE THROUGH SPORTS* 255, 257 (Sandra Spickard Prettyman & Brian Lampman eds., Rowman & Littlefield Education 2006) (calling sports “one of the most powerful social forces in our country”); Symposium, *Sports Law As a Reflection of Society’s Law and Values*, 38 S. TEX. L. REV. 999 (1997) (discussing prevalence of sports as American pastime); Stewart Macauley, *Images of Law In Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC’Y REV. 185, 204 (1987) (explaining how sports may affect everyday life and law).

41. *United States v. Shortt*, 485 F.3d 243, 250 (4th Cir. 2007) (highlighting effects steroid use by professional athletes has on youth and fans due to players’ status as role models).

42. Compare LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 42 (University of Chicago Press 1991) (stating that Supreme Court “can perform a deeply educative role in society, affecting behavior far beyond the strictly legal domain”), ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 58 (Harper 1948) (“The Supreme Court . . . is and must be one of our most effective teachers.”), and Bernard J. Ward, *The Federal Judges: Indispensable Teachers*, 61 TEX. L. REV. 43, 46 (1982) (declaring that judges are “the indispensable teachers of the American people,” conducting seminars “every day from the classrooms of [their] courtrooms”), with William H. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 PEPP. L. REV. 227, 227-28 (1980) (describing reasoning for some Supreme Court case law).

[T]he Supreme Court does not ‘teach’ in the normal sense of that word at all. In many cases we hand down decisions which we believe are required by some Act of Congress or some provision of the Constitution for which we, as citizens, might have very little sympathy and would not choose to make a rule of law if it were left solely to us.

Id. See generally James B. White, *Special Issue: Judicial Opinion Writing*, 62 U. CHI. L. REV. 1363, 1363-69 (1995) (discussing how judicial opinions can be written different ways which will create different interpretations without changing each decision’s conclusion).

arching concern of the ABA Model Code of Judicial Conduct for maintaining the prestige and dignity of judicial office sometimes counsels restrained use of sports references in official judicial writing.⁴³ Civil and criminal litigation remains serious business for parties and the fabric of the law, sometimes too serious for sports references. Courtroom proceedings may raise the prospect of millions of dollars won and lost, sundered intimate relationships, or state-imposed loss of life or liberty. Images of sports as mere fun and games indeed seem misplaced in contemporary American culture, but a sports reference nonetheless remains incompatible with litigation's high stakes, and thus at potential loggerheads with judicial prestige and dignity, when reasonable readers would conclude that the court invoked it primarily for the judge's own personal pleasure and not to facilitate communication and enhance the readers' understanding. The calculus remains unchanged even where the court believes that relationships with the lawyers or parties during a lengthy proceeding might justify a measure of written informality; published opinions become part of the public record, readily accessible to litigants, lawyers and other readers not privy to such relationships.

II. SPORTS REFERENCES IN JUDICIAL OPINIONS

In the Supreme Court and the lower federal and state courts alike, the range of sports references that have found their way into judicial opinions since the early 1970s is nearly as broad as the kaleidoscope of sports that captivate so many Americans.

A. The Supreme Court

Chief Justice Roberts' analogy to boxing and ice hockey in *Brigham City* demonstrates the growing comfort with sports references that has marked Supreme Court opinion writing since the early

43. See MODEL RULES OF JUDICIAL CONDUCT R. 1.3 (2004) ("A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."). Sports references can help courts explain and resolve complexity, but may also implicate Rule 1.3 of the Model Code of Judicial Conduct by detracting unacceptably from the prestige indispensable to the judicial role. See *id.*

1970s.⁴⁴ In *Engquist v. Oregon Dep't of Agriculture*⁴⁵ in 2008, golf helped the Court, whose opinion was again written by Chief Justice Roberts, reject the employment discrimination claim on the ground that “treating seemingly similarly situated individuals differently in the employment context is par for the course.”⁴⁶ In *Metropolitan Life Insurance Co. v. Glenn* a week later, Justice Stephen G. Breyer’s majority opinion specified that a product “falls below par” when it fails to meet expectations.⁴⁷

In 2007, *Morse v. Frederick* rejected a First Amendment free speech challenge to a high school principal’s suspension of a student who unfurled a banner (“BONG HiTS 4 JESUS”) at a school-sponsored and school-supervised event on a public street near the campus.⁴⁸ The Court found that the principal had reasonably concluded that the banner advocated illicit drug use.⁴⁹ Football accented Justice John Paul Stevens’ dissenting argument that the

44. See *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006) (drawing distinction between role of police and that of boxing or hockey referee); see also *United States v. Oakland Cannabis Buying Coop.*, 532 U.S. 483, 491 n.4 (2001) (“we decline to set the bar so high”); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999) (“throw-in-the-towel approach”); *Comm’r of Internal Revenue v. Estate of Hubert*, 520 U.S. 93, 128-29 (1997) (Scalia, J., dissenting) (explaining alternative reading of provision would leave Court and parties “without any hint as to what might be a ‘ballpark’ figure”); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (stating that initial warnings given to defendant “touched all the bases required by *Miranda*”); *Perry v. Leeke*, 488 U.S. 272, 282 (1989) (holding that trial court’s order directing accused not to consult his attorney during fifteen minute afternoon recess, called while accused was on witness stand, did not violate Sixth Amendment right to counsel; majority reasoned that permitting consultation would enable defense counsel to coach witness before cross-examination, perhaps depriving prosecutors of opportunity to “punch holes” in defendant’s testimony; dissenting Justice Marshall argued that holding would help assure that “the prosecutor would be more likely to face the punch-drunk witness who the majority thinks contributes to the search for truth.”); *Lehr v. Robertson*, 463 U.S. 248, 253 (1983) (saying trial court had not “dropped the ball” by approving adoption of two-year-old girl without consent from her unwed father, who had never supported her and had rarely seen her); *Texas v. New Mexico*, 462 U.S. 554, 557-58 (1983) (discussing twenty years of “false starts” before two states began negotiating compact); *Lockett v. Ohio*, 438 U.S. 586, 632 (1978) (Rehnquist, J., concurring in part and dissenting in part) (“I am . . . uncertain whether today’s opinion represents the seminal case . . . , or whether instead it represents the third false start . . . within the past six years.”); *Heutsche v. United States*, 414 U.S. 898, 899 (1973) (Douglas, J., dissenting from denial of application for bail) (“ringside seat”).

45. 128 S. Ct. 2146 (2008).

46. *Id.* at 2148.

47. 128 S. Ct. 2343, 2349 (2008).

48. 551 U.S. 393, 410 (2007) (holding that “the First Amendment does not require schools to tolerate at school events student expression that contributes to [dangers of illegal drug use]”).

49. See *id.* at 407-08 (explaining prevalence of drug use in school and priority of schools educating students about drug use).

Court's precedents also required proof that the student's conduct interfered with the school's educational mission.⁵⁰ "[I]nstead of demanding that the school make such a showing," wrote Justice Stevens for himself and Justices Souter and Ginsburg, "the Court punts," and thus avoids confronting a difficulty, much like a football team avoids disadvantageous field position by kicking the ball downfield and yielding possession to the opposition.⁵¹

In *Federal Election Commission v. Wisconsin Right to Life, Inc.* ("WRL")⁵² in 2007, the Court held that as applied, the Bipartisan Campaign Reform Act's ban on use of corporate funds to finance "electioneering communications" during pre-federal-election periods violated WRL's free speech rights.⁵³ The decision turned on whether WRL's advertising constituted campaign advocacy, within the ban, or issue advocacy, outside the ban.⁵⁴ Chief Justice Roberts found the question close, but concluded that WRL was entitled to the advantage that base runners enjoy on a close play in baseball: "Where the First Amendment is implicated, the tie goes to the speaker, not the censor."⁵⁵

In *Randall v. Sorrell* in 2006, the Court held that two Vermont statutory provisions – one limiting amounts that candidates for state office could spend on their own campaigns, and the other limiting campaign contributions by other entities – violated the First Amendment's free speech guarantee.⁵⁶ A central issue in the lower courts was whether the state legislature sought to help insulate incumbents from effective opposition at the polls.⁵⁷ In a footnote punctuated by a basketball term for an easy offensive score that overpowers the opposition, dissenting Justice Stevens cited district court findings in an unrelated case that no Albuquerque, New Mexico mayor had been reelected in the twenty-five years since that city set campaign spending limits.⁵⁸ The uninterrupted pattern of de-

50. *See id.* at 441 ("Figuring out just how it punts is tricky.").

51. *Id.*

52. 551 U.S. 449 (2007).

53. *See id.* at 476.

54. *See id.* at 465 ("The only question, then, is whether it is consistent with the First Amendment for [the ban] prohibit WRL from running [the advertisements at issue].").

55. *See id.* at 474 (discussing standard for First Amendment protection of WLA's advertisements).

56. *See* 548 U.S. 230, 237-38, 262 (2006) (describing statute and explaining acts' burden on First Amendment rights is disproportionate to public interest).

57. *See id.* at 279 (Stevens, J., dissenting) (arguing that acts are not "fronts for incumbency protection").

58. *See id.* at 280 n.4 (Stevens, J., dissenting).

feat, he wrote, “cuts against the view that there is a slam-dunk correlation between expenditure limits and incumbent advantage.”⁵⁹

In 1994, *NLRB v. Health & Care and Retirement Corp. of America* held that under the National Labor Relations Act, the company’s nurses were not “employees” with the right to organize and engage in collective bargaining, but rather were “supervisors” who directed the work of aides.⁶⁰ Justice Ruth Bader Ginsburg, dissenting, concluded that the nurses spent little time directing aides, but, like baseball or softball players who bat in a teammate’s place, would “pinch-hit for aides” when necessary to assure proper patient care.⁶¹

The Justices sparred about boxing in a 1992 decision, *R.A.V. v. City of St. Paul*, which struck down a city hate-crime ordinance that prohibited display of a symbol that “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”⁶² The majority found impermissible viewpoint discrimination because speakers favoring tolerance in the five specified matters would be treated differently than their opponents. “St. Paul has no such authority,” wrote Justice Antonin Scalia, “to license one side a debate to fight freestyle, while requiring the other the other to follow Marquis of Queensberry rules”⁶³ – the basic rules of boxing published in 1867 by John Graham Chambers under the sponsorship of John Sholto Douglas, the Marquis of Queensbury. Concurring Justice Stevens found no viewpoint discrimination because, “[t]o extend the Court’s pugilistic metaphor, the St. Paul ordinance simply bans punches ‘below the belt’ – *by either party*,” that is, blows outside the rules because they confer unfair advantage by striking at particular vulnerability.⁶⁴

59. *Id.*

60. See 511 U.S. 571, 584 (1994) (holding that National Labor Relations Board’s test for determining whether nurses are supervisors is inconsistent with National Labor Relations Act).

61. *Id.* at 593 (Ginsburg, J., dissenting) (“[the nurses] pinch-hit for aides in ‘bathing, feeding or dressing residents,’ and ‘handled incoming telephone calls from physicians and from relatives of residents who wanted information about a resident’s condition.’”); see also *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (rejecting defendant’s contention that, in addition to four standard *Miranda* warnings, Fifth Amendment required officers to advise him that he had been in custody when he made un-coerced remarks before receiving warnings). Justice Sandra Day O’Connor’s majority opinion said that “[p]olice officers are ill-equipped to pinch-hit for counsel.” *Id.* at 316.

62. 505 U.S. 377, 380-31 (1992) (describing statute and holding it to be unconstitutional on its face).

63. *Id.* at 392.

64. *Id.* at 435 (Stevens, J., concurring) (emphasis in original).

In *Peretz v. United States*, decided in 1991, the Court held that the Federal Magistrates Act authorizes the district court to permit magistrate judges to conduct *voir dire* in felony cases with the litigants' consent.⁶⁵ The majority distinguished a prior decision of the Court, which had withheld this authority where the parties had not consented.⁶⁶ Writing on behalf of himself, as well as Justices White and Blackmun, dissenting Justice Thurgood Marshall argued that the prior decision depended on construction of the Act and not on absence of consent, and he accused the majority of "an amazing display of interpretive gymnastics" to peg the outcome on a defendant's consent.⁶⁷ Since *Peretz*, the Justices have drawn analogies to "gymnastics," a sport marked by skillful bodily contortions, in more than a dozen decisions.⁶⁸

Jones v. Thomas, decided in 1989, arose from a Missouri prosecution for felony-murder and attempted robbery.⁶⁹ After it became apparent that the trial court had imposed two consecutive sentences where state law permitted only one, a state court vacated the shorter sentence, which the defendant had already served, and credited time already served against the longer sentence.⁷⁰ By a 5-4 vote, the Court held in *Jones* that the procedure "fully vindicated" the defendant's Fifth Amendment double jeopardy rights because the defendant did not suffer greater punishment than the legislature intended.⁷¹ Justice Scalia's dissent likened the majority's rationale to excusing a batter's failure in baseball: "A technical rule with

65. See *Peretz v. United States*, 501 U.S. 923, 932 (1991) ("The considerations that led to our holding [that Magistrates may not conduct *voir dire* over defendant's objections] do not lead to the conclusion that a magistrate's "additional duties" may not include supervision of jury selection when the defendant has consented."); 28 U.S.C. § 636 (2006).

66. See *Peretz*, 501 U.S. at 932 ("The considerations that led to our holding in [*Gomez v. United States* that Magistrates may not conduct *voir dire* over defendant's objections] do not lead to the conclusion that a magistrate's 'additional duties' may not include supervision of jury selection when the defendant has consented."); see also *Gomez v. United States*, 490 U.S. 858, 876 (1989) (holding that it is not harmless error when Magistrates select juries in criminal trials over defendants' objections).

67. See *Peretz*, 501 U.S. at 940-41 (Marshall, J., dissenting).

68. See, e.g., *Dada v. Mukasey*, 128 S. Ct. 2307, 2325 (2008) (Scalia, J., dissenting) ("interpretive gymnastics"); *Bryan v. United States*, 524 U.S. 184, 203 (1998) (Scalia, J., dissenting) ("mental gymnastics"); *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 631 (1992) (White, J., concurring in part and dissenting in part) ("analytic gymnastics").

69. See *Jonas v. Thomas*, 491 U.S. 376, 378 (1989) (discussing facts of case).

70. See *id.* at 379 (reviewing procedural history of case).

71. *Id.* at 381-82.

equitable exceptions is no rule at all. Three strikes is out. The state broke the rules here, and must abide by the result.”⁷²

In *Owen v. City of Independence*, decided in 1980, the Court held that municipalities sued under 42 U.S.C. § 1983 for violating federally protected rights may not claim qualified good faith immunity from liability.⁷³ To bolster his argument that strict liability would unreasonably subject local governments to damages for conduct that was reasonable when performed, dissenting Justice Lewis F. Powell, Jr., joined by Chief Justice Burger and Justices Stewart and Rehnquist, evoked images of the circuitous route characteristic of some downhill skiing events.⁷⁴ Strict liability, he wrote, “converts municipal governance into a hazardous slalom through constitutional obstacles that often are unknown and unknowable.”⁷⁵

In 1978, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, football helped explain the Court’s holding that the Administrative Procedure Act’s notice-and-comment formula “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.”⁷⁶ Writing for the majority, Justice William H. Rehnquist noted that the court of appeals had imposed greater procedures only after reviewing the record of the Vermont Yankee rulemaking proceeding itself, which he said permitted “Monday morning quarterbacking,” the second-guessing that happens when a writer or fan questions athletic strategy or decision-making from the relative comfort of hindsight.⁷⁷

In *United States v. Little Lake Misere Land Co.*, which in 1973 began a post-*Flood* embrace of sports references in its official writing, the Court held that Louisiana state legislation did not affect later acquisitions of land made by the United States under the federal Migratory Bird Conservation Act.⁷⁸ Chief Justice Warren E. Burger’s majority opinion recited that the lawsuit proceeded to conclusion in the federal courts, but only after the company first filed in

72. *Id.* at 396 (Scalia, J., dissenting).

73. *See* 445 U.S. 622, 657 (1980).

74. *See id.* at 665 (Powell, J., dissenting).

75. *Id.*

76. 435 U.S. 519, 524 (1978) (holding that Administrative Procedure Act’s notice-and-comment formula generally “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures”).

77. *Id.* at 547 (discussing organizational rulemaking procedures in context of hindsight).

78. *See*, 412 U.S. 580, 604 (1973) (outlining parameters of 16 U.S.C. §§ 715(a)-(s) in relation to Louisiana state law).

the Louisiana courts, and thus, like a track runner who leaves the block before the starting gun sounds, committed a “false start.”⁷⁹

B. The Lower Courts

Lower federal and state court opinions invoke a wide range of references drawn from sports that help shape American culture. Some of these references are ones which also appeared in the Supreme Court decisions described above.⁸⁰ With their significantly larger caseloads, however, lower courts also have occasion to use references that have not yet appeared in the United States Reports.

1. *Football*

A 2009 Harris Interactive survey found that professional football remains America’s favorite sport; thirty-one percent of Americans who follow one or more sports ranked professional football at the top.⁸¹ In *Cabell Huntington Hospital, Inc. v. Shalala*, the U.S. Court of Appeals for the Fourth Circuit plumbed this widespread popularity when it held that the U.S. Secretary of Health and Human Services had improperly calculated disproportionate-share payments under the Medicare statute.⁸² The key section distinguished between patients who were “eligible” for Medicaid benefits and patients who were “entitled” to them; the Secretary contended that the terms were interchangeable.⁸³ The court of appeals rejected the contention.⁸⁴ “In a football game,” explained Judge J. Harvie Wilkinson III, “wide receivers are *eligible* to receive the ball from the quarterback, but none of them is *entitled* to receive it.”⁸⁵

79. *Id.* at 587.

80. *See, e.g.*, *Riues v. Quarterman*, 522 F.3d 517, 532 (5th Cir. 2008 (“slam dunk”)); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1175 (11th Cir. 2006) (“tie goes to the runner”); *Hennessey v. City of Melrose*, 194 F.3d 237, 243 (1st Cir. 1999) (“pinch hit”); *Fuhrman v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993) (“Monday Morning Quarterbacking”); *Polaroid Corp. v. Eastman Kodak Corp.*, 641 F. Supp. 828, 872 (D. Mass. 1985) (“slalom”).

81. *See* HARRIS INTERACTIVE, PROFESSIONAL FOOTBALL CONTINUES DOMINANCE OVER BASEBALL AS AMERICA’S FAVORITE SPORT 3 (2009), *available at* http://www.harrisinteractive.com/harris_poll/pubs/Harris_Poll_2009_01_27.pdf.

82. *See* 101 F.3d 984, 991 (4th Cir. 1996) (affirming district court ruling).

83. *Id.* at 987-88 (distinguishing provisions 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I)-(II) (2003)).

84. *Id.* at 988 (“We cannot endorse the Secretary’s reading. To do so, we would have to violate both a clear canon of statutory construction, and the plain meaning of the two terms.”).

85. *Id.* (emphasis by court).

Other judicial opinions describe counsel's litigation strategy (like a football coach's strategy) as the "game plan,"⁸⁶ which may be found in a "playbook."⁸⁷ Parties may engage in pretrial "scrimmaging," a term referring to practice games, usually in amateur leagues, that do not count in league standings in football and other sports.⁸⁸ When opposing parties stake out their respective positions, they, like the offensive and defensive units of opposing football teams, assume positions at the "line of scrimmage."⁸⁹ Similar to a running back or pass receiver when the quarterback turns to him, a party or its representative who takes the initiative on a matter "carries the ball," even while others may "sit on the sidelines."⁹⁰

86. *See, e.g.*, *Reynolds v. Giuliani*, 506 F.3d 183, 209 (2d Cir. 2007) (Wallace, J., concurring) ("[T]here is no reason to remand and allow appellees to start over with a new game plan."); *Gomes v. Hameed*, 184 P.3d 479, 493 n.11 (Opala, J., dissenting) (Okla. 2008) ("new liability for those professionals who fail to submit for judicial approval every component of their litigation game plan"); *People v. Alleyne*, 98 Cal. Rptr.2d 737, 739 (Ct. App. 2000) ("Alleyne's game plan went awry"); *Gen. Elec. Co. v. U.S. Nuclear Reg. Comm'n*, 750 F.2d 1394, 1403 (D.C. Cir. 1984) (discussing party's "game plan" for improving its nuclear reactors); *Herrrell v. Maddux*, 535 P.2d 935, 938 (Kan. 1975) ("A careful lawyer . . . works out a 'game plan' and any attempt to counteract a new issue dragged into the case at the eleventh hour may well work to his disadvantage.").

87. *See, e.g.*, *Nosik v. Singe*, 40 F.3d 592, 597 (2d Cir. 1994) ("[B]ut prevents prosecutors from effectively stealing Nosik's playbook."); *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396, 422 (E.D. Va. 2004) ("[T]he analogy to a playbook is quite apt in this instance and [the defendant] came into possession of that playbook."); *DMG, Inc. v. Aegis Corp.*, 1984 Del. Ch. LEXIS 597, at *11 (Del. Ch. 1984) ("The parties have got things turned around. The offense is attempting to score with a defensive maneuver while the defense has dug in with a basic play taken from the playbook of the offense. It is little wonder that this portion of the game is difficult to follow.").

88. *See, e.g.*, *Dayton Power & Light Co. v. Deagle-Anderson Dev., Inc.*, 1993 WL 333651, at *2 (Ohio 2d Dist. Ct. App. 1993) ("After some preliminary procedural scrimmaging between the parties, which is of no moment here, appellant Gary Anderson filed an answer . . ."); *State v. Griffin*, 392 A.2d 681, 682 (N.J. Super. Ct. 1978) ("the scrimmage between the defense counsel and the prosecutor").

89. *See, e.g.*, *Posadas de Puerto Rico Assocs. v. NLRB*, 243 F.3d 87, 93 (1st Cir. 2001) ("would effectively place the unit employees 'behind the line of scrimmage'"); *Huffman v. Koppers Co.*, 616 A.2d 451, 457 (Md. Ct. Spec. App. 1992) ("Rather, the Claimant was merely on the other side of the line of scrimmage . . .").

90. *See, e.g.*, *Lear Siegler, Inc. v. Lehman*, 893 F.2d 205, 208 (9th Cir. 1989) ("[L]et the Senate carry the ball on the constitutionality issue."); *Corporacion Insular de Seguros v. Garcia*, 680 F. Supp. 476, 479 (D.P.R. 1988) (mentioning case that "appears to condone that the first court to carry the ball and run with it the fastest should not be blocked by the other jurisdiction and thus be the one to score in the adjudication of cases"); *Whitehouse Invest., Ltd v. Bernstein*, 51 F.R.D. 163, 167 n.12 (S.D.N.Y. 1970) (noting awarding costs and attorney's fees to defense counsel who "carried the ball" throughout proceedings); *Benedict v. Ark. Dep't of Human Servs.*, 242 S.W.3d 305, 319 (Ark. Ct. App. 2006) ("counsel for DHS stood on the sideline while the ad litem carried the ball").

On appellate review, football analogies can help sculpt the contours of permissible trial court discretion. The U.S. Court of Appeals for the Third Circuit has said that “trial judges are somewhat like quarterbacks in that they have a broad range of options for their game plan, and the losing party is not entitled to a new trial even when the trial judge’s ruling approaches the maximum latitude of the rules.”⁹¹ Appellate courts grant particular deference to trial court fact-finding because “absent an evidential vacuum or clear error, the final judgment . . . must come from the judicial gridiron, and not from armchair quarterbacks’ reading of the game in Sunday’s paper.”⁹² More specifically, when the trial court rules on whether to admit assertedly cumulative evidence, the court must decide whether the proffered evidence would aid the jury, or else whether “in the parlance of the gridiron, [it] will just be piling on,” akin to a late tackle on an opposing ball carrier who has already been brought down.⁹³

Like a desperate quarterback who seeks a seemingly miraculous victory by throwing a long pass to a teammate heavily covered near or beyond the goal line in the waning seconds, a party seeking to avoid impending defeat near the end of a legal proceeding may throw a “Hail Mary pass” by advancing a contention or argument whose success appears unlikely but not impossible.⁹⁴ Uncertainty late in the legal proceeding may presage “sudden death overtime,” the period played when teams remain tied at the end of regulation time in football and other sports; “death” is “sudden” because the first team to score and break the tie wins.⁹⁵ When the court enters

91. *Heyl & Patterson Int’l, Inc. v. F.D. Rich Hous. of the V.I., Inc.*, 663 F.2d 419, 426-27 (3d Cir. 1981) (holding that trial judge did not abuse discretion).

92. *Bel v. United States*, 452 F.2d 683, 688 (5th Cir. 1971); *see, e.g.*, *Wilson v. IBM*, 323 F. Supp. 2d 370, 374 (N.D.N.Y. 2004) (“This Court’s function is not to armchair quarterback business decisions. . . .”); *State v. Lane*, 671 N.E.2d 272, 278 (Ohio Ct. App. 1995) (“It is much easier to sit back as an ‘armchair quarterback’ and pick apart counsel’s trial strategy after a defeat than to formulate and execute such strategy in the face of all of the factors that enter a trial.”).

93. *United States v. Nektalov*, 461 F.3d 309, 318 (2d Cir. 2006).

94. *See, e.g.*, *Global Naps, Inc. v. Verizon New Eng., Inc.*, 505 F.3d 43, 48 (1st Cir. 2007) (saying adoption of agreement “looks like a Hail Mary pass”); *McMorris v. TJX Cos.*, 493 F. Supp. 2d 158, 166 (D. Mass. 2007) (“[T]he arguments here presented are something of a Hail Mary pass.”); *In re Lionel Corp.*, 722 F.2d 1063, 1072 (2d Cir. 1983) (Winter, J., dissenting) (“The courts below were quite right in not treating their arguments seriously for they are the legal equivalent of the ‘Hail Mary pass’ in football.”); *United States v. Ortiz-Miranda*, 931 F. Supp. 85, 92 (D.P.R. 1996) (calling defense counsel’s request for new trial “a strategic ‘Hail Mary’”).

95. *See, e.g.*, *Lampasas v. Spring Ctr. Inc.*, 988 S.W.2d 428, 437 (Tex. Ct. App. 1999) (“Like sudden death overtime, the last pleading filed would win.”).

final judgment in a party's favor, "[a] win, whether by four touchdowns or a last second field goal, is a win."⁹⁶

2. *Baseball*

a. The Rules and Conduct of the Game

"The one constant through all the years," said James Earl Jones ("Terence Mann") in the 1989 movie classic, *Field of Dreams*,

"has been baseball. America has rolled by like an army of steamrollers. It's been erased like a blackboard, rebuilt, and erased again. But baseball has marked the time. This . . . game: it's a part of our past It reminds us of all that once was good, and that could be again."⁹⁷ From this profound national heritage, judges "often draw on baseball analogies."⁹⁸

The duel between pitcher and batter provides a rich lode. For example, in *Hoskins v. Wainwright*, the U.S. Court of Appeals for the Fifth Circuit granted the prisoner's habeas corpus petition after two prior hearings.⁹⁹ "We step back into the batter's box, having allowed one to go by us and tipping another, in hopes that on our third and final swing we can avoid a judicial strike-out."¹⁰⁰

When an individual or entity, such as a labor union representing a member in accordance with the duty of fair representation, helps another person, the individual or entity "goes to bat for" the

96. *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706, 714 (5th Cir. 1986) (Brown, J., dissenting).

97. Internet Movie Database — Memorable Quotes for *Field of Dreams*, <http://www.imdb.com/title/tt0097351/quotes> (last visited Oct. 31, 2009).

98. *State v. Eason*, 629 N.W.2d 625, 661 (Wis. 2001) (Prosser, J., dissenting) ("We often draw on baseball analogies to explain American life. In baseball, a player who fails to touch all the bases is not permitted to score. In fact, the player is out. There is no good faith exception for failing to touch third base. The officer and the magistrate should have touched third base."). See generally, e.g., Paul Finkelman, *Baseball and the Rule of Law Revisited*, 25 T. JEFFERSON L. REV. 17, 29 (2002) ("The internal dynamics of baseball have led many scholars to use the game as a metaphor for the legal world."); Douglas O. Linder, *Strict Construction and the Strike Zone*, 56 UMKC L. REV. 117 (1987) (discussing strict construction principals of certain umpires as to strike zone has prevented it from moving through interpretation); Michael J. Yelnosky, *If You Write It, (S)He Will Come: Judicial Opinions, Metaphors, Baseball, and the Sex Stuff*, 28 CONN. L. REV. 813 (1996); Margaret Robb, *Running Bases, Winning Cases: Why the Grand Old Game of Baseball is Much Like the Legal Profession*, 82 A.B.A. J. 140 (Aug. 1996).

99. 485 F.2d 1186, 1188 (5th Cir. 1973) (holding that defendant was deprived of Sixth Amendment right to fair trial).

100. *Id.* at 1187.

person.¹⁰¹ A party that takes the initiative “steps up to the plate,” as a batter does when he gets ready to face the pitcher.¹⁰² A party that suffers a default judgment without having received constitutionally adequate notice is “called out on strikes without ever being allowed a turn at bat.”¹⁰³ When a party fails to satisfy a threshold requirement for relief, the party fails to “get out of the batter’s box”¹⁰⁴ or else to reach “first base.”¹⁰⁵

When parties or witnesses advance confusing or unexpected facts or arguments, they may throw a “curve ball” similar to the pitch designed to confuse a batter with its deceptive approach to the plate.¹⁰⁶ Parties showing apparent restraint may “bunt,”¹⁰⁷ but

101. *See, e.g., Vincent v. United Aerospace Workers*, 63 Fed. Appx. 919, 920 (7th Cir. 2003) (“[Plaintiff’s] union went to bat for him, obtained his reinstatement after the suspension, and filed a grievance about the firing.”); *San Francisco County Democratic Ctr. Comm. v. March Fong Eu*, 826 F.2d 814, 831 (9th Cir. 1987) (“[A]lthough a state’s interest in orderly elections allows it to impose reasonable, non-discriminatory restrictions on ballot access, a state may not go to bat for political parties to assure that they remain ballot-qualified.”); *Idaho State Tax Comm’n v. Staker*, 663 P.2d 270, 275-76 (Idaho 1982) (Bistline, J., dissenting) (stating six counties “have gone to bat” for taxpayers by filing suit to compel equal assessment of properties).

102. *See, e.g., Ellis v. United States Dist. Ct.*, 356 F.3d 1198, 1229 (9th Cir. 2004) (“[The prosecutor] never stepped up to the plate and moved to dismiss the first-degree murder indictment.”); *Doe v. Ariz. Dep’t of Educ.*, 111 F.3d 678, 680 (9th Cir. 1997) (“[T]he [Arizona Department of Education] stepped up to the plate after the action was filed. . .”).

103. *Birden v. Romaniello*, 1987 WL 348964, at *1 (Conn. 1987); *see also, Linton v. Mo. Veterinary Med. Bd.*, 988 S.W.2d 513, 520 (Mo. 1999) (Wolff, J., dissenting) (“[E]ven in baseball, a batter is allowed more than three swings because a foul ball, which normally counts as a strike, does not count when it occurs on the third strike.”).

104. *See, e.g., Hall v. Canal Ins. Co.*, 392 S.E.2d 340, 342 (Ga. Ct. App. 1990) (Beasley, J., concurring) (“Thus [Plaintiff] does not even get out of the batter’s box in his quest for legal costs and there is no need to consider calls on other balls thrown.”).

105. *See, e.g., Holland v. State*, 713 A.2d 364, 370 (Md. Ct. Spec. App. 1998) (“[T]o touch first base by way of showing that the statement was hearsay in the first instance[.]”).

106. *See, e.g., Local 879, Allied Indus. Workers of Am., AFL-CIO v. Chrysler Marine Corp.*, 819 F.2d 786, 798 (7th Cir. 1987) (Coffey, J., dissenting) (“The Majority’s unwarranted intercession on behalf of the union throws another financial curve ball at American industry which is currently struggling for survival against foreign competition—competition unhindered by the imposition of ridiculous severance pay awards in foreign countries such as that invented by the arbitrator in this case and accepted by the Majority at a cost of over \$1.3 million to Chrysler.”); *Bandoni v. State*, 715 A.2d 580, 608 n.34 (R.I. 1998) (depicting “constitutional curve ball” thrown at Bandoni); *Teachers’ Ret. Sys. v. Adinoff*, 900 A.2d 654, 669-70 (Del. Ch. 2006) (asserting “conflicted insider gets no credit for bending a curve ball past a group of uncurious Georges who fail to take the time to understand the nature of the conflict transactions at issue”).

107. *See, e.g., GTE Cal., Inc. v. FCC*, 39 F.3d 940, 949 (9th Cir. 1994) (Noonan, J., dissenting) (saying “to exercise discretion is to turn the requirement of the ex-

parties seeking immediate advantage with strong claims or defenses “swing for the fences,” like their baseball counterparts trying to hit a home run.¹⁰⁸ An experienced police officer may perceive a casual street encounter as a drug transaction, “just as a trained observer on the baseball diamond might be able to point out the bunt sign among an array of otherwise meaningless scratches and touches by the third base coach.”¹⁰⁹

Where a party lacks standing, the court dismisses the action because “[t]o score a home run the plaintiff must first have touched first base.”¹¹⁰ To show a substantial likelihood of success on the merits, a necessary element to establish entitlement to a preliminary injunction, the movant “need not establish that he can hit a home run, only that he can get on base, with a possibility of scoring later.”¹¹¹ A party that enjoys overwhelming success before settlement or final judgment is akin to a batter who hits a “home run”¹¹² or a “grand slam”¹¹³ with the bases loaded, or to a pitcher

haustion of administrative remedies into a game of bunts and sacrifice plays”); *In re Smith*, 2007 WL 1406913, at *4 (Bankr. E.D. Ky. 2007) (contrasting bankruptcy trustee’s counsel’s “grand slam” to estate’s “bunt” sound counsel’s full fee application be approved).

108. *See, e.g., In re Smith*, 2007 WL 1406913, at *4 (“Accepting employment on a contingent basis may result in situations where counsel sometimes hits a home run and at other times just dribbles the ball down the first base line.”); *Wash.-Baltimore Newspaper Guild v. Wash. Post*, 959 F.2d 288, 290-91 (D.C. Cir. 1992) (discussing plaintiff “swinging for the fences” by bringing broader, rather than narrower, claims concerning arbitration); *Allgood v. Gen. Motors Corp.*, 2007 WL 647496, at *6 (S.D. Ind. 2007) (using phrase “swing for the fences” regarding plaintiff’s large recovery demands).

109. *United States v. Johnson*, 488 F.3d 690, 698 (6th Cir. 2007); *see also United States v. Merritt*, 1997 WL 297490, at *4 (4th Cir. 1997) (“[C]heats and swindlers who go down swinging for the bleachers ought to be punished more severely than those who bunt foul on the third strike.”).

110. *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 145 (9th Cir. 1989).

111. *Schiavo v. Schiavo*, 403 F.3d 1223, 1241 (11th Cir. 2005) (Wilson, J., dissenting).

112. *See, e.g., LaGrasta v. First Union Sec., Inc.*, 358 F.3d 840, 848 (11th Cir. 2004) (equating good investments to home runs); *Aquilla v. Wash. Gas Res. Corp.*, No. RWT 02-3138, 2006 WL 2130639, at *2 (D. Md. July 21, 2006) (analogizing large jury verdicts to “legal home run”); *Dodson Int’l Parts, Inc. v. Hiatt*, No. 02-4042, 2004 WL 3037964, at *1 (D. Kan. Dec. 30, year) (“The court will not permit the defendants to take another crack at hitting a summary judgment home run with the trial scheduled to commence next month.”); *United States v. Bush*, No. IP 91-806-C, 1992 U.S. Dist. LEXIS 15634, at *40 (S.D. Ind. Sept. 23, 1992) (providing sports reference to explain that in filing last-minute requests for admission, lawyer “sought to hit a home run with two outs in the ninth”).

113. *Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1308 n.22 (11th Cir. 2008) (“The district court found that all four of the statutory factors favored defendants and concluded that defendants had “hit a grand slam on the fair use playing field.”); *Barrett v. Catacombs Press*, 64 F. Supp.

who pitches a “perfect game”¹¹⁴ by retiring all twenty-seven batters without allowing any to reach base.

Baseball’s fundamentals and rules also find their way into judicial opinions. When parties and the court focus on the facts and claims, for example, they keep their “eyes on the ball,” an offensive and defensive fundamental in baseball and several other sports.¹¹⁵ When parties select among reasonable alternatives, they execute a “fielder’s choice”; this is similar to the option enjoyed by the defensive team, which with one or more players on base, may get an out at any base to which an offensive player seeks to advance.¹¹⁶ A judicially-created rule that shortcuts the ordinary method for calculating a claimant’s entitlement to relief “essentially allows the claimant, after successfully reaching first base, to be waved home and exempted from traversing to second and third bases, thus improperly converting a single into a home run”; base runners can be called out for leaving the base path, or for failing to touch a base on the way to the next, thus highlighting the impropriety of the legal equivalent.¹¹⁷

2d 440, 447 (E.D. Pa. 1999) (“[A]s it was not merely unnecessary to the court’s holding, but was inserted to complete a grand-slam where the game was already over.”); *In re Jordan*, 91 B.R. 673, 681 (Bankr. E.D. Pa. 1988) (seeking dismissal of claimant’s entire claim for bad faith suggests debtor takes “a wild swing for a grand-slam home run”).

114. *See, e.g.*, *Muirhead v. Mecham*, 427 F.3d 14, 19 (1st Cir. 2005) (“While that exception demands that government officials adhere to Congress’s general game plan as they carry out their duties, it does not demand that they play a perfect game.”); *Ala. Power Co. v. Gorsuch*, 672 F.2d 1, 26 (D.C. Cir. 1982) (Wilkey, J., dissenting) (utilizing “perfect game” terminology); *In re Shamburger*, 189 B.R. 965, 974 (Bankr. N.D. Ala. 1995) (“There is some point between pitching in a game and pitching a perfect game that elevates the normal and customary to the extraordinary.”).

115. *See, e.g.*, *United States v. Medina*, 430 F.3d 869, 877 (7th Cir. 2005) (discussing judge “keeping his eyes on ball”); *Hardy v. Chemetroni Corp.*, 870 F.2d 1007, 1014 n.1 (5th Cir. 1989) (discussing court’s “task of “keeping our eyes on the ball””); *Dalmia v. Palffy*, No. 264088, 2007 WL 394884, at *83 (Mich. Ct. App. Feb. 6, 2007) (suggesting need to concentrate on goals).

116. *See, e.g.*, *Torrence v. Cherry Creek Sch. Dist.*, 119 F. Supp. 2d 1135, 1139 (D. Colo. 2000).

117. *Casco v. Armour Swift-Eckrich*, 154 P.3d 494, 527 (Kan. 2007). *See, e.g.*, *R.W. Int’l Corp. v. Welch Foods, Inc.*, 937 F.2d 11, 15 (1st Cir. 1991) (explaining that seeking dismissal for discovery abuse without prior court order is “tantamount to a ball player sprinting from second base to home plate, without bothering to round, let alone touch, third base”); *State v. Eason*, 629 N.W.2d 625, 661 (Wis. 2001) (Prosser, J., dissenting) (“In baseball, a player who fails to touch all the bases is not permitted to score. In fact, the player is out. There is no good faith exception for failing to touch third base. The officer and the magistrate should have touched third base.”); *Trone v. Del. Alcoholic Beverage Control Comm’n*, No. 99A-11-007, 2000 WL 33113799, at *7 (Del. Super. Ct. Dec. 28, 2000) (discussing trial court improperly permitting parties to remain in case and saying “[p]utting it in baseball terms, the Appellants struck out, but due to the umpire’s

Like a ballplayer who misses part of preseason conditioning before Opening Day, a party making a belated argument may suffer for being “late to spring training.”¹¹⁸ A party’s offer or estimate within a particular range may present a “ballpark figure.”¹¹⁹ By seeking a continuance or otherwise postponing action, a party requests a “rain check,” similar to the substitute pass which permits ticket holders to attend a future makeup game when inclement weather causes postponement of the game.¹²⁰ An ineffective argument, action or request by a party or lawyer may be “bush league,” that is, worthy only of a lower minor league game and not of major league competition.¹²¹ An odd or unsupported argument or re-

error, they have been able to get to third base. This Court can find no basis in equity, good conscience or fair play to let them now score the winning run.”).

118. *See In re LTV Sec. Litig.*, 88 F.R.D. 134, 152 (N.D. Tex. 1980) (emphasizing need to be timely: “when the team is already seven deep in one’s position, one ought not be late to spring training.”); *see also* *Housing Works, Inc. v. Turner*, 362 F. Supp. 2d 434, 438 (S.D.N.Y. 2005) (“[L]itigants cannot be permitted to use litigation before a magistrate judge as something akin to a spring training exhibition game, holding back evidence for use once the regular season begins before the district judge.”) (internal citations omitted).

119. *See, e.g.*, *Synfuel Tech., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (insisting parties provide evidence to “come up with a ‘ballpark valuation’”); *Republic Tech. Fund, Inc. v. Lionel Corp.*, 483 F.2d 540, 547 (2d Cir. 1973) (entitling stockholders “to assume that the interim financial statements furnished them. . . will give them better than ‘ballpark’ figures”); *United States v. George*, 786 F. Supp. 56, 62 n.6 (D.D.C. 1992) (denying defendant’s motion to compel production of documents because “[i]f defendant’s real concern is to show how many documents he saw everyday and how few mentioned Iran-Contra, then defendant needs a ballpark figure of the number of documents at issue, not the documents themselves.”); *Schaub v. Job*, 335 N.W.2d 568, 572 (S.D. 1983) (reversing order imposing monetary terms as condition for continuance based on theory that “the trial court should have ascertained the expenses caused by the postponement before arbitrarily assessing the terms in ‘ballpark figures’”); *Wagner Farms, Inc. v. Modesto Irr. Dist.*, 52 Cal. Rptr. 3d 683, 690 (Ct. App. 2007) (symbolizing reasonable monetary estimation with baseball by saying that “whether the amount requested is within the ballpark of what is reasonable”).

120. *See, e.g.*, *State v. Gore*, 184 P.3d 972, 977 (Kan. Ct. App. 2008) (using “rain check” to refer to continuances); *State v. Brown*, 676 A.2d 350, 356 (Vt. 1996) (Morse, J., concurring) (asserting “[r]ights given up in one case are not ‘rain checks’ for future prosecutions”).

121. Such a reference can also be used to describe the seriousness of an action committed. *See, e.g.*, *United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990) (affirming conviction of defendant who engaged in “more than bush-league drug dealing”); *United States v. Burke*, 495 F.2d 1226, 1230 (5th Cir. 1974) (upholding convictions arising from unlawful gambling enterprise and commenting that “[t]he betting began with bush-league sums”); *Savin Corp. v. Rayne*, No. 00-CV-11728 PBS, 2001 WL 34815751, at *8 (D. Mass. Mar. 26, 2001) (asserting party’s actions as bush-leagued in comparison to those of more serious cybersquatters); *Darby v. State*, 538 So.2d 1168, 1178 (Miss. 1989) (discussing defense lawyer’s failure to move for continuance as being bush-leagued in comparison to more serious attorney violations).

quest may come “out of left field,”¹²² but a well-crafted argument or judicial opinion “touches all the bases”¹²³ and thus scores for the proponent or judge.

Within the bounds of the applicable law, the court may call a judicial “infield fly rule” to thwart a party’s effort to profit from sharp tactics at any step of the proceedings.¹²⁴ In baseball, the “infield fly rule” applies when there are less than two outs and a force play is possible at third base or home plate. The rule prevents an infielder from intentionally dropping a fly ball to get an easy double or triple play. The umpire calls the batter automatically out if the fly ball remains in fair territory and, in the umpire’s judgment, could be caught by the infielder with ordinary effort.¹²⁵

Legal proceedings approaching finality enter the “late innings,” the “ninth inning,” or even “extra innings,” which opposing baseball teams play to break a tie at the end of the game.¹²⁶

122. *See, e.g.*, *Karr v. Heffner*, 475 F.3d 1192, 1204 (10th Cir. 2007) (referring to unrelated information as coming “out of left field”); *Harbor Ins. Co. v. Stokes*, 45 F.3d 499, 502 (D.C. Cir. 1995) (describing previously unconsidered uncertainties as “post-contract discovery [that] comes out of left field”).

123. *See, e.g.*, *United States v. Jiminez*, 498 F.3d 82, 87 (1st Cir. 2007) (discussing sufficiency of facts that “touch all the bases” by addressing all issues, as basis of guilty plea); *Sanders v. Union Pac. R.R.*, 193 F.3d 1080, 1081 n.1 (9th Cir. 1999) (reasoning that district court order “did not touch all of the bases we have previously said a district court must touch before imposing dismissal as a sanction” for failure to comply with court’s pretrial preparation order) (citation omitted); *Raddish v. Raddish*, 652 S.W.2d 668, 670 (Ky. Ct. App. 1983) (“[T]he trial court touched all bases in its findings of fact and reached an equitable conclusion”); *Turner Gas Co. v. Workmen’s Comp. Appeals Bd.*, 120 Cal. Rptr. 663, 667 (Ct. App. 1975) (noting that second application for workers’ compensation benefits “apparently was filed to make certain that the applicant had ‘touched all bases’” thus fulfilling all requirements).

124. *See, e.g.*, *Mann v. Lima*, 290 F. Supp. 2d 190, 194 (D.R.I. 2003) (“[A] ‘hostile work environment’ sexual harassment claim, like the infield fly rule, is composed of specific elements all of which must be present”); *In re J.T. Rapps, Inc.*, 225 B.R. 257, 264 n.10 (Bankr. D. Mass. Sept. 30, 1998) (discussing infield fly rule as ensuring fair play); *N. County Contractor’s Ass’n v. Touchstone Ins. Servs.*, 33 Cal. Rptr.2d 166, 171 (Cal. Ct. App. 1994) (stating infield fly rule “has its roots in the ethical and moral precept that an infielder will not be permitted to enjoy the fruits of his or her devious conduct” (footnote omitted)).

125. *See, e.g.*, John J. Flynn, *Further Aside: A Comment on ‘The Common Law Origins of the Infield Fly Rule,’* 4 J. CONTEMP. L. 241 (1978) (establishing legal origin of infield fly rule); Mark W. Cochran, *The Infield Fly Rule and the Internal Revenue Code: An Even Further Aside*, 29 WM. & MARY L. REV. 567 (1988) (associating infield fly rule with financial industry). *See generally* *Aside, The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474, 1478-79 (1975) (applying infield fly rule to legal realm).

126. *See, e.g.*, *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998) (reversing order that denied intervention motion, asserting that movants showed requisite interest, and saying “the game may already be lost by the time the intervenors get to bat in the late innings”); *Gennaro v. Rosenfield*, 600 F. Supp. 485, 489 (S.D.N.Y. 1984) (observing that in light of later production’s success, situation

b. The Umpire

A. Barlett Giamatti, former MLB Commissioner, stated, “Baseball fits America well because it expresses our longing for the rule of law while licensing our resentment of law givers” — the umpires.¹²⁷ “Much like an umpire in a baseball game who does not make the rules defining the strike zone but must only call the balls and the strikes,” says the Tennessee Court of Appeals, “the jurist has the duty to apply the laws as written.”¹²⁸

In *Haluck v. Ricoh Electronics, Inc.*, the California Court of Appeal reversed the jury verdict in favor of the defendants for judicial misconduct.¹²⁹ When sustaining objections during examination of witnesses, the trial judge would hold up a “red card,” which he told the jury indicated a soccer player’s ejection from the game for a

underlying breach of contract action “resembles that where a baseball manager replaces the starting pitcher in the late innings despite the fact that he is pitching a shut out and has a comfortable lead. If the relief pitcher fails, the manager looks terrible.”); *Speedway SuperAmerica, L.L.C. v. Holmes*, 885 N.E.2d 1265, 1273 (Ind. 2008) (calling discovery of evidence night before trial “late inning surprise”); *Gardner v. State*, 724 N.E.2d 624, 628 (Ind. Ct. App. 2000) (asserting “late inning surprises” should not be justified as “harmless error”); *see also Anderson v. Davila*, 125 F.3d 148, 158 (3d Cir. 1997) (referring to district court’s late notice of consolidation as “ninth-inning announcement”); *N.W. Airlines v. U.S. Dep’t. of Transp.*, 15 F.3d 1112, 1119 (D.C. Cir. 1994) (holding that by trying to withdraw application, party “strained the administrative process by attempting to call off the game in the bottom of the ninth inning”); *Sierra Club v. Penfold*, 857 F.2d 1307, 1317 (9th Cir. 1988) (declaring that plaintiff “amended its complaint in the ninth inning”); *Chapman v. United States*, 553 F.2d 886, 892 (5th Cir. 1977) (reversing order that denied criminal defendant’s motion to proceed pro se as untimely because defendant’s “request was not a ninth inning ploy. The umpire had dusted off the plate, the lineup cards had been delivered, but Chapman demanded to defend pro se before the first pitch was thrown. Accordingly, we send appellant’s motion to vacate sentence into extra innings.”); *AFG Indus. v. Cardinal IG Co.*, 594 F. Supp. 2d 889, 903 (E.D. Tenn. 2008) (observing that late development in litigation “appears to be a change in the rules of the game by the Federal Circuit in the ninth inning”); *Watts v. Thompson*, 116 F.3d 220, 222 (7th Cir. 1997) (comparing case extension to “extra innings”); *Rohan v. Barnhart*, 306 F. Supp. 2d 756, 766 (N.D. Ill. 2004) (employing “extra innings” analogy to illustrate intensity of trial); *Chapman*, 553 F.2d at 892 (“Accordingly, we send appellant’s motion to vacate sentence into extra innings.”).

127. A. Bartlett Giamatti, *Baseball Almanac*, http://www.baseball-almanac.com/quotes/umpire_quotes.shtml (last visited Oct. 31, 2009) (listing popular quotes by umpires).

128. *State v. Dabbs*, No. 01C01-9308-CR-00253, 1994 WL 504413, at *5 (Tenn. Crim. App. Sept. 15, 1994); *see also Helgeland v. Wis. Muns.*, 745 N.W.2d 1, 7 (Wis. 2008) (“[A] judge’s job is like an umpire’s . . . to make calls according to the rules, not according to the voices of a partisan crowd.”); *People v. Dennis*, 223 Cal. Rptr. 236, 240 (Ct. App. 1986) (reversing order granting defendant’s motion for new trial without giving State opportunity to respond with sports reference that “the judicial umpire miscalled the play by ruling that the People were out before they had their inning at bat”).

129. 60 Cal. Rptr.3d 542, 544 (Ct. App. 2007).

serious foul.¹³⁰ The appellate court rejected the defendants' argument that the judge's unorthodox behavior did not amount to reversible error because he flashed the card against both sides. The court reasoned that "[i]t is like saying a baseball team could not complain if the umpire decided to call balls and strikes with his eyes closed, as long as he kept them closed for both teams."¹³¹

The umpire analogy also surfaced in *Canady v. Wal-Mart Stores, Inc.*¹³² A divided panel of the U.S. Court of Appeals for the Eighth Circuit held that the assistant manager's apology for one of his many racial slurs had no legal significance.¹³³ One Judge argued that "[i]f a baseball player harassed an umpire over a called strike, thereafter apologized, but once again swore at the umpire, there can be little question that the umpire would eject the ballplayer from the game."¹³⁴

3. *Basketball*

Even before President Barack Obama "showed off those hoop skills" before television cameras during the 2008 campaign and then became the game's "first fan," the National Basketball Association had moved "from a struggling sports league to an era-defining cultural phenomenon."¹³⁵ Since the 1980s, lower courts have taken notice and employed references to this increasingly popular sport. A party's aggressive strategy throughout a legal proceeding, for ex-

130. *See id.* at 545 (making reference to soccer red cards).

131. *Id.* at 549

132. 452 F.3d 1020 (8th Cir. 2006) (affirming summary judgment for defendant store where white assistant manager repeatedly used racial slurs in presence of black employees and co-workers).

133. *See id.* at 1021 (holding apology is without legal significance).

134. *Id.* *See, e.g.,* *City of Chattanooga v. Cinema 1, Inc.*, 150 S.W.3d 390, 401 n.5 (Tenn. Ct. App. 2004) (citations omitted) (asserting statutory guarantee of prompt judicial review requires both expeditious hearing and decision, because undue delay "would be like throwing a pitch and not getting a call" of ball or strike from umpire); *Huffaker v. Ramella*, 600 N.E.2d 1082, 1084 (Ohio Ct. App. 1991) (reversing trial court decision to shorten filing period provided in court rules because decision below meant parties had "fallen victim to the old hidden ball trick typically practiced by a first baseman after an opponent has come up with a single. . . . [But] the tag was made by someone comparable to the first base umpire, *i.e.*, the judge, instead of the first baseman.").

135. *See, e.g.,* Larry Richter, *The Caucus; Now It's April Madness*, N.Y. TIMES, Apr. 3, 2008, available at <http://query.nytimes.com/gst/fullpage.html?res=9900E4DD143DF930A35757COA96E9C8B63&fta=y> (detailing Obama's basketball skills and campaign strategy of playing basketball to get youth vote before democratic primary elections); Viv Bernstein, N.Y. TIMES, Mar. 19, 2009, at B14 (commenting on Obama's N.C.A.A. basketball bracket selections and referring to him as "First Fan"); *see also* James Sullivan, *Cool Beyond White: How Pop Culture Sets the Tone of Diversity for the Country*, S.F. CHRON., Aug. 25, 2002, at R1 (noting rise of N.B.A. in popular culture) (book review).

ample, has been likened to a “full-court press,” a basketball strategy used by the team on defense to pressure the team on offense up and down the court.¹³⁶

Lower courts have also freely drawn analogies between judges and basketball referees. In *Tejada v. Dubois*, for example, the U.S. Court of Appeals for the First Circuit granted federal habeas corpus relief to defendant Tejada, who had been convicted in state court for drug and firearms offenses.¹³⁷ One question that arose was whether the defendant was prevented from presenting an effective fabrication defense after the trial judge and defense counsel had provoked each other throughout the acrimonious trial. The court of appeals declined to apportion blame. The panel found itself “in much the same position as a basketball referee who sees a player throw an elbow at an adversary but cannot tell if the blow was the initial foul or a retaliatory strike But unlike the basketball referee, [the court had] no need to decide whether to assess a single foul or a double foul” because the acrimony, over all, prejudiced Tejada’s effort to present an effective defense.¹³⁸

In *Kreager v. Blomstrom Oil Co.*, a judge said that “[a] good judge in a trial is like a good referee in a basketball game; when he sees a foul committed, he blows the whistle and tries to right the wrong.”¹³⁹ A few years later, in *Blackfeet National Bank v. Nelson*, the U.S. Court of Appeals for the Eleventh Circuit rejected the plaintiff bank’s claim that because the Federal Deposit Insurance Corporation fully insured an unmatured certificate of deposit (to \$100,000) up to its maturity date, the CD was a bank deposit that the plaintiff

136. See, e.g., *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 33 (1st Cir. 2001) (FBI “mounted a full-court press in an endeavor to dismantle an extensive drug-smuggling operation headquartered in Puerto Rico.”); *Jenkins v. Tatem*, 795 F.2d 112, 112 (D.D.C. 1986) (“While nominal amounts of money can sometimes implicate substantial legal questions, . . . neither the principal nor the principle in this case warranted the full-court press put on by both sides.”); *Grabowski ex rel. Second Pine, Inc. v. Levin*, No. 89-7825, 1990 U.S. Dist. LEXIS 16713, at *7 (E.D. Pa. 1990) (“[P]rivacy interests warrant some recognition even in the inherently invasive context of the process of a full-court press of civil discovery.”).

137. 142 F.3d 18 (1st Cir. 1998).

138. 142 F.3d at 24-25. See, e.g., *Liberty Mut. Ins. Co. v. Constr. Mgmt. Servs.*, No. 99 C 6906, 2001 WL 1159203, at *7 (N.D. Ill. Sept. 28, 2001) (“[A] stakeholder is to a ‘stake’ he controls as a basketball referee is to a jump-ball. He holds it, but he does not claim it for his own. Rather, he willingly allows the rival contestants to fight for it”); *In re Olshefski*, 692 A.2d 1168, 1177-78 (Pa. Commw. Ct. 1997) (striking nominating petitions of six candidates for local elective office and saying “this is a lot like trying to win the championship on a technical foul rather than taking the opposing team to the hoop in a spirited election contest. Unfortunately, you can win on a technical foul.”).

139. 379 N.W.2d 307, 312 (S.D. 1985) (Henderson, J., concurring in part, dissenting in part).

could sell.¹⁴⁰ *Nelson* compared the judge to a referee: “We cannot decide the nature of this instrument at its maturity date any more than a referee could decide the winner of a basketball game at halftime.”¹⁴¹

Trial judges, like referees, seek to let the adversaries’ relative strengths influence the outcome. In *State v. Weatherspoon*, a judge observed that the need to justify race-neutral bases for peremptory strikes of potential jurors would put “pressure on trial judges, as there is now on basketball referees . . . to roughly equalize the foul calls.”¹⁴² As basketball fans know, a team playing particularly rough or dirty should accumulate more fouls or penalties than the opposition, and “evening up” the number of foul calls for the sake of appearance or competitive parity may be the sign of poor refereeing.

4. *Ice hockey*

Since the National Hockey League expanded from six to twelve teams for the 1967-68 season, ice hockey has assumed a more prominent place on the American sports scene.¹⁴³ Twenty-four of the NHL’s thirty teams are now based in U.S. cities, and a growing percentage of the league’s players are now American citizens or veterans of United States collegiate teams.¹⁴⁴

As Chief Justice Roberts demonstrated in *Brigham City*, courts have taken notice of ice hockey. In *United States v. Rodriguez-Rivera*, for example, the U.S. Court of Appeals for the First Circuit rejected the robbery defendant’s contention that the district judge had favored the prosecution by interrupting defense counsel more often than she interrupted the prosecutor during their respective examinations of witnesses.¹⁴⁵ Echoing the sentiments expressed in *State v. Weatherspoon* above, the panel wrote, “[W]e do not consider this sort of comparison to be any more reliable an indicator of a biased

140. 171 F.3d 1237, 1240 n.5 (11th Cir. 1999).

141. *Id.*

142. 514 N.W.2d 266, 297 (Minn. Ct. App. 1994) (Randall, J., concurring specially) (internal quotations omitted).

143. See, e.g., Gerald Eskenazi, *New Hockey Clubs Put Up \$12-Million for Draft*, N.Y. TIMES, June 6, 1967, at 59 (noting expansion of National Hockey League).

144. See National Hockey League Standings, <http://www.nhl.com/ice/standings.htm?navid=NAV-STN-Div> (last visited Oct. 31) (listing hockey teams based in U.S.); Dean Spiros, *The Top Players in the WCHA Are Leaving School Earlier Each Year, Weakening Teams and Hurting Graduation Rates*, STAR TRIB. (Minneapolis, Minn.), Jan. 14, 2007, at 1C (detailing increased early commitment of young college students to hockey); Francis Rosa, *Changing Face of the NHL: US Players Are Welcome*, BOSTON GLOBE, Dec. 27, 1990, at 60 (discussing increase in U.S. participation in National Hockey League).

145. 473 F.3d 21 (1st Cir. 2007).

judge than the relative number of penalties called against each side in a hockey game indicates a biased referee.”¹⁴⁶

Lower courts have frequently cited professional hockey’s reputation for fighting — conduct that remains outside the rules of the game.¹⁴⁷ Judges have referenced hockey’s penalty box, a small bench adjacent to the playing surface, but separate from the team’s bench where an offending player is forced to sit as punishment for fighting and other rule violations. For example, a collateral party or witness may be entitled to an interlocutory appeal rather than have to wait in a “judicial penalty box” for the main suit to reach final judgment.¹⁴⁸ Discussing particularly weak claims made by the plaintiff and his counsel, one federal district court expressed disappointment that “the law has no equivalent of the penalty box in hockey, in which a lawyer (or the lawyer’s client) could somehow suffer some adverse consequence in the litigation game for having committed a foul (in this instance, for advancing a truly frivolous argument).”¹⁴⁹ With the increasing popularity of the sport, courts continue to use hockey references in their judicial opinions.¹⁵⁰

5. *Golf*

Golf’s Senior Tour and fifty-nine-year-old Tom Watson’s inspiring run at the 2009 British Open serve as reminders that golf is a quintessential “carryover” or “lifetime” sport.¹⁵¹ An estimated twenty-five million Americans play golf throughout adulthood, giving courts ample reason to assume readers’ familiarity with the sport and its basics.¹⁵²

146. *Id.* at 27.

147. *See, e.g.,* *Martinez v. Hooper*, 148 F.3d 856, 857 (7th Cir. 1998) (using sarcastic reference to fighting in hockey to refer to unusual occurrence in case facts by saying “[w]e know the story about the surprised audience that went to see a fight and a hockey game broke out.”).

148. *Marsh v. Mountain Zephyr, Inc.*, 50 Cal. Rptr.2d 493, 499 (Ct. App. 1996) (saying no need to place appellant in “judicial penalty box” to punish him by denying appeal).

149. *Nilssen v. Motorola, Inc.*, 130 F. Supp. 2d 976, 982 n.11 (N.D. Ill. 2000).

150. *See, e.g.,* *Lambert v. McBride*, 365 F.3d 557, 563-64 (7th Cir. 2003) (asserting trial court’s spectator section was “separated from the proceedings by a transparent barrier, similar to that in a hockey rink”).

151. *See, e.g.,* Thomas L. Friedman, *59 Is the New 30*, N.Y. TIMES, July 28, 2009, at A23 (asserting prevalence of golf at all ages); Larry Dorman, *Cink Rewrites Storybook Ending*, N.Y. TIMES, July 20, 2009, at D1 (detailing ability to win tournaments at all ages).

152. *See, e.g.,* Encyclopedia Britannica, <http://www.britannica.com/bps/additional/content/18/30009143/EXPANSION-OF-GOLF-COURSES-IN-THE-UNITED-STATES> (last visited Oct. 31, 2009) (discussing growing impact of golf in recent years as exhibited by expansion of golf courses).

In *Pacific Insurance Co. v. Catholic Bishop of Spokane*, the plaintiff insurance company contended that the alleged negligence of the Diocese in connection with its priests' alleged sexual abuse was not an "accident" under state law, and thus that the company had no duty to defend or indemnify the Diocese under the relevant liability policies.¹⁵³ The federal district court denied the company's summary judgment motion on the ground that "[t]he performing of intentional acts does not mean that every such act that results in injury to another is an 'intentional' excluded act under a comprehensive liability insurance policy."¹⁵⁴ The district court explained the nuance with an analogy to golf:

Clearly, a covered person intentionally striking a golf ball with the intention that it land on its assigned fairway or green, but which sharply diverts from its intended course and strikes a player on an adjacent fairway, does not mean that the intended launching of the golf ball excludes coverage for any negligence involved in failing to warn the adjacent players with a time honored (and expected) "fore!!!"¹⁵⁵

Like a golfer who readies to play a hole, a party "tees up" evidence for the trial court.¹⁵⁶ Once the "game" begins at trial, judges use other golf analogies, including the term "par," to assess a party's performance.¹⁵⁷ On substantive and procedural matters alike, performance by a party or counsel that meets expectations is "par for the course."¹⁵⁸ In *Muff v. Dragovich*, for example, the ineffective-

153. 450 F. Supp. 2d 1186 (E.D. Wash. 2006).

154. *Id.* at 1206.

155. *Id.*; *see, e.g.*, *Fleming Lounge of Ashtabula, Inc. v. Ohio Liquor Comm'n*, No. 02 AP-1079, 2003 WL 21386273, at *8 (Ohio Ct. App. June 17, 2003) (Tyack, J., concurring) ("I compare the mixture of skill and chance upon which the player bets as similar to the mixture of skill and chance when a golfer bets she or he can hit a hole-in-one at a golf outing."); *Commonwealth v. One Electro-Sport Draw Poker Mach.*, 443 A.2d 295, 298 (Pa. Super. Ct. 1981) (discussing whether poker machines are gambling devices and asking whether "chance plays a role in determining . . . whether an errant golf ball which strikes a tree will rebound into the rough or onto the fairway?").

156. *See, e.g.*, *Horina v. City of Granite City*, 538 F.3d 624, 641 (7th Cir. 2008) (Manion, J., dissenting) (describing city's failure to tee-up by not presenting evidence to court); *Arnold v. Garlock, Inc.*, 278 F.3d 426, 443 (5th Cir. 2001) (asserting tee-up issue for discussion expecting to create binding authority is unlikely to succeed).

157. The term "par" is used in reference to the performance expected of a player on a particular hole. *See, e.g.*, Ken McFadyen, *Equity Firm of the Year*, 22 *Mergers & Acquisitions Rep.* 39 (May 4, 2009) (quoting golf great, Sam Snead and advising that once the ball is on tee, "[f]orget your opponents; always play against par").

158. *See, e.g.*, *West v. Bennett*, No. CV06-51-S-LMB, 2009 U.S. Dist. LEXIS 25828, at *4 (D. Idaho Mar. 26, 2009) ("A disagreement with the Court's ruling is

assistance-of-counsel claim failed because the petitioner did not demonstrate a reasonable probability that “had her lawyer’s performance been up to par, the result of the proceeding . . . would have been different.”¹⁵⁹ In *Enzo Therapeutics, Inc. v. Yeda Research & Development Co.*, the plaintiff, which unnecessarily prolonged the proceedings, failed to live up to the court’s expectations, and thus shot a “bogey,” the term for one stroke over par.¹⁶⁰ Americans’ perceived familiarity with golf has provided courts with a bountiful source of sports analogies, which they abundantly incorporate into their written opinions.

6. Soccer

Television coverage of the World Cup, professional leagues in the United States, and soccer’s visibility in high schools and colleges make the game a familiar sport to many Americans. Recognizing this popularity, courts sometimes illuminate concepts of fair play with references to soccer. In *Portnoy v. Cryo-Cell International, Inc.*, for example, a CEO, allegedly knowing that the company’s incumbent board was lacking votes needed for reelection, engaged in delaying tactics designed to give the incumbents more time to seek votes.¹⁶¹ The Delaware Court of Chancery found the CEO’s conduct “analogous to a corrupted soccer referee, intent on adding extra time so that the game would end only when her favored team had a sure lead.”¹⁶²

Earlier, in *Alton & Southern Railway Co. v. Brotherhood of Maintenance Way Employees*, the federal district court expressed concern that undue resort to the Railway Labor Act’s dispute resolution mechanisms might upset the balance reached in the parties’ prior collective bargaining agreement.¹⁶³ The court held that “[a]ny

. . . par for the course in litigation, and a matter for appeal.”); *UNR Indus. v. Bloomington Factory Workers*, 173 B.R. 149, 153 (N.D. Ill. 1994) (observing parties’ motion to reconsider “has become par for the course”); *In re Elrod*, 455 So. 2d 1325, 1326 (Fla. Dist. Ct. App. 1984) (“[I]gnoring the trial court’s directives has been par for the course.”).

159. 310 F. App’x 522, 524 (3d Cir. 2009) (unpublished opinion); see also *United States v. Rodriguez*, 53 F.3d 1439, 1448 (7th Cir. 1995) (asserting ineffectiveness claim fails unless attorney’s performance falls “below par”).

160. 477 F. Supp. 2d 699, 717 (E.D. Va. 2007).

161. 940 A.2d 43 (Del. Ch. 2008) (holding CEO’s and board of directors’ dealings with shareholder regarding voting inappropriate and ordering new elections).

162. *Id.* at 77.

163. 928 F. Supp. 7, 20 (D.D.C. 1996) (upholding injunction to prevent railroad union strike and ruling that parties negotiate working terms on national-handling basis).

piecemeal alteration to this balancing act could result in a situation more akin to the unfairness of a soccer game played on a hill; one team forced to run up and one team permitted to run down.”¹⁶⁴

In *Niehus v. Liberio*, the U.S. Court of Appeals for the Seventh Circuit affirmed a damages award against police officers for using excessive force.¹⁶⁵ In its decision, the court used soccer to contradict the logic behind the defendants’ explanation of events. The court rejected the defendants’ contention that it was physically impossible for them to have kicked the suspect in the left side of the face because that side of his face was against the floor.¹⁶⁶ “Imagine kicking a soccer ball,” Judge Richard A. Posner wrote for the panel, “[t]he foot goes *under* the ball. And so with a head: a sharp kick to a face lying on the floor is quite likely to go under the face”¹⁶⁷ Like many courts before them, the *Niehus* court found a way to draw comparisons between the law and this sport of nationwide popularity.

7. *Track and Field*

Track and field – a staple of the Summer Olympics and interscholastic and intercollegiate programs – features various individual and team events, several of which have found their way into judicial opinions. When a litigant advances a claim or takes a position prematurely, for example, the litigant makes a “false start”¹⁶⁸ or “jumps the gun,”¹⁶⁹ similar to a runner who leaves the starting block before the starting gun fires.

164. *Id.*

165. 973 F.2d 526, 527 (7th Cir. 1992) (affirming damages award in favor of suspect who alleged police used excessive force by kicking him repeatedly in face).

166. *See id.*

167. *Id.* at 527-28 (emphasis by the court). *See, e.g.,* *Bowers v. Fed’n Internationale de l’Automobile*, 489 F.3d 316, 322 (7th Cir. 2007) (asserting auto racing with reduced number of drivers “is not prohibited or nonsensical under the rules like a soccer match between three teams” (par. omitted)).

168. *See, e.g.,* *United States v. Best*, 426 F.3d 937, 939 (7th Cir. 2005) (“After a few false starts with appointed counsel [defendant] decided that he wanted to represent himself”); *Stella v. Kelley*, 63 F.3d 71, 73 (1st Cir. 1995) (“[A]fter two notoriously false starts . . . , [defendant] selectmen moved for summary judgment on qualified immunity grounds.”); *State v. Hinton*, 601 P.2d 338, 339 (Ariz. Ct. App. 1979) (“The State’s prosecution of the case was marked by false starts.”).

169. *See, e.g.,* *Arreola v. Godinez*, 546 F.3d 788, 800 (7th Cir. 2008) (stating that parties’ premature presentation of complete arguments on court’s abuse of discretion “jumps the gun”); *John Doe Inc. v. Drug Enforcement Admin.*, 484 F.3d 561, 570 (D.C. Cir. 2007) (rationalizing that defendant’s interpretation of statute “encourages dissatisfied claimants to ‘jump the gun’ by going directly to the district court” and skipping other administrative options); *United States v. Vahlco Corp.*, 720 F.2d 885, 889 (5th Cir. 1983) (stating trial court should not “jump the gun but should wait until both sides have presented their evidence before ruling

Track analogies continue once the “race” starts. In *McKnight v. General Motors Corp.*, for example, the federal district judge initially limited the length of the impending trial.¹⁷⁰ Midway through the trial, he cut two hours from each side’s allotted time for argument. Writing for the Seventh Circuit, Judge Posner warned that this practice threatened to “turn a federal trial into a relay race” in which one lawyer follows another in the rush toward the finish line.¹⁷¹ Other courts have compared the flow and fulfillment of a party’s responsibilities at trial to the passing of the baton. Passing the baton is “a key factor in any relay race” that signals the finish of one runner’s lap and the beginning of her teammate’s lap.¹⁷² Dropping the baton, which is cause for disqualification in a relay race, similarly connotes a setback in legal proceedings for failure to fulfill a responsibility.¹⁷³

In *Ad Hoc Telecommunications Users Comm. v. FCC*, a central consideration was whether various telephone services were “functionally equivalent.”¹⁷⁴ The U.S. Court of Appeals for the District of Columbia Circuit sought to establish whether a customer could sub-

on motions for directed verdict.”); *Gen. Motors Corp. v. New York*, 501 F.2d 639, 659-60 (2d Cir. 1974) (“[S]ome judges . . . have tended to ‘jump the gun’ by making an early determination in favor of a class certification without benefit of adequate data.”).

170. 908 F.2d 104 (7th Cir. 1990) (affirming employee’s entitlement to backpay under Title VII and remanding for reconsideration of reinstatement).

171. *Id.* at 114-15. See, e.g., *Davidson v. FDIC*, 44 F.3d 246, 248 (5th Cir. 1995) (discussing “statute-of-limitations relay race”); *Taxara v. Gutierrez*, 8 Cal. Rptr.3d 172, 177 (Ct. App. 2003) (saying that “two or more observers who – much like runners in a relay race – observe the subject in succession [may] . . . be deemed to have conducted . . . ‘continuous observation’” required by drivers license regulation).

172. *Little Rock Sch. Dist. v. Pulaski County Spec. Sch. Dist.*, 237 F. Supp. 2d 988, 995 (E.D. Ark. 2002) (referring to movement of case from lower court to court of appeals as “passing of the baton”). See, e.g., *TIG Ins. Co. v. Aon Re Co.*, No. C-06-848, 2006 WL 954177, at *1 (N.D. Cal. Apr. 12, 2006) (holding that service “by hand” does not require “hand-to-hand contact, i.e., an exchange essentially of the nature required of participants in a relay race”); *Oman Int’l Fin., Ltd. v. Hoiyong Gems Corp.*, 616 F. Supp. 351, 361 (D.R.I. 1985) (“The bottom-line question is whether each entity has run its own race, or whether there has been a relay-style passing of the BATON from one to the other.”).

173. See, e.g., *Smith v. Zant*, 887 F.2d 1407, 1438 (11th Cir. 1989) (en banc) (denying writ concerning conviction of armed robbery and malice murder because “[t]he baton . . . was dropped long ago by the state”). See, e.g., *In re Duratech Indus., Inc.*, 241 B.R. 291, 293 n.5 (Bankr. E.D.N.Y. 1999) (stating complex statutory formulas may require parties seeking relief to run “marathon” tests akin to 26-mile, 385-yard race that tests limits of human endurance).

174. 680 F.2d 790, 793 (D.C. Cir. 1982) (vacating lower court’s decision that Wide Area Telephone Services (WATS) were “like” ordinary long distance service for purposes of Federal Communications Act and remanding for more precise definition of “likeness”).

stitute a new service for long distance and do everything it could do with a long distance phone.¹⁷⁵ In his concurring opinion, Judge George E. MacKinnon found the point “effectively illustrated by drawing an analogy to track and field competitors.”¹⁷⁶ He said: “[o]ne surely would not argue that a track athlete who only runs the 100 yard dash is ‘functionally equivalent’ to a decathlon competitor because the two athletes use the same track for their respective 100 yard dash races.”¹⁷⁷ The one hundred meter dash is only one of ten events in the decathlon.¹⁷⁸ The analogy thus implies that although both services provide some overlapping functions, one ultimately provides more, surpassing the extent of the other.¹⁷⁹

Field event references also surfaced in *Anderson v. Westinghouse Savannah River Co.*¹⁸⁰ Dissenting from the court’s denial of a motion for en banc rehearing, Judge Roger L. Gregory of the U.S. Court of Appeals for the Fourth Circuit concluded that the plaintiff proved a statistically significant disparity.¹⁸¹ He rationalized that “we have set the bar too high . . . [W]hat was a high jump has now become a pole vault that must be accomplished without a pole.”¹⁸²

8. *Boxing*

Professional boxing has held public attention for years, leading judges frequently to enhance their opinions with concepts basic to

175. *Id.* at 759 (noting that the functional equivalency test involved customers’ perceptions on whether WATS provided the same services as other long-distance phone providers).

176. *Id.* at 804 (MacKinnon, J., concurring).

177. *Id.*

178. See LARS ANDERSON, CARLISLE VS. ARMY: JIM THORPE, DWIGHT EISENHOWER, POP WARNER, AND THE FORGOTTEN STORY OF FOOTBALL’S GREATEST BATTLE 247 (Random House 2007) (discussing Thorpe’s impressive athletic achievements).

179. See *Ad Hoc Telecomm. Users Comm.*, 680 F.2d at 804 (drawing comparison of athletic decathlon event to equivalency of telephone services).

180. 406 F.3d 248 (4th Cir. 2005), petition for rehearing en banc denied, 418 F.3d 393 (4th Cir. 2005) (affirming grant of summary judgment against female African American administrative assistant alleging violation of Title VII of Civil Rights Act of 1964); 42 U.S.C. § 2000e *et seq.* (2006).

181. See 418 F.3d at 394 (discussing variation in amount of blacks that applied versus those who were hired or promoted).

182. *Id.* (Gregory, J., dissenting from denial of petition for rehearing en banc); see also *Blackwell v. Cole Taylor Bank*, 152 F.3d 666, 671 (7th Cir. 1998) (stating that “[b]y raising the bar in a high jump you stimulate the contestants to greater effort but you also knock some, and eventually all but one, out of the contest.”).

the sport.¹⁸³ In *Love v. State*, for example, the Florida appellate court likened criminal trials to “boxing matches, where the state and defense trade punches within defined rules of engagement.”¹⁸⁴ In *Barefield v. DPIC Cos.*, the dissenting judge argued that by punishing an insurer “simply for being adversarial,” the majority created a situation “about as fair as a boxing match where one boxer has a hand tied behind his back.”¹⁸⁵

Images of two adversaries in the ring regulated by the referee lend themselves to judicial analogies depicting images of two adversaries in the courtroom regulated by the judge. Premature claims or wasteful pretrial proceedings, for example, may amount to “shadow boxing,” the exercise in which a fighter seeks to develop endurance by boxing an imaginary opponent before entering the ring and facing the real opponent.¹⁸⁶ A particularly powerful precedent or argument may deliver a “knockout punch.”¹⁸⁷ It may also inflict a “body blow,” which is a decisive assault that inflicts pain on a fighter or ends the bout.¹⁸⁸ A party suffering successive setbacks

183. David Remnick, *I Ain't Got No Quarrel With Them Viet Cong*, SUNDAY MAIL (Queensland, Australia), Dec. 12, 1999, at 106 (noting U.S. boxer, Muhammed Ali's renown as one of the world's most recognizable faces for over a generation).

184. 971 So. 2d 280, 283 (Fla. Dist. Ct. App. 2008) (reversing defendant's conviction of battery of police officer, resisting arrest, and possession of marijuana). See *supra* text accompanying note 44 (discussing boxing's Marquis of Queensbury Rules).

185. 600 S.E.2d 256, 281 (W. Va. 2004) (Maynard, C.J., concurring) (holding that insurer's conduct during lawsuit may support cause of action under state's Unfair Trade Practices Act). See, e.g., *Lockett v. Bodner*, No. 2007AP308, 2008 WL 1787675, at *9 (Wis. Ct. App. Apr. 22, 2008) (Fine, J., dissenting) (holding that “[t]his is akin to sending a fighter into a boxing ring with both hands tethered.”); *Commonwealth v. Goodwin*, Nos. 3756–06 et al., 2007 WL 5313519 at *398 (Pa. Ct. Com. Pl. Nov. 20, 2007) (discussing domestic violence prosecution, saying “[i]n boxing terms, this case pitted a heavyweight [husband] versus a lightweight [wife] – not a fair fight inside or outside the ring.”).

186. See, e.g., *McInnis-Misenor v. Me. Med. Ctr.*, 319 F.3d 63, 72 (1st Cir. 2003) (noting waste of court's resources on tasks it need not undertake); *Hoover v. Byrd*, 801 F.2d 740, 741 (5th Cir. 1986) (stating that “[p]etitioner's argument amounts to semantic shadow-boxing.”); *Miller v. Ostly*, 109 Cal. Rptr. 714, 717 (Ct. App. 1973) (explaining that “[t]he courts do not have time for ‘shadow boxing’ with litigants when the problem can easily be resolved without litigation.”).

187. See, e.g., *Trans-Spec Truck Serv., Inc. v. Caterpillar, Inc.*, 524 F.3d 315, 322 (1st Cir. 2008) (quoting *Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 991 (1st Cir. 1988)) (“[s]ystemic efficiencies would be frustrated . . . if a party were allowed to . . . save its knockout punch for the second round.”); *Knorr Brake Corp. v. Harbil, Inc.*, 556 F. Supp. 489, 493 (N.D. Ill. 1983) (describing defendant's action as “going for a knockout punch on one set of issues”); *Peeples v. Sargent*, 253 N.W.2d 459, 467 (Wis. 1977) (noting plaintiff counsel's apparent gamble and describing witness' answer to be “knockout punch needed”).

188. See, e.g., *United States v. Virgil*, No. CR 05-2051, 2006 WL 4109683, at *7 (D.N.M. Aug. 7, 2006) (discussing harmful elements to cases as “a body blow”);

in rapid succession takes a “one-two punch,” an immediate combination of blows designed to inflict maximum punishment on a fighter.¹⁸⁹ A party unable to defend against the opponent’s barrage of factual or legal arguments may find itself “on the ropes,” the strategically disadvantageous position in the ring where an opponent can continue to deliver blows with little or no opportunity for effective self-defense or retaliation.¹⁹⁰ Even worse, the party may go “down for the count,” much like the boxer who is floored by an opponent and must rise to his feet before the referee finishes the ten-count.¹⁹¹

Struggling parties who receive a second chance late in court proceedings due to a tolling of a deadline or other technicality are deemed “saved by the bell.”¹⁹² This comparison relates to what can occur when a fighter gets knocked down with less than ten seconds remaining in a round, insufficient time to be counted out by the

U.S. Steel Mining Co. v. Helson, 631 S.E.2d 559, 568 (W. Va. 2005) (stating that discovering contradictory information equates to “a body blow”); Airline Pilots Ass’n, Int’l v. UAL Corp., 874 F.2d 439, 447 (stating that “we do not think that the framers of the Railway Labor Act meant to deal the body blow to state regulation of corporations”); Posada v. Lamb County, 716 F.2d 1066, 1070 (5th Cir. 1983) (referring to repression of minority political participation as “body blow to the body politic”).

189. *See, e.g.*, Rosenruist-Gestao e Servicios LDA v. Virgin Enters. Ltd., 511 F.3d 437, 450 (4th Cir. 2007) (using phrase to describe harmful blows to party’s appeal of denial of trademark registration); Bethesda Lutheran Homes & Servs., Inc v. Born, 238 F.3d 853, 856 (7th Cir. 2001) (finding that “the one-two punch violated the Constitution and must be enjoined”); Murphy v. Korea Asset Mgmt. Corp., 421 F. Supp. 2d 627, 630 (S.D.N.Y. 2005) (describing harm to company due to two devastating events as “one-two punch”); 216 Sutter Bay Assocs. v. County of Sutter, 68 Cal. Rptr.2d 492, 499 (Ct. App. 1997) (stating dual passage of ordinances “landed the classic ‘one-two punch,’” with a third ordinance “delivering the knockout blow of repeal.”).

190. *See, e.g.*, Residential Mktg. Group, Inc. v. Granite Inv. Group, 933 F.2d 546, 548 (7th Cir. 1991) (describing Granite’s troublesome position at time it hired Residential); Metro-Goldwin-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 975 (C.D. Cal. 2006) (describing music company to be “on the ropes”); Thornton v. Breland, 441 So. 2d 1348, 1350 (Miss. 1983) (“[W]hen his client is on the ropes, the lawyer, standing alone if need be, is that one person who, in the interest of his client, skillfully defies the state, the opposing litigant, or whoever threatens.”).

191. *See, e.g.*, Pourghoraishi v. Flying J, Inc., 449 F.3d 751, 762 (7th Cir. 2006) (asserting conclusion did not knock defendant officer down for count); Blackburn v. Snow, 771 F.2d 556, 578 (1st Cir. 1985) (Aldrich, J., dissenting) (suggesting that in losing, defendant was “down for the count”).

192. *See, e.g.*, Nat’l Indus., Inc. v. Republic Nat’l Life Ins. Co., 677 F.2d 1258, 1270 (9th Cir. 1982) (suggesting defendants to be “saved by the bell” due to time-related technicalities).

referee.¹⁹³ Where a party abandons a weak argument or voluntarily abandons the trial, the party “throw[s] in the towel.”¹⁹⁴ This analogy draws upon the signal given by the handlers of an outmatched or bloodied boxer signifying that the referee should immediately stop the bout and declare the opponent the winner before the boxer suffers greater injury.¹⁹⁵ Where opposing litigants present cases that appear equally strong, “the legal and factual issues [are] fully duked out to a draw,” much like boxers who leave the ring without declaration of a victor.¹⁹⁶ In the courtroom, however, the judge or jury must produce a winner, often by applying the burden of persuasion on contested issues.¹⁹⁷

In *Akers v. Nicholson*, the U.S. Court of Appeals for the Federal Circuit denied attorney’s fees and expenses under the Equal Access to Justice Act, which permits awards to “prevailing parties.”¹⁹⁸ *Akers* held that neither applicant had prevailed because the court below remanded their cases for reconsideration.¹⁹⁹ The court stated that “[a] boxer thrown out of the ring and then allowed back in to continue the fight has not prevailed.”²⁰⁰ In other cases, a judge may accuse a party of “rope-a-doping” for raising time-wasting, frivolous claims.²⁰¹

193. See, e.g., ELIZABETH KNOWLES, *THE OXFORD DICTIONARY OF PHRASE AND FABLE*, “SAVED BY THE BELL” (Oxford University Press 2006), available at <http://www.encyclopedia.com/doc/1O214-savedbythebell.html> (Last visited Oct. 31, 2009).

194. See, e.g., *Taurus IP, LLP v. DaimlerChrysler Corp.*, 559 F. Supp. 2d 947, 968 (W.D. Wis. 2008) (contending that counsel should have thrown in towel by giving up his argument); *In re J.B.*, 618 A.2d 1329, 1332 (Vt. 1992) (asserting defense counsel “simply ‘threw in the towel’ and abandoned any strategy to bargain for best outcome for juvenile client.”).

195. See, e.g., *State v. Goode*, 268 S.E.2d 82, 84 (N.C. 1980) (offering that “[i]f the evidence offered by the State has made a strong case against defendant, he may decide [during a recess] to ‘throw in the towel’ and tender a plea.”).

196. *Prof'l Servs. Group, Inc. v. Town of Rockland*, No. 04-11131-PBS, 2008 U.S. Dist. LEXIS 35592, at *4 (Mass. Dist. Ct. 2008).

197. See, e.g., *United States v. Varbaro*, 597 F. Supp. 1173, 1176 (S.D.N.Y. 1984) (concluding that “[t]he statutory language appears to wrestle itself to a draw.”).

198. *Akers v. Nicholson*, 409 F.3d 1356 (Fed. Cir. 2005); see also 28 U.S.C. § 2412 (2009) (establishing costs and fees associated with judicial proceeding).

199. 409 F.3d at 1360.

200. *Id.*; see also *In re Wilson*, No. 04-65540, 2007 WL 4248134, at *4 (Bankr. N.D. Ohio Nov. 30, 2007) (ruling that “even a boxer has to avoid the needless, draining effort of throwing wild punches”).

201. See Dave Anderson, *Time Stands Still For One Who Never Did*, N.Y. TIMES, Jan. 17, 2007, at D3 (describing “rope-a-dope” boxing technique popularized by Muhammad Ali in his 1974 heavyweight title bout against George Foreman). A boxer assumes a protected stance against the ropes, shielding his torso and face with his arms and hands, and allows the opponent to hit him. *Id.* The boxer anticipates that the opponent carelessly will tire himself out and commit errors so the boxer to mount an effective counterattack. *Id.*; see also *Borsuk v. Town of St. John*,

Despite the prevalence of boxing references in judicial opinions, these references may have their limitations. For example, in *Hunkins v. Bradley* the Wisconsin Court of Appeals called the trial judge “more than a referee.”²⁰² The panel held that the trial court, in an effort to accelerate a six day trial, did not abuse its discretion by questioning witnesses and anticipating objections:

The referee in a boxing match, football or BASKETBALL game does not have to concern himself with the length of time the contest takes. That is the job of the timekeeper. When the allotted number of minutes for a round, quarter, half, or end of the game are gone, the gong sounds or the gun goes off or the whistle blows, and the contest is concluded. However in a trial, civil or criminal, it is the judge who has the duty, while affording each side a fair opportunity to present its case, to seek a reasonably unprotracted conclusion to the proceedings.²⁰³

9. *Wrestling*

For several decades, televised professional wrestling has provided mass public entertainment. As such, judges have recognized that parties and courts “wrestle” with difficult factual and legal questions.²⁰⁴ Police officers take turns questioning a suspect and form a “tag team” similar to professional wrestling teams whose members take turns grappling opponents.²⁰⁵ A court with an unobstructed

803 N.E.2d 1216, 1217 (Ind. Ct. App. 2004) (illustrating that defendant engaged in “rope-a-doping” where “one fighter pretends to be trapped against the ropes while his opponent wears himself out throwing punches.”); *Ramos-Barrientos v. Bland*, No. 606CV089, 2008 U.S. Dist. LEXIS 12113, at *4 (D. Ga. 2008) (granting motion to strike lengthy and rambling complaint, asserting that “[a] ‘Rope-A-Dope’ is for the boxing ring, not here.”).

202. No. 77-788, 1979 Wisc. App. LEXIS 3245, at *6 (Wis. Ct. App. 1979) (holding that lower court did not exhibit abuse of discretion).

203. *Id.* at *6-7.

204. *See* *United States v. Fortes*, CR No. 08-0035 S, 2008 WL 4219493 at *3 (D.R.I. Sept. 12, 2008) (“Trial courts frequently wrestle with the question of whether statements by law enforcement officers are the ‘functional equivalent’ of interrogation . . .”).

205. *See, e.g., Walker v. City of Orem*, 451 F.3d 1139, 1153 (10th Cir. 2006) (holding that allowing a “tag-team” effort of officers each detaining a suspect for a lawful period of time could result in an impermissibly long detention on the aggregate); *Gay Officers Action League v. Commonwealth of Puerto Rico*, 247 F.3d 288, 298 (1st Cir. 2001) (stating that attorney’s fees for four lawyers litigating single claim in a tag-team effort should be closely scrutinized); *see also Fireman’s Fund Ins. Co. v. Garamendi*, 790 F. Supp. 938, 964 (N.D. Cal. 1992) (discussing collusive tag-team behavior of insurance companies through common legal representatives); *Fertig v. State*, 146 P.3d 492, 499 (Wyo. 2006) (detailing how officers from different jurisdictions can pull over suspect and give him repeated sniff tests, then pass him off to be stopped in next jurisdiction); *State v. Monroe*, 645 P.2d 363, 366 (Idaho 1982) (discussing police “tag-team interrogation tactics”).

and close-up view of a conflict between parties has a “ringside seat” similar to the expensive seats which are closest to a wrestling or boxing ring.²⁰⁶ Additionally, a powerful argument may “pin” an opponent “to the mat,” enabling an individual to emerge victorious.²⁰⁷

Loud public incivility, often staged for effect, may help draw attention to upcoming professional wrestling matches. In *Daniels v. Burse*, the federal district court sternly chastised both attorneys for their personal attacks, criticisms, and general incivility directed at one another throughout the trial.²⁰⁸ The court lectured that “[o]ur system of justice . . . does not work, or at least does not work well, if lawyers act like professional wrestlers hyping the next match rather than as members of the honorable profession to which they belong.”²⁰⁹ When individuals allow anger or spite to influence strategy or witness examination, courts criticize the behavior as a “no-holds-barred” slugfest, similar to the mayhem of a wrestling match.²¹⁰

206. See *Savino v. Computer Credit, Inc.*, 71 F. Supp. 2d 173, 176 (E.D.N.Y. 1999) (finding awarding attorney’s fees to plaintiff would be improper, given court’s first hand view of parties’ quarrels and repeated amendments).

207. See, e.g., *Hsieh v. R.R. Donnelley & Sons Co.*, No. 04 C 5956, 2006 WL 3469539 at *4 n.3 (N.D. Ill. Nov. 30, 2006) (permitting limited alternative litigation strategies when initial litigation attempts fail in context of principal and agent); *State v. McLemore*, 782 S.W.2d 127, 129 (Mo. Ct. App. 1989) (“Courts have continuously wrestled with this problem and consistently have been pinned to the mat.”); *Fireman’s Fund Ins. Co. v. Garamendi*, 790 F. Supp. 938, 964 (N.D. Cal. 1992) (“Now . . . the companies bring their brawl to federal court, seeking to pin the Commissioner before he can render his administrative decisions.”).

208. See generally No. 03 C 1550, 2004 WL 1144046 at *2 (N.D. Ill. May 19, 2004) (providing criticism when lawyers acted in disgraceful ways during proceedings).

209. *Id.*

210. See, e.g., *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 194 (3d Cir. 2007) (discussing threats of ongoing litigation); *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 68 (1st Cir. 2002) (depicting conflict within company that led to aggressive litigation); *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995) (explaining need for no-holds-barred cross-examination when examining attorney has conflict due to witness being former client); *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) (“The sheer ponderousness of the panel’s . . . labored effort to smother the Second Amendment by sheer body weight has all the grace of a sumo wrestler trying to kill a rattlesnake by sitting on it – and is just as likely to succeed.”); *Deepwater Investments, Ltd v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1114 (10th Cir. 1991) (Aldisert, J., dissenting) (equating “[t]he principals in this high finance drama” to “two professional Sumo wrestlers in a high stakes contest.”).

10. *Horse Racing*

Horse racing has been a popular spectator sport since America's colonial days, and today judicial images of a racetrack and its finish line conjure images of a party's quest for a court's final judgment.²¹¹ For example, in *Zanesville Metropolitan Housing Authority v. Callipare*, the court rejected the plaintiff authority's effort to change its theory of the case for the third time.²¹² The court found that the authority "changed horses in the middle of the trot to judgment," first "[c]oming out of the chute," then "around the bend," into the "backstretch," and finally, the "homestretch."²¹³ The court instructed that the plaintiff "must ride the same horse through *all* the hurdles of the race."²¹⁴

When proceeding to court, a party will be "put through the paces," much as a jockey guides a horse through a race or practice run.²¹⁵ A party showing a strong initial burst of energy charges "out of the starting gate," similar to a horse at the beginning of a race.²¹⁶ A party with an apparent advantage before or during a lawsuit may have the "inside track" and a shorter path to victory, similar to a

211. *See, e.g.*, SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 70, 148-49, 471, 669, 786-87 (1965) (noting popularity that horseracing has achieved).

212. No. CA-81-13, 1981 Ohio App. LEXIS 12355 (Ohio Ct. App. Dec. 10, 1981) (holding that housing authority did not follow proper guidelines for tenants' eviction).

213. *Id.* at *6-7.; *See, e.g.*, *Fuller v. City of Oakland*, 47 F.3d 1522, 1532 (9th Cir. 1995) (comparing allowance of party to withdraw jury demand once trial has started to ability of gambler switching bet as horse comes down "home stretch"); *Philips Elecs. N. Am. Corp. v. Contec Corp.*, 220 F.R.D. 415, 417 (D. Del. 2004) (referring to end of trial as "home stretch"); *Rateree v. Rockett*, 685 F. Supp. 670, 673 (N.D. Ill. 1988) (describing dispute as being in "home stretch"); *Anchorage Chrysler Ctr., Inc. v. DaimlerChrysler Corp.*, 129 P.3d 905, 908 (Alaska 2006) (determining that at certain date, negotiations had reached "home stretch").

214. *Zanesville Metro. Hous. Auth.*, 1981 Ohio App. LEXIS 12355, at *7.

215. *See, e.g.*, *Grenz v. EBI/Orion Group, Inc.*, No. 91-35674, 1992 U.S. App. LEXIS 16231 at *6 (9th Cir. 1992) (maintaining the court's denial of declaratory judgment despite possibility that plaintiff will have to "be put through the paces again in the future").

216. *See, e.g.*, *Deniz v. Municipality of Guaynabo*, 285 F.3d 142, 148 (1st Cir. 2002) (noting that plaintiff's argument does not go far and is not developed); *see also* *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1097 (1st Cir. 1992) (holding that argument "does not get out of the starting gate" because negated before even asserted); *Hillie v. Maggio*, 712 F.2d 182, 186 (5th Cir. 1983) (Thornberry, J., concurring) (stating inmate convicted of attempted armed robbery did not come close to committing the robbery and thus, "never even got out of the starting gate"); *Dobbs v. Roche*, 329 F. Supp. 2d 33, 41 (D.D.C. 2004) (referring to plaintiff as emerging out of "starting gate" when asserting first argument); *Koch v. Koch Indus. Inc.*, 6 F. Supp. 2d 1192, 1200 (D. Kan. 1998) (agreeing that defendant's motion can make it out of "starting gate" and proceed despite procedural objections).

racehorse which gains the inside track and has a shorter path to the finish line.²¹⁷ A federal court may decline to abstain or grant a stay when a pending state court action is “neck and neck,” similar to two horses that are almost tied in a race toward the finish line.²¹⁸ When narrowly avoiding missing a court deadline, a party gets in “just under the wire,” similar to a horse that barely beats a competitor.²¹⁹ When suffering a narrow defeat in court, a party loses “by a nose,” similar to a horse that finishes a few inches behind a competitor.²²⁰

11. *Gymnastics*

Inviting images of the contortions that frequently accompany gymnasts’ moves, dozens of lower courts have spoken of the interpretive, linguistic or mathematical “gymnastics” needed to argue or decide a case.²²¹ In *Green v. Court Common Pleas*, the federal district court denied habeas corpus relief because the petitioner failed to demonstrate “manifest necessity,” the constitutional test for determining whether a trial judge’s grant of a mistrial prevents a defendant’s retrial.²²² To emphasize the subjective and fact intensive nature of the inquiry, the court acknowledged that applying the test

217. *See, e.g.*, *United States v. Latchin*, 554 F.3d 709, 711 (7th Cir. 2009) (reasoning that by being one himself, defendant would have an advantage in befriending Iraqi Christians in the United States); *Md. Troopers Ass’n v. Evans*, 993 F.2d 1072, 1079 (4th Cir. 1993) (using phrase “inside track” to illustrate fact pattern of case); *Cent. Telecomm., Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891, 895 (W.D. Mo. 1985) (noting that “[existing television operators] naturally enjoyed the inside track in the competition for the next franchise”).

218. *See, e.g.*, *Evans Transp. v. Scullin Steel*, 693 F.2d 715, 720 (7th Cir. 1982) (noting equivalency of proceedings puts them “neck and neck”); *Provident Life & Accident Ins. v. Grganto*, No. 97 C 4021, 1998 U.S. Dist. LEXIS 1000 at *5 (N.D. Ill. Jan. 30, 1998) (illustrating that state and federal decisions on stay are not “neck and neck”).

219. *See Demos v. City of Indianapolis*, 139 F. Supp. 2d 1026, 1027 n.2 (S.D. Ind. 2001) (“Having just filed their motion on January 16, 2001, Defendants are in just under the wire.”).

220. *See, e.g.*, *United States v. Rozen*, 600 F.2d 494, 497 (5th Cir. 1979) (“The government’s effort to win by a nose does not succeed.”); *Quickturn Design Sys., Inc. v. Meta Sys.*, No. C-96-0881 MHP, 1996 WL 671230 at *7 (N.D. Cal. Nov. 5, 1996) (describing plaintiff’s loss by a narrow margin as “by a nose”); *Wis. Citizens Concerned for Cranes and Doves v. Wis. Dep’t of Natural Res.*, 661 N.W.2d 858, 868 (Wis. Ct. App. 2003) (describing case outcome where party “won by a nose”).

221. *See, e.g.*, *Ramadan v. Keisler*, 504 F.3d 973, 976 (9th Cir. 2007) (O’Scannlain, J., dissenting from denial of rehearing en banc) (utilizing term “interpretive gymnastics” to describe panel’s application of statute); *see also, e.g.*, *Pendlebury v. Starbucks Coffee Co.*, No. 04-80521-CV, 2008 WL 763213 at *8 (S.D. Fla. 2008) (referring to courts’ aversion to “mathematical gymnastics” when comparing wages in cases); *Amherst Country Club, Inc. v. Harleysville Worcester Ins.*, 561 F. Supp. 2d 138, 147 (D.N.H. 2008) (asserting that “linguistic gymnastics” would not be employed to create ambiguity in statute).

222. No. 08-1749, 2008 WL 2036828 at *1 (E.D. Pa. 2008).

is “more similar to deciding how many points to award a gymnast than deciding whether a football has crossed the line.”²²³

12. *Other Sports*

Since *Flood v. Kuhn*, judges have also paid attention to three other sports: (1) bowling, (2) figure skating, and (3) fencing.²²⁴ In *Joker Club, L.L.C. v. Hardin*, the plaintiff seeking to open a poker club requested a declaratory judgment that poker is a game of skill, rather than an unlawful game of chance.²²⁵ The North Carolina Court of Appeals held that because chance predominates over skill, poker is a game of chance.²²⁶ Skill remains important, but “novices may yet prevail with a simple run of luck,” depending on the cards that are drawn.²²⁷ The court found the calculus different in bowling “where the player’s skill determines whether he picks up the spare,” that is, whether a bowler knocks down all the remaining pins with his or her second roll of the ball.²²⁸

In *Connor v. Mid South Insurance Agency*, the federal district court awarded the plaintiff attorney’s fees of over \$151,000 in an action brought under the Employee Retirement Income Security Act (ERISA).²²⁹ The court rejected the defendants’ contention that a lower figure was appropriate because the “simple” case did not require the attorneys’ level of expertise.²³⁰ The court reasoned that “[l]ike a world-class figure skater who ‘effortlessly’ lands triple axels,” a particularly difficult jump, “a well-prepared and highly skilled attorney can make difficult legal problems seem easy.”²³¹

A fencer scores only when the foil, the light and flexible sword-like weapon, strikes an opponent’s torso. In *State v. Pearson*, the defendant was convicted of second-degree sexual abuse, requiring

223. *Id.*

224. See *supra* text accompanying notes 9-18.

225. See generally 643 S.E.2d 626 (N.C. Ct. App. 2007) (establishing skill and luck present in poker).

226. *Id.* at 630.

227. See *id.* (finding that novice poker players can compete against skilled players despite having less odds calculating skill, bluffing ability, and knowledge of human psychology).

228. *Id.*; see also, e.g., *Stiuso v. City of New York*, 663 N.E.2d 321, 322 (N.Y. 1995) (drawing comparison that “[an injured plaintiff] was unable to steer back onto the road, because one of his tires became stuck in the swale [of the road] in the manner of a bowling ball in the gutter lane.”).

229. 943 F. Supp. 663, 665 (W.D. La. 1996); see also 29 U.S.C. § 1001 et seq. (listing Congressional findings and declaration of policy concerning employee retirement)

230. *Connor*, 943 F. Supp. at 668.

231. *Id.* at 669.

proof that sexual contact occurred between him and his eight-year-old victim.²³² The Iowa Supreme Court rejected the defendant's contention that one count failed because he and the victim remained fully clothed throughout the incident.²³³ The dissenting justice argued that sexual contact could not occur through layers of clothing because "[t]he contact experienced . . . by the fencer touched by the foil on his mask is not the type of harmful contact sought to be reached and criminalized."²³⁴

III. THE USE AND MISUSE OF SPORTS REFERENCES IN JUDICIAL OPINIONS

Sports references may serve a judge's mission to decide and communicate. Nevertheless, such references may also detract from the prestige and dignity that sustains the judicial role in the public system of dispute resolution. This Part examines the balance.

A. Enhancing Communication

In lay and professional writing alike, reasoning-by-analogy can focus and sharpen a reader's understanding, particularly when the writer seeks to analyze and explain intricate concepts.²³⁵ A skillfully drawn analogy can orient readers, who normally may accept the analogy, reject it, distinguish it from the matter at hand, or respond with analogies of their own.²³⁶ Reasoning by analogy is a familiar form of legal reasoning, used extensively in briefs and opinion writing.²³⁷

As an initial matter, however, a sports analogy enhances communication only when the court uses it in the proper context. The federal district court missed the proper context in *Booth v. Carrill*, which held that the Prisoner Litigation Reform Act of 1995 did not compel dismissal of a state prisoner's federal action.²³⁸ The decision turned on a "three strikes" provision, which requires the dis-

232. See 514 N.W. 2d 452, 461 (Iowa 1994) (affirming decision from lower court).

233. See *id.* at 455 (holding that no skin-to-skin contact is required to constitute sex act).

234. *Id.* at 458 (Snell, J., dissenting).

235. See generally Cass Sunstein, *Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) (discussing use of reasoning by analogy in legal writing).

236. See *id.* 747-48, 782-83 (exploring benefits of reasoning by analogy).

237. See *id.* at 741 (mentioning popularity of reasoning by analogy in brief and opinion writing).

238. See No. 05-72905, 2007 WL 295236 (E.D. Mich. Jan. 29, 2007) (adopting magistrate judge's report and recommendation); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codifying as amended at 18

missal of suits by incarcerated or detained prisoners who have brought three or more federal suits previously dismissed as “frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted.”²³⁹ The court held that one of prisoner Booth’s prior three federal suits did not count as a “strike” because the court dismissed it without prejudice for failure to exhaust administrative remedies.²⁴⁰

The *Booth* district judge accepted the magistrate judge’s report, which misconstrued Chief Justice Roberts’ statement that it is the judge’s “job to call balls and strikes.”²⁴¹ This statement, made in 2005 during his Senate confirmation hearings on his nomination as Chief Justice, has become a benchmark.²⁴² During Justice Sonia Sotomayor’s Supreme Court confirmation hearings in 2009, Senate Judiciary Committee members and the nominee took Chief Justice Roberts’ baseball reference as a foundation for debating the judicial role.²⁴³

The Sotomayor hearings demonstrated the stamina and persuasiveness of sports references in contemporary legal and political dialog because the participants discussed balls and strikes knowing that television audiences would grasp the analogy.²⁴⁴ Nevertheless, the discussion of baseball in *Booth* added nothing to the readers’ understanding of the Prisoner Litigation Reform Act because the court’s discussion was out of context. Chief Justice Roberts’ statement concerned only his approach to the judicial role generally, without any claim of expertise about the interpretation of federal or state “three strikes” legislation.

U.S.C. § 3626, 28 U.S.C. § 1915, 28 U.S.C. § 1346, 42 U.S.C. § 1997, and other scattered sections).

239. See *Booth*, 2007 WL 295236, at *4 (interpreting 28 U.S.C. § 1915(g)).

240. See *id.* (stating that Congressional mandate is unambiguous)

241. See *id.* at *1; see also *Panel One of a Hearing of the S. Judiciary Comm., Nomination of Judge John G. Roberts to Be Chief Justice of the Supreme Court*, CNN.COM, Sept. 12, 2005, <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/index.html> (last visited Oct 31, 2009) (detailing transcription of Roberts’ hearing).

242. See David Waldman, *On Balls and Stricks*, DAILY KOS, July 13, 2009, <http://www.dailykos.com/storyonly/2009/7/13/753086/-On-balls-and-strikes> (last visited Oct. 31, 2009) (setting forth confusion and controversy regarding Chief Justice Roberts’ statement from his Senate hearing in 2005).

243. See, e.g., Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 12, 2009, at 1 (interpreting Chief Justice Roberts’ baseball reference in context of Sotomayor hearings).

244. See *id.* (discussing Sotomayor hearings and use of baseball references).

At the hearings, then-Judge Roberts assured Senator Arlen Specter that, "I come before the committee with no agenda. I have no platform."²⁴⁵ The nominee explained:

Judges are not politicians who can promise to do certain things in exchange for votes. I have no agenda, but I do have a commitment: If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench. And I will decide every case based on the record according to the rule of law without fear or favor to the best of my ability. *And I will remember that it's my job to call balls and strikes and not to pitch or bat.*²⁴⁶

When a court passes this initial hurdle with an opinion that properly uses sports references ingrained in the American lexicon, the usage may serve valuable institutional ends. Sports references can help the court illuminate and simplify intricate points of law or fact.²⁴⁷ As discussed earlier, *Pacific Insurance Co. v. Catholic Bishop of Spokane* arose from allegations of sexual abuse by priests.²⁴⁸ In this high-profile case with significant public implications, eighteen major law firms filed appearances to argue complex issues of causation on behalf of the various plaintiffs and the defendant insurance companies.²⁴⁹ The district court's readily understood golf analogy helped explain difficult issues relating to intent in insurance law.²⁵⁰ Furthermore, the golf analogy may enhance the opinion's value as precedent that will be instructive in future cases whose parties are unfamiliar with this aspect of insurance law.

Careful use of sports references can also help humanize judges, who are sometimes praised and criticized for leading iso-

245. See CNN.COM, *supra* note 241 (excerpt from Roberts' hearing transcript).

246. *Id.* (emphasis added).

247. See Sunstein, *supra* note 235 and accompanying text, at 747-48, 782-83 (highlighting benefits of reasoning by analogy).

248. See generally 450 F. Supp. 2d 1186 (E.D. Wash. 2006); see *supra* notes 153 to 160 and accompanying text (laying out facts of case and specific golf analogy).

249. *Id.*

250. See *id.* at 1206. The golf analogy is restated below:

Clearly, a covered person intentionally striking a golf ball with the intention that it land on its assigned fairway or green, but which sharply diverts from its intended course and strikes a player on an adjacent fairway, does not mean that the intended launching of the golf ball excludes coverage for any negligence involved in failing to warn the adjacent players with a time honored (and expected) "fore!!!"

Id.

lated and “monastic” lives once they ascend to the bench.²⁵¹ The dialog invites discussion about the nature of judging and the role, if any, that a judge’s life experiences should play when resolving close legal questions.²⁵² One need not choose a side in this jurisprudential debate to acknowledge that sports references can help assure litigants, lawyers, and observers that a judge deciding high-stakes issues of public or private law has followed a cultural path similar to the paths followed by legions of other Americans in our “sports-minded society.”²⁵³

Finally, careful use of sports references can help invigorate an opinion, even when their use is not essential to explain the law or facts. This distinctive contribution flows from advice Judge Aldisert shared with advocates who submit briefs and other papers to the court: “It is not unconstitutional to be interesting.”²⁵⁴ Like the parties that incorporate sports references into their written and oral submissions, judges can facilitate communication when they combine their legalistic prose with passages that stimulate interest.

Institutional utility may be tempered, however, when a sports reference is beyond the understanding of some members of the opinion’s discrete readership. For instance, some readers may more readily grasp references drawn from America’s more popular professional and amateur sports, such as football and baseball, than from less popular sports such as fencing.²⁵⁵ The judgment call is for the court, whose written opinion may avoid the reference entirely or place it in a contextual discussion that facilitates understanding among non-fans.

251. See, e.g., David Lightman, *Leahy Sees Justice In Place By October*, CHI. TRIB., May 4, 2009, at 11 (mentioning Sen. Patrick Leahy, S. Judiciary Comm. Chair and President Barack Obama’s first Supreme Court nomination). He explains, “I would like to see more people from outside the judicial monastery, somebody who has had some real-life experience.” *Id.*; see also Mark B. Rotenburg, *Politics, Personality and Judging: The Lessons of Brandeis and Frankfurter on Judicial Review*, 83 COLUM. L. REV. 1863, 1863 n.1 (1983) (“[T]his Court has no excuse for being unless it’s a monastery”). Sports references assure litigants, lawyers, and observers that judges followed a cultural path similar to legions of others in Americas’ “sports-minded society.” *In re Application of N.Y. Times Co.*, No. M8-85, 1984 WL 971 at *4 (S.D.N.Y. Oct. 9, 1984).

252. See, e.g., Ruggero J. Aldisert, *THE JUDICIAL PROCESS: TEXT, MATERIALS AND CASES*, chs. 4-5 (2d ed. 1996).

253. *In re Application of N.Y. Times Co.*, No. M8-85, 1984 WL 971 at *4 (S.D.N.Y. Oct. 9, 1984).

254. Ruggero J. Aldisert, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT* § 9.2, at 152 (rev. 1st ed. 1996).

255. For a discussion about the popularity of sports in the United States by way of participating, see *supra* notes 23 to 35 and accompanying text.

B. Fidelity to the Judicial Role

1. *Defining fidelity*

When the court considers invoking sports references in a written opinion, the prospect of enhanced communication is only half the decision. Even when a particular sports reference would not impose an apparent barrier to the communication of ideas, the American Bar Association Model Code of Judicial Conduct (“Model Code”) advises judges to also consider whether invocation would maintain the prestige and dignity on which the judicial process depends for public acceptance.²⁵⁶

Rule 1.3 of the Model Code invites a measure of restraint: “A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge”²⁵⁷ So too does the Model Code’s Preamble, instructing that “[j]udges should maintain the dignity of the judicial office at all times”²⁵⁸

In comparing the current code provision to the 1990 version, the drafters of Rule 1.3 comment that “a judge’s personal ‘interests’ might commonly be thought to include ‘economic’ interests.” To clarify that “personal” is broader than “economic,” however, the drafters specifically listed both.²⁵⁹ Regardless of the outer limits of this breadth, “the core objective underlying the Rule” is that “a judge should not use his or her position as a judge to gain personal advantage in business or daily life.”²⁶⁰

The Model Code does not directly or indirectly reach the use of sports references in published opinions because a judge derives no “personal advantage in business or daily life”²⁶¹ from the use. Sports references do not enhance the salary or job security of judges appointed for life or elected for a lengthy term of years. Similarly, neither the judge nor any family member or acquaintance achieves financial reward for the references.

To the extent that a judge’s professional standing depends on perceptions of the quality of written opinion, sports references remain fully exposed to ordinary professional and public scrutiny. Trial court opinions remain subject to appellate review, and appellate court opinions normally remain subject to critique by panel

256. *See* Model Code of Judicial Conduct, 16 (A.B.A., 2007) (governing proper conduct for judges).

257. *Id.*

258. *Id.* at 1.

259. *Id.* at 85

260. *Id.* at 86 (Comment & Explanation of Comments 1).

261. *Id.*

members, other members of the court, and higher courts that can reverse or overrule. Senate confirmation hearings for federal judges, including hearings for sitting judges moving from one court to another, demonstrate that judges can be held publicly accountable for the substance and style of their official writing by the “court of public opinion.”²⁶² This influential forum includes not only legislators, but also perhaps mainstream broadcast and print media, academic researchers, and writers in the blogosphere.

Despite the absence of direct or indirect formal application, the Model Code’s overarching concern for maintaining the prestige and dignity of judicial office may provide reason for careful use of sports references in official judicial writing. When the sharply divided en banc U.S. Court of Appeals for the Fourth Circuit invoked baseball in *Cooper v. Taylor*, the judges themselves raised this overarching concern while also demonstrating the force of judicial temptation sometimes to give it short shrift.²⁶³

The en banc court denied the habeas corpus petition of Cooper, who was sentenced to life in prison for murder.²⁶⁴ The eight-member majority found the alleged constitutional error harmless because the evidence on record, taken as a whole, powerfully and overwhelmingly demonstrated guilt.²⁶⁵ Judge Niemeyer wrote that “the jury witnessed the government score 14 runs with its evidence and the defense score none.”²⁶⁶ Judge Niemeyer continued that “[i]f . . . we were required to invalidate what we would expect Cooper to characterize as a government grand-slam home run, the remaining 10-0 score would still have left the jury’s verdict the same.”²⁶⁷

Dissenting Judge Hamilton, writing for himself and Judge Murnaghan, argued that “because this case involves a man who is sentenced to life in prison, the majority’s analogy to baseball trivializes the serious nature of this case.”²⁶⁸ In its internal deliberations,

262. See, e.g., Major Garrett & Shannon Bream, *Sotomayor’s Judicial Record Could Be Battlefield for Critics, Advocates*, FOXNEWS.COM, May 26, 2009, <http://www.foxnews.com/politics/2009/05/26/sotomayors-judicial-record-battlefield-critics-advocates/> (last visited Oct 31, 2009) (noting emphasis placed on judicial opinions and language). The article demonstrates how closely the language used by potential Supreme Court judges will be scrutinized by the Senate and public in determining approval of the President’s nomination. See *id.*

263. See generally 103 F.3d 366, 375 (4th Cir. 1996) (*en banc*) (chastising majority for trivializing situation and referencing baseball).

264. See *id.* at 372 (affirming district court’s decision).

265. See *id.* at 371 (stating that error was harmless).

266. *Id.* at 370.

267. *Id.*

268. *Id.* at 375 (Hamilton, J., dissenting).

the en banc majority doubtlessly had the opportunity to weigh this objection before declining to remove the analogy from the opinion. Judge Hamilton evidently lost on his objection, but his dissenting opinion nonetheless followed with a lengthy baseball analogy of its own:

If we are to engage in such triviality, it is fair to say the jury in this case witnessed something far different than the 14-0 game suggested by the majority. Rather, what the fans at Yankee Stadium recently witnessed in the eighth inning of the first game of the American League Championship Series is symbolic of what the jury witnessed in this case. A young boy in the stands, while attempting to catch a Yankee fly ball as a souvenir, knocked the ball over the right field wall. Replays showed that the ball could have been caught by an Oriole outfielder; however, the umpire erroneously declared the hit a Yankee home run. The late inning home run tied the game, and the Yankees went on to win. Would the Yankees have won without the umpire's erroneous call? Or, would the Orioles have won? No one knows. What we do know without question is that the umpire's erroneous call had a substantial and injurious effect or influence on the outcome of the game.²⁶⁹

The specter of judicial trivialization is not unique to criminal cases. The specter surfaced even more starkly in *Hunt's Generator Committee v. Babcock & Wilcox Co.*, which granted a defendant summary judgment in a suit under the Comprehensive Environmental Response and Liability Act (CERCLA).²⁷⁰ The federal district court published the opinion in late September 1994, approximately two weeks after baseball commissioner Bud Selig canceled the rest of the season due to a players' strike.²⁷¹

In *Hunt's Generator Committee*, Judge Evans lamented the loss of the World Series:

269. *Id.*; see also, e.g., Bruce Weber, *Boy Who Saved the Yankees Becomes a Man About Town*, N.Y. TIMES, Oct. 11, 1996, at A1 (reporting Yankee Stadium incident to which Judge Hamilton refers).

270. See 863 F. Supp. 879 (E.D. Wis. 1994) (granting summary judgment); see also 42 U.S.C. § 9601 *et seq.* (detailing public health and welfare act).

271. See William B. Gould IV, *The 1994-'95 Baseball Strike and National Labor Relations Board: To the Precipice and Back Again*, 110 W. VA. L. REV. 983 (2008) (revealing chronology of 1994 baseball strike); see also Richard Sandomir, *A Baseball Ruling, A Steppingstone To the Top Court*, N.Y. TIMES, May 27, 2009, at B11 (referencing 1995 ruling by then-District Judge Sonia Sotomayor, issuing preliminary injunction that President Barack Obama cited for having "saved baseball" by leading to ultimate 1996 settlement); see also Silverman v. Major League Baseball Player Relations Comm., 880 F. Supp. 246 (S.D.N.Y. 1995) (Sotomayor, J.) *aff'd*, 67 F.3d 1054 (2d Cir. 1995) (Sotomayor's opinion that 'saved baseball').

I thought I would, at this time, be getting ready to watch the World Series. As a baseball lover, that was a warm thought indeed. But alas, the World Series is not, this year, meant to be . . . Please excuse me if, while discussing the case, my mind wanders a bit to things that might have been.²⁷²

The court's extended wandering contributed nothing to the resolution of the summary judgment motion, which was the court's official responsibility at that stage of the proceedings.

The district court's opinion first identified the parties. "The plaintiffs are an unincorporated association of corporations (much like the owners of major league baseball teams)."²⁷³ The court explained that the plaintiffs' consent decree with the Environmental Protection Agency "served the purpose of a salary cap limiting [their] financial liability."²⁷⁴ The defendant sought dismissal on the ground that it was not a successor to another plaintiff company, a position that the district court wrote was "not unlike the situation in 1970 when the Milwaukee Brewers wanted nothing to do with the debts of their predecessor, the Seattle Pilots."²⁷⁵

Throughout the recitation of the facts, the court in *Hunt's Generator Committee* included extraneous footnotes laden with baseball references that likewise were entirely off the mark. For instance, after the court stated that

"[t]he landfill at issue operated from September 1959 to May 1962," the court's footnote read: "September of 1959 was an exciting time. The San Francisco Giants – who blew off Manhattan's Polo Grounds after the 1957 season – were leading the Dodgers and the Braves (Milwaukee, not Atlanta) by two games with eight to go in the race for the National League Pennant"²⁷⁶

272. *Hunt's Generator Committee*, 863 F. Supp. at 881.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at n.1. Footnote 1 continued:

"[B]ut the Giants were playing in old Seals Stadium (a minor league park), a place not suited for World Series play. If they made it to the Series, they thought, they might want to play in the yet unfinished Candlestick Park. They were in a pickle-which way would they go? Fortunately, their old friends, the Dodgers (who, like the Giants, had broken hearts the year before by running away from Ebbets Field) came to the rescue. The Dodgers beat the Giants three straight times over the week-end of September 19-20, sending the Giants reeling into third place. There would be no need to choose between Candlestick Park and Seals

After the court stated that “[a] buyer purchased the landfill in May of 1959 and operated it until September 1970,” the court’s footnote read: “In September of 1970, the Milwaukee Brewers were drawing the curtain on their maiden campaign in Milwaukee. Despite the fact that they finished 65-97, 33 games out of the race, baseball was back in town and Milwaukee fans were loving it.”²⁷⁷

After the court stated that “[i]n March 1975, the predecessor company agreed to sell its assets to a partnership” the court’s footnote read:

The year 1975 brought us one of the greatest moments in World Series history. The sixth game of the Series, one of the greatest ever played, saw Boston’s Bernie Carbo hit a three-run pinch hit homer which paved the way for Carlton Fisk’s game winning round tripper in the bottom of the 12th The Red Sox didn’t return to the big show until 1986”²⁷⁸

After the court stated that “[t]he predecessor company closed on the sale of its assets to a partnership on April 8, 1975” the court’s footnote read: “April 8, 1975, was the one-year anniversary of Henry Aaron’s historical 715th dinger which broke Babe Ruth’s lifetime record of 714.”²⁷⁹

The court concluded that the summary judgment motion presented a question which was not previously decided by “the Seventh (as in inning stretch) Circuit.”²⁸⁰ The court examined earlier decisions by the “Ninth (as in bottom of the ninth inning) Circuit,” the “Fourth (as in the baseball bar, the Fourth Base, located on Milwaukee’s National Avenue) Circuit,” and the “Eighth (as in ‘dial 8’) Circuit.”²⁸¹ The court’s footnote explained that:

‘Dial 8’ . . . means to hit a home run. Why? Well, the term comes from hotels where, as we know, traveling ballplayers spend a lot of time. When they’re in a hotel, and they want to make a long distance call, they ‘dial 8’ on the ho-

Stadium. The World Series instead would be won by the transplanted Dodgers, with a team peppered with old Brooklyn stars like Gil Hodges, Duke Snider, and Junior Gilliam plus a 23-year-old southpaw, Sandy Koufax.”

Id.

277. *Id.* at n.2.

278. *Id.* at n.3.

279. *Id.* at n.4.

280. *Id.* at 882.

281. *Id.* at 882-83.

tel phone. Hitting a home run – sending the ball ‘long distance’ – is called (probably only by witty baseball players) ‘dialing 8.’²⁸²

The court of appeals precedents led the court in *Hunt’s Generator Committee* to hold that the summary judgment movant “should be yanked out of this game and sent to the showers.”²⁸³ The holding came only after the district court discussed the argument of the movant’s counsel, Eric Klumb, who the court advised “is not to be confused with the legendary Elmer Klumpp who won two games in a very forgettable major league career that ended with the Boston Braves in 1937.”²⁸⁴

2. *Exercising judgment*

The Model Code leaves sports references to the discretion of each judge, exercised in light of the formal nature of legal proceedings and subject to open professional and public scrutiny. In the final analysis, that discretion is best exercised when judges distinguish between their public and private writing. In published opinions and orders, judges write not as private citizens, but as public officers vested by constitution and statute with authority to speak with the force of law. By contrast, judges writing in law reviews and other forums outside of their official, public capacity enjoy much wider latitude for self-expression.²⁸⁵ It may be fanciful to suggest that a particular opinion’s inclusion of sports analogies would affect the outcome, but it is not fanciful to suggest that inclusion could affect the professional and public esteem on which judges and courts depend for institutional integrity.

Unbridled excursions into sports analogies challenge the court’s prestige and dignity because judges, by virtue of their official positions, enjoy advantages not commonly enjoyed by other writers. Judges hold their positions for life or a comfortable term of years, regardless of the content of what they publish in reporters. Short of impeachment or defeat at the polls, scrutiny of their official writing does not threaten loss of employment or income. No

282. *Id.* at 884 n.6.

283. *Id.* at 884.

284. *Id.* at 883 n.5.

285. *Cf.* *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (explaining that Code of Judicial Conduct provision that prohibited candidates for judicial election, including sitting judges, from stating their views on legal or political issues within province of court for which they were running violated First Amendment speech clause).

editor seeks to influence their writing unless the judge, consistent with Canon 3.B(7) of the Model Code, requests help.²⁸⁶

Aside from institutional standards imposed by authorities responsible for judicial administration, judges preparing written opinions typically face few deadlines for submission. Judges do not receive rejection letters because reporters and electronic search engines typically guarantee publication of whatever opinions they submit. Even so-called “unpublished” opinions are typically published nowadays, free from barriers which other writers face in their quests for a public forum.²⁸⁷

Most writers would envy such guaranteed long-term job security and income, plus freedom from often-intrusive editing, incessant deadline pressures, and the prospect of rejection. But there is more. Any professional writer soon recognizes that putting something on paper does not necessarily mean that it will be read. Judicial opinions, on the other hand, have a guaranteed audience. Judges may suffer criticism of their work, and loose judicial writing may be particularly susceptible to distinction by future litigants seeking to avoid precedent. Advocates who overlook judicial writing, however, act at their peril because anything written in an opinion affects the parties’ rights and obligations and can be cited as binding or persuasive authority.

With advantages of employment security and guaranteed audiences, courts would be better served if judges wishing to write about the glories of baseball or other sports would confine such writing to the pages of law reviews, law journals, magazines, blogs, op-ed columns, and similar professional and popular venues available to other writers.

286. See MODEL CODE OF JUD. CONDUCT Canon 3B(7) (2009) (outlining judge’s ability to seek assistance).

The Model Code permits judges to consult with court staff and court officials whose functions are to aid the judge in carrying out the judge’s adjudicative responsibilities, . . . provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

Id. The judge must give parties advance notice, and opportunity to respond or object, when judge seeks to “obtain the written advice of a disinterested expert on the law.” *Id.*

287. See, e.g., Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1236 (2004) (noticing how technology and Internet allow opinions to be published quickly and affordably so many unpublished opinions are still made public).

IV. CONCLUSION

The social significance of sports was not lost on Chief Justice Earl Warren, who proudly called himself an “ardent fan of most sports” because he found athletic competition “an important phase of American life.”²⁸⁸ Warren particularly loved baseball, and reportedly received serious consideration to become Commissioner of Major League Baseball in 1950.²⁸⁹ This position held his interest until President Eisenhower appointed him to the Court three years later.²⁹⁰ Earl Warren, Jr. recalled that his father might have accepted the baseball position if he had not just announced his candidacy for reelection as Governor of California.²⁹¹ One biographer notes that when the Court reaffirmed Major League Baseball’s anti-trust exemption in *Toolson v. New York Yankees, Inc.* on the new Chief Justice’s first opinion day, “[f]ew knew how close Warren had come to representing baseball in this case, rather than judging it.”²⁹²

For several years, Warren brought the other Justices and their wives to Philadelphia for the Army-Navy football game.²⁹³ He rarely missed a Washington Redskins home football game, attended as many Washington Senators baseball games as his schedule permitted, often with his clerks, and attended at least one World Series game whenever it was played in a city near Washington.²⁹⁴ Justice Potter Stewart reported that the Chief Justice would come to his

288. See Earl Warren, *THE MEMOIRS OF EARL WARREN* 23 (1977) (recounting life of Chief Justice Warren); see also John Hart Ely, *The Chief*, 88 HARV. L. REV. 11, 11 (1974) (calling Chief Justice Warren “a great sports fan”).

289. See Leo Katcher, *EARL WARREN: A POLITICAL BIOGRAPHY* 247-48 (1967) (interviewing Earl Warren, Jr., who said that in early 1950 his father “received either a definite offer, or a very strong feeler, from some source asking him if he would take the job of commissioner of baseball”); see also John Drebing, *Webb of Yanks Says Majors Plan No Immediate Action on Chandler*, N.Y. TIMES, Feb. 6, 1951, at 44.

290. See James Reston, *The Majesty of the Court*, N.Y. TIMES, Nov. 14, 1975, at 37 (summarizing Chief Justice Warren’s time in lower court and nomination to Supreme Court Justice).

291. See Katcher, *supra* note 289, at 247-48 (interviewing Earl Warren, Jr.); see also John Drebing, *Webb of Yanks Says Majors Plan No Immediate Action on Chandler*, N.Y. TIMES, Feb. 6, 1951, at 44 (quoting Earl Warren as saying “I was just elected governor, and I think that’s the job I want.”).

292. 346 U.S. 356 (1953) (per curiam); see also Katcher, *supra* note 271, at 314.

293. See Warren, *supra* note 288, at 348; see also Christine L. Compston, *EARL WARREN: JUSTICE FOR ALL* 103 (2001).

294. See William J. Brennan, Jr., *A Personal Remembrance, THE WARREN COURT: A RETROSPECTIVE* 4 (Bernard Schwartz ed., 1996); see also Compston, *supra* note 275, at 104; see also Bernard Schwartz, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT – A JUDICIAL BIOGRAPHY* 62 (1983).

chambers “to watch the World Series because . . . my secretary had the only television set in the building . . . He was like a little boy playing hooky.”²⁹⁵ Messengers would deliver World Series scores to the Chief Justice and his colleagues during oral arguments and in the Court’s conferences.²⁹⁶

The Warren Commission’s general counsel explained how the panel would relieve tension-filled days during its deliberations on President Kennedy’s assassination: “When they got too bad, the Chief Justice would break it up by talking about other things, baseball, for instance. He was always good for a couple of minutes on the pleasure of watching Willie Mays catch a fly or the speed of Sandy Koufax’s fast ball.”²⁹⁷

Chief Justice Warren himself displayed no reticence when he explained his unorthodox practice of reading the daily newspaper from back to front: “I always turn to the sports page first,” he said, “[t]he sports page records people’s accomplishments; the front page, nothing but man’s failure.”²⁹⁸

Since the early 1970s, the proliferation of sports references in federal and state court opinions has validated Chief Justice Warren’s passion for athletics as a reflection of American life. Courts have routinely used sports references to enhance decision making, but misuse of these references may also compromise the prestige and dignity essential to public perceptions about the administration of justice.

As judges draw the line of demarcation between use and abuse in the exercise of personal judgment, it would be wise to remember Chief Justice Warren’s formula. In his memoirs, he wrote freely about his private passion for baseball and other sports.²⁹⁹ Nevertheless, in his sixteen years on the Court from 1953 to 1969, his official writing used sports references carefully, and never in a way

295. See Schwartz, *supra* note 294, at 132-33.

296. See Compston, *supra* note 293, at 104; see also Bill Severn, MR. CHIEF JUSTICE: EARL WARREN 143 (1968); see also Warren, *supra* note 270, at 283 (editors’ note); see also Brennan, *supra* note 294, at 9 (recalling how Justice Brennan’s new colleagues paid no attention when Warren brought him into Court’s darkened third floor lounge to meet them for first time in 1956). “[O]ne of them . . . told me to get out of the way because I was blocking the television set on which they were all watching the first game of the World Series” between the New York Yankees and the Brooklyn Dodgers. *Id.*

297. See Katcher, *supra* note 289, at 461.

298. See Alec Lewis, THE QUOTABLE QUOTATIONS BOOK 262 (Crowell 1980).

299. See Warren, *supra* note 270, at 23 (“I have been an ardent fan of most sports throughout my life and . . . I have always encouraged my children in any sports activities they liked. I believe competitive sports are an important phase of American life.”).

that would compromise the Court's institutional prestige or dignity.³⁰⁰

300. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 558 n.27 (1969) (Warren, C.J.) (discussing “two-thirds ground rule”); *Flast v. Cohen*, 392 U.S. 83, 110 (1968) (Warren, C.J.) (“[T]he role of the federal courts is not only to serve as referee between the States and the center but also to protect the individual against prohibited conduct by the other two branches of the Federal Government.”); *State v. Katzenbach*, 383 U.S. 301, 324 (1966) (Warren, C.J.) (“The ground rules for resolving this question are clear.”).

