

C

Mercer Law Review
Spring 2007Lead Articles Edition
Using Metaphor in Legal Analysis and Communication
A Symposium of the Mercer Law Review

Article

*919 LEVELS OF METAPHOR IN PERSUASIVE LEGAL WRITING

Michael R. Smith [FN1]

Copyright © 2007 Walter F. George School of Law, Mercer University; Michael

R. Smith

The role of **metaphor** in the law has been a hot topic among legal scholars in recent years. [FN1] In fact, recent scholarly works on **metaphor** in the law (and the more general works on **metaphor** that have served as their basis) have addressed the topic from the standpoints of numerous disciplines, including linguistics, [FN2] philosophy, [FN3] rhetoric, [FN4] *920 cognitive psychology, [FN5] and literary theory. [FN6] Because of these vastly different approaches to the topic, however, much of the literature on **metaphor** in the law is difficult to reconcile. Moreover, while these scholarly works have increased lawyers' appreciation and understanding of the prevalence and power of **metaphor** in legal discourse, the absence of some type of organizational scheme has made it difficult for legal advocates to harness this power so that it can be used in their everyday practices.

This Article, then, has two primary goals. First, this Article attempts to reconcile some of the approaches to the topic of "**metaphor** and the law" by identifying different "**levels**" of **metaphor** operating in legal analysis and writing. [FN7] A close reading of the scholarship reveals that there are actually four basic types or **levels** of **metaphor** operating in persuasive legal discourse. These four **levels** of **metaphor** correspond with the four basic components of any legal argument: (1) the legal principles governing an issue; (2) the tools of analysis applied to the governing principles; (3) the writing style of an advocate who is presenting the legal argument; and (4) the inherent nature of language itself, which serves as the foundation of any written legal argument. The fact that **metaphor** plays a significant role in all four of these components of legal argumentation highlights the sheer prevalence of **metaphor** in legal discourse. The four **levels** of **metaphor** discussed here will be presented generally in descending order, starting with those types of **metaphor** that play the most significant roles in the decision-making process and working down. The following is a summary of the four **levels** of **metaphor** that will be discussed:

*921 Level 1--Doctrinal **Metaphors**Level 2--Legal Method **Metaphors**Level 3--Stylistic **Metaphors**Level 4--Inherent **Metaphors**

The second, and more practical, goal of this Article is to analyze the specific implications of these four **levels** of **metaphor** on the practice of persuasive legal writing. While most of the recent scholarship on **metaphor** has made it clear that **metaphors** are more than mere rhetorical or literary devices, [FN8] these works do not diminish the importance of **metaphor** to legal rhetoricians. To the contrary, the more the legal profession learns about **metaphors**, the more opportunities exist for legal advocates to develop rhetorical strategies around them. Thus, while this Article acknowledges that **metaphors** are more than rhetorical devices, it nevertheless demonstrates that **metaphors**, more than ever, can and do serve as the basis for numerous rhetorical strategies.

I. Level One: Doctrinal **Metaphors**

A. Defining Doctrinal **Metaphors**

The first category--or level--of **metaphor** implicated by the existing "law and **metaphor**" literature is what I call "doctrinal **metaphor**." This level of **metaphor** refers to aspects of doctrinal law that are expressed in metaphoric terms. Many of the legal rules and principles governing the analysis of an issue are expressed in the form of a **metaphor**. In fact, doctrinal law is rife with metaphoric constructs. [FN9] Consider the following recognizable examples:

*922 . The "marketplace of ideas" principle in First Amendment law; [FN10]

. The "wall of separation" principle in connection with the law on the separation of church and state under the First Amendment; [FN11]

. The "overbreadth" doctrine under constitutional law; [FN12]

. The "chilling effect" doctrine under constitutional law; [FN13]

. Treating a corporation as a "person" under the law; [FN14]

. The relationship between "parent corporations" and subsidiaries and "piercing the corporate veil" under corporations law; [FN15]

. The "fruit of the poisonous tree" doctrine under criminal law and evidence law; [FN16]

. "Long arm" statutes under personal jurisdiction law. [FN17] *923 Without a doubt, doctrinal **metaphors** are the most powerful--and potentially the most dangerous--**metaphors** operating in legal discourse. In these contexts, substantive legal rights are expressed, analyzed, and argued not in literal terms, but in figurative, symbolic, and metaphoric terms. Granted, metaphoric language can be useful for describing or expressing an abstract legal concept. In fact, it is the ability of **metaphor** to "give names to nameless things" [FN18]--to put an abstraction into concrete terms--that has led to the prevalence of **metaphor** in doctrinal law. However, a **metaphor** cannot possibly capture the true meaning of, and all the dimensions and nuances implicated by, an abstract legal concept. [FN19] Indeed, it is this allure of **metaphor** combined with its potential pitfalls that led renowned jurist Benjamin Cardozo to his famous criticism of **metaphors** in doctrinal law: "**Metaphors** in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." [FN20] And it is this criticism, and the shortcomings of **metaphor** that it reflects, that lead us to our first rhetorical metaphoric strategy: challenging an established doctrinal **metaphor**.

B. Advocacy Strategy with Doctrinal **Metaphors**: The Cardozo Attack

As discussed in the preceding section, many rules of law and legal principles are expressed in metaphoric terms. As we also saw, the ability of a **metaphor** to accurately and effectively capture and reflect a legal abstraction is questionable. Thus, the first metaphoric strategy available to the legal advocate is to challenge an unfavorable doctrinal **metaphor**, a strategy I have dubbed the "Cardozo Attack."

Many legal advocates represent clients on issues that implicate doctrinal **metaphors**. If a lawyer finds that his or her client would not fare well under the established doctrinal **metaphor**, one strategy that may be available to the lawyer is to challenge the **metaphor** itself. That is, the lawyer may be able to convince the court to adopt a new (and more favorable) governing rule by arguing that the existing doctrinal **metaphor** is defective because it does not accurately and effectively capture the legal concept at issue. A lawyer in this situation may *924 advocate either for a new "literal" rule or for a new metaphoric rule that (in the opinion of the advocate) more effectively captures the legal abstraction (i.e., fighting **metaphor** with **metaphor**). [FN21]

Numerous illustrations of successful attacks on doctrinal **metaphors** exist. We will consider two.

1. Replacing a Factors Test for the "Alter Ego" Doctrine for "Piercing the Corporate Veil" Under Corporations Law. The first example of a successful challenge to a doctrinal **metaphor** stems from Justice (then Judge) Cardozo's statement itself. Justice Cardozo's earlier quoted admonishment about **metaphors** was given in the context of corporations law and the "mists of **metaphor**" that "envelop" the relationship between parent corporations and subsidiary corporations. [FN22] Justice Cardozo warned that **metaphors** such as "alias" and "dummy," which often dominate the discussion of whether a parent corporation will be held responsible for the obligations of its subsidiary, should be employed carefully and not to the exclusion of literal language that more accurately expresses the proper relationship between such corporations. [FN23]

Justice Cardozo's warning has had a major impact on the development of corporations law in many jurisdictions around the country. In fact, based in large part on Justice Cardozo's warning, [FN24] many courts have abandoned the traditional doctrinal **metaphors** used to analyze the limitations on a corporation's liability--"piercing the corporate veil," "alter ego," "alias," "dummy," "instrumentality," "fiction"--and have *925 replaced them with literal rules (such as factor tests [FN25]) that more accurately assess the legitimacy of the corporation's relationships and existence. [FN26] One example of such a case is *Laya v. Erin Homes, Inc.*, [FN27] in which the West Virginia Supreme Court of Appeals adopted a nineteen-factor test for determining whether to disregard the corporate entity in a particular case. [FN28] In establishing this rule, the court in *Laya* acknowledged the limitations of the traditional corporate law **metaphors** and paid appropriate homage to Justice Cardozo:

Examination of the numerous relevant factors in a "totality of the circumstances" test provides a more enlightening analysis than merely applying **metaphors**, like "simulacrum," "alter ego," "instrumentality," etc., to describe the unity of the shareholder(s) and the corporation justifying, where equitable, the piercing of the corporate veil in the case.

.....

In discussing the concept of piercing the corporate veil to hold the parent corporation liable for the debts of its subsidiary corporation, the renowned Benjamin N. Cardozo, then Chief Judge of the New York Court of Appeals, remarked that this concept "is still enveloped in the mists of **metaphor**. **Metaphors** in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." [FN29]

2. Dismantling the "Wall of Separation" Between Church and State and Replacing it with the "Lemon Test."

A second example of a successful attack on a doctrinal **metaphor** has been well chronicled by author and communications professor Haig Bosmajian and involves the Establishment Clause of the First Amendment to the United States Constitution. [FN30] The First Amendment provides that "Congress shall make no law respecting an establishment of religion." [FN31] This provision in the Constitution is generally designed to prevent states and the federal government from enacting laws that favor one religion over another, that favor the religious over the nonreligious, or that otherwise *926 punish or favor people for having or not having certain religious beliefs. [FN32]

As Professor Bosmajian points out, the United States Supreme Court, in the 1947 case of *Everson v. Board of Education Ewing Township*, [FN33] established a doctrinal **metaphor** that was designed to guide state and federal courts' analysis of Establishment Clause issues. [FN34] In *Everson*, the Court, speaking through Justice Black, held that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." [FN35]

After *Everson*, courts generally used the wall of separation **metaphor** as a guiding principle for interpreting and applying the Establishment Clause. [FN36] In many cases, however, an absolute division between government and church proved to be unworkable as courts began to recognize that some relationship between the government and religion was inevitable. Soon, some federal judges and legal scholars, unhappy with the development of Establishment Clause jurisprudence under *Everson*, began to attack the "wall" **metaphor** by criticizing its inability to accurately reflect the literal and nuanced relationship between church and state. Here is a sampling of such criticisms presented by Professor Bosmajian:

. 1962--Justice Stewart dissenting in *Engel v. Vitale*: [FN37] "I think that the Court's task, in this as in all areas of constitutional adjudication, is not responsibly aided by the uncritical invocation of **metaphors** like the 'wall of separation,' a phrase nowhere to be found in the Constitution." [FN38]

. 1963--Justice Stewart dissenting in *Abington School District v. Schempp*: [FN39] "The short of the matter is simply that the two relevant clauses of the First Amendment cannot accurately be reflected in a sterile **metaphor** which by its very nature may distort rather than illumine the problems involved in a particular case." [FN40]

*927 . 1963--Robert Hutchins: "The wall has done what walls usually do: it has obscured the view The wall is offered as a reason. It is not a reason; it is a figure of speech." [FN41]

In the face of such criticism, the Supreme Court, in the 1971 case of *Lemon v. Kurtzman*, [FN42] established a new three-part test for evaluating whether a governmental action is constitutional under the Establishment Clause. [FN43] Under the *Lemon* test, the challenged governmental action (1) must have a secular purpose; (2) must have a primary effect that neither advances nor inhibits religion; and (3) must not foster excessive government entanglement with religion. [FN44] In establishing this test, a majority of the Court formally recognized the limitations of the wall of separation **metaphor**:

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship. [FN45]

Since 1971, the *Lemon* test has served as the primary rule for evaluating Establishment Clause issues.

[FN46] Nevertheless, Justice Cardozo's warning and the limitations of the wall **metaphor** were revisited in 1985 when Justice Rehnquist dissented in *Wallace v. Jaffree*, [FN47] a case involving an Alabama statute that established "a period of silence . . . for 'meditation or voluntary prayer'" in public schools: [FN48]

Notwithstanding the absence of a historical basis for this theory of rigid separation, the wall idea might well have served as a useful albeit misguided analytical concept, had it led this Court to unified and *928 principled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived."

Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proved all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo's observation that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." [FN49]

Thus, here are presented two examples of successful attacks on doctrinal **metaphors**: one in the context of corporations law and one in the context of constitutional law. The shift in corporate liability law away from its traditional alter ego and related **metaphors** and the shift in the Establishment Clause jurisprudence away from the wall of separation **metaphor** demonstrate in dramatic fashion how metaphoric rules can be changed. Regardless of whether the changes in these instances were brought about by the courts themselves or by advocates who faced unfavorable doctrinal **metaphors**, these illustrations nevertheless demonstrate that courts can be convinced to reassess established doctrinal **metaphors** and, if appropriate, abandon them for rules that more accurately reflect the reality of the legal issue at hand. Thus, legal advocates should watch for doctrinal **metaphors** that may be implicated by their clients' issues. And if a legal advocate finds that his or her client would not fare well under an applicable doctrinal **metaphor**, the advocate should consider whether the metaphoric rule can be challenged via a Cardozo Attack.

II. Level Two: Legal Method **Metaphors**

A. Defining Legal Method **Metaphors**

The second level of **metaphor** relevant to persuasive legal writing is "legal method **metaphor**." This category of **metaphor** refers to concepts of legal method and legal analysis that are expressed in metaphoric *929 terms. Many of the analytical tools used to reason through legal issues are metaphoric constructs. Consider these examples: [FN50]

. "parts" or "elements" of a rule--to say that an abstract rule can be broken down into "parts" or "elements" to be separately analyzed is a metaphoric concept.

. "balancing" or "weighing" tests--to say that a legal issue is resolved by "weighing" or "balancing" a number of "factors" is also metaphoric.

. "narrow" or "broad" construction--arguing that a legal rule can be interpreted "narrowly" or "broadly" is evoking a **metaphor**.

. the "spirit behind a rule"--the idea that a rule has a "spirit" that can be appealed to is also a metaphoric idea.

Although lawyers often use such legal method **metaphors** reflexively or unthinkingly, they are nonetheless metaphoric constructs. Furthermore, the pervasiveness of these metaphoric tools in the analysis of legal issues in all areas of the law makes them extremely important and relevant to all legal advocates.

The above examples of legal method **metaphors** include references to elements, factors, and balancing tests. Because element tests, factor tests, and balancing tests can formally be made part of doctrinal law by legislatures or by courts, [FN51] one can easily confuse legal method **metaphors** with doctrinal **metaphors** (i.e., Level 1 **metaphors**) in these contexts. Legal method **metaphors** are different from doctrinal **metaphors** in the sense that in the context of legal method **metaphors**, the rule itself is not metaphoric (or at least does not have to be); rather the tools used to analyze or apply the rule are metaphoric. Legal method **metaphors**, then, do not include court-established or court-acknowledged "factor tests" or "element tests" or the like, which technically are generic forms of doctrinal **metaphors**. [FN52]

***930** Legal method **metaphors** occur when a lawyer or a judge comes across a legal rule and independently employs (or advocates for the employment of) a metaphoric construct to that rule. Legal method **metaphors** are tools and strategies applied to a rule. If the rule itself expressly states that it is a factor or balancing test, it is a doctrinal **metaphor**, and all a lawyer is asked to do is apply the established metaphoric construct to the facts at hand.

B. Advocacy Strategy with Legal Method **Metaphors**: Arguing for a Favorable Legal Method **Metaphor**

Legal method **metaphors** were defined above as tools of legal analysis expressed in metaphoric terms. A fairly obvious strategy that flows from this definition, then, is for a legal advocate who is arguing a legal issue to a court to propose to the court a legal method **metaphor** that favors the advocate's client. [FN53] Such strategies, in fact, are commonplace. Whenever, for example, a legal advocate argues for a "narrow" or "broad" interpretation of a rule (whichever is more advantageous to the advocate's client), the advocate "whether he or she knows it or not" is employing, and arguing for the court to employ, a favorable legal method **metaphor**. Consider this more elaborate example:

Hypothetical Fact Pattern: In the fictitious state of Lincoln, the defendant hung a brick with a rope from a bridge over a road in the path of traffic. A truck ran into the brick, and the truck's windshield was broken. The driver of the truck and his passenger were injured. The defendant was arrested and charged with violating Lincoln Statute section 123.01, which reads as follows:

Whoever, wantonly or maliciously, throws, hurls, or projects any stone or other hard substance that is capable of producing death or great bodily harm at, within, or into any occupied vehicle, including any automobile, truck, or bus, or any occupied train, cable railway car, street railway car, or monorail car, or any occupied boat, vessel, ship, ***931** or barge lying in or plying the waters of this state, or any occupied aircraft flying through the airspace of this state shall be guilty of a felony of the second degree. [FN54]

Defendant's Strategy" An "Elements Test" **Metaphor**: Advocating for a favorable legal method **metaphor**, the attorney for the defendant is likely to argue that the language of section 123.01 can be "broken down" into "parts" or "elements," all of which must be established by the State. One such element, according to the defendant's counsel, is the requirement that the object in question be "thrown, hurled, or projected." In the present case, the defendant did not throw, hurl, or project the brick at the victims' truck; rather he merely placed it in the truck's path. Thus, the attorney is likely to argue, the State cannot establish an essential "element" of the statute, and consequently, the defendant's actions do not fall within the language of the statute.

The Prosecutor's Strategy" The "Broad Interpretation" and "Spirit of the Rule" **Metaphors**: The prosecuting attorney, on the other hand, is likely to argue two favorable legal method **metaphors** of his or her own: that the word "project" in the statute should be interpreted "broadly" and that the "spirit" of section 123.01 dictates a finding that the defendant's actions come under the statute.

First, the prosecutor is likely to argue that the word "project" should be interpreted broadly to include the action of projecting an object into the path of a moving truck. While the most common meaning of the word "project" is to "throw or cast forward," [FN55] it also can mean "to cause to protrude." [FN56] Thus, a broad interpretation of this word would include the action, like that of the defendant, of causing an object to protrude into the path of a moving vehicle.

Second, the prosecutor is likely to argue that such a broad interpretation is consistent with the spirit of section 123.01. The language of the statute makes it clear that it is designed to protect occupied conveyances. In this regard, the prosecutor is likely to point out that all of the items designed to be protected under the statute are capable of movement (automobiles, trucks, buses, trains, boats, and planes) and that the statute applies only if such items are "occupied." The prosecutor is also likely to point out that there are two ways that a hard object can come in contact with an occupied conveyance: (1) a person could throw or hurl an object at the target or (2) a person could place an object in the path of the moving target. Thus, the prosecutor is likely to argue *932 that the defendant's conduct is exactly the type of conduct section 123.01 is designed to address and that a broad interpretation of the word "project" would be consistent with the spirit of the statute.

As one can tell from these illustrations, arguing for a favorable legal method **metaphor** is nothing new for legal advocates. Attorneys make these kinds of arguments all the time; they are an ingrained part of legal practice. What legal advocates may not appreciate, however, is that such strategies are actually metaphoric strategies. To argue that a rule has required elements, or that a rule should be interpreted broadly, or that a certain interpretation of a rule is consistent with the spirit of the rule, is to impose a metaphoric construct onto a rule. Granted, because lawyers regularly employ these types of **metaphors** already, it is unlikely that this discussion of legal method **metaphors** will have a practical effect on how lawyers approach their cases. Perhaps, however, it will increase lawyers' appreciation of the sheer prevalence of **metaphor** in legal advocacy.

III. Level Three: Stylistic **Metaphors**

The previous two categories of **metaphor**" doctrinal **metaphors** and legal method **metaphors**" implicated substantive strategies (as opposed to writing style strategies) for legal advocates. In the context of doctrinal **metaphors**, we saw how a legal advocate could, as a substantive legal strategy, challenge an existing doctrinal rule expressed in the form of a **metaphor**. Similarly, in the context of legal method **metaphors**, we saw how a legal advocate, as a substantive strategy, could argue for a favorable metaphoric construct to be applied to the rule governing the analysis of the issue at hand. Such metaphoric strategies are substantive strategies because they affect the substantive content of an advocate's argument.

The third level of **metaphor**, by contrast, involves the use of **metaphors** in one's writing style. That is, this level of **metaphor** focuses on different types of **metaphors** an advocate can use as part of his or her writing style. Whereas the first two **levels** of **metaphor** that were discussed affect "what is said" by an advocate, the third level of **metaphor** relates to "how it is said."

That being said, however, readers of this Article should not be misled by the term "stylistic" in this context. The metaphoric strategies that will be discussed in this section are stylistic in the sense that they reflect writing

style choices made by an advocate in writing a brief or other form of persuasive document. The word "stylistic," however, does not and should not imply that these types of **metaphor** are mere ornamentation or adornment or that they lack legitimate rhetorical power. To the contrary, as we will see, these types of **metaphors** serve *933 numerous rhetorical functions and, if used correctly, can be very powerful in legal advocacy. In this section, we will discuss two general subcategories of stylistic **metaphors**: "metaphoric themes" and "point-specific stylistic **metaphors**."

A. Metaphoric Themes

The first subcategory of stylistic **metaphors** is the concept of a metaphoric theme. A metaphoric theme is a stylistic persuasive writing strategy in which the discussion of several points in a legal argument (such as a court brief) revolves around a consistent theme that is metaphoric in nature. Stated another way, a metaphoric theme is a recurring or extended **metaphor** that serves as the theme behind a set of different points in a legal argument. [FN57]

Because the theme of an argument pervades the argument and can be fully appreciated only by reading the argument as a whole, it is difficult to provide a clear example of metaphoric theme. In his textbook on legal writing, however, Professor Charles R. Calleros briefly describes an example of a metaphoric theme in which an "attorney used the **metaphor** of a lawless frontier to convey a theme in a motion for summary judgment": [FN58]

The motion for summary judgment challenged an arbitration decision interpreting a collective bargaining agreement, a decision to which a reviewing court would grant substantial deference. Accordingly, the author of the brief bore the burden of showing that even that deferential standard of review imposed meaningful limits on the arbitrator's interpretation and that the arbitrator had exceeded those limits as a matter of law. Throughout the brief, the author argued those points with sound analysis of the law and facts and with traditional policy arguments. But the author of the brief wanted to create a mood as well, and the case itself invited the author to draw allusions to unrestrained frontier justice in the lawless Wild West: The workplace was a coal mine, and the arbitrator's last name was West. To introduce this theme, the first sentence of the argument suggested that failure to curb the arbitrator's discretion would render labor relations as chaotic and lawless as in some frontier outpost in the Wild West:

Despite the deference arbitrators are granted in reaching their decisions, one principle stands clear: the federal labor policy of promoting arbitration of industrial disputes does not create a *934 lawless frontier where arbitrators are free to impose their own brand of "industrial justice."

The phrase "industrial justice" by itself is not pejorative, but the author linked it to an image of arbitrariness and lawlessness associated with untamed frontiers. The brief did not belabor this **metaphor**; however, it reminded readers of this image every time it named the arbitrator, West, and every time it referred to West's "own brand of industrial justice." Finally, both these reminders combined with a new play on words at the beginning of the third subsection of the argument:

. . . Arbitrator West also shot holes through another provision of the [agreement], enforcing his own brand of "industrial justice." [FN59]

Notice that in the context of a metaphoric theme, the recurring **metaphor** is unrelated to the doctrinal rule that governs the analysis of the issue. In this example, for instance, the "Wild West" references are unrelated to the rules governing the challenge to the arbitrator's decision. If, by contrast, an issue is governed by a doctrinal

metaphor, recurring references to that metaphoric concept would not be a metaphoric theme. [FN60] Such references would merely be part of the discussion and application of the metaphoric doctrinal rule. For example, in an argument involving the fruit of the poisonous tree doctrinal **metaphor**, recurring references to the "fruit" **metaphor** would not be a metaphoric theme; they would simply be part of the discussion and application of the metaphoric rule. Thus, a metaphoric theme involves recurring references to a metaphoric concept that is unrelated to the doctrinal law under discussion.

Many of the textbooks on brief writing state that developing a theme for the argument is a critical component of writing an effective legal brief. [FN61] A theme is a basic value or principle that underlies an advocate's position on an issue and that unifies all of the advocate's various points on that issue. [FN62] As one textbook explains,

A theme is a core value that the advocate wants the court to embrace or recoil from. A theme is the preservation of a "good," such as stability, trust, freedom, responsibility, and loyalty, or the prevention of a "bad," such as abuse, laziness, recklessness, slippery slopes, and open floodgates.

*935 A theme is not in itself a legal rule. A theme anchors the advocate's argument in support or rejection of a legal rule. [FN63]

While a theme can be, and often is, presented in literal language, it can also be combined with **metaphor**, as we saw in the above "Wild West" example. In that motion for summary judgment, the advocate's theme was the principle of preventing insurrection and the notion that the arbitrator in question acted randomly and rebelliously. While the advocate could have presented this theme with literal language, the advocate instead decided to combine it with the metaphoric concept of a lawless frontier. Metaphoric themes such as this not only offer the benefits provided by all well-crafted themes" presenting a core value and a unifying concept for the advocate's argument" but they also provide the benefits of a well-crafted **metaphor**.

In other works, I have written extensively about the rhetorical functions of originally crafted **metaphors**. [FN64] While it is beyond the scope of this Article to discuss them at length, the following is a summary of the rhetorical benefits of crafting a theme in the form of a **metaphor**:

. Logos Function: A **metaphor**, by definition, is an analogy. By providing an apt metaphoric analogy, the writer helps to communicate the substance of his or her argument to the audience. [FN65]

. Ethos Function: Aristotle once said that crafting an effective **metaphor** is "a sign of genius." [FN66] Presenting an original metaphoric theme enhances the writer's credibility as an intelligent source of information. [FN67]

. Pathos Function" Emotional Substance: A metaphoric theme sets a mood for the argument [FN68] and evokes emotions associated with the metaphoric concept. [FN69] In the "Wild West" example, for instance, the metaphoric theme evokes the emotions associated with frontier justice, such as fear and dread.

. Pathos Function" Medium Mood Control: Helping to avoid boring a reader, a metaphoric theme in a brief can "amuse" a reader *936 and keep the reader interested and in a positive mood with regard to how the brief is written. [FN70]

. Rhetorical Style Function: Because of their clever and unexpected nature, metaphoric references associated with a metaphoric theme can draw attention to an advocate's argument and can make it more memorable to the reader. [FN71]

As one can see, metaphoric themes serve numerous rhetorical functions. Consequently, legal advocates should consider this strategy in drafting their own briefs.

B. Point-Specific Stylistic **Metaphors**

The second subcategory of stylistic **metaphors** is "point-specific stylistic **metaphor**." The preceding section discussed the concept of a metaphoric theme by which a legal writer in his or her argument makes several recurring references to an underlying metaphoric theme. Point-specific stylistic **metaphors**, by contrast, involve a legal writer employing a stylistic **metaphor** in connection with communicating a single, specific point in his or her argument. These, by far, are the most common forms of stylistic **metaphor** in legal writing and are what most of the legal writing books are referring to when they discuss **metaphor** as a persuasive strategy. [FN72]

Point-specific stylistic **metaphors** come in a variety of forms. The most elaborate form entails a legal writer communicating a specific point in his or her argument by employing a lengthy metaphoric analogy that can span several sentences or even paragraphs. Consider this example:

A **metaphor** may better illuminate the distinction between contending evidence is irrelevant to prove a claim as opposed to asserting that sufficient evidence was not adduced to prove such claim. Assume that the pieces of two jigsaw puzzles, one of a horse and the other of a ship, were inadvertently commingled. Assume further that we are concerned only with putting together the horse puzzle. By raising a relevancy contention, the objector is effectively claiming that the puzzle builder is using a piece from the ship puzzle to build the horse puzzle. The ship piece does not belong there. A sufficiency of the evidence contention, on the other hand, effectively states that, while the puzzle builder has used only horse pieces to assemble the horse puzzle, the picture is not yet complete. [FN73] *937 In this excerpt, the legal writer, Judge Glenn Harrell, Jr. of the Maryland Court of Appeals, is communicating one specific point within his opinion: the difference between "irrelevant" evidence and "insufficient" evidence. To communicate this point, Judge Harrell employs a lengthy metaphoric analogy involving commingled jigsaw puzzles of a horse and a ship.

At the other end of the spectrum of point-specific stylistic **metaphors** are single-word stylistic **metaphors** whereby a writer uses a single metaphoric word in an effort to communicate his or her point more forcefully. [FN74] Consider these examples in the context of judicial opinion writing (the metaphoric word is italicized in each example): [FN75]

. "Crimes committed because of the perpetrator's hatred of the race, color, religion or national origin of the victim have the obvious tendency to ignite further violence by provoking retaliatory crimes and inciting community unrest." [FN76]

. "To permit the present sense impression exception to apply to overheard conversations, such as in the instant case, would in effect permit this exception to substantially devour the entire hearsay rule of exclusion." [FN77]

. At the other end of the spectrum of constitutional errors lie "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." The existence of such defects "deprivation of the right to counsel, for example" requires automatic reversal of the conviction because they infect the entire trial process. [FN78]

. "Drug dealing is particularly corrosive to the well-being of Idaho communities." [FN79]

. Where substantially necessary to present to the jury the complete story of the crime, . . . evidence or testi-

mony may be given even though it may reveal or suggest other crimes. These holdings *938 are made necessary by the danger that, otherwise, testimony by the witnesses for the prosecution too carefully manicured might lead alert jurors to the thought that something of importance was being withheld. Such suspicions on the part of jurors could lead to a mischievous miscarriage of justice. [FN80]

. "[Plaintiff] takes issue with the defendants' use of the McDonnell Douglas test and cites a ragbag of cases in apparent support of the proposition that the test is inapplicable here. Because her argument is so poorly developed, however, we are entitled to disregard it." [FN81]

In each of these examples, the writer makes an effort to communicate his or her point more forcefully by inserting a single metaphoric word. This is the most basic form of stylistic **metaphor**.

In between lengthy metaphoric analogies and single metaphoric words are stylistic metaphoric sentences. Stylistic metaphoric sentences involve a writer communicating a specific point by weaving or otherwise fully integrating metaphoric language into a sentence or a group of related sentences. [FN82] Consider these examples: [FN83]

. "[T]he work of the Alabama Legislature in the area of medical liability is a mule" the bastard offspring of intercourse among lawyers, legislators, and lobbyists, having no pride of ancestry and no hope of posterity." [FN84]

. "[C]onspiracy . . . [is the] darling of the modern prosecutor's nursery." [FN85]

. If the small claims court is to be the "People's Court," it must not be encumbered with rules and restrictions which can only frustrate and hinder the litigant who resorts to that court in response to its promise of speedy and economical justice. In the case of inexperienced pro se litigants, it is better to err on the side of admitting an ore-heap of evidence in the belief that nuggets of truth may be found amidst the dross, rather than to confine the parties to presenting assayed and refined matter which qualifies as pure gold under the rules of evidence. [FN86]

*939 . "[P]arties to a preliminary agreement may not provide that they do not intend to be bound until the transaction is buttoned up by a more detailed and formal agreement. There is commercial utility to allowing persons to hug before they marry." [FN87]

. "[Evidence] should not be admitted . . . where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." [FN88]

. "[E]ach [oppressive] practice is one wire in a birdcage; while no one wire could prevent the bird's escape, the wires woven together make a thoroughly effective prison." [FN89]

In all of these examples, the writers communicate their points by weaving metaphoric language with literal language in their sentences. [FN90] Metaphoric sentences such as these are what many people think of when they hear of the use of **metaphor** as a stylistic strategy. [FN91]

Related to point-specific stylistic **metaphors** are extended stylistic **metaphors**. Extended stylistic **metaphors** occur when a writer builds on an initial stylistic **metaphor** by subsequently employing related metaphoric references. [FN92] Consider this example, which discusses the use of an extended stylistic **metaphor** in the Fifth Circuit case of *Shanley v. Northeast Indiana School District*: [FN93]

In *Shanley*, the court held that, under the First Amendment, a school board did not have the right to prevent high school students from distributing an underground newspaper near a school. In the case, the court had to balance the rights of school boards to establish school disciplinary policies with the students' First Amendment rights of freedom of expression. The court relied on a previous Supreme Court case, *Tinker v. Des Moines Independent Community School District* [393 U.S. 503 (1969)], which established guidelines for balancing constitutional rights against the rights and duties of school officials.

*940 Writing for the majority in *Shanley*, Judge Goldberg compared *Tinker* to a "dam":

....

"*Tinker's* dam to school board absolutism does not leave dry the fields of school discipline. This court has gone a considerable distance with the school boards to uphold its disciplinary fiats where reasonable. *Tinker* simply irrigates, rather than floods, the fields of school discipline. It sets canals and channels through which school discipline might flow with the least possible damage to the nation's priceless topsoil of the First Amendment."

[In this excerpt,] Judge Goldberg's initial **metaphor** of a "dam" is extended into several related **metaphors**: "irrigates," "floods," "fields of school discipline," "canals and channels," and "topsoil of the First Amendment." Rather than making one metaphoric comparison, Judge Goldberg makes several, all revolving around a single theme: farm irrigation. [FN94]

A writer can employ a stylistic **metaphor** either by creating an apt **metaphor** on his or her own or by borrowing (i.e., quoting) a stylistic **metaphor** that was previously created by someone else. Not surprisingly, however, more rhetorical benefits are gained by creating an original **metaphor** than by borrowing pre-existing metaphoric language. When a writer crafts an original **metaphor**, he or she benefits from the standard rhetorical functions of **metaphor** that were previously discussed in connection with metaphoric themes. [FN95] These benefits include (1) the logos function of providing an analogy that helps communicate the substance of the writer's point, (2) the ethos function of establishing the writer as a credible and intelligent source of information, (3) the pathos functions of evoking favorable emotions, and (4) the rhetorical style function of drawing attention and emphasis to the writer's point. [FN96]

While many of these same functions are served when a writer borrows a pre-existing stylistic **metaphor**, the ethos function is not as great. Incorporating pre-existing metaphoric language into one's writing demonstrates resourcefulness, which is an indication of credibility. However, as was discussed earlier, crafting an original **metaphor** is a *941 sign of genius. [FN97] Consequently, when a writer crafts an original **metaphor**, the writer demonstrates more emphatically that he or she is an intelligent, and therefore credible, source of information. [FN98]

Another issue regarding the use of pre-existing stylistic **metaphors** is the concern over avoiding trite and cliché **metaphors**. Many **metaphor** experts stress that legal writers should avoid using cliché metaphoric language such as "fishing expedition," [FN99] "woven into the fabric of our society," [FN100] "wolf in sheep's clothing," [FN101] "wheels of justice grind," [FN102] "parade of horrors," [FN103] and the like. Thus, if a legal writer is going to "borrow" a **metaphor**, the writer would be well advised to borrow a particularly clever and unique one. For those legal writers who would like to try their hand at creating an original stylistic **metaphor** but fear they lack the natural talent or experience, I have elsewhere set out specific tips and guidelines for crafting these stylistic devices. [FN104] Such guidelines are beyond the scope of this Article. [FN105]

Two final points are in order about the relationship between stylistic **metaphors** (Level 3) and doctrinal **metaphors** (Level 1). First, the former can become the latter. If a legal advocate creates an effective **metaphor** and uses that **metaphor** to communicate a legal point in his or her brief, it is possible that the court will pick up that **metaphor** and repeat it in a published opinion. If subsequent courts and lawyers continue to employ that **metaphor** for that particular legal concept, it is also possible for the **metaphor** to become the rule governing the analysis of that issue" to wit, a doctrinal **metaphor**. This process is also possible for a judge who crafts an effective **metaphor** of his or her own in a judicial opinion. An example of the birth of a doctrinal **metaphor** can be seen in the 1939 United States Supreme Court opinion, *Nardone v. United States*, [FN106] the case in which the Court first used the phrase "fruit of the poisonous tree" to describe evidence derived from an initial illegal act. [FN107] The stylistic metaphoric phrase used by the Court in *Nardone* *942 was quickly picked up and repeated by numerous subsequent courts. [FN108] Today this **metaphor** is the primary tool for analyzing this issue of evidentiary law. [FN109]

Second, because judges can employ both doctrinal **metaphors** and stylistic **metaphors** in their judicial opinions, there can be confusion between the two in this context. Every **metaphor** used by a judge in an opinion is not a doctrinal **metaphor** even though the **metaphor** is being used in a judicial opinion, which is a form of primary legal authority. Doctrinal **metaphors**, in fact, are much rarer than stylistic **metaphors** in all contexts, including judicial opinions. Most of the **metaphors** used by judges in writing their opinions, be they original **metaphors** or pre-existing, borrowed **metaphors**, are simply stylistic choices designed to add rhetorical power to the opinions. In fact, nearly all of the examples of stylistic **metaphors** set out in this section were written by judges in the context of published judicial opinions. By contrast, a judicial opinion contains a doctrinal **metaphor** only when a relevant doctrinal rule discussed in the opinion in and of itself is expressed in metaphoric language. [FN110]

IV. Level Four: Inherent **Metaphors**

The fourth level of **metaphor** relevant to legal analysis and writing is "inherent **metaphor**." In recent years, much has been written in the fields of cognitive psychology, linguistics, and philosophy that demonstrates that **metaphor** is fundamental to the way people make sense of and interact with the world. These works indicate that far from simply being a rhetorical tool occasionally employed by persuasive and creative writers, **metaphor** is a natural and inherent component of human language. [FN111]

One of the most well known of these works is the book "**Metaphors We Live By**." [FN112] As the title suggests, this book points out that metaphoric language is all around us even if much of it goes unnoticed. Consider this example regarding the words "up" and "down," which have many metaphoric uses in every day language:

Happy is Up; Sad is Down: I'm feeling up. That boosted my spirits. My spirits rose. You're in high spirits. Thinking about her always *943 gives me a lift. I'm feeling down. I'm depressed. He's really low these days. I fell into a depression. My spirits sank.

....

Conscious is Up; Unconscious is Down: Get up. Wake up. I'm up already. He rises early in the morning. He fell asleep. He dropped off to sleep. He's under hypnosis. He sank into a coma.

....

Health and Life Are Up; Sickness and Death Are Down: He's at the peak of health. Lazarus rose from the dead. He's in top shape. As to his health, he's way up there. He fell ill. He's sinking fast. He came down with the flu. His health is declining. He dropped dead.

....

Having Control or Force is Up; Being Subject to Control or Force is Down: I have control over her. I am on top of the situation. He's in a superior position. He's at the height of his power. He's in the high command. He's in the upper echelon. His power rose. He ranks above me in strength. He is under my control. He fell from power. His power is on the decline. He is my social inferior. He is low man on the totem pole. [FN113]

As is true of all language, inherent **metaphors** exist in legal language. Many words regularly used in legal discourse "such as "higher court" and "going forward with a motion"" are metaphoric in nature even though they are rarely thought of as such. [FN114]

So, you may be asking yourself, how is the concept of inherent **metaphor** relevant or important to legal advocacy? Granted, inherent **metaphors**, as natural and automatic components of language, do not implicate specific rhetorical strategies for legal advocates like the other **levels of metaphor** we have discussed. Nevertheless, knowledge about inherent **metaphor** is important to legal advocates. The scholarship in this area explores the foundations of **metaphor** within the human brain and how **metaphor**-making is a fundamental cognitive function. If legal advocates really want to understand how **metaphors** function as rhetorical tools, they should study the cognitive foundations of **metaphor**. Understanding **metaphor's** basis in cognition can help legal advocates understand **metaphor's** rhetorical power. And understanding the source of **metaphor's** power can lead to better skills in using that power.

*944 V. Conclusion

Although much has been written in recent years about **metaphor** in the law, many of these works seem to talk past one another. [FN115] This apparent disconnect is due in part to the fact that many of these works are actually discussing different types of **metaphor** within legal discourse without acknowledging or perhaps even realizing that this is so. This Article attempts to help rectify some of this confusion by identifying, as an organizational scheme, four different "levels" of **metaphor** relevant to legal analysis and writing implicated by the existing literature.

The second goal of this Article is to discuss the specific implications of these various **levels of metaphor** on the practice of persuasive legal writing. Ever since it was first explored by the classical rhetoricians of the Greco-Roman era, **metaphor** has been viewed as an important source of persuasive power. [FN116] The modern interdisciplinary scholarship on **metaphor** has done nothing to minimize this view. In fact, as we have seen in this Article, recent revelations about **metaphor** have only enhanced its potential as a source of strategies for legal advocates.

*945 APPENDIX A

Bibliography on Law and **Metaphor**

Jim Accardi, Winning Closing Arguments With Narrative **Metaphor**, *The Prosecutor*, Nov.-Dec. 1999, at 38.

Miriam Jacks Achtenberg, [The Misleading **Metaphor** of the Slap in the Face: An Analysis of Ash v. Tyson](#), 29 *Harv. J.L. & Gender* 501 (2006).

Aristotle, *The Rhetoric of Aristotle* 187-90 (Lane Cooper trans., Appleton Century Crofts 1932).

Maureen Archer & Ronnie Cohen, [Sidelined on the \(Judicial\) Bench: Sports **Metaphors** in Judicial Opin-](#)

ions, 35 Am. Bus. L.J. 225 (1998).

Linda L. Berger, [What is the Sound of a Corporation Speaking? How the Cognitive Theory of **Metaphor** Can Help Lawyers Shape the Law](#), 2 J. Ass'n Legal Writing Directors 169 (2004).

Haig Bosmajian, **Metaphor** and Reason in Judicial Opinions (1992).

Charles R. Calleros, Legal Method and Writing 328-30 (4th ed. 2002).

Jayne Seminare Docherty, [Narratives, **Metaphors**, and Negotiation](#), 87 Marq. L. Rev. 847 (2004).

Anne Enquist & Laurel Currie Oates, Just Writing: Grammar, Punctuation, and Style for the Legal Writer 171-72 (2d ed. 2005).

Michael H. Frost, Greco-Roman Analysis of Metaphoric Reasoning, in Introduction to Classical Legal Rhetoric: A Lost Heritage 85 (2005).

Michael Frost, Greco-Roman Analysis of Metaphoric Reasoning, 2 Legal Writing 113 (1996).

Bryan A. Garner, The Elements of Legal Style 149-51 (2d ed. 2002).

Bryan A. Garner, A Dictionary of Modern Legal Usage 558 (**Metaphors**) (2d ed. 1995).

Daniel J.H. Greenwood, [Introduction to the **Metaphors** of Corporate Law](#), 4 Seattle J. Soc. Just. 273 (2005).

Louis Henkin, [War and Terrorism: Law or **Metaphor**](#), 45 Santa Clara L. Rev. 817 (2005).

Bernard J. Hibbitts, [Making Sense of **Metaphors**: Visuality, Aurality, and the Reconfiguration of American Legal Discourse](#), 16 Cardozo L. Rev. 229 (1994).

Vicki C. Jackson, [Constitutions as "Living Trees" ? Comparative Constitutional Law and Interpretive **Metaphors**](#), 75 Fordham L. Rev. 921 (2006).

***946** Mark Johnson, Moral Imagination: Implications of Cognitive Science for Ethics (1993).

Mark Johnson, The Body in the Mind: The Bodily Basis of Meaning, Imagination, and Reason (1987).

George Lakoff, Women, Fire, and Dangerous Things: What Categories Reveal About the Mind (1987).

George Lakoff & Mark Johnson, **Metaphors We Live By** (1980).

George Lakoff & Mark Johnson, Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought (1999).

George Lakoff & Mark Turner, More than Cool Reason: A Field Guide to Poetic **Metaphor** (1989).

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

Parker B. Potter, Jr., [Surveying the Serbonian Bog: A Brief History of a Judicial **Metaphor**](#), 28 Tul. Mar.

[L.J. 519 \(2004\).](#)

Philosophical Perspectives on **Metaphor** (Mark Johnson ed., 1981)

Jane N. Richmond, Legal Writing: Form and Function 117-18 (2002).

Mark Rose, [Copyright and Its **Metaphors**](#), 50 UCLA L. Rev. 1 (2002).

Thomas Ross, [Metaphor and Paradox](#), 23 Ga. L. Rev. 1053 (1989).

Lucia Ann Silecchia, [Pinning the Blame & Piercing the Veil in the Mists of **Metaphor**: The Supreme Court's New Standards for the CERCLA Liability of Parent Companies and a Proposal for Legislative Reform](#), 67 Fordham L. Rev. 115, 173- 201 (1998).

Jonathan Simon, [Governing Through Crime **Metaphors**](#), 67 Brook. L. Rev. 1035 (2002).

Louis J. Sirico, Jr. & Nancy L. Schultz, Persuasive Writing for Lawyers and the Legal Profession app. A (2d ed. 2001).

Michael R. Smith, The Power of **Metaphor** and Simile in Persuasive Writing, in Advanced Legal Writing: Theories and Strategies in Persuasive Writing 179 (2002).

Elizabeth G. Thornburg, [Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System](#), 10 Wis. Women's L.J. 225 (1995).

Elizabeth G. Thornburg, [Just Say "No Fishing": The Lure of **Metaphor**](#), 40 U. Mich. J.L. Reform 1 (2006).

Robert L. Tsai, [Fire, **Metaphor**, and Constitutional Myth-Making](#), 93 Geo. L.J. 181 (2004).

James B. White, The Legal Imagination: Studies in the Nature of Legal Thought and Expression 694-95 (1973).

Steven L. Winter, A Clearing in the Forest: Law, Life, and Mind (2001).

Steven L. Winter, The **Metaphor** of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371 (1987).

***947** Steven L. Winter, The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning, 87 Mich. L. Rev. 2225 (1989).

Steven L. Winter, [Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law](#), 137 U. Pa. L. Rev. 1105 (1989).

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).

[FNa1]. Professor of Law and Director of Legal Writing, University of Wyoming College of Law. Florida State University (B.S., 1982); University of Florida (J.D., 1985). Member, State Bars of California and Florida; Legal Writing Institute (Board of Directors, 2006-2010); Association of Legal Writing Directors (Board of Directors,

2003-2005). © **Michael R. Smith**, 2007.

[FN1]. For an extensive list of articles and books on or relevant to the role of **metaphor** in legal discourse, see Appendix A of this Article.

[FN2]. See, for example, the various works by linguist and cognitive psychologist George Lakoff, many of which have been cited in legal scholarship on the role of **metaphor** in the law. Professor Lakoff's works in this area include **Metaphors We Live By** (1980) (with Mark Johnson); *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind* (1987); *More Than Cool Reason: A Field Guide to Poetic Metaphor* (1989) (with Mark Turner); *Moral Politics: How Liberals and Conservatives Think* (1996); *Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought* (1999) (with Mark Johnson); *Don't Think of an Elephant: Know Your Values and Frame the Debate" The Essential Guide for Progressives* (2004); *Thinking Points: Communicating Our American Values and Vision* (2006).

[FN3]. See, for example, the various works by philosophy professor Mark Johnson, many of which have been cited in legal scholarship on the role of **metaphor** in the law. Professor Johnson's works in this area include **Metaphors We Live By** (1980) (with George Lakoff); *Philosophical Perspectives on Metaphor* (Mark Johnson ed., 1981); *The Body in the Mind: The Bodily Basis of Meaning, Imagination, and Reason* (1987); *Moral Imagination: Implications of Cognitive Science for Ethics* (1993); *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought* (1999) (with George Lakoff).

[FN4]. See, e.g., Michael H. Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, in *Introduction to Classical Legal Rhetoric: A Lost Heritage* 85 (2005); **Michael R. Smith**, *The Power of Metaphor and Simile in Persuasive Writing*, in *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 179, 179 (2002) [hereinafter **Smith, The Power of Metaphor**].

[FN5]. See, for example, the various works by law professor Steven L. Winter, such as *A Clearing in the Forest: Law, Life, and Mind* (2001); *The Metaphor of Standing and the Problem of Self-Governance*, 40 *Stan. L. Rev.* 1371 (1988); *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 *Mich. L. Rev.* 2225 (1989) [hereinafter **Winter, The Cognitive Dimension**]; *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 *U. Pa. L. Rev.* 1105 (1989).

[FN6]. See, e.g., **Michael R. Smith**, *The Functions of Literary References in Persuasive Writing: A Multidisciplinary Analysis*, in *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 9, 15-30 (2002) (discussing "Literary References for Nonthematic Metaphoric Comparison").

[FN7]. Admittedly, to say that an abstract concept like **metaphor** can be broken down into "levels" is itself a **metaphor**.

[FN8]. See, for example, the numerous works by George Lakoff, Mark Johnson, and Steven Winter cited in *supra* notes 2, 3, and 5, respectively. See also Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 *J. Ass'n Legal Writing Directors* 169, 170 (2004). Berger writes,

[C]ognitive theory of **metaphor** ... reconstructs the foundation in which **metaphor** was seen as merely literary or rhetorical in contrast with the "real" literal and scientific world. In cognitive theory, **metaphor** is not only a way of seeing or saying; it is a way of thinking and knowing, the method by which we structure and reason, and it is fundamental, not ornamental.

Id.

[FN9]. Related to doctrinal **metaphors** are some standard policy arguments that are expressed in the form of **metaphor**, such as the "slippery slope" argument and the "opening the floodgates of litigation" argument. See, e.g., Ellie Margolis, [Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs](#), 62 *Mont. L. Rev.* 59, 73 (2001).

[FN10]. For a comprehensive discussion of the "marketplace of ideas" **metaphor**, see Haig Bosmajian, *The Metaphoric "Marketplace of Ideas,"* in **Metaphor** and Reason in Judicial Opinions 49, 49-72 (1992).

[FN11]. For a comprehensive discussion of the "wall of separation" **metaphor**, see Haig Bosmajian, *The Metaphoric "Wall of Separation" between Church and State* in **Metaphor** and Reason in Judicial Opinions 73, 73-94 [hereinafter Bosmajian, *Wall of Separation*].

[FN12]. For a comprehensive discussion of the "overbreadth" **metaphor**, see Haig Bosmajian, *The Metaphoric "Chilling Effect" and Related Tropes*, in **Metaphor** and Reason in Judicial Opinions, 95, 110-16.

[FN13]. For a comprehensive discussion of the "chilling effect" **metaphor**, see *id.* at 95-110.

[FN14]. For a comprehensive discussion of the "corporation as person" **metaphor**, see generally Berger, *supra* note 8 (citing numerous other works on this topic).

[FN15]. See generally, e.g., Lucia Ann Silecchia, [Pinning the Blame & Piercing the Veil in the Mists of **Metaphor**: The Supreme Court's New Standards for the CERCLA Liability of Parent Companies and a Proposal for Legislative Reform](#), 67 *Fordham L. Rev.* 115 (1998).

[FN16]. See, e.g., Jennifer Diana, Note, [Apples and Oranges and Olives? Oh My! Fellers, the Sixth Amendment, and the Fruit of the Poisonous Tree Doctrine](#), 71 *Brook. L. Rev.* 985 (2005). Diana writes,

Derivative evidence or, more commonly, "fruits," refers to evidence one step removed from illegally obtained evidence, as opposed to the evidence that resulted directly from a constitutional violation. The exclusionary rule prohibits the use of either form of evidence. [Nardone v. United States](#), 308 U.S. 338, 340-41 (1939); [Silverthorne Lumber Co. v. United States](#), 251 U.S. 385, 392 (1920) As a tool to determine whether a particular piece of evidence derived from an initial illegality, the Court coined the **metaphor** "fruit of the poisonous tree." See [Nardone](#), 308 U.S. at 341.

Id. at 986 n.8.

[FN17]. See, e.g., Jerome A. Hoffman, [Recognition By Courts in the Eleventh Circuit of Judgments Rendered By Courts of Other Countries](#), 29 *Cumb. L. Rev.* 65 (1999). Hoffman writes,

Speakers and writers often use the metaphorically evocative term "reach" when considering the authority of courts to render judgments enforceable (1) for or against the parties named therein, (2) for or against interests claimed in property named therein, or (3) for or against interests claimed in statuses borne or shared by persons named therein. As a colorful example of the **metaphor**, we customarily refer to those statutory grants of judicial authority to affect the in personam rights of persons beyond a recipient court's territorial jurisdiction as "long-arm" statutes.

Id. at 135 n.356.

[FN18]. Aristotle, *The Rhetoric of Aristotle* 188 (Lane Cooper trans., Appleton Century Crofts 1932).

[FN19]. See, e.g., Smith, The Power of **Metaphor**, supra note 4, at 216-17.

[FN20]. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

[FN21]. For a discussion of this and related advocacy strategies see Berger, supra note 8, at 204-08.

[FN22]. *Berkey*, 155 N.E. at 61.

[FN23]. Id. Justice Cardozo's full quote reads as follows:

The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of **metaphor**. **Metaphors** in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it. We say at times that the corporate entity will be ignored when the parent corporation operates a business through a subsidiary which is characterized as an "alias" or a "dummy." All this is well enough if the picturesqueness of the epithets does not lead us to forget that the essential term to be defined is the act of operation. Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice.

Id. (footnotes and citations omitted).

[FN24]. Using key terms from Justice Cardozo's quote as search terms, a Westlaw or Lexis search of case law databases reveals numerous cases in which courts evoke this quote in the context of abandoning the old corporate **metaphors** in favor of literal rules.

[FN25]. As we will see later, "factor tests" themselves are a form of **metaphor**. See infra notes 51-52 and accompanying text.

[FN26]. See generally 18 Am. Jur. 2d Corporations "§ 46-54 (2004 & Supp. 2006) (discussing theories for disregarding the corporate entity and listing the numerous factors modern courts consider in making this determination).

[FN27]. 352 S.E.2d 93 (W. Va. 1986).

[FN28]. Id. at 98-99.

[FN29]. Id. at 99 & n.4 (quoting *Berkey*, 155 N.E. at 61).

[FN30]. See Bosmajian, Wall of Separation, supra note 11, at 73-94.

[FN31]. U.S. Const. amend. I.

[FN32]. 16A Am. Jur. 2d Constitutional Law § 417 (1998 & Supp. 2006).

[FN33]. 330 U.S. 1 (1947).

[FN34]. See Bosmajian, Wall of Separation, supra note 11, at 77-78.

[FN35]. *Everson*, 330 U.S. at 18; see also Bosmajian, Wall of Separation, supra note 11, at 78.

[FN36]. See generally Bosmajian, Wall of Separation, supra note 11, at 78.

[FN37]. 370 U.S. 421, 444-46 (1962) (Stewart, J., dissenting) (school prayer case).

[FN38]. *Id.* at 445-46.

[FN39]. 374 U.S. 203, 308 (1963) (Stewart, J., dissenting) (school prayer case).

[FN40]. *Id.* at 309.

[FN41]. Robert M. Hutchins, *The Future of the Wall*, in *The Wall Between Church and State* 17, 19 (Dallen H. Oaks ed., 1963).

[FN42]. 403 U.S. 602 (1971).

[FN43]. *Id.* at 612-13; see also Bosmajian, *Wall of Separation*, *supra* note 11, at 84-85.

[FN44]. *Lemon*, 403 U.S. at 612-13; see also Bosmajian, *Wall of Separation*, *supra* note 11, at 84-85. Interestingly, the third part of the *Lemon* test itself contains a **metaphor**: "excessive government entanglement." *Lemon*, 403 U.S. at 613.

[FN45]. *Lemon*, 403 U.S. at 614; see also Bosmajian, *Wall of Separation*, *supra* note 11, at 85.

[FN46]. 16A Am. Jur. 2d *Constitutional Law* § 419 (1998 & Supp. 2006).

[FN47]. 472 U.S. 38, 106-07 (1985) (Rehnquist, J., dissenting).

[FN48]. 472 U.S. at 40.

[FN49]. *Id.* at 106-07 (Rehnquist, J., dissenting) (quoting *Berkey*, 155 N.E. at 61) (footnotes and citations omitted); see also Bosmajian, *Wall of Separation*, *supra* note 11, at 87-88.

[FN50]. This list of legal method **metaphors** is derived generally from James B. White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* 695 (1973).

[FN51]. See, e.g., Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 18-22 (4th ed. 2006) (discussing common doctrinal rule structures that lawyers often work with, such as factor tests and balancing tests).

[FN52]. In my advanced legal writing textbook, I offer this example of an established "factor test" from *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989):

"In determining whether a hired party is an employee [as opposed to an independent contractor] under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Michael R. Smith, *The Quest for Coherence and the Creation of Factor Tests in Persuasive Legal Writing*,

in *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 285, 289 (2002) (quoting Cmty. for [Creative Non-Violence](#), 490 U.S. at 751-52). Because this factor test for determining whether a hired party is an employee has been established as the rule by the Court, it is a generic type of doctrinal **metaphor**, rather than a legal method **metaphor**.

[FN53]. See generally, e.g., *id.* at 285-309 (discussing how, as a strategy of advocacy, a lawyer can create and propose to a court a new "factors test").

[FN54]. This fictitious statute is based loosely on [Fla. Stat. § 790.19 \(2006\)](#).

[FN55]. Webster's New Collegiate Dictionary 913 (1981).

[FN56]. *Id.*

[FN57]. See Charles R. Calleros, *Legal Method and Writing* 329-30 (4th ed. 2002).

[FN58]. *Id.* at 329. Professor Calleros credits this example of a thematic **metaphor** to Christopher Mason, an attorney with the Phoenix office of the law firm of Bryan Cave LLP. *Id.* at 329 n.4.

[FN59]. *Id.* at 329-30 (footnotes omitted and brackets in original).

[FN60]. For a discussion of "doctrinal **metaphors**," see *supra* Part I.

[FN61]. See, e.g., Carole C. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument* 77 (3d ed. 2003); Calleros, *supra* note 57, at 328-30; Bradley G. Clary et al., *Advocacy on Appeal* 6-9 (2d ed. 2004); Michael R. Fontham et al., *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* 53-56 (2002).

[FN62]. E.g., Clary et al., *supra* note 61, at 6; Berry, *supra* note 61, at 77.

[FN63]. Clary et al., *supra* note 61, at 6.

[FN64]. See Smith, *The Power of **Metaphor***, *supra* note 4, at 204-06.

[FN65]. See *id.* at 204.

[FN66]. Aristotle, *Aristotle's Poetics: A Translation and Commentary for Students of Literature* 41 (Leon Golden trans., Prentice Hall 1968), quoted in Michael Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, 2 *Legal Writing* 113, 127 (1996).

[FN67]. See Smith, *The Power of **Metaphor***, *supra* note 4, at 206.

[FN68]. E.g., Calleros, *supra* note 57, at 329-30.

[FN69]. See Smith, *The Power of **Metaphor***, *supra* note 4, at 205-06.

[FN70]. See *id.* at 206.

[FN71]. See *id.*

[FN72]. See generally *id.* at 179-221; see also, e.g., Anne Enquist & Laurel Currie Oates, *Just Writing: Gram-*

mar, Punctuation, and Style for the Legal Writer 171-72 (2d ed. 2005); Bryan A. Garner, *The Elements of Legal Style* 149-51 (2d ed. 2002); Louis J. Sirico, Jr. & Nancy L. Schultz, *Persuasive Writing for Lawyers and the Legal Profession* app. A (2d ed. 2001).

[FN73]. This illustration was taken from Smith, *The Power of Metaphor*, supra note 4, at 200 (quoting *Anderson v. Litzenberg*, 694 A.2d 150, 161 n.11 (Md. Ct. Spec. App. 1997)).

[FN74]. See id. at 198-200.

[FN75]. These illustrations were taken from id. at 198-99.

[FN76]. *State v. Vanatter*, 869 S.W.2d 754, 755 (Mo. 1994) (emphasis added).

[FN77]. *Estate of Parks v. O'Young*, 682 N.E.2d 466, 471 (Ill. App. Ct. 1997) (emphasis added).

[FN78]. *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993) (emphasis added) (citation omitted).

[FN79]. *State v. Devore*, 2 P.3d 153, 158 (Idaho Ct. App. 2000) (emphasis added).

[FN80]. *McFee v. State*, 511 So. 2d 130, 139 (Miss. 1987) (Robertson, J., concurring in part and dissenting in part) (emphasis added) (citation omitted).

[FN81]. *Emerson v. E.I. Du Pont de Nemours & Co.*, 707 F. Supp. 336, 338 n.1 (N.D. Ill. 1989) (emphasis added).

[FN82]. Smith, *The Power of Metaphor*, supra note 4, at 192.

[FN83]. These examples of stylistic metaphoric sentences are taken from id. at 181-82.

[FN84]. *Hayes v. Luckey*, 33 F. Supp. 2d 987, 995 n.16 (N.D. Ala. 1997).

[FN85]. *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

[FN86]. *Houghtaling v. Superior Court*, 21 Cal. Rptr. 2d 855, 860 (Cal. Ct. App. 1993).

[FN87]. *Goren v. Royal Invs., Inc.*, 516 N.E.2d 173, 176 (Mass. App. Ct. 1987).

[FN88]. *State v. Goebel*, 218 P.2d 300, 306 (Wash. 1950).

[FN89]. Louise M. Antony, *Back to Androgeny: What Bathrooms Can Teach Us About Equality*, 9 *J. Contemp. Legal Issues* 1, 4 (1998) (attributing the origin of this **metaphor** to Marilyn Frye, *Oppression*, in *The Politics of Reality* 1 (1983)).

[FN90]. Stylistic metaphoric sentences also include "pure" metaphoric sentences, which contain only metaphoric language (and no literal language) and rely on their context to complete the metaphoric analogy. See Smith, *The Power of Metaphor*, supra note 4, at 192-95.

[FN91]. By far, metaphoric sentences such as these make up most of the examples of **metaphor** in legal writing literature. See, e.g., Enquist & Oates, supra note 72, at 171; Garner, supra note 72, at 149-51; Sirico & Schultz, supra note 72, at app. A.

[FN92]. Smith, The Power of **Metaphor**, supra note 4, at 201-03.

[FN93]. 462 F.2d 960 (5th Cir. 1972).

[FN94]. Smith, The Power of **Metaphor**, supra note 4, at 202 (quoting [Shanley, 462 F.2d at 978](#) (citation omitted) and citing Bosmajian, Personifying Justice, the Constitution, and Judicial Opinions, in **Metaphor** and Reason in Judicial Opinions 167, 181-82 (1992) and Michael Frost, Greco-Roman Analysis of Metaphoric Reasoning, 2 Legal Writing 113, 128-30 (1996)). Extended **metaphors** such as this are often discouraged by writing experts. See, e.g., Bosmajian, supra, at 181 (criticizing this "Tinker dam" extended **metaphor** as "[bringing] too much attention to itself"); Bryan A. Garner, A Dictionary of Modern Legal Usage 559-60 (2d ed. 1995) (discussing "overwrought **metaphor[s]**").

[FN95]. See supra notes 64-71 and accompanying text.

[FN96]. Smith, The Power of **Metaphor**, supra note 4, at 204-06.

[FN97]. See supra notes 66-67 and accompanying text.

[FN98]. Smith, The Power of **Metaphor**, supra note 4, at 206.

[FN99]. See Elizabeth G. Thornburg, [Just Say "No Fishing": The Lure of **Metaphor**](#), 40 U. Mich. J.L. Reform 1, 1-3 (2006).

[FN100]. See Enquist & Oates, supra note 72, at 171.

[FN101]. See id.

[FN102]. See Jane N. Richmond, Legal Writing: Form and Function 117 (2002).

[FN103]. See Smith, The Power of **Metaphor**, supra note 4, at 191.

[FN104]. Id. at 217-21.

[FN105]. For further discussion of creating an original stylistic **metaphor**, see Chapter 9 of Smith, The Power of **Metaphor**, supra note 4, at 179-221.

[FN106]. 308 U.S. 338 (1939).

[FN107]. Id. at 341. For further discussion, see Diana, supra note 16, at 986 n.8.

[FN108]. See generally Diana, supra note 16.

[FN109]. See generally id.

[FN110]. See supra Part I.A.

[FN111]. See supra note 8 and accompanying text.

[FN112]. George Lakoff & Mark Johnson, **Metaphors We Live By** (1980).

[FN113]. *Id.* at 15. These are just a few of the metaphoric uses of the concepts of "up" and "down" that are discussed by Professors Lakoff and Johnson. See *id.* at 15-17.

[FN114]. See, e.g., Winter, *The Cognitive Dimension*, *supra* note 5, at 2231- 32.

[FN115]. See *infra* app. A.

[FN116]. E.g., Smith, *The Power of Metaphor*, *supra* note 4, at 179, 204-06.

END OF DOCUMENT