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Metaphor in Law as Poetic and Propositional Language

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I. Introduction

One of my colleagues describes language as the opening through which the law discloses itself to us.¹ If this is so, the opening is rarely clear. As Iris Murdoch wrote, "we can no longer take language for granted as a medium for communication. Its transparency is gone. We are like people who for a long time looked out of a window without noticing the glass—and then one day began to notice this too."²

Metaphor is an apt vehicle for examining the relationship between law and language, and not only because metaphors are ubiquitous in law. In metaphor, the speaker has quite clearly said one thing and the listener has most likely understood that she meant another. Metaphor is thus effective rhetorically, though a non-literal use of language.

Perhaps as a result, philosophy and law have a shared history of disdain for metaphor:

metaphor “openly professes deceit”; it “move(s) the passions and thereby mislead(s) the judgment”;³ once used, a metaphor becomes not only “a literal truth but the literal truth, a self-fulfilling prophecy.”⁴

My argument in this essay is that although lawyers routinely use and abuse metaphor as propositional language, they mostly neglect the use of metaphor as poetic language. Poetic metaphor openly invites you to view a topic or a target from a new angle by setting it against or alongside a light source; in this way, it prompts second looks and encourages insights. Propositional metaphor, by comparison, appears designed to persuade you to view the target or the topic under discussion as something you already know about because of your experience with the source. As a result, you are better able to understand or to “handle” the topic, but you discover little that is new.

The prototypical poetic metaphor is *Juliet is the sun*. The capacity to create and express metaphors like this one is claimed to be the source of eloquence: “Eloquence lies in the unbound mental capacity to perceive similarity where it may not appear.”⁵ Poetic metaphor evokes the senses and conjures up images and emotions; it thus seems suggestively open-ended. Poetic metaphor leaves us hanging.

A quintessential propositional metaphor is that *the corporation is a person competing within a marketplace of ideas*.⁶ This conceptual metaphor is the now-conventional foundation of a newly controversial line of authority in U.S. judicial decision making.⁷ The basic propositions being asserted are that the corporation should be treated as a living entity, rather than as a mechanism or artificial creation, and that a corporation’s spending of money to participate in the political or commercial arenas of expression should be seen as the “speech” of a person and protected from undue

governmental regulation. When successful, as these have been, propositional metaphors are processed like literal speech: no one notices they are metaphors until problems occur. Rather than leaving us wondering, they shut the door and turn out the light.

II. What Are Metaphor's Effects? How Does Metaphor Work?

Although I have just described a metaphor as propositional, metaphor theorists are divided on the question of whether metaphor is capable of carrying propositional content. Pragmatists contend that the speaker of a metaphorical sentence “makes as if to say” a distinct propositional content⁸ while non-cognitivist theorists contend that metaphor produces only non-propositional shifts of perspective.⁹

A. The Effects of Metaphor

As already noted, the poetic power of metaphor arises from its invitation to see one thing “as another,” providing us with a novel perspective and generating new information in the process. We don't see Juliet “as” the sun. But something happens in our thinking that is similar to our viewing the figure in which, depending on your perspective, one of two different women seems to appear. The figure always contains the elements of both a young woman and an old woman and that does not change, but the elements slip and slide before our eyes until they click into place. Although we now see something we did not see before, it is not because we have received new information: “Rather, the difference is experiential, intuitive, and holistic.”¹⁰

Theorists who focus on poetic metaphor may conclude that metaphor carries no cognitive content that was intended by the speaker. Instead, a metaphor is “like a picture or a bump on the head” that works by “prompting,” “inspiring,” “provoking or inviting” us to appreciate some feature of a target in contrast with a source. Metaphors are like

“scraps of poetry which send shivers down our spine”; they “do not (literally) tell us anything, but they do make us notice things. . . . They do not have cognitive content, but they are responsible for a lot of cognitions.”¹¹

Contextualists, on the other hand, concentrate on more conventional, so-called conceptual metaphors, such as *life is a journey*. They argue that we understand these statements as if they were making propositional assertions. The speaker intends for the listener to figure out what is meant and to do so because the listener knows, more or less, what meaning the speaker intended. If challenged, the speaker is expected to respond with a more explicit statement of the proposition that was meant. Within any given context, speakers and hearers can usually find common ground about the gist of what the speaker said.¹²

Perhaps the most well known of metaphor theorists, George Lakoff & Mark Johnson, a linguist and a philosopher, argued not only that metaphor creates cognitive content, but also that metaphor is fundamental to thought and expression.¹³ They were persuaded by their research that metaphor is absorbed through long, constant, and unconscious experience. The resulting conceptual metaphors provide tacit knowledge, knowledge that has become embedded through unavoidable and repeated experience.¹⁴ Lakoff and Johnson’s research focused on the use of a concrete, experienced source domain to structure and understand a more abstract target domain. They suggested that experts were able to solve problems by recognizing patterns and retrieving solutions from a stored repertoire acquired by encountering similar problems in the past.

Critics of Lakoff and Johnson’s cognitive theory of metaphor dispute their overarching claim that metaphor is *the* fundamental feature of thought.¹⁵ These critics

point out that metaphor is not the only language process that works in a similar way. Other stored knowledge structures—including schema, analogy, and narrative—also create new meaning by mapping the source domain on top of the target or by transferring features from the source to the target. Some additional doubt has been cast on the argument that all thinking is fundamentally metaphorical by studies showing that unfamiliar and novel metaphors take longer to process than literal sentences.¹⁶

B. Models of the Metaphorical Process

Rather than competing with one another, models of metaphorical processing may fall along a spectrum that describes different kinds of metaphors. Like Aristotle, cognitive researchers believe that “comparison is the fundamental process that drives metaphor.” Moreover, they conclude that “[n]ovel metaphors are understood only by comparison. Conventional metaphors can be understood by accessing stored abstractions, but these metaphoric abstractions are a product of past comparisons.”¹⁷

The traditional model of juxtaposition suggested that metaphor works by contrasting the target (Juliet) with the source (that is, with any another object, event, or situation, like the sun). The juxtaposition was thought to nudge us to attend to previously un-noticed features of the target. This model, however, failed to explain how metaphors could generate new information.¹⁸

“Category-transfer” models proposed that metaphor works by forming ad hoc categories, abstracting from a prototype of the source, and then transferring to the target. When we think of life as a journey, we derive abstract categories from the concrete features of a journey to produce a more general schema for understanding life. Category-transfer models explained why metaphor can help organize our understanding of an

unfamiliar target, but they did not account for the different effects of applying the same source to different targets. (Camp, 162-63) In contrast to the category-transfer model, the “feature-matching” model aligned the source and the target and directly compared their features. The feature-matching model could not, however, explain some of metaphor’s broader organizational effects or how metaphors created new information. (Camp, 163-64)

An emerging consensus by cognitive scientists surrounds a hybrid model that grew out of studies of analogy, the “structural alignment” model. This model incorporates alignment and projection. First, a relevant analogy or metaphor is accessed from long-term memory. The processor then begins mapping the source onto the target to identify matches and align the corresponding parts of the target and the source. The mapping allows analogical inferences to be made about the target, creating new knowledge to fill in gaps. The inferences are evaluated and adapted if needed. As a result, new categories and schemas may be generated.¹⁹ For analogies, the model showed that the most important similarities were found in the *relationships* within the domains rather than in the *features* of those domains.²⁰ Dedre Gentner and her co-authors have concluded that the same “basic processes of analogy are at work in metaphor . . . structural alignment, inference projection, progressive abstraction, and re-representation.”²¹

III. The Imaginative Power of Metaphor

This section draws primarily on the work of Elisabeth Camp, a philosopher of language.²² Camp concludes that metaphor sometimes enables speakers to communicate things that cannot be fully expressed in literal terms and that metaphor sometimes provides “our only cognitive access to certain properties.”²³ In Camp’s view, the

distinctive feature of metaphor is that it reveals an overall perspective. Perspectives “provide us with a tool for thinking rather than a thought per se.”²⁴ Because of perspectives, metaphor can go beyond highlighting new and surprising features of the things that exist in the world, “[it] can also tell us that things are a certain way.” (Camp, 13)

Metaphor accomplishes this through a process involving characterizations, aspectual thinking, and perspectives.²⁵ A characterization is a collection of properties and attributes possessed by the person or thing being characterized, structured so that some of them are more central and others are more prominent. When it comes in the form of a stereotype or prototype, a characterization may be “ready made,” consisting of properties and characteristics we intuitively associate with the person or thing because of prior characterizations. But we also are able to narratively construct new and individual characterizations. My characterization of a lioness might include the appearance features of a muscular body and soft, large paws; the characteristics and qualities of being quiet and watchful while sitting, slow and imperious while walking, fast and deadly while hunting. In addition to such general attributes, my characterization might include more specific properties that apply in certain circumstances: thus, I might characterize the lioness as being painstaking, patient, and serious when teaching her cubs. Some properties of a characterization affect how we feel about the subject: describing the lioness as a hunter and protector may stir feelings of endangerment and respect.

In Camp’s theory, one characterization is used as an aspect, to filter, frame, or structure another. So I might use my characterization of the lioness to structure my characterization of Angela Merkel, the German chancellor. This process would begin

with the most prominent and central features in the framing characterization (the lioness), seek matches for them within the subject characterization (Merkel), and then highlight the prominence and centrality of the matched features. Restructuring one characterization in light of another appears intuitive: if it works, you will come to “see” Merkel as a lioness without knowing how your insight came about.

Perspectives have the same effect at a higher level of generality: they are more general modes of interpretation and are not tied to a particular subject. “[A] perspective provides an intuitive, holistic principle for organizing our thoughts about some topic” around “a complex structure of relative prominence . . . so that some features stick out in our minds while others fade into the background, and by making some features especially central to explain others.”²⁶ For instance, a perspective might be a political orientation or a general worldview that individuals are responsible for helping themselves. As these examples illustrate, a perspective may carry attitudes, emotions, and values. Rather than a complete, complex thought, a perspective provides a tool for thinking that “helps us to do things with the thoughts we have: to make quick judgments based on what’s most important, to grasp intuitive connections, and to respond emotionally.” Perspective also “provides us with a ‘way to go on,’ incorporating new thoughts about the focal topic and often about related topics as well.” (Camp, 111)

Thus, according to Camp, the process of metaphorically “seeing as” is not a *what* but a *how*. Rather than changing what exists, “[i]t imaginatively alters *how* we structure and color our thoughts about what *is* so.” Seeing a target through a characterization requires the viewer to re-structure her thinking to make the relevant features play an appropriately prominent or central role. Trying on a perspective requires the viewer to re-

configure her patterns of thought about a broader collection of topics. (Camp, 111-16)

IV. Applying Metaphor's Imaginative Power to Law

For those engaged in legal persuasion, poetic metaphor supports the intuition that there may be more effective “ways of changing someone’s mind than changing his or her beliefs.” What we are after is not so much different beliefs, but “changes in the associations and comparisons one makes, differences in the vivid or ‘felt’ appreciation of something already known, or changes in one’s habits of attention and sense of the important and the trifling.”²⁷ These changes and differences—dependent on thoughts, images, and feelings—may fall within metaphor’s power.²⁸

To illustrate the power of “seeing as” in legal argument, following are examples from the U.S. Supreme Court’s 2012 decision upholding federal power to regulate immigration and striking down major portions of an Arizona statute.²⁹ In his opinion for the majority, Justice Anthony Kennedy describes the United States as a nation of immigrants, but this is not the important metaphor. He characterizes the power of “Government of the United States” with regard to immigration as “broad [and] undoubted,” resting not only on the Constitution but also on the inherent power of a national sovereign to conduct relations with foreign nations.³⁰ He depicts a national government that exercises its significant power with the restraint and discretion necessary when human concerns are immediately at stake:

The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation’s meeting its

responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

This characterization of the national government, its power, and its restraint is the lens through which Arizona's law may be seen as undermining federal law. From a larger perspective, Justice Kennedy views the United States as a member of the international community of nations.³¹ Trying on this perspective, an audience might re-align its patterns of thought even if Justice Kennedy did not explicitly state the proposition that only the national sovereign has the power to control and conduct relations with foreign nations.

In his opinion concurring in part and dissenting in part, Justice Antonin Scalia proposes a different metaphor:

The United States is an indivisible "Union of sovereign States." Today's opinion, approving virtually all of the Ninth Circuit's injunction against enforcement of the four challenged provisions of Arizona's law, deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there.³²

These characterizations accord prominence and centrality to the sovereign character of the States, and they make the central feature of sovereignty the power “to forbid the entrance of foreigners.”³³

Justice Scalia describes the “human realities” this way: “Arizona bears the brunt of the country’s illegal immigration problem. Its citizens feel themselves under siege by large number of illegal immigrants who invade their property, strain their social services and even place their lives in jeopardy.”³⁴ But this is not the only danger:

the specter that Arizona and the States that support it predicted [has come to pass]: A Federal Government that does not want to enforce the immigration laws as written, and leaves the States’ borders unprotected against immigrants whom those laws would exclude. So the issue is a stark one. Are the sovereign States at the mercy of the Federal Executive’s refusal to enforce the Nation’s immigration laws?³⁵

Through the filter provided by Justice Scalia’s characterizations, Arizona’s legislation is seen as warranted. Trying on his overall perspective that the States have always had the authority to protect themselves from foreign invasion, an audience might adjust its thinking to conclude that left unprotected, Arizona must have authority to act.

Because lawyers distrust intuition and imagination, metaphor’s poetic power may be overlooked in favor of apparently more rational persuasive methods. But “[i]f we insist upon confining ourselves to scrupulously rational modes of thought and discussion, . . . this may well have the effect of granting inappropriate influence to pre-existing biases

. . . . Against this, harnessing the power of imagination to reconfigure our thought by more intuitive means may enable us to counteract these biases in a more thoroughgoing way.”³⁶

¹ Linda L. Berger & Jack L. Sammons, “The Law’s Mystery,” 2 *Brit. J. Am. Legal Stud.* (forthcoming).

² Iris Murdoch, *Sartre* (Cambridge: Bowes and Bowes, 1953), 27.

³ Elizabeth Camp, “Metaphor in the Mind: The Cognition of Metaphor,” 1/2 *Philosophy Compass* (2006), 154-70, 154 (quoting Thomas Hobbes, *Leviathan or, The Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil* (London: Andrew Crooke, 1651), ch. 8; John Locke, *An Essay Concerning Human Understanding* (London: T. Basset, 1690), bk. 3, ch. 10).

⁴ Douglas Berggren, “The Use and Abuse of Metaphor, I,” 16 *Rev. Metaphysics* (1962-63), 237-58, 244-45.

⁵ Paul A. Bové, *Poetry Against Torture: Criticism, History, and the Human* (Hong Kong University Press, 2008), 29.

⁶ See Linda L. Berger, “What Is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law,” 2 *Leg. Comm. & Rhetoric: J. ALWD* (2004), 169-208.

⁷ *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010) (the First Amendment bars campaign spending restrictions on corporations and unions).

⁸ Camp, “Metaphor in the Mind,” 155.

⁹ *Ibid.* (referring to Donald Davidson, “What Metaphors Mean,” in *On Metaphor*, ed. S. Sacks (Chicago: University of Chicago Press, 1978), 29-45).

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- ¹⁰ Elizabeth Camp, "Showing, Telling and Seeing: Metaphor and 'Poetic Language,'" *The Baltic International Yearbook of Cognition, Logic and Communication* (2008), 1-24, 2.
- ¹¹ Camp, "Showing, Telling and Seeing," 2-3 (quoting Davidson, "What Metaphors Mean," 46; Richard Rorty, "Unfamiliar noises I: Hesse and Davidson on Metaphor," *Proceedings of the Aristotelian Society* supp. vol. 61 (1987), 283-96, 285, 290).
- ¹² Camp, "Showing, Telling and Seeing," 3-4.
- ¹³ See, e.g., George Lakoff & Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980).
- ¹⁴ George Lakoff & Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought* (Basic Books 1999).
- ¹⁵ See, e.g., Camp, "Metaphor in the Mind," 158-60.
- ¹⁶ Dedre Gentner et al., "Metaphor Is Like Analogy," in *The Analogical Mind: Perspectives from Cognitive Science*, ed. D. Gentner et al. (Cambridge: MIT Press, 2001), 100-253, 202.
- ¹⁷ *Ibid.*, 234-35.
- ¹⁸ Camp, "Metaphor in the Mind," 161-62.
- ¹⁹ Keith J. Holyoak et al., "Introduction: The Place of Analogy in Cognition," *The Analogical Mind: Perspectives from Cognitive Science*, 1-19, 9-10.
- ²⁰ *Ibid.*, 8.
- ²¹ Gentner, "Metaphor Is Like Analogy," 243.
- ²² See Elizabeth Camp, *Saying and Seeing-as: The Linguistic Uses and Cognitive Effects of Metaphor* (2003) (Dissertation, University of California Berkeley).

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- ²³ Elizabeth Camp, “Metaphor and That Certain ‘Je Ne Sais Quoi,’” *Philosophical Studies* (2006), 129:1-25
- ²⁴ Camp, “Showing, Telling and Seeing,” 7.
- ²⁵ See Camp, *Saying and Seeing-as*.
- ²⁶ Elizabeth Camp, “Two Varieties of Literary Imagination: Metaphor, Fiction, and Thought Experiments,” *Midwest Studies in Philosophy XXXIII* (2009), 107-30, 110-11.
- ²⁷ Richard Moran, “Seeing and Believing: Metaphor, Image, and Force,” 16 *Critical Inquiry* (Autumn 1989) 87-112, 100.
- ²⁸ See Paul Ricoeur, “The Metaphorical Process as Cognition, Imagination, and Feeling,” 5 *Critical Inquiry* (Autumn 1978), 143-159.
- ²⁹ *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492 (2012).
- ³⁰ *Id.* at 2498.
- ³¹ *Id.* at 2510.
- ³² *Id.* at 2511.
- ³³ *Id.* at 2514.
- ³⁴ *Id.* at 2522.
- ³⁵ *Id.* at 2521.
- ³⁶ Camp, “Two Varieties of Literary Imagination,” 128.