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Harold Anthony Lloyd
Wake Forest University School of Law

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LAW AS TROPE: FRAMING AND EVALUATING CONCEPTUAL METAPHORS

Harold Anthony Lloyd*

I. EYELID MOONS AND MORE

A. Kennings

Like others who work with language, many lawyers no doubt appreciate good kennings: “beam from the eyelid moon” (gaze), “hat’s perch” (head), “head-sedge” (hair), “brow’s sky” (forehead), “serpents of the shield” (swords), “sword’s lair” (scabbard), “spear-meadow” (shield), “feeder of wolves” (warrior), “shield trees” (warriors yet again), “shield-storm” (battle), “spear-thaw” (battle again), “quarrelling of the swords” (battle yet again), “axe storms” (still more battle), “darts’ shower” (battle one more time), “spear-river” (blood), “wound sea” (blood again), “sea’s horse” (ship), “fjord’s-helmet” (ice), “pot snakes” (sausages), and “Odin’s ale” (poetry), just to quote a few.¹

However, metaphors also play a much deeper role in

* © 2016 Harold Anthony Lloyd, Associate Professor, Wake Forest University School of Law. This article draws from and expands upon portions of several earlier articles of mine including: *Narrative in Law and Life: Some Frequently Asked Questions*, THE SECOND DRAFT (2015); *Plane Meaning and Thought: Real-World Semantics and Fictions of Originalism*, 24 S. CAL. INTERDISC. L.J. 657 (2015) (which more broadly explores framing, metaphor, planes of thought, and the inconsistencies of Originalism and how meaning actually works in the real world); *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice, and the Humanities*, 49 WAKE FOREST L. REV. 1213 (2014); “Original” Means Old, “Original” Means New: An “Original” Look at What “Originalists” Do, 67 NAT’L LAW. GUILD REV. 135-55 (2010). I want to thank the faculty of Georgia State University College of Law for their lively comments and suggestions for this paper. All errors and shortcomings are of course my own.

1. KORMAK’S SAGA, SAGAS OF WARRIOR-POETS 5-67 (Rory McTurk et al. trans., Penguin Books 1997).

thought and law than style, ornament, or verbal virtuosity. As we shall see, metaphors play a necessary role in our categories of thought. As a result, metaphors are a necessary part of thought itself, including legal thought.

B. Categories

To grasp this deeper role of metaphor, it helps to step back and briefly address the nature and purpose of categories. Categories are “sets of things” “treated as if they were, for the purposes at hand, similar or equivalent or somehow substitutable for each other.”² (For purposes of this article, I will use “category” and “concept” interchangeably.) Of course, whether something falls inside or outside any such category will turn “upon the criteria chosen to measure likeness or unlikeness.”³ When considering categories, lawyers thus need to understand and agree “upon the criteria chosen to measure likeness or unlikeness.”⁴ We will explore the importance of these conscious and unconscious criteria in more detail below.

Why are categories important? Lawyers (and all other thinkers) use categories to organize experiences in ways that make such experiences more predictable and thus easier and hopefully safer to handle.⁵ By categorizing experiences together, lawyers do not have to debate every experience in a vacuum, but can treat “similar” experiences in ways they have already decided. For example, if a lawyer has decided that all of her associates are competent and are not likely to make a mistake when drawing up a deed, she can act accordingly without further analysis when she needs them to prepare a deed in the future.⁶ Of course, for these categories to be good ones, they must work “sufficiently well enough for [the user] to function.”⁷ We will explore workability in more detail below.

2. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 20 (2002).

3. *Id.* at 49.

4. *Id.*

5. *Id.* at 21-26.

6. *See id.* at 25-26.

7. GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH 21 (1999) [hereinafter PHILOSOPHY IN THE FLESH].

C. Metaphors and Categories

Exploring how categories can treat sets of different things as equivalent or similar leads us to an exploration of metaphor and simile. Metaphors literally equate different things (as in “law is a gnarly tree”), while similes emphasize likeness without the bolder assertion of equivalence (as in “law is like a gnarly tree”).⁸ Despite their surface difference from metaphors, however, one can question whether similes are not also metaphorical at a deeper level. To say “X is like Y,” do we not in some sense equate “X” with its referent? Is this not equating something with what it is not? Is this not therefore a form of metaphor? Perhaps we should call this something like embedded metaphor? Though I cannot resist raising these questions, I need not resolve them here since, as noted below, grasping the bolder claims of metaphor should also allow readers to grasp the weaker facial claims of similes.

D. Metaphors, Similes, and Law

Metaphors and similes guide even the most mundane legal matters. A simple contract for the sale of baseballs, for example, might specify that the balls must be “spheres.” Such a specification is effectively either metaphor or simile depending upon what is meant by “sphere.” Since true or perfect spheres do not exist in the real world,⁹ the contract specifications would be metaphorical if “sphere” has the perfect geometrical sense never actually found in this imperfect world.

8. See RICHARD A. LANHAM, *A HANDLIST OF RHETORICAL TERMS* 100 (2d ed. 1991) (emphasis omitted) (defining a metaphor as an “assertion of identity rather than, as with [s]imile, likeness.”). For the difference between metaphor and metonymy (i.e., the use “of one entity to refer to another that is related to it,” such as when a server refers to a customer as “the ham sandwich” because of what he ordered), see GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 35-40 (1980) [hereinafter *METAPHORS WE LIVE BY*].

9. See Robert J. Rovetto, *The Shape of Shapes: An Ontological Exploration*, RESEARCHGATE (Jan. 2011), <https://www.researchgate.net/publication/288717561> (explaining the difference between geometric and physical shapes).

In such a case, the contract would be equating baseballs (imperfect spheres) with something not found in this imperfect world (perfect spheres). However, if “sphere” instead means “something like an ideal geometric sphere,” we would have a simile in form at least.¹⁰ In either case, the applied “sphere” category would treat “sets of things” “as if they were, for the purposes at hand, similar or equivalent or somehow substitutable for each other.”¹¹

Additionally, we must speak metaphorically when we would populate the world with legal creations. Fee simple, for example, does not exist in nature itself. Pointing to any “parcel” of land as a “fee simple tract” necessarily equates something (dirt) with something else (fee simple) that does not really exist in the world.¹² Of course, one might make the same point about non-legal concepts we create such as “dirt” and even “nature” itself. A child’s notion of “dirt” undoubtedly differs from a geologist’s, yet they both apply those different notions to the same thing. Similarly, an atheist’s notion of “nature” undoubtedly differs from a pantheist’s notion. Yet, again, both apply these very different notions to the same thing. I raise these non-legal points only to note that there are no natural categories apart from our definitional systems; categories, in other words, come from us and not from the world itself.¹³ As we shall see, good lawyers recognize and remain cognizant of this fundamental truth.

II. HOW METAPHORS WORK BY EMPHASIZING AND HIDING

Since metaphor makes the bolder assertion of equivalence, rather than simile’s facial assertion of mere similarity, I shall focus on metaphor rather than simile for the remainder of the

10. The question of embedded metaphors posed in Section I(C) could be posed here as well.

11. AMSTERDAM & BRUNER, *supra* note 2, at 20.

12. *See id.* at 27-28. Additionally, if we say that Blackacre is a rectangle, we use metaphor to the extent we frame Blackacre as a geometric space involving perfect lines, angles and points that can never exist in the real world. *See also* Rovetto, *supra* note 9, at 1.

13. *See* AMSTERDAM & BRUNER, *supra* note 2, at 50.

article. Grasping the bolder claim of metaphor should allow the reader to grasp as well the functions of simile's weaker facial claim.

How, then, do conceptual metaphors work? They have two primary functions: "highlighting certain properties" and "downplaying . . . [or] hiding still others."¹⁴ For example, a husband contemplating divorcing his wife might refer to the same event by these very different statements:

My wife whispered with another man at length last night.

My wife had a quiet conversation with her brother last night.

My wife talked quietly with her brother on the phone last night.

My wife talked with her brother yesterday.¹⁵

Although possibly all truthful, these statements highlight and downplay various aspects of what happened and are thus incomplete and biased. The husband might well prefer the first statement as most consistent with his divorce aims. However, a good lawyer cannot uncritically accept any such biased and incomplete statement.¹⁶ Instead, good lawyers consider what such statements highlight, downplay, and hide as they chart courses consistent *both* with their clients' real interests and professional ethics.

In fact, good lawyers know that forgetting what metaphors downplay and conceal can lead to real, physical disaster. For example, a worker apparently once caused an explosion by discarding a cigarette into an "empty" barrel that had previously contained explosive chemicals.¹⁷ Downplaying the barrel's previous explosive contents, an "empty" label presumably facilitated the disaster.¹⁸ As the poor worker

14. METAPHORS WE LIVE BY, *supra* note 8, at 163. *See also id.* at 152. The nature of conceptualization, of course, requires this. Since a concept differs from the thing conceptualized, there cannot be a perfect one-to-one match. *See, e.g., id.* at 13.

15. For another example, *see id.* at 163.

16. Nor can a good lawyer-citizen do the same on broader social issues. For example, is welfare a "safety net" or a "handout?" *See* AMSTERDAM & BRUNER, *supra* note 2, at 51.

17. *Id.* at 142.

18. *Id.*

learned the hard way, “empty,” like all other categories, can downplay highly-relevant information.

Good lawyers also know that forgetting the incomplete and biased nature of metaphor can also lead them to miss opportunities provided by “the alternative categories [they] did *not* use.”¹⁹ This can apply at multiple levels, including both structure and strategy. For example, a lawyer representing a client seeking “to lease” Blackacre does not represent her client well if she does not consider whether other possible means of controlling the land (such as a license or a purchase) might better serve her client. To do that, she of course needs to inquire sufficiently about the client’s needs and interests. If, for example, she finds that the client wishes to control the land for generations, she might better serve her client by suggesting a purchase. Additionally, if that lawyer always sees negotiation as combat, she forgets that negotiation can be (and often ought to be) cooperative.²⁰ She may thus unwittingly harm her client by negotiating a worse deal than she might otherwise have done.

Remembering to look for the categories and metaphors in play is not always easy. As Amsterdam and Bruner put it, we often “*experience the world as categorized* and simply take this experience for granted, as given.”²¹ At least ninety-five percent of thought may be “below the surface of conscious awareness,”²² which means that we must constantly struggle to grasp what our metaphors highlight and conceal.

19. *Id.* at 49.

20. METAPHORS WE LIVE BY, *supra* note 8, at 10.

21. AMSTERDAM & BRUNER, *supra* note 2, at 26. In fact, Lakoff and Johnson maintain that we cannot “‘get beyond’ our categories and have a purely uncategorized and unconceptualized experience.” PHILOSOPHY IN THE FLESH, *supra* note 7, at 19. For purposes of this article, I take no position on this issue. However, even if we must always think with categories and can thus never have pure uncategorized experience, this of course does not mean that we cannot change the categories we use.

22. PHILOSOPHY IN THE FLESH, *supra* note 7, at 13.

III. HOW COGNITIVE METAPHORS ARISE AND CHANGE

A. Metaphors by Design

We can consciously construct metaphors. When we lack concepts that specifically apply to a given situation, we must either create new ones or “stretch” those that we have. We can do this by using analogy or simile (X is like Y) or by using metaphor (X is Y).²³ For example, to forge concepts that adequately fit atomic or chemical data that we wish to present to a jury, we might speak of atoms as little solar systems with electrons as planets revolving around a nucleus of protons and neutrons. In doing this, we would focus on the similarities between the two parts of the equation and ignore the dissimilarities. Of course, good lawyers ignore nothing of potential relevance and will keep in mind what such metaphors suppress and suggest. A solar-system atom, for example, might suggest that neutrons and protons are hot, like the sun, while electrons are colder, like planets. It might also suggest that electrons are solid and particulate like planets. The metaphor presumably ignores such things as moons of planets, comets, and other things within solar systems but without obvious relevance to atoms. This may ultimately work or it may not, depending on how close the correlations must be for jury purposes. We explore workability in more detail below.

B. Metaphors From Early Experience

We also carry forward metaphors based upon our early experiences. As Lakoff and Johnson point out, many of our conceptual metaphors are rooted in our early experiences with the world.²⁴ For example, children associate and conflate warmth and affection (their parents are warm when holding their children) and this carries forward into such metaphors as “a warm smile.”²⁵ This also explains the apparent

23. METAPHORS WE LIVE BY, *supra* note 8, at 5 (emphasis omitted) (“The essence of metaphor is understanding and experiencing one kind of thing in terms of another.”).

24. PHILOSOPHY IN THE FLESH, *supra* note 7, at 46.

25. *See id.* (emphasis omitted).

inconsistency between such metaphors as “Conscious Is Up” and “Unknown Is Up.” When we are awake (conscious) we are up; yet, things closer to the ground are easier to see than those high above.²⁶

Thus, we can understand the following spatial metaphors based upon our earliest experiences:²⁷

Metaphor: “Good Is Up”²⁸

Example: “Things are looking up”²⁹

Metaphor: “Virtue Is Up”³⁰

Example: “She has high standards”³¹

Metaphor: “Health And Life Are Up”³²

Example: “He’s at the peak of health. Lazarus rose from the dead”³³

Metaphor: “Conscious Is Up”³⁴

Example: “He rises early in the morning”³⁵

Metaphor: “Rational Is Up”³⁶

Example: “high-level intellectual discussion”³⁷

Metaphor: “Unknown Is Up”³⁸

Example: “That’s still up in the air”³⁹

Metaphor: “Happy Is Up”⁴⁰

26. See METAPHORS WE LIVE BY, *supra* note 8, at 15, 20.

27. I do not claim that Lakoff and Johnson would necessarily agree with the form of this presentation. For example, they tie primary metaphors into a specific “sensorimotor domain.” See, e.g., PHILOSOPHY IN THE FLESH, *supra* note 7, at 50-54. In the Appendix to this article, I set out these spatial metaphors in the broader context of other metaphors derived from early experience. See also Harold Anthony Lloyd, Plane Meaning and Thought: Real-World Semantics and Fictions of Originalism, 24 S. CAL. INTERDIS. L.J. 711-20 (2015).

28. METAPHORS WE LIVE BY, *supra* note 8, at 16.

29. *Id.* (emphasis omitted).

30. *Id.* (emphasis added).

31. *Id.* (emphasis omitted).

32. *Id.* at 15 (emphasis added).

33. METAPHORS WE LIVE BY, *supra* note 8, at 15 (emphasis omitted).

34. *Id.* (emphasis added).

35. *Id.* (emphasis omitted).

36. *Id.* at 17 (emphasis added).

37. *Id.* (emphasis omitted).

38. METAPHORS WE LIVE BY, *supra* note 8, at 137 (emphasis added).

39. *Id.* (emphasis omitted).

40. PHILOSOPHY IN THE FLESH, *supra* note 7, at 50.

Example: “I’m feeling up today”⁴¹

Metaphor: “More Is Up”⁴²

Example: “Prices are high”⁴³

Metaphor: “Control Is Up”⁴⁴

Example: “I’m on top of the situation”⁴⁵

Metaphor: “Self Control Is Being In One’s Normal Location”⁴⁶

Example: “I was beside myself,”⁴⁷ “He’s out to lunch”⁴⁸

Metaphor: “. . . Self Control Is Having The Self Together”⁴⁹

Example: “Pull yourself together.”⁵⁰

Metaphor: “Self Control As Being On The Ground”⁵¹

Example: “The ground fell out from under me . . . [h]e’s got his head in the clouds”⁵²

Metaphor: “Important Is Big”⁵³

Example: “Tomorrow is a big day”⁵⁴

Metaphor: “Intimacy Is Closeness”⁵⁵

Example: “We’ve been close . . . but we’re beginning to drift apart.”⁵⁶

Metaphor: “Similarity Is Closeness”⁵⁷

Example: “These colors . . . [are] close”⁵⁸

Metaphor: “Closeness Is Strength Of Effect”⁵⁹

Example: “Who are the men closest to Khomeini?”⁶⁰

41. *Id.* (emphasis omitted).

42. *Id.* at 51.

43. *Id.* (emphasis omitted).

44. *Id.* at 53.

45. PHILOSOPHY IN THE FLESH, *supra* note 7, at 53 (emphasis omitted).

46. *Id.* at 274.

47. *Id.*

48. *Id.* at 274-75.

49. *Id.* at 276.

50. PHILOSOPHY IN THE FLESH, *supra* note 7, at 276 (emphasis omitted).

51. *Id.* at 275.

52. *Id.* (emphasis omitted).

53. *Id.* at 50.

54. *Id.* (emphasis omitted).

55. PHILOSOPHY IN THE FLESH, *supra* note 7, at 50.

56. *Id.* (emphasis omitted).

57. *Id.* at 51.

58. *Id.* (emphasis omitted).

59. METAPHORS WE LIVE BY, *supra* note 8, at 128 (emphasis added).

Metaphor: “Purposes Are Destinations”⁶¹

Example: “He’ll ultimately be successful, but he isn’t there yet.”⁶²

Metaphor: “Means Are Paths”⁶³

Example: “However you want to go about it is fine with me.”⁶⁴

Metaphor: “States Are Locations”⁶⁵

Example: “I’m close to being in a depression”⁶⁶

Metaphor: “An Argument Is A Journey”⁶⁷

Example: “We have arrived at a disturbing conclusion.”⁶⁸

In exploring spatial metaphors, it is also interesting to note that categories themselves are often metaphorically conceived in spatial terms because we often perceive them as “containers” of things “with an interior, an exterior, and a boundary.”⁶⁹ For example, as Lakoff and Johnson put it: “When we understand a bee as being *in* the garden, we are imposing an imaginative container structure on the garden, with the bee *inside* the container.”⁷⁰ As they also note, such “containers” have “bounded regions, paths, centers and peripheries, objects with fronts and backs, regions above, below, and beside things.”⁷¹ Again, what we put in these containers will depend upon “the criteria chosen to measure likeness or unlikeness.”⁷²

Because of their shared nature, these “primary” conceptual metaphors⁷³ are useful to note. Since “everybody has basically

60. *Id.* at 129 (emphasis omitted).

61. PHILOSOPHY IN THE FLESH, *supra* note 7, at 52.

62. *Id.* at 53 (emphasis omitted).

63. *Id.* at 179 (emphasis added).

64. *Id.* at 191 (emphasis omitted).

65. *Id.* at 52.

66. PHILOSOPHY IN THE FLESH, *supra* note 7, at 52 (emphasis omitted).

67. METAPHORS WE LIVE BY, *supra* note 8, at 90.

68. *Id.* (emphasis omitted).

69. PHILOSOPHY IN THE FLESH, *supra* note 7, at 20.

70. *Id.* at 117.

71. *Id.* at 508.

72. AMSTERDAM & BRUNER, *supra* note 2, at 49.

73. According to Lakoff and Johnson, “primary metaphor[s]” have “minimal structure,” “arise[] naturally, automatically, and unconsciously through every day experience,” and serve as the “atomic” building blocks of

the same kinds of bodies and brains and lives in basically the same kinds of environments, so far as the features relevant to metaphor are concerned,”⁷⁴ these metaphors provide a common source of discourse of which lawyers may take advantage. In the spirit of Lakoff and Johnson, I have set out in the Appendix and elsewhere the above spatial metaphors in the context of a much broader table, which also addresses other metaphors arising from the early experiences of vision, hearing, touch, taste, smell, matter, motion, and other things.⁷⁵

C. *Mutability of Metaphors*

Since metaphors either come from our reactions to early experience or are later constructed by us, we can try to change them. A good lawyer understands this and does not fall into the trap of falsely believing in categorical immutability.

Even some of the most seemingly-entrenched categories can be changed, since they come from us and not from nature.⁷⁶ For example, the centuries of denying women’s suffrage could seem so fixed that change would uproot nature itself.⁷⁷ Of course, nature survived such change and lawyers aware of such history can see that nature will survive remedying other long-standing wrongs as well. Understanding this changeable nature of even “entrenched” categories can thus help lawyers to understand that progress is possible even in the most “entrenched” areas.

D. *Flexible Logic*

In grasping the basic nature of metaphor, one must also understand its flexible logic. The very fact that metaphor can

more complex metaphor. PHILOSOPHY IN THE FLESH, *supra* note 7, at 46. For example, a child’s conflating affection and warmth leads to the primary metaphor of affection as warmth. *Id.*

74. METAPHORS WE LIVE BY, *supra* note 8, at 257.

75. See *supra* note 27, at 711-20.

76. See AMSTERDAM & BRUNER, *supra* note 2, at 36-37; Harold Anthony Lloyd, *Let’s Skill All the Lawyers: Shakespearean Lessons on the Nature of Law*, 11 VERA LEX 33, 42-45 (2010).

77. See AMSTERDAM & BRUNER, *supra* note 2, at 44.

equate “A” and “not-A” demonstrates metaphor’s power over traditional canons of logic, such as the principle of non-contradiction which holds that something cannot both be and not be in the same way at the same time.⁷⁸ Thus, despite our logic courses and despite our English teachers’ admonitions that metaphors should not be mixed, there are times when metaphors should be mixed, should contradict one another. Quantum mechanics, for example, tells us that light can be explained as both a particle and a wave.⁷⁹ Of course light is not a particle (at least in the sense of the dust particles that traverse its beams) nor is it a wave (at least in the sense of waves that wash the beach under its beams). Furthermore, quantum mechanics not only tells us to equate things with what they are not, but to contradict ourselves by calling light two different things: particles and waves. Quantum mechanics does this because such a mixed metaphor can be required for good science.⁸⁰

Similarly, our early childhood experiences also teach that experience is not always consistent. As we saw in Section III(B) above, consciousness is “up” because we rise from bed into our awake state. Yet, as also seen in Section III(B) above, “up” is unknown and is beyond awareness because it is removed from our location on the ground below. “Up” is both conscious and not-conscious. And, as noted in the Appendix, time is both stationary and in motion: “Time flies,”⁸¹ yet, we have made it through another week.⁸² Good lawyers and law students thus understand that:

To operate only in terms of a consistent set of metaphors is to hide many aspects of reality. Successful functioning in our daily lives seems to

78. See THE OXFORD COMPANION TO PHILOSOPHY 625 (Ted Honderich ed., 1995) (“The conjunction of a proposition and its negation is a *contradiction and necessarily false.”).

79. Franco Selleri, *Preface to WAVE-PARTICLE DUALITY* (Franco Selleri ed., 1992); see generally B. H. BRANSDEN & C. J. JOACHAIN, *QUANTUM MECHANICS* 760 (2d ed. 2000).

80. See also *id.* English teachers rightly shudder at carelessly-mixed metaphors: “Life’s sailboat often jumps its tracks.”

81. PHILOSOPHY IN THE FLESH, *supra* note 7, at 52 (emphasis omitted).

82. See generally METAPHORS WE LIVE BY, *supra* note 8, at 43.

require a constant shifting of metaphors. The use of many metaphors that are inconsistent with one another seems necessary for us if we are to comprehend the details of our daily existence.⁸³

E. Metaphors in Narrative

Finally, metaphors are frequently infixed in narrative, and rival narratives can frequently interpret the same “facts” with equal plausibility.⁸⁴ Failure to realize “that there is more than one ‘true’ story”⁸⁵ can lead one to be “unconsciously captive to a set of unexamined assumptions based on narratives.”⁸⁶ Linda H. Edwards, for example, explores how rival narratives of “hard-won freedoms secured by the American Revolution and the founding of the Nation”⁸⁷ versus “the myth of redemptive violence”⁸⁸ and its narrative of “the world as an overwhelmingly dangerous place, under attack by powerful evil forces”⁸⁹ helped drive the case of an American citizen held as an “enemy combatant.”⁹⁰

More specifically, as Professor Edwards persuasively recounts, President Bush and the Fourth Circuit saw the arrest and detention of Hamdi through the lens of a dangerous-world narrative whose “only hope is a strong leader, who will save vulnerable mortals by defeating the powers that threaten them, thus imposing order and safety.”⁹¹ This strong leader was of course the President, and “[t]o defend us, the executive

83. *Id.* at 221. We can also see this flexibility in the inconsistency of our basic metaphors: “rational is up,” *id.* at 17 (emphasis omitted), yet, “unknown is up.” *Id.* at 137 (emphasis omitted).

84. See generally AMSTERDAM & BRUNER, *supra* note 2, at 111 (explaining that “stories construct the facts that comprise them”).

85. Linda H. Edwards, *Where Do the Prophets Stand? Hamdi, Myth, and the Master’s Tools*, 13 CONN. PUB. INT. L.J. 43, 52 (2013).

86. *Id.*

87. *Id.* at 64.

88. *Id.* at 58.

89. *Id.* at 61.

90. Edwards, *supra* note 85, at 60-63.

91. *Id.* at 54.

must be given a virtually free hand.”⁹² Consistent with this narrative, the Fourth Circuit therefore affirmed the President’s broad powers.⁹³ However, the Supreme Court saw the case through a different narrative lens. The Court focused on the detainee’s status as an American citizen, as well as the importance of “the hard-won freedoms” won through the American Revolution; so viewed, the Court quite logically found that the President acted unconstitutionally.⁹⁴

As *Hamdi* demonstrates, those who miss the narratives surrounding metaphors and other categories not only miss much of what happened in a case. They also miss much of what might otherwise have been done strategically and rhetorically.

IV. EVALUATING METAPHORS

A. *Evaluation and Workability*

Once we understand the importance of metaphors generally, how do we evaluate metaphors in specific cases? How do we know whether they are “good” or “bad,” “right” or “wrong,” or “true or false,” especially given metaphor’s flexible logic noted above? To answer these questions, we must return to the purpose of categories and other metaphors.

Again, lawyers (and all other thinkers) use categories and other metaphors to organize experiences in ways that hopefully, among other things, make such experiences more predictable and otherwise easier to handle.⁹⁵ By categorizing experiences together, lawyers do not have to reanalyze “similar” experiences, but can reuse metaphors and categories in ways they have seen already work. For example, as noted earlier, if a lawyer has decided that all of her associates are competent and are not likely to make a mistake when drawing

92. *Id.* at 63.

93. *See id.* at 64.; *see generally* *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002).

94. *See* Edwards, *supra* note 85, at 64-66; *see generally* *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

95. *See* AMSTERDAM & BRUNER, *supra* note 2, at 21-23, 25-26.

up a deed, she can act accordingly without further analysis when she needs them to prepare a deed in the future. Of course, the lawyer's categorization of such associates (as well as the lawyer's resulting decision to use such associates accordingly) must actually work in practice if the categorization is to be a good one. One would not say that she has reasoned well if some of her "good" associates cannot in fact do good work. Thus, at a minimum, good categories must work "sufficiently well enough for [the user] to function."⁹⁶ What, however, do we mean by the term "work"?

B. Four Factors of Workability

1. Predictability

We can begin to uncover the sense of "workability" here by starting with logic's distinction between valid arguments (where the conclusions logically follows from the premises) and sound arguments (where the premises and conclusions are all true).⁹⁷ The following argument, for example, is valid (of good form⁹⁸) but is not sound (not factually true): If clocks measure time, then I will become Chief Justice of the Supreme Court tomorrow. Clocks measure time. Therefore, I will become Chief Justice of the Supreme Court tomorrow.

Of course, I will not become Chief Justice tomorrow (nor is that status tied to clocks in the way claimed). Despite its perfectly logical form, the argument above must fail because it predicts something that will not in fact happen. Because of such inaccurate prediction, this argument does not work in the real world of experience, and we can thus see how predictability plays a role in workability. For something to work, it of course must not lead to inaccurate predictions of how experience will unfold. This is a pretty obvious necessary component of workability, though (as the following sections

96. PHILOSOPHY IN THE FLESH, *supra* note 7, at 21.

97. See LANHAM, *supra* note 8, at 168-69.

98. It is a valid *modus ponens* of the following form: If *P*, then *Q*. *P*. Therefore, *Q*. See THE OXFORD COMPANION TO PHILOSOPHY, *supra* note 78, at 583.

show), it does not exhaust what we mean by “workable.”⁹⁹

2. Respecting Past and Precedent

Respecting past and precedent can promote economy (not wasting effort solving problems already solved), fairness (treating similar cases the same), and predictability (permitting those contemplating future action to rely on past decisions, practices, and views).¹⁰⁰

Such respect for the past (though *not* unbending deference to the past) thus plays a critical role in legal and other analysis.¹⁰¹ For example, imagine that a parent starts giving his first child a weekly allowance when that child reaches the age of twelve and the parent is satisfied with that decision. If the parent has no reason to think the “at twelve” rule did not work, why would it not be a waste of effort to reconsider the rule when the second child comes round? Furthermore, how would it be fair to treat the next child differently unless the parent had good reason to do so (such as financial setbacks or the second child’s behavior)? Any change could also generate confusion for the next child who, because of past example, had assumed his allowance would also begin at age twelve. Why do that without good reason? On their faces, similar economy, fairness, and predictability considerations apply lawyers, judges, litigants, and parties to transactions.

Of course, these reasons for respecting past and precedent fail when there has been error, unfairness, or other reasons that require new thought. Unbending deference to the past can generate unfair results (by perpetuating error or injustice or reaching wrong results in changed circumstances), thwart judicial or mental economy (by requiring periodic reconsideration or patches as discussed below where the

99. See HILARY PUTNAM, PRAGMATISM: AN OPEN QUESTION 9-10 (Blackwell 1995) (referring to “different *types* of ‘expediency’”).

100. See DAVID M. WALKER, THE OXFORD COMPANION TO LAW 1174 (Oxford 1980) (“The main justifications [for *stare decisis*] are that it enables a judge to utilize the wisdom of his predecessors, that it makes for uniformity of application of law to similar cases, and that it makes the law predictable.”).

101. See WILSON HUH, THE FIVE TYPES OF LEGAL ARGUMENT 41-50 (3d ed. 2014) (discussing the importance of precedent and tradition).

precedent simply does not work well in practice), and thwart predictability (by the doubt that hangs over questionable decisions or rules). When this happens, the very reasons of economy, fairness, and predictability that generally support precedent require us to reconsider specific precedent.¹⁰²

3. Simplicity

Practically speaking, one should prefer the simplest of otherwise-equally effective decisions or rules.¹⁰³ First, the simpler, by definition, should generally be easier to use. Second, additional complexity can increase the possibility of error.¹⁰⁴ Adding more moving parts to a machine, for example, adds more ways for the machine to break. Where a machine with one solid part works just as well as a machine with three solid parts, why would one choose the more complex device which is likely more difficult to maintain and offers three parts, rather than one-part subject to breakage? Analysis of workability must therefore always involve simplicity analysis.

Unfortunately, what is “simpler” is not always as clear as in the above example. We can see this, for example, in cases where we can either replace something or “patch” or “rig” it. When our widget maker breaks, for example, should we patch the break or replace the entire machine? A machine with a patch has an additional part lacking in an unpatched machine and is thus more complex in that sense. However, the patch may have nominal cost and extend the life of the machine to the length of a replacement. Measuring simplicity here in terms of the number of patches would be inadequate. We should also consider the additional cost and effort required for a new machine (including new training), which are complexities actually avoided by the patch. However, what if that “simple” patch is required every day? At what point does it become simpler just to replace the machine? The scientific

102. Adhering to precedent can also promote simplicity and coherence in the senses discussed below, and any reconsideration of precedent should also involve these considerations.

103. See generally RONDO KEELE, *OCKHAM EXPLAINED: FROM RAZOR TO REBELLION* (2010).

104. *Id.*

revolutions from Aristotle to Copernicus to Newton to Einstein give us non-legal examples of how long it has seemed sensible to patch and rig failing models.¹⁰⁵

In matters of law, we also have similar struggles over whether and how long to patch or rig. For example, if prohibiting same-sex marriage is a violation of equal protection, is it sufficient to patch or rig the problem by recognizing “equivalent” civil unions and continuing to prohibit same-sex unions? From a simplicity standpoint, this is not a difficult question. Here we either open up a working vehicle to others or require them to ride in a “separate but equal” new vehicle which we must now acquire and maintain. To ask which approach is simpler really answers itself. The mere fact of adding and maintaining a new vehicle alongside another already working one is on its face more complex. The one-vehicle solution on these facts is simpler, and the Supreme Court has sensibly ended the patching and rigging here.¹⁰⁶

4. Coherence in the Broadest Sense

To manage experience, concepts must furthermore work with every relevant aspect of experience. In other words, they must fit with every relevant part of experience. William James succinctly describes such coherence as “what fits every part of life best and combines with the collectivity of experience’s demands, *nothing being omitted*.”¹⁰⁷

Taking experience in its broadest sense, experience will include, without limitation, objective experience (such as my current body temperature), subjective experience (such as my current private thoughts and speculations about my current body temperature), and personal and community values and standards.

Something may work in one form of such experience and yet fail in another. When that happens, overall coherence fails. For example, I might objectively solve a need for money by

105. *See generally* THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996) (discussing patching and replacing various scientific models over time).

106. *See* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

107. WILLIAM JAMES, *PRAGMATISM* 32 (Dover 1995) (emphasis added).

simply stealing it. However, that would run afoul of both my personal values and moral values and standards. Stealing would thus not be a workable solution because it would not fit with all such experience.

Similarly, in matters of law, a metaphor or concept may fail to cohere with the whole of experience. A state, for example, might need land for a roadway and might conceive that simply seizing the land without compensation would be the simplest and thus best solution. It would involve only one step, while taking and paying would involve two steps. However, that “simplest” solution would not work because it would not fit with the limitations on the powers of states to take private property without just compensation.¹⁰⁸ Additionally, it would not fit with moral experience: it is generally not right to take property without paying for it. Though I have criticized natural law theory and found it generally wanting,¹⁰⁹ natural law does bring insight in this regard. When considering legal categories and other metaphors, moral experience is *part* of the total of experience we should consider.

VII. CONCLUSION

Though perhaps better known for their stylistic use of metaphor, lawyers’ substantive use of metaphor drives the law. Like other disciplines, law requires its categories and thus its metaphors.

For utility’s sake, lawyers put similar things in categories and thereby treat them as categorically the same. However, good lawyers understand that such categorical equating is not literally true, since nothing truly is what it is not. Instead, good lawyers understand the metaphorical nature of categorization.

Good lawyers also understand the need to identify both the conscious and unconscious metaphors in play in a given situation. They understand the need to avoid uncritically

108. See U.S. CONST. amend. V.

109. See *supra* note 76, at 42-53.

accepting others' metaphors, categories, and narratives, the need, where possible, to construct metaphors, categories, and narratives that benefit one's case, and the need to be aware of what operative metaphors, categories, and narratives highlight and conceal so that one can proceed accordingly and avoid surprise.

Good lawyers further understand that predictability, precedent, simplicity, and coherence in the broadest sense also help them evaluate their own categories and other metaphors and the "flexible" logic of metaphor discussed above. These tests also help good lawyers evaluate the categories and metaphors of others.

Finally, good lawyers understand that metaphor is more than powerful kennings or stylistic flourish. Metaphor is more than blood as "raven-wine," more than raven as "battle-gull."¹¹⁰ Metaphor lives in and generates much blood, flesh, and bone of that living thing we call the law.

110. THE SAGA OF HALLFRED TROUBLESOME POET, SAGAS OF WARRIOR POETS 92 (Rory McTurk, trans., Penguin Books 1997).

APPENDIX

OVERVIEW OF COMMON CONCEPTUAL METAPHORS¹¹¹I. Metaphors Based Upon Experience of Space¹¹²

Metaphor: “Good Is Up” (MWLB 16)

Example: “Things are looking up” (MWLB 16)

Metaphor: “Virtue Is Up” (MWLB 16)

Example: “She has high standards (MWLB 16)

Metaphor: “Health And Life Are Up” (MWLB 15)

Example: “He’s at the peak of health,” “Lazarus rose from the dead” (MWLB 15)

Metaphor: “Conscious Is Up” (MWLB 15)

Example: “He rises early in the morning” (MWLB 15)

Metaphor: “Rational Is Up” (MWLB 17)

Example: “high-level intellectual discussion” (MWLB 17)

Metaphor: “Unknown Is Up” (MWLB 137)

Example: “That’s still up in the air” (MWLB 137)

Metaphor: “Happy Is Up” (PIF 50)

Example: “I’m feeling up today” (PIF 50)

Metaphor: “More Is Up” (PIF 51)

Example: “Prices are high” (PIF 50)

Metaphor: “Control Is Up” (PIF 53)

Example: “I’m on top of the situation” (PIF 53)

Metaphor: “Self Control Is Being In One’s Normal Location” (PIF 274)

111. See also Lloyd, *supra* note 27, at 711-20. I use the term “common” here more broadly than the term “primary,” as that latter term is used in primary metaphor theory (which holds that there are “atomic” or primary metaphors that make up more complex metaphors). See PHILOSOPHY IN THE FLESH, *supra* note 7, at 46. Many of these metaphors are based upon our early experiences with the world. *Id.* For example, again, children link warmth and affection, a link carried forward in such metaphors as “a warm smile.” *Id.* Again, this also explains the apparent inconsistency between such metaphors as “Conscious Is Up” and “Unknown Is Up.” When we are awake (conscious) we are up; yet, things nearer to the ground are easier to see than those higher above. See METAPHORS WE LIVE BY, *supra* note 8, at 15, 20.

112. The headings and arrangement here are mine and I do not claim that Lakoff and Johnson would fully agree with what I have done. For example, they tie primary metaphors into a specific “sensorimotor domain.” See, e.g., PHILOSOPHY IN THE FLESH, *supra* note 7, at 50-54. To save space, sourcing is indicated in each line as follows: (PIF 50) means PHILOSOPHY IN THE FLESH, *supra* note 7, at 50, and (MWLB 50) means METAPHORS WE LIVE BY, *supra* note 8, at 50. An asterisk indicates my own example.

Example: "I was beside myself," "He's out to lunch" (PIF 274-275)

Metaphor: "Self Control Is Having The Self Together" (PIF 276)

Example: "Pull yourself together." (PIF 276)

Metaphor: "Self Control As Being On The Ground" (PIF 275)

Example: "The ground fell out from under me," "head in the clouds" (PIF 275)

Metaphor: "Important Is Big" (PIF 50)

Example: "Tomorrow is a big day" (PIF 50)

Metaphor: "Intimacy Is Closeness" (PIF 50)

Example: "We've been close . . . but we're beginning to drift apart." (PIF 50)

Metaphor: "Similarity Is Closeness" (PIF 51)

Example: "These colors . . . [are] close" (PIF 51)

Metaphor: "Closeness Is Strength Of Effect" (MWLB 128)

Example: "Who are the men closest to Khomeini?" (MWLB 129)

Metaphor: "Purposes are destinations" (PIF 52)

Example: "He'll ultimately be successful, but he isn't there yet." (PIF 53)

Metaphor: "Means Are Paths" (PIF 179)

Example: "However you want to go about it is fine with me" (PIF 191)

Metaphor: "States Are Locations" (PIF 52)

Example: "I'm close to being in a depression" (PIF 52)

Metaphor: "Argument Is A Journey" (MWLB 90)¹¹³

Example: "We have arrived at a disturbing conclusion. (MWLB 90)

II. Metaphors Based Upon Experience of Matter in Space

Metaphor: "The Mind Is A Container" (PIF 338)

Example: "He has an empty head"*

Metaphor: "The Mind Is A Theatre" (PIF 339)

Example: "I watched our ideas play out."*

Metaphor: "The Mind Is A Machine" (PIF 247, 547)

Examples: "turning out ideas," "mental breakdown" (PIF 247)

Metaphor: "The Mind Is A Brittle Object" (MWLB 28)

Example: "Her ego is very fragile," "He cracked up" (MWLB 28)

Metaphor: "Ideas Are Inanimate Objects" (PIF 240)

113. This could also of course be classed in the motion through space category below. I invite the reader to try to reclassify (or put in multiple classes) as many of these metaphors as she can.

Example: Putting “the idea under a microscope” (PIF 241)

Metaphor: Ideas Are Animate Objects (MWLB 47)

Examples: “a budding theory,” a theory still in its infancy (MWLB 47)

Metaphor: Thought Is “Object Manipulation” (PIF 546)

Example: “Complex ideas can be crafted, fashioned, shaped. . .” (PIF 240)

Metaphor: “Life Is A Container” (MWLB 51)

Example: “Life is empty for him” (MWLB 51)

Metaphor: The Self Is A “Container” (PIF 275)

Examples: “I was beside myself,” Being “out of your mind/head/skull” (PIF 275)

Metaphor: “Visual Fields Are Containers” (MWLB 30)

Example: “That’s in the center of my field of vision” (MWLB 30)

Metaphor: “Categories Are Containers” (PIF 51)

Example: “Are tomatoes in the fruit or vegetable category?” (PIF 51)

Metaphor: “Linguistic Expressions Are Containers” (MWLB 10)

Example: “His words carry little meaning” (MWLB 11)

Metaphor: “Argument Is A Container” (MWLB 92)

Example: “That argument has holes in it.” (MWLB 92)

Metaphor: “Argument Is A Building” (MWLB 98)

Example: “We’ve got the framework for a solid argument” (MWLB 98)

Metaphor: “Memory Is A Storehouse” (PIF 240)

Example: “Teaching is putting ideas into the minds of students” (PIF 240)

Metaphor: “Remembering Is Retrieval (Or Recall)” (PIF 240)

Example: I can recall every detail of the event*

Metaphor: “Organization Is Physical Structure” (PIF 51)

Example: “How do the pieces of this theory fit together?” (PIF 51)

Metaphor: “Understanding Is Grasping” (PIF 54)

Example: ability “to grasp transfinite numbers” (PIF 54)

Metaphor: “Purposes Are Desired Objects” (PIF 53)

Example: “I saw an opportunity . . . and grabbed it” (PIF 53)

Metaphor: “Difficulties Are Burdens” (PIF 50)

Example: “She’s weighed down by responsibilities” (PIF 50)

Metaphor: “More Of Form Is More Of Content” (MWLB 127)

Example: “He is very very very tall.” (MWLB 127)

Metaphor: “Vitality Is A Substance” (MWLB 51)

Example: “I’m drained,” “That took a lot out of me” (MWLB 51)

Metaphor: “Love Is A Patient” (MWLB 49)

Example: “This is a sick relationship” (MWLB 49)

III. Metaphors Based Upon Experience of Motion in Space

Metaphor: “Thinking Is Moving” (PIF 236)

Examples: “My mind wandered,” “line of reasoning,” “flights of fancy” (PIF 236)

Metaphor: “Time Is Motion” (PIF 52)

Example: “Time flies” (PIF 52)

Metaphor: “Time Is Stationary And We Move Through It” (MWLB 43)

Example: “As we go through the years . . .” (MWLB 43)

Metaphor: “Change Is Motion” (PIF 52)

Example: “My car has gone from bad to worse lately” (PIF 52)

Metaphor: “Actions Are Self-propelled Movements” (PIF 187)

Example: “I’m moving right along on the project” (PIF 52)

Metaphor: “Difficulties Are Impediments To Movement” (PIF 202)

Example: “We ran into a brick wall” (PIF 189)

Metaphor: Freedom To Act Is “Lack Of Impediment To Movement” (PIF 188)

Examples: “Break out of your daily routine” (PIF 188)

Metaphor: “Communication Is Sending” (MWLB 10)

Examples: “Your reasons came through to us” (MWLB 10)

IV. Metaphors Otherwise Based Upon the Five Senses or Other Experience

(“Thinking Is Perceiving” (PIF 238))

1. Vision

Metaphor: “Knowing Is Seeing” (PIF 53)

Example: “I see what you mean.” (PIF 54)

Metaphor: “Being Ignorant Is Being Unable To See” (PIF 238)

Example: Being “in the dark.” (PIF 239)

Metaphor: “Paying Attention Is Looking At” (PIF 238)

Example: “Pointing something out.” (PIF 239) “Keep your eye on the ball.”*

Metaphor: “Deception Is Purposefully Impeding Vision” (PIF 238)

Examples: “cover-up,” “pull the wool over their eyes” (PIF 238-239)

Metaphor: “Thinking Is Linguistic Activity” (Writing/Reading) (PIF 244)

Example: “I can read her mind.” (PIF 244)

2. Hearing

Metaphor: “Being Receptive Is Hearing” (PIF 238)

Example: I’m all ears*

Metaphor: “Taking Seriously Is Listening” (PIF 238)

Example: “I always listen to what my father tells me.” (PIF 239)

Metaphor: “Thinking Is Linguistic Activity” (Speaking/Listening) (PIF 244)

Example: I hear what you say.*

3. Touch

Metaphor: “Emotional Reaction Is Feeling” (PIF 238)

Example: I feel bad for him*

Metaphor: “Affection Is Warmth” (PIF 50)

Example: “They greeted me warmly” (PIF 50)

Metaphor: “Emotional Effect Is Physical Contact” (MWLB 50)

Example: “I was struck by his sincerity” (MWLB 50)

Metaphor: “Seeing Is Touching” (PIF 54)

Example: “She picked my face out of the crowd” (PIF 54)

4. Taste

Metaphor: “Ideas Are Food” (PIF 241)

Examples: “an appetite for learning,” “fresh ideas,” “spoon-feed” (PIF 242)

Metaphor: “Considering Is Chewing” (PIF 241)

Example: Chewing on an idea (PIF 242)

Metaphor: “Accepting Is Swallowing” (PIF 241)

Example: A gullible person “swallows ideas whole” (PIF 243)

Metaphor: “Personal Preference Is Taste” (PIF 238)

Example: “A sweet thought” (PIF 240)

Metaphor: Good Is Tasty*

Example: A delicious idea*

Metaphor: Bad Is Unpalatable

Example: “Rotten ideas” (PIF 242)

5. Smell

Metaphor: Bad Is Malodorous (PIF 50)

Example: “This movie stinks” (PIF 50)

Metaphor: Good Is Fragrant*

Example: This movie is sweet*

Metaphor: “Sensing Is Smelling” (PIF 238)

Example: “Something doesn’t smell quite right here” (PIF 240)

6. Other Experience

Metaphor: “Thought Is Mathematical Calculation” (PIF 405)

Examples: “That figures,” “That just doesn’t add up” (PIF 406)

Metaphor: “Explanation Is An Accounting” (PIF 246)

Example: "Give me an account of why that happened," "bottom line?" (PIF 246)

Metaphor: "Causes Are Physical Forces" (PIF 53)

Example: "They pushed the bill through Congress." (PIF 53)

Metaphor: "Argument Is War" (MWLB 4)

Example: "He shot down all of my arguments" (MWLB 4)

Metaphor: "Love Is A Physical Force" (MWLB 49)

Example: "There were sparks," "His whole life revolves around her" (MWLB 49)

Metaphor: "Love Is Madness" (MWLB 49)

Example: "I'm crazy about her." (MWLB 49)

Metaphor: "Love Is Magic" (MWLB 49)

Example: "I'm charmed by her." (MWLB 49)

Metaphor: "Love Is War" (MWLB 49)

Example: "He won her hand in marriage," "He has to fend them off" (MWLB 49)

Metaphor: "Life Is A Gambling Game" (MWLB 51)

Example: "I'll take my chances," "It's a toss-up" (MWLB 51)